Too Big, Too Small, not yet "Just Right": UK Collective Actions Regime Still to find its Goldilocks

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Introduction

In the two years since competition collective actions became possible in the UK, not a single claim has yet been certified as suitable to proceed. The first case, *Gibson*,[1] was withdrawn by the applicant after an unfavourable judgment meant that any possible class would be too small and not cost effective. By contrast, the second, *Merricks*,[2] was effectively rejected for being too large and unworkable. It seems that, if collective actions have a future at all, we are yet to find the "Goldilocks" case that is not too big, not too small, but just the right size.

Despite the lack of success to date, the *Gibson* and *Merricks* cases do provide useful guidance on how the Competition Appeal Tribunal (CAT) will approach applications for collective proceedings orders (CPO). We set out in this article some of the points we have learned.

The legislative background

By way of background, in October 2015 Sch.8 to the new Consumer Rights Act 2015 (CRA)[3] amended the Competition Act 1998 (CA) and extended the CAT's jurisdiction to, inter alia, hear both opt-in and opt-out collective proceedings claims. Under these new rules any person may apply for permission to bring a class action for competition law infringements on behalf of a class of people who have suffered loss due to that infringement.

Section 47B of the CA sets out the procedure for collective actions. Collective actions require a CPO from the CAT before they can proceed. For a CPO to be granted the CAT must satisfy itself that:

1) the person who brought the proceedings is a suitable representative; and
2) the claims are eligible for inclusion in collective proceedings.

To be eligible, claims must be on behalf of an identifiable class of persons, raise the same, similar or related issues of fact or law and be "suitable" to be brought in collective proceedings. The CAT has a wide remit to discern whether it considers a claim to be suitable, but it will consider matters such as whether collective proceedings are a fair means to resolve the common issues and whether the claims are suitable for an aggregate award of damages.

The background to the cases

Gibson was both the first application for a CPO at all and the first application for a CPO for an "opt-out" class action.[4] Dorothy Gibson, the General Secretary of the National Pensioners Convention (an umbrella organisation for approximately 1,000 pensioners' groups in the UK), sought the order to allow her to pursue a follow-on claim for damages on behalf of consumers of mobility scooters affected by a competition infringement committed by Pride. In March 2014, the Office of Fair Trading (OFT) issued a decision against Pride finding that it, together with eight of its customers, had infringed Ch.1 of the CA.[5] The retailers had agreed to a request from Pride that they refrain from advertising below RRP prices online for certain models of scooter. The claim sought damages for every consumer who had purchased a Pride mobility scooter in the UK between 1 February 2010 and 29 February 2012. This included all purchases, not just those from retailers who were named in the infringement decision, on the basis that the agreement had an umbrella effect on the rest of the market. The class comprised around 27,000–32,000 people and damages were estimated at between £2.7 and 3.2 million.[6]

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[1] *Dorothy Gibson v Pride Mobility Products (Gibson)* [2017] CAT 9; [2017] Comp. A.R. 257; [2017] 4 C.M.L.R. 33. Judgment available at *http://www.catribunal.org.uk/files/1257_Dorothy_Gibson_Judgment_CPO_CAT_9_310317.pdf* [Accessed 7 February 2018].

[2] *Merricks v Mastercard Inc* [2017] CAT 16; [2017] 5 C.M.L.R. 16. Judgment available at *http://www.catribunal.org.uk/files/2.1266_Walter_Hugh_Judgment_CAT_16_210717.pdf* [Accessed 7 February 2018].

[3] Consumer Rights Act 2015 Sch.8, available at *http://www.legislation.gov.uk/ukpga/2015/15/schedule/8* [Accessed 7 February 2018]. The requisite changes to the Competition Act 1998 have yet to be reflected on legislation.gov.uk, though they are noted as pending.

[4] Opt-out proceedings are ones where any judgment binds all members of the class apart from those who actively indicate that they do not want to be represented by the class representative. Opt-in proceedings are ones where the only class members bound by a judgment are those who actively indicate that they wish to be represented by the class representative. Though an application may state a preference, the CAT has a broad discretion to decide whether a claim should proceed on an opt-in or opt-out basis.

