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CERTIFICATION OF COMPETITION COLLECTIVE PROCEEDINGS

A MORE SETTLED PATH?

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The legal framework for the certification of competition class actions in the UK has developed at pace since the Supreme Court's decision in Merricks v Mastercard ("SC Merricks") lowered the threshold for certification in December 2020,[1] and there have been a considerable number of contested certification hearings before the Competition Appeal Tribunal ("CAT") and appeals from the CAT's decisions to the Court of Appeal ("CoA").

However, in July 2023, the CoA expressed the hope that "in light of the guidance given by this Court […] the issues of certification, carriage and other issues raised by applications for CPOs can be dealt with by the CAT at shorter hearings and in shorter judgments"[2].

As the President of the CAT, Sir Marcus Smith, remarked at a ThoughtLeaders4 conference in June of this year, to some extent the CoA's hope has been fulfilled "with a clear test for certification, and certification coming quickly and sometimes by agreement between the parties".

In this article we discuss the areas where the test for the certification of competition class actions has become more settled, and then briefly discuss areas that are likely to require further consideration by the courts.

The Test For Certification – More Settled?

As will be familiar to many readers of this publication, a competition class action will only be certified (and a Collective Proceedings Order ("CPO") made) if the CAT is satisfied that the following criteria are met:

(i) it is just and reasonable for the applicant to act as the class representative (commonly referred to as the 'authorisation' condition);

(ii) the application is brought on behalf of an identifiable class of persons;

(iii) the proposed claims raise common issues (that is, they raise the same, similar or related issues of fact and law); and

(iv) the claims are suitable to be brought in collective proceedings (suitability being assessed based on a range of factors and relative to individual proceedings)[3] ((ii)-(iv) are commonly referred to as the 'eligibility' condition). At the same time as addressing these issues, the CAT may also need to determine whether the claim is to proceed on an opt-in or opt-out basis and, where there are two competing proposed class

1 [2020] UKSC 51.

2 UK Trucks Claim Limited v Stellantis NV (formerly Fiat Chrylser Automobiles NV) & Others and Traton SE & Others v Road Haulage Association Limited [2023] EWCA Civ 875, §9. Sir Julian Flaux, Chancellor of the High Court, also noted in the same paragraph that: "Appeals to this Court should be limited to genuine issues of law as opposed to challenges to the exercise of the broad discretion and case management powers afforded to the CAT in this area dressed up as errors of law."

3 Section 47B of the Competition Act 1998.

representatives ("PCR"s), it will need to decide which is best placed to represent the class (i.e., the issue of 'carriage').

The CoA has provided important guidance on each of these aspects of certification and we discuss below three key areas where that guidance seems to have resulted in a more settled position.

Firstly, whilst the authorisation condition has rarely presented serious issues for the CAT, the eligibility condition (particularly the commonality and suitability elements) has required the courts to consider claims in detail at the certification stage. To facilitate this, the courts have adopted and refined what has become known and the "Pro-Sys" or "Microsoft" test from the Canadian case of Pro-Sys Consultants Ltd v Microsoft Corp.[4]

This test requires the PCR to put forward a "methodology" setting out how the issues in the case will be determined or answered at trial in order to assist the CAT in forming a judgment on commonality and suitability. As explained in SC Merricks and the CoA in Gutmann,[5] the methodology must be "sufficiently credible or plausible to establish some basis in fact for the commonality requirement", which "means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis"[6].

This methodology is usually prepared by an expert economist, but is not intended to result in a 'mini-trial' at the certification stage and it has been emphasised that the CAT's role is not to determine the best methodology available, or even to choose between the rival approaches of the parties' expert economists, but simply to assess the methodology advanced by the PCR to determine whether it provides a 'blueprint' for trial.

While several defendants have tried to persuade the CAT that the proposed methodology in their case falls short of this standard, the CAT has been reluctant to refuse to certify claims on this basis. Indeed, even where the CAT has found a proposed methodology wanting, PCRs have been provided with an opportunity to try again by the CAT (and CPOs have later been made). It is, therefore, perhaps not surprising that a recent certification decision dealt with the methodology relatively briefly, following a large measure of agreement between the parties.[7] It remains to be seen, however, whether that trend continues or new issues in relation to methodology emerge that require further guidance.

Secondly, when choosing whether to certify a claim on an opt-in or opt-out basis, the CAT will consider some of the same factors as it does in relation to certification, but also (a) the strength of the claims; and (b) whether it is practicable for the proceedings to be brought on an opt-in basis. In making this assessment there is no legislative presumption towards or against opt-in or opt-out proceedings, and the strength of a claim should not automatically point towards opt-in over opt-out.8 Instead, the CAT must decide which approach (opt-in or opt-out) is more appropriate taking into account all circumstances of the case.

The CoA has stated that most opt-in/opt-out decisions will be an exercise of judgment within the CAT's discretion and that the CoA should not interfere simply on the basis that it might have drawn a different conclusion from weighing the evidence.9

Finally, whilst the CAT was initially reluctant to determine the issue of carriage as a preliminary issue – instead preferring to choose between PCRs as part of reaching a decision on certification – the CAT's practice is now to consider carriage as a preliminary issue before two PCRs have incurred the considerable costs of a certification hearing. The choice between competing PCRs has been held to be a quintessentially multi-factorial question and a matter of discretion and case management for the CAT.[10]

Areas Of Uncertainty Remain

Although these developments are welcome, it is likely that the law around certification will continue to develop and that further decisions will provide additional clarity. Indeed, the President of the CAT has noted that the Tribunal is still working out how best to determine carriage disputes at the preliminary issue stage. In addition, the legality of certain types of litigation funding remain in doubt following the Supreme Court's decision in PACCAR,[11] which held that litigation funding agreements are damages based agreements ("DBAs") for the purposes of the DBA Regulations 2013. DBAs are expressly prohibited in opt-out proceedings, and the re-formulated funding arrangements of a number of class representatives are subject to appeal. Those appeals were stayed pending proposed new legislation to reverse the effect of PACCAR, although it is currently unclear whether this legislation will be taken forward by the new UK government.

Finally, it is likely that new claims will give rise to novel certification issues and that the competition class action regime will continue to evolve and mature.

4 [2013] SCC 57.
5 London & South Eastern Railway Limited v Gutmann [2022] EWCA Civ 1077.
6 Ibid., §41.
7 Ad Tech Collective Action LLP v Google [2024] CAT 38.
8 BT Group plc v Le Patourel [2022] EWCA Civ 593, §§61-63 and 68; Philip Evans and Michael O-Higgins v Barclays Bank Plc & Ors [2023] EWCA Civ 876, §§92-93, 118-138.
9 BT Group plc v Le Patourel, §57.
10 Trucks, §100.
11 PACCAR and others v CAT and others [2023] UKSC 28.