HERBERT SMITH FREEHILLS

NEXT STEPS IN THE EVOLUTION OF UK COMPETITION LITIGATION: SURVIVAL OF THE FIRST COMPETITION LAW CLASS ACTION

05 April 2017 | UK
Legal Briefings

Already, 2017 has seen significant developments in the UK's competition litigation landscape. Most recently, last Friday the Competition Appeal Tribunal (**CAT**) allowed the first 'class action' brought under the new competition law collective redress regime to continue, at least for now, providing some clarifications on important aspects of the regime. Earlier in March the Government finally implemented the EU Damages Directive into UK law, which, whilst not representing a major overhaul of the system, introduces some important changes presenting opportunities from both a claimant and defendant perspective.

These developments highlight the continuing evolution of competition law private enforcement in the UK. In many cases the prospect of private damages actions now represents equal, if not greater, risks to infringers of competition law than public enforcement action and fines.

THE FIRST COMPETITION CLASS ACTION

Background

Under the UK's collective redress regime for competition law claims, representatives seeking to bring a collective action on behalf of consumers and/or businesses must apply to the CAT for a collective proceedings order (**CPO**) certifying the claim before it can proceed. The CAT must consider whether:

- It is "just and reasonable" for the putative representative to act on behalf of the class (including whether he/she can fairly and adequately act in the interests of the class members, has any conflict of interest with the class members, and can pay the defendant's costs if ordered to do so).
- The claims raise the "same, similar or related" issues of fact or law (common issues), and are "suitable" to be brought in collective proceedings (including in light of the costs and the benefits of doing so, and the suitability of awarding damages on an aggregate basis).
- The action should be brought on an opt-in or an opt-out basis (including taking account of the strength of the claims and whether it is practicable for the proceedings to be brought on an opt-in basis).

Despite the intense interest in the new collective proceedings regime, and an expectation that claimant lawyers would seek to utilise the new procedure widely to bring opt-out claims, to date only two CPO applications have been made. The first is a relatively modest claim in relation to mobility scooters.

Mobility scooters claim

In May 2016 Leigh Day, the lawyers for Dorothy Gibson (**Gibson**) - the General Secretary of the National Pensioners Convention (**NPC**), issued a CPO application seeking damages from Pride Mobility Products Limited (**Pride**) on an opt-out basis. The proposed class is consumer purchasers of Pride mobility scooters between 2010 and 2012. The claim is a follow-on claim relying on a decision of the UK competition authority (the OFT, now the CMA). The OFT found that Pride had infringed competition law through a form of resale price maintenance (**RPM**), by entering into agreements with eight of its retailers prohibiting them from advertising prices online below its recommended retail prices (as part of a market-wide policy). The claim estimated the class as comprising 27,000-32,000 people, and the damages as between £2.7 and £3.2 million. Each purchaser was estimated to have suffered an average pre-interest loss, depending on the model purchased, of £195 or £40.

The CAT heard the CPO application over three days in December 2016. Interestingly, the CAT called Gibson's economic expert to give oral evidence. Much of the hearing addressed the proposed damages assessment methodology and the feasibility of approaching damage as a class-wide "common issue", as well as the validity of the collective actions regime under human rights and EU law.

The CAT raised concerns that the proposed approach for assessing damages did not distinguish between the eight infringing retailers and other Pride dealers, instead comparing prices where a market-wide RPM policy was applied by Pride as regards online advertising – which was not itself subject of the OFT infringement finding – and likely prices in the absence of such a policy. The CAT considered this was not sustainable in a follow-on case.

In light of these concerns Gibson requested an adjournment to reformulate her claim, revising the proposed approach to damages (seeking third party disclosure from the retailers as necessary), and the scope of proposed sub-classes. Pride opposed this, in light of the prejudice such "indulgence" would cause to it, and the unlikelihood of this process resulting in a claim suitable for collective proceedings. Pride argued that the loss suffered by any consumer depended on his or her individual purchasing behaviour and so cannot constitute a common issue or enable proper distribution of any aggregate damages award

CPO decision

Common issues

On 31 March 2017 the CAT issued its judgment in response to the CPO application (see **here**). It rejected Pride's submissions that the case be thrown out. Instead the CAT adjourned the application and has given Gibson a second chance to file an amended application and new expert evidence, setting out a damages methodology focussed on the infringing agreements identified in the OFT's decision.

Although the CAT recognised that this is a burden on Pride, it emphasised that: Pride was found to have committed a hard-core infringement of competition law; claimants are usually allowed to amend their case so far in advance of trial (and collective proceedings should not be treated differently); the OFT's decision stated that the RPM was likely to have led to higher prices; and the proposed class contained many vulnerable consumers, for whom, although individual damage may be small, it is likely to have been significant.