[5] Office of Fair Trading, "Mobility scooters supplied by Pride Mobility Products Ltd: prohibition on online advertising of prices below Pride's RRP", CE/9578-12, 27 March 2014. Non-confidential version of the decision available at *https://assets.publishing.service.gov.uk/media/54522051ed915d1380000007/Pride_Decision_Confidential_Version.pdf* [Accessed 7 February 2018].

[6] *Gibson* [2017] CAT 9; [2017] Comp. A.R. 257; [2017] 4 C.M.L.R. 33 at [4] and [93].

The second CPO was applied for by Walter Merricks, a qualified lawyer and former Chief Financial Services Ombudsman, in September of 2016. The application was for a CPO to allow him to act as class representative for, basically, the class of all consumers in the UK who purchased goods or services from businesses accepting MasterCard between 22 May 1992 and 21 June 2008. To be included in the class consumers also had to have been resident in the UK for at least three months and have been aged 16 or over. [7] It was, again, an application to bring a claim on an opt-out basis. It was also, again, a follow-on application based in this case on the European Commission decision finding certain of MasterCard's multilateral interchange fees arrangements to be in breach of art.101 of the Treaty on the Functioning of the European Union (TFEU).[8] Claims against MasterCard have already been brought by retailers, but this claim was the first on behalf of end-consumers. The class included those who both had and had not used a MasterCard method of payment, since merchants generally charge the same for goods or services irrespective of payment method. It was alleged that any overcharge caused by the anti-competitive behaviour would be passed on to consumers paying by cash, cheque or credit card. The class amounted to around 46.2 million people with an estimated value for the damages award of approximately £14 billion.[9]

Expert evidence: Canada shows the way

In both *Gibson* and *Merricks* expert evidence was a major focus of the CAT's scrutiny. During the *Gibson* hearing the CAT considered expert reports from both parties and oral evidence from Ms Gibson's expert. In *Merricks* the economics experts were also questioned during the hearing about the reports they had prepared.

The CAT referred to the same Canadian precedent in both cases in explaining the approach it intends to take toward expert evidence at the CPO application stage. Quoting from the case, *Pro-Sys Consultants*,[10] the CAT stated that the economic evidence relied upon to establish commonality of loss to the members of the class must

> "offer a realistic prospect of establishing loss on a class-wide basis … The methodology cannot be purely theoretical or hypothetical, and must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied".[11]

Ms Gibson's claim was a follow-on claim, but as the CAT pointed out, the overcharge being claimed for involved the entire scooter market, not just that covering the eight relevant retailers. Due to limitation issues a standalone claim was time-barred.[12] Ms Gibson was therefore unable to claim for any infringement beyond the scope of the OFT's decision. However, the CAT found that the proposed class structure would have done just that, as it covered not only the retailers named in the decision, but also other Pride retailers whose prices it considered would have been affected by the infringement. There was no distinction made between customers who had purchased from the eight named retailers and those who had purchased from other retailers.

Despite objections from Pride, the CAT permitted an adjournment so that Ms Gibson's expert could reformulate these subclass definitions. The CAT did not agree that these "umbrella effects" could be claimed for, as they were time barred by limitation. The judgment stated that the claim could not, in essence, recover by the back door what it was not able to recover by the front. The expert economist ought only, as a follow-on claim, to have considered losses resulting from Pride's agreements with the eight retailers, not the possible effects of that policy on other retailers of Pride's products.[13]

In *Merricks*, the CAT's scrutiny of the expert evidence focused mainly on the calculation of damages. The CAT was concerned with issues of commonality on the basis that, given the size and scale of the proposed class, it would be impracticable to individually assess the level of pass through or the individual spend of each member of the proposed class. To do so would require knowledge of an individual's actual purchases and the level of pass through of the interchange fee of each retailer in question. This would obviously be unworkable at this scale.[14] Instead, Merricks' expert proposed that aggregate damages could be calculated and a weighted average determined for retailer pass through, considering the different levels of pass through in the various markets and sectors. Distribution amounts to be awarded would be different for each year, but the amount given to each consumer would be the same across the class as a whole. Merricks' argued that a rough and ready approach to the assessment of the aggregated damages so that members could obtain some justice was preferable to no justice at

