

CAT CERTIFIES GUTMANN STAND-ALONE CLAIMS:

WHERE NEXT FOR THE UK'S COLLECTIVE PROCEEDINGS REGIME?

On 19 October 2021, the Competition Appeal Tribunal (the “CAT”) delivered its highly anticipated certification judgment in *Justin Gutmann v First MTR South Western Trains Limited* and another, and *Justin Gutmann v London & South Eastern Railway Limited*,¹ the first standalone claims issued under the opt-out collective proceedings regime.²

By unanimous judgment, the CAT ruled in favour of the Applicant, Mr Gutmann, authorising him to act as the representative of what is alleged to be a class of millions of individuals in relation to allegations of abuse of dominance concerning the sale of “Boundary Fares”, a type of excess fare that may be purchased as an ‘add-on’ for use in conjunction with a TfL Travelcard.

The judgment addresses a number of important issues, including abuse of dominance and the approach to causation and quantum in collective proceedings. It also represents the latest milestone in the development of the collective proceedings regime, following the Supreme Court’s landmark judgment in December 2020 in *Merricks v Mastercard* (“Merricks”). The judgment is likely to have far-reaching and profound implications for the collective action regime in the UK.

1. Legal framework

The UK’s collective proceedings regime was introduced by the Consumer Rights Act 2015, which amended the Competition Act 1998 (the “1998 Act”). These amendments provided, for the first time, the ability to commence opt-out class actions in respect of competition law infringements pursuant to sections 47B and 47C of the 1998 Act. Under the regime, an action by a proposed class representative (“PCR”) can only proceed if the CAT first grants a collective proceedings order (“CPO”). The criteria for granting a CPO are set out in the 1998 Act and the Competition Tribunal Rules 2015. A CPO will only be granted if the CAT:

- (A) authorises the PCR on the basis that it is “just and reasonable” for them to act as a representative in the proceedings (the “authorisation condition”); and
- (B) certifies that the claims are eligible for inclusion in collective proceedings (the “eligibility condition”).

When assessing the eligibility condition, the CAT should have regard to certain criteria, including whether the claims are “suitable” to be brought in collective proceedings. *Merricks* provided guidance that a claim may be suitable in circumstances where traditional, individual proceedings would be unsuitable for obtaining redress at the individual consumer level, thereby lowering the threshold that PCRs need to overcome when applying for CPOs.

2. Factual background

On 27 February 2019, Mr Gutmann issued opt-out collective proceedings against (i) First MTR South Western Trains Limited and Stagecoach South Western

¹ The two sets of proceedings are being heard together by the CAT.

² The collective proceedings regime for opt-out actions is relatively new, having only been introduced by the Consumer Rights Act 2015, by way of amendment to the Competition Act 1998.

Trains Limited (in relation to the south-western rail franchise); and (ii) London & South Eastern Railway Limited (in relation to the south-eastern rail franchise), (together, the “Respondents”) on the basis of alleged abuse of dominance. Mr Gutmann accuses the Respondents of abusing their dominant positions and acting contrary to the Chapter II prohibition under the 1998 Act by:

- (A) failing to make Boundary Fares sufficiently available for sale; and / or
- (B) failing to ensure that customers are aware of the existence of Boundary Fares and buy an appropriate fare.³

3. The CAT’s judgment and implications for the future

In summary, the CAT: (i) rejected the summary judgment / strike out applications advanced by the Respondents; (ii) authorised Mr Gutmann to act as the class representative in the proceedings; and (iii) found that the claims raised common issues and are suitable to be brought in collective proceedings. A case management conference to finalise the specific terms of the CPOs has been listed for 18 November 2021.

Abuse of dominance

In rejecting the Respondents’ summary judgment / strike out applications, the CAT found that Mr Gutmann’s case on abuse of dominance was reasonably arguable and not “a dramatic extension of the existing law”. In particular, the CAT noted that the categories of abuse are not closed and that it was not extraordinary or fanciful to say that where a dominant company operates an unfair selling system (e.g. where the availability of cheaper alternative prices for the same service is not transparent or adequately communicated to customers) this may also constitute an abuse. It was also relevant that the customers charged in this case were end consumers (predominantly individuals) as opposed to commercial undertakings.

Importantly for future cases, the CAT found that establishing abusive conduct does not require the identification of a counterfactual in specific detail. Mr Gutmann was not in a position to specify the precise manner in which the Respondents should have organised their businesses to achieve a different outcome, although the claim forms referred to the examples of better training and amended sales procedures.

While abuse of dominance will be considered in detail as part of any substantive determination of Mr Gutmann’s claims (and no conclusion as to either the existence of dominance or abuse thereof has yet been reached), the CAT’s judgment will be of particular interest to consumer-facing businesses who might hold a dominant position on a specified market.

Causation and quantum

The CAT’s interpretation of section 47C(2) of the 1998 Act represents an interesting development in the analysis of causation and quantum in collective proceedings. Section 47C(2) provides that damages may be awarded in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person.

Specifically, in interpreting section 47C(2), the CAT applied obiter comments from the judgment of Lords Sales and Leggatt in *Merricks*, who considered this provision to include “*proof of liability as well as quantification of loss*”. As a result, the CAT concluded that issues of liability and causation can be tried on a common basis, provided that there is sufficient commonality to those issues and a realistic and plausible way to calculate aggregate damages.

Future defendants to collective proceedings may therefore be limited in their ability to test individual features of the claims made, with little or no substantive requirement on the part of individual claimants to show proof of loss – a contrasting approach to Canada, a jurisdiction from which the CAT took guidance in its judgment, given the more advanced state of that jurisdiction’s own regime.

Other points of interest and conclusion

While the above issues are the most significant takeaways from the judgment, the CAT also provided some noteworthy commentary on the costs and benefits of the collective proceedings. Indeed, having regard to all the considerations (including the low estimates of recovery for each class member, the substantial cost of the proceedings, the likely benefits to the funder and lawyers as opposed to class members, and the promotion of efficiency and justice), the CAT accepted the risk of very low recovery for class members, and its cost-benefit analysis came out against the granting of the CPOs. Despite this, the CAT nonetheless considered that the CPOs should be granted.

Following *Merricks*, the CAT also re-confirmed that the role of expert evidence at the certification stage should

³ A Boundary Fare is valid for travel to or from the outer boundaries of TfL’s fare zones and is intended to be combined with a Travelcard whose validity stretches to the relevant zone boundary.

not be “an occasion for a full evaluation of the merit and robustness of an expert methodology”. Experts will continue to play a significant role going forwards in establishing these claims, and their initial evidence will need to present a workable and credible methodology for calculating aggregate loss.

In conclusion, the UK’s collective proceedings regime is still evolving and it will be interesting to see how other certification decisions (due in the coming months) are determined. While the CAT will continue to play a “screening or gatekeeping role over the pursuit of collective proceedings”, as proposed by Lord Briggs in

Merricks, it appears that it may be much easier for proposed collective proceedings to pass through that gateway.

Slaughter and May acts for First MTR South Western Trains Limited in these proceedings.

Slaughter and May will be publishing a series of pieces over the coming months covering the UK class actions landscape, including with regard to CPOs in the CAT. If you or your colleagues would like to be added to our mailing list for that series, please [click here](#).

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