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UK COLLECTIVE ACTIONS REGIME: WHERE ARE WE NOW?

RISK & RESILIENCE
Part of the Horizon Scanning series

Since December 2020, when the Supreme Court handed down its landmark decision in Merricks v MasterCard ("Merricks"), the UK collective actions regime for competition damages actions has continued to develop at pace. This briefing summarises some key trends emerging from the recent case law.

General observations

As anticipated, the *Merricks* judgment appears to have encouraged claimant law firms and funders to use the regime. No fewer than nine applications have been published since the judgment was handed down, and a further two have been announced.

Growing confidence in the regime is also apparent from the prevalence of stand-alone abuse of dominance cases among the new applications. Applicants appear undeterred by the fact that such cases are significantly more challenging to bring than "follow-on" cartel damages actions, which now represent a minority of the live collective claims.

Faced with the liberal approach now applied by the CAT to certification and the costs risk for respondents in opposing CPO applications, some respondents are opting not to do so. This meant that the CAT was able to provide same-day confirmation that it would grant a CPO following one recent hearing.[1]

Merricks made clear that making a summary judgment/strike-out application is one of the only ways in which respondents can require the CAT to conduct a merits assessment at the certification stage. Respondents are now regularly deploying such applications, although none of these has been successful to date so this trend may be short-lived. The CAT has also emphasised that it can consider whether a CPO application should be struck out of its own motion. However, the CAT refrained from striking out the two *FX* CPO applications (despite concluding that neither applicant had established "*reasonable grounds for making the claim*") on the basis that the relevant area of law was uncertain which made it inappropriate to do so without giving the applicants an opportunity to address the CAT's concerns.[2]

Given the relative novelty of the regime, it is to be expected that attempts will be made to appeal the CAT's CPO judgments. However, in its *recent Le Patourel* judgment[3], the Court of Appeal made a point of delineating the limited scope for appeals and emphasised the CAT's margin of discretion, particularly as regards the choice between opt-out and opt-in proceedings. This suggests that it may be more difficult to persuade the Court of Appeal to grant permission to appeal in future.

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[1] Dr Rachel Kent v (1) Apple Inc. & Anor [2022] CAT 28.

[2] Michael O'Higgins FX Class Representative v Barclays Bank plc and Ors; and Mr Phillip Evans v Barclays Bank plc and Ors [2022] CAT 16.

[3] *BT Group plc & Anor v Justin Le Patourel* [2022] EWCA Civ 593.

Application of the authorisation condition

To date, there have been very limited "authorisation" challenges based on the personal attributes of PCRs, and the CAT appears unlikely to be receptive to such arguments. So far, most proposed class representatives ("**PCR**") are individuals with relevant subject matter expertise and/or a track record of defending consumer interests (including two individuals jointly in one recent application[4]). However, a range of different structures are being used, including pre-existing associations[5] and special purpose vehicles[6].

Most challenges based on the authorisation condition have focussed on alleged deficiencies in the PCR's proposed funding arrangements. However, no respondent has successfully persuaded the CAT to refuse certification on this basis. Various different respondents have sought to argue that the PCR's adverse costs cover is or may be inadequate, but the CAT has been consistently unwilling to prevent CPOs from proceeding on this basis. Even where funding challenges have been successful, the CAT has given PCRs the opportunity to amend their funding arrangements to rectify the flaws identified. Given the associated costs risk, it may be that respondents bring fewer funding challenges in future.

The Supreme Court is expected to provide further guidance on funding issues in a pending appeal. The appeal concerns the two *Trucks* CPO applications and contends that the PCRs' funding arrangements are in substance "damages-based agreements" which (i) do not comply with the applicable regulatory requirements and (ii) are unenforceable in respect of opt-out proceedings.[7] The CAT and appeal courts have recognised that litigation funding is critical to the success of the regime and, if successful, this appeal has the potential to seriously undermine its effectiveness.

The CAT's judgments on the CPO applications concerning the FX and Trucks cartels provide much-anticipated insight as to how the authorisation condition operates in relation to competing CPO applications. From a procedural standpoint, the CAT chose not to adopt the approach followed in other jurisdictions (such as Canada) of determining carriage as a preliminary matter, and both PCRs in both cases were required to incur the significant costs of pursuing their applications to a full hearing. In *FX*[8], the CAT ultimately held that, if it had been minded to certify the claims on an opt-out basis, it would have granted carriage to Evans (rather than O'Higgins) on the basis that his claims were "*better thought through*" although noted that this decision was "*very marginal*". In the *Trucks* judgment[9], the CAT identified a range of factors that weighed in favour of the RHA claim, including the opt-out nature of its application (which the CAT considered to be the more sensible way to proceed in all the circumstances) and the relative robustness and comprehensiveness of RHA's expert methodology. Taken together, these judgments indicate that the relative strengths of the claims/expert methodologies are likely to be more important factors in choosing between competing PCRs than the attributes or qualifications of the PCRs and their respective teams. Given the costs and risks involved in preparing a CPO application, it may be that claimant law firms and funders are wary of doing so in future if competing applications are anticipated e.g. following an infringement decision by the CMA.

Application of the eligibility condition

The majority in *Merricks* held that the "suitability" of claims to be brought in collective proceedings

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[4] *Boyle & Vermeer v Govia Thameslink Railway Limited & Ors* 1404/7/721.

[5] e.g. Road Haulage Association, Which?

[6] e.g. UK Trucks Claim Limited, Mark Mclaren Class Representative Limited and Michael O'Higgins Class Representative Limited.

[7] UKSC 2021/0078 *R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents)*.