[7] *Merricks* [2017] CAT 16; [2017] 5 C.M.L.R. 16 at [1].
[8] Commission Decision of 19 December 2017 (Case COMP/34.579—*MasterCard*). Non-confidential version of the decision available at *http://ec.europa.eu/competition /antitrust/cases/dec_docs/34579/34579_1889_2.pdf* [Accessed 7 February 2018].
[9] Commission Decision of 19 December 2017 (Case COMP/34.579—*MasterCard*), paras 1–2.
[10] *Pro-Sys Consultants Ltd v Microsoft Corp* [2013] SCC 57. Judgment available at *https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13320/index.do* [Accessed 7 February 2018].
[11] *Gibson* [2017] CAT 9; [2017] Comp. A.R. 257; [2017] 4 C.M.L.R. 33 at [104]-[105] and *Merricks* [2017] CAT 16; [2017] 5 C.M.L.R. 16 at [58]-[59].
[12] In theory, collective proceedings can be brought in relation to competition law infringements that occurred before 1 October 2015. However, the transitional provisions of the new CAT procedural rules provided that claims arising before 1 October 2015 may not be brought in collective proceedings before the CAT unless and until they are the subject of an infringement decision by the European Commission or a UK competition authority (whether before or after 1 October 2015). Any claim for the period prior to 1 October 2015 will only be allowed to the extent it falls strictly within the terms of such an infringement decision.
[13] *Gibson* [2017] CAT 9; [2017] Comp. A.R. 257; [2017] 4 C.M.L.R. 33 at [110]-[114].
[14] Commentators suggest that for the claim to have had a greater chance of success, the class size should have been pared down to a much smaller one, for instance every consumer in the UK who had not held a MasterCard, and so could not have benefitted from the scheme at all, for instance through rewards.

all. If the claim were not allowed to proceed on this basis, Mastercard would unfairly get away with its infringing actions without penalty.

The data Merricks proposed would be used by his experts to calculate the weighted average pass through; however, it did not convince the CAT. While, in theory, the calculation of global loss through weighted average pass through was "methodologically sound", applying that methodology to "virtually the entire UK retail sector over a period of 16 years" was an enormously complex undertaking. The model proposed by Merrick's expert involved calculating a weighted average of 255 different interchange fees charged by Mastercard in the relevant period. The overcharge passed on varied across industries and markets. While the CAT stated it did not expect this investigation process to have been fully carried out for the CPO application, there did need to have been a proper effort to ascertain whether data to this effect was in fact available.[15] The CAT did not believe, based on the evidence before it, that there would be sufficient data available to be able to carry out this analysis. Thus, the case was not suitable for an aggregate award of damages.[16]

Disclosure: limited but available

The CAT expressly noted the desire to steer clear of US style class certification—which often involves a very lengthy discovery process and extensive hearings for expert evidence—explicitly stating that the application for a CPO is "not a mini trial" and that there should be "no or only very limited disclosure".[17] In *Merricks*, while a certain amount of information was voluntarily provided pre-hearing, the CAT was not inclined to order any further disclosure to enable Merricks' experts to rectify their methodology. That said, during the *Gibson* hearing, it went on to suggest that limited disclosure was in fact available to Ms Gibson in order to rectify her application to amend the class and sub class definitions. [18]

Damages: a broad brush, but not a paint roller

In *Merricks*, the CAT concluded that the distribution proposals did not reflect the principle that damages must be compensatory in nature. The proposed distribution method would bear no actual relation to the loss of any individual class member. It would most likely lead to significant over- or under-compensation for many of the class members. To accurately work out a more suitable distribution model the methodology would have had to take into account:

- individual spend;
- merchants from whom said individuals purchased their goods and services; and
- the mix of products they purchased.

The CAT stated that it would be virtually impossible to do this in any credible manner given the huge size of the class and the lengthy time period covered by the claim.

Merricks' experts had considered working out individual spend making some differentiation based on age, income bracket and region, but had discounted this as unfeasible. The reason they had not considered asking for more information to bring this actual loss more in line with the compensation to be granted was that they considered that every step added would result in fewer members of the class claiming their share of the reward. The more complex the stages and evidence required, the fewer people would claim, and the greater the distribution costs would be. Similarly, to work out pass through on a more thorough basis would require disclosure from retailers. Such analysis would run into issues regarding both lack of data and retailers not wanting to share their pass-through rates. Merricks ultimately went with the simplest, but least precise option of the single award amount for each class member to avoid needing to ask individuals for more data. As stated above, while the experts believed they could obtain sufficient data for the weighted average pass through, the CAT was not convinced.[19] Since all the alternatives had been discounted by Merricks, it seems that the CAT was not willing in this instance, unlike in *Gibson*, to offer an adjournment for the claim to be amended.[20]

Funders can have their returns

As Merricks' application had already been rejected before reaching the consideration of funding arrangements, the CAT's comments on funding are technically obiter dicta. Nonetheless they provide helpful clarity on a previously unclear area of the new rules and an approach that will most likely be followed in future cases.

