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UK collective actions appeal ruling offers clarity on certification - lawyers

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- Canada confirmed as model for future actions, further clarity welcomed
- Judgment goes against principles of English law, claims lawyer
- MasterCard intends to appeal to Supreme Court

A landmark Court of Appeal (CoA) ruling on class certification for collective proceedings against MasterCard offers guidance on how such actions might be approved in future, against a backdrop of little clarity, several lawyers have told PaRR.

This week (16 April) the CoA ruled that the Competition Appeals Tribunal (CAT) erred in refusing to certify the proposed class seeking GBP 14bn damages from MasterCard on behalf of UK consumers, as reported.

The CoA held that the CAT was wrong to refuse certification of the CPO "by reference to the proposed method of distribution: an error compounded by their view that distribution must be capable of being carried out by some means which corresponds to individual loss".

"The Court of Appeal (CoA) has now opened the door on collective actions in this jurisdiction after a number of false starts," said Boris Bronfentrinker, a partner at Quinn Emanuel, representing Walter Merricks. Speaking to this news service after judgment was handed down, he said that the Court of Appeal had followed all the arguments that Merricks ran before the CAT, adding: "It's a reflection of the fact that the CAT got it wrong."

The UK class action regime has a long record of unsuccessful claims. The first opt-in class action on behalf of consumers relating to sports shirts was largely considered a failure of the regime and led to its change and introduction of the opt-out model in 2015.

The claim, The Consumers Association v JJB Sports PLC, was made on behalf of 130 individual consumers, and in an out-of-court settlement, the defendant agreed to pay affected consumers between GBP 5 and GBP 20 for each sports shirt purchased. Subsequently, the claim was withdrawn and a dispute over costs followed.

The first application for a collective proceeding order (CPO) on behalf of consumers who purchased mobility scooters was later

PROPRIETARY

Sector: Government
Topics: Private Litigation

Grade: Confirmed

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Court Of Appeal Of England And Wales

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withdrawn over costs, in 2017. Merricks' was only the second application for a CPO and this was rejected by the CAT in July 2017. Now, nearly two years later the action will go ahead, unless MasterCard successfully appeals today's ruling directly to the Supreme Court.

If unchallenged, the ruling clarifies many aspects of the process for any current and future proposed class action applicants. Anna Morfey, Partner at Hausfeld highlighted the ruling's endorsement of the Canadian case-law on class certification: "This gives would-be class representatives, and their lawyers, a rich seam of jurisprudence to draw on – in the absence of anything much [currently in existence] to go by." Morfey pointed out that the CoA's indication that the threshold for certification should be lower is actually double-edged – since the CoA suggested it can be modified or revoked later – and the implications of that will require careful consideration.

According to Alan Bates, who represented Pride in the first opt-out CPO application "what matters is whether the class representative has a real prospect of being able to prove quantifiable aggregate loss." This, he said, benefits all current applicants. He said that what the CoA's ruling confirms is that the collective actions regime "was intended to allow recovery, on behalf of consumers, of aggregate damages. It was never envisaged that the amount of the aggregate damages award would be set on the basis of quantifying the loss suffered by each individual consumer, rather than capturing the total amount of consumer losses." Although the judgment resolves this problem from one perspective the applicant still faces "significant challenges to estimate on an aggregated basis" the barrister at Monckton Chambers added.

Not all lawyers agree with the CoA finding. "The aggregate award should be reflective of the individual losses suffered by the represented class" – said Andrij Jurkiw, head of the Competition Team that represented Sainsbury's in its claim against Mastercard, securing an award of GBP 68m for the former, as reported.

"How can you justify an approach under English law, where the degree of compensation is much greater than the harm suffered?" he asked.

Jurkiw, now a partner at Womble Bond Dickinson, said he was 'astonished' that the Court of Appeal had made a ruling which had the potential to lead to overcompensation of the individual claimants on the one hand and to the imposition of penal damages on defendant companies on the other. Both go "against the principles of English law applicable to damages claims for breach of Competition Law", he said.

Rosemary Ioannou, regional managing director at litigation funder Vannin Capital, said that the CAT's collective action regime offers great opportunity for the English jurisdiction at a time when there is a broader uncertainty about it – describing it as a

"real opportunity that we need to sieze with both hands".

Ioannou, who said her team is currently looking at a number of potential class actions, said she welcomes the new clarity the ruling brings to "a lot of questions that claimants need to be ready to address when seeking certification. To the extent this claim is remitted to the CAT, and subsequently certified, the guidance provided will obviously be helpful."

"While it appears that certainty is around the corner, if the defendant appeals directly to the Supreme Court and permission is granted, we may still be in it for a long wait," Ioannou cautioned, however, flagging that the final outcome of the CoA ruling is subject to doubt.

"I have always been confident this claim will succeed and now I am far more confident, following this judgment," said Bronfentrinker. He added that MasterCard could also seek settlement. In this scenario, any unclaimed damages would be returned to it. If the claim succeeds, Mastercard would not be able to recoup any of the damages awarded, as any unclaimed awards would go to charity.

Sir Peter Roth, the President of the CAT, who handed down the ruling refusing Merricks CPO application, told PaRR a week before CoA's ruling that the CPO judgments were 'carefully studied' by the CoA and added that if the case returns to the CAT, "it will proceed, and it might win".

MasterCard confirmed to this news service that despite the CoA's refusal to grant permission to appeal, it intends to appeal directly to the Supreme Court. "This decision is not a final ruling and the proposed claim is not approved to move forward, rather the court has simply said a re-hearing on certain issues should happen," the company said in an e-mailed statement.

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