[8] *Ibid.*

[9] *UK Trucks Claim Limited v Stellantis N.V. & Ors* and *Road Haulage Association Limited v Man SE & Ors* [2022] CAT 25

(which forms part of the eligibility condition) is a relative concept requiring the CAT to consider whether a claim is more suitable to be brought in collective proceedings rather than individual proceedings. As predicted, this test is, in practice, proving to be a low hurdle for PCRs to overcome.

The Court of Appeal's pending *Trains* judgment[10] will shed light on just how fundamentally the collective action regime has altered conventional tort law principles. They are due to rule on whether s47C(2) Competition Act 1998, which permits damages to be assessed on an aggregate basis in collective proceedings, should be given the expansive interpretation adopted by the CAT (following the minority judgment of Lords Sales and Leggatt in *Merricks*). According to that interpretation, in collective proceedings the need to conduct an individualised assessment is dispensed with for all purposes antecedent to an award of damages, including "*proof of liability as well as the quantification of loss*" provided there is sufficient commonality to those issues and a realistic and plausible way to calculate aggregate damages. If upheld, this may limit the ability of future defendants to collective proceedings to test individual features of the claims made, with little or no substantive requirement on the part of individual claimants to show loss.

It is now well-established that the expert methodology put forward by the PCR at the certification stage must satisfy the test borrowed from the Canadian case of *Pro-Sys Consultants Ltd v Microsoft Corpn*. While multiple respondents have sought to persuade the CAT that the relevant PCR's expert methodology has fallen short of this standard, none have succeeded to date. It remains to be seen whether such arguments will gain greater traction with the Court of Appeal in the pending *Trains* judgment as the other key ground of appeal concerns the alleged mismatch between the PCR's abuse allegation and the methodology proposed by the PCR's expert.

Opt-in v opt-out

The decision to certify on an opt-in or an opt-out basis has a fundamental impact on the scale of the potential liability associated with collective proceedings. This has been a key battleground in several applications, and is likely to be in future given the stakes.

The Court of Appeal's *Le Patourel* judgment[11] provides guidance on how the CAT should approach this question. It confirms that that CAT should exercise this power based on all the circumstances of the case, and that there is no legislative presumption either way. The judgment also emphasises the CAT's broad margin of discretion in balancing the different factors relevant to the decision, indicating that such decisions will be difficult to appeal. The Court of Appeal further concluded that the role that the merits plays in this assessment may vary depending on the circumstances, observing that in some cases it may be difficult to form a clear view on the merits at the certification stages, whereas in others, such as follow-on claims, it might be able to go further. It ultimately found that it was open to the CAT to determine BT's summary judgment application and then to conclude that the merits added nothing additional to the choice between opt-in and opt-out.

It is striking that the two cases which the CAT has deemed suitable for certification on an opt-in basis both involve classes made up of businesses rather than individual consumers. Indeed, the CAT's finding (upheld by the Court of Appeal) that it would not be practicable to certify the *Le Patourel* claim on an opt-in basis despite the proposed consumer class being readily identifiable and contactable (as BT customers) indicates that it will be extremely difficult to persuade the CAT that opt-in certification is appropriate in a consumer claim.

In the *FX* case, the CAT concluded (by a 2:1 majority) that the applications should only be certified on an opt-in basis despite (i) both having

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[10] *First MTR South Western Trains Ltd & Anor v Justin Gutmann; London & South Eastern Railway Limited v Justin Gutmann, CA Ref CA-2021-003329, CA-2021-003339, CA-2021-003328.*

[11] *Ibid.*

been made on an opt-out basis and (ii) evidence from both PCRs that this meant that the claims were unlikely to proceed. In reaching this decision, the CAT first reviewed the factors going to the authorisation and eligibility conditions and concluded that certain of these pointed "weakly" in favour of opt-out certification, namely (i) the fact that neither PCR was a pre-existing body, (ii) the PCRs' levels of funding (and risk that insufficient funding would lead to pressure to settle early); and (iii) the existence of separate proceedings making similar claims. They considered these factors to be reinforced by the additional factors that required consideration: strength of the claims (which should be assessed primarily by reference to the plausibility of the pleaded case) and practicability of opt-in proceedings[12]. The CAT considered that opt-in proceedings were practicable on the basis that, on the whole, the proposed class was likely to be made up of large and sophisticated institutions, each with claims of a material size, who are unlikely to be ignorant of their potential claims. While the CAT identified both the risk of claims not proceeding at all and the fact that damages recovered in opt-out proceedings would not be eroded by costs as countervailing factors in factor of opt-out certifications, the majority ultimately concluded them to be outweighed.

In the *Trucks* case, a fundamental difference between the two CPO applications under consideration was that the RHA application was made on an opt-in basis, whereas the UKTC application was made primarily on an opt-out basis. This was one of the key factors which led the CAT to favour the RHA application. The CAT was persuaded that opt-in proceedings would be practicable on the basis that the class members were likely to become aware of the proceedings and, if they would interested in recovery, would take the initiative to join in. They also considered opt-in proceedings to have the advantage of giving the expert economists access to data from the class members to assist in quantifying damages.

Looking forward

Given the number of pending applications before the CAT, we can expect the next few years to be very instructive regarding the operation of the regime. Now that a number of claims have achieved certification we will also see how the CAT approaches the challenge of case managing these very large claims, particularly where related non-collective proceedings have been brought by other claimants. It will be interesting to see whether the CAT chooses to exercise its new power to make "Umbrella Proceedings Orders" to enable collective proceedings and other related proceedings to be dealt with together.

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Slaughter and May is a market-leader in competition litigation. We have particular expertise in large group actions and are instructed in some of the largest proceedings currently before the courts and the Competition Appeal Tribunal, including the *Trucks*, *FX* and *Trains* cases referred to above.

[12] Rule 79(3) of the Tribunal Rules.

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