The CAT emphasised that its decision does not pre-judge the outcome of an amended CPO application, and the question of whether there are sufficient "common issues" may still face considerable difficulties under a revised approach.

Other certification criteria

In relation to the other certification questions:

- The CAT did not reach a final conclusion on whether the claim is "suitable" for collective proceedings, given that the cost/benefit analysis will depend on the damages estimates resulting from the revised approach. The CAT did indicate that the claim would otherwise be considered suitable, in particular that, given the size and nature of the class, it would

not be cost-efficient or reasonable for the claims to be brought other than by way of collective proceedings.

- In relation to the opt-out/opt-in choice, the CAT stated that, if the difficulties as to "common issues" can be overcome, the case justifies certification on an opt-out basis, given the size of the class, the fact that the class members are individual consumers, and the estimated amount that each represented class member could recover. It considered the "strength of claims" on a high level basis. It was sufficient for this test to be met that the action is a follow-on claim (as infringement of competition law is established), and that the OFT's decision found that the infringements had a likely effect on prices.

- The CAT found that Gibson would act fairly and adequately in the interests of the proposed class. The CAT took into account her experience as a campaigner and spokesperson, her ability to take decisions on behalf of the class having received legal advice (despite a lack of experience in managing litigation), the experience of her lawyers and the funding arrangements in place and the fact that she had secured the services of a class administration company. An after-the-event (ATE) insurance policy was in place to pay the defendant's recoverable costs should the claim fail. Although Pride's estimated costs were in excess of the coverage under the ATE policy, the CAT noted that the applicant's cost estimate was below this level and concluded that, at this stage, this factor was not sufficient to refuse authorisation for Gibson to act as class representative.

Wider issues

Whilst the outcome is dependent on the facts of the case, the judgment does resolve a number of legal issues of wider applicability, and provides some indication into the CAT's likely approach in future cases. In particular:

- The CAT rejected Pride's arguments that the fact that the opt-out collective actions regime applies retrospectively to claims arising before its introduction breached its fundamental rights, on the basis that it provided a new procedural mechanism for bringing claims rather than creating a new cause of action.

- The CAT emphasised that the certification hearing was not a mini-trial weighing evidence from both sides and choosing between the approaches proposed by each side's expert economist (and did not call the defendant's expert). It is instead designed to consider whether the applicant has established a sufficiently sound and proper basis for the case to proceed. In particular, the CAT drew a distinction with the US approach to certification (involving extensive disclosure and expert evidence). It stated that the better analogy is with the position in Canada, where it is sufficient for the representative to adduce expert evidence to show:

"*a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class.*"

- The CAT confirmed that it did not regard the fact that the impetus for the collective proceedings came from Leigh Day as objectionable (but rather almost inevitable with collective proceedings, in particular for consumers).

Impact

The CAT's decision demonstrates that, while not adopting the US approach to certification, the CAT will be rigorous when assessing common issues, the proposed damages methodology and class definitions in CPO applications. However, the decision indicates that other aspects of the certification criteria may be easier to meet. In particular, the CAT appears to be taking a relatively light touch approach to considering whether opt-out proceedings are appropriate, at least in follow-on consumer claims.

It is not clear how likely the CAT would be to allow adjournments to deal with deficiencies in the applicant's approach in future cases, in particular in the absence of particularly vulnerable consumers such as those in this case.

The CAT's decision in the second pending CPO application - brought by proposed representative Walter Merricks OBE on behalf of over 46 million UK consumers against MasterCard (in relation to its interchange fees) and seeking around £14 billion in damages – is awaited (see **here**). The existence of common issues and proposed damages methodology are also likely to be crucial issues in that decision, which will also address other important outstanding questions about the regime, including in particular the ability of applicants to utilise third party funding to bring collective actions.

WIDER COMPETITION LITIGATION OUTLOOK

The development of the competition law collective redress regime, and the 9 March 2017 implementation of the EU Damages Directive, underline the continued high levels of private enforcement activity in the UK.

Such activity is likely to continue into the foreseeable future, although it remains to be seen what impact Brexit will have on the UK's status as a preferred jurisdiction for damages claims in European Commission cartel cases, and the resulting impact on the use of the collective actions regime for such cases in the future.

What is clear is that the possibility of private damages actions is now a very significant risk for businesses accused of competition law infringements, and must be taken into account when dealing with customers and competitors.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

STEPHEN WISKING
MANAGING PARTNER, COMPETITION, REGULATION AND TRADE, LONDON
+44 20 7466 2825
stephen.wisking@hsf.com

KIM DIETZEL
PARTNER, LONDON

+44 20 7466 2387
Kim.Dietzel@hsf.com

LEGAL NOTICE