The main point to come out of the judgment is that commercial returns for a litigation funder can be recovered from unclaimed damages. Merrick's agreement with his funder stipulated that, should the claim succeed, he would apply to the CAT to seek payment of a percentage share of any undistributed damages, representing the funder's return on investment. It was held that this return was recoverable even in cases where the applicant's obligation to pay the funding cost is contingent on the success of the action, provided that the obligation is a direct liability on the applicant. Further, Merrick's funder's fees were to be taken only from the undistributed damages leaving the interests of the class

[15] *Merricks* [2017] CAT 16; [2017] 5 C.M.L.R 16 at [77].
[16] Commentary suggests that a better approach would have been to determine initially the best model available for calculating damages for each consumer and to then build the case, and class size, around that model.
[17] *Gibson* [2017] CAT 9; [2017] Comp. A.R. 257; [2017] 4 C.M.L.R. 33 at [104].
[18] *Gibson* [2017] CAT 9; [2017] Comp. A.R. 257; [2017] 4 C.M.L.R. 33 at [114].
[19] *Merricks* [2017] CAT 16; [2017] 5 C.M.L.R. 16 at [84]-[88].
[20] In future cases, it may be that it is not appropriate to make an aggregate award across a whole class but, instead, that there should be aggregate awards for different sub-groups. This was considered in *Gibson*, albeit that the sub-classes chosen were considered to be incorrect by the CAT.

members to take precedence over the funder's interests.[21] Despite objections from MasterCard, the CAT concluded that this was permissible under the new rules.[22] Legal success fees and ATE insurance premiums were also deemed recoverable.

CAT shows flexibility about suitability

It had been suggested at various points in the passage of the legislation leading to the creation of collective actions that claims should only be brought by consumer organisations and similar bodies.[23] The legislature rejected this limitation but CAT guidance still seemed to suggest that such entities would be preferred as claimants.

Both Ms Gibson and Mr Merricks were considered to be suitable class representatives. However, while Ms Gibson was the head of an established consumer organisation, Mr Merricks was not (albeit that he had experience in public interest roles). This suggests a willingness on the part of the CAT to be flexible. Further, whilst the representative needs to be able to instruct the lawyers effectively, it was said that it was not necessary for them to understand all the complexities of the arguments without assistance from their lawyers.

On the suitability of claims for certification on an opt-out basis, it is notable that the CAT did consider that, but for the issues on definition of the class, the *Gibson* claims would have been suitable for class certification on an opt out basis given:

1) the size of the class;
2) the fact the class members were individual consumers; and
3) the estimated amount that each class member would receive.[24]

This suggests that the class need not be particularly big, nor the total damages particularly large, for an opt-out collective action to be considered appropriate.

What have we learned for future cases?

Both judgments demonstrate that, while the CAT is keen to encourage collective redress in the UK, it is fully scrutinising claims to ensure their suitability. These cases show that the CAT will consider fully the many factors determining whether a CPO can be granted, so claimants must be extremely thorough in preparing their plan.

The major takeaways from these two cases in respect of future CPO applications are:

- Use of Canadian authority—The CAT has strongly distanced the UK from the US approach, but Canadian authorities may be useful.
- Expert methodology—In both cases the expert methodology was carefully scrutinised. The methodology and data will need to be sufficiently well developed to withstand considerable scrutiny, albeit not to the same level as in the US.
- Third party disclosure—"[L]imited orders for third party disclosure may be necessary" despite the guidance on the new rules discouraging use of disclosure for a CPO application.
- Damages—Although the assessment of damages payable may be quite approximate in a collective action, there must still be a reasonable connection to losses suffered so as to minimise over- and under-compensation.
- Suitability of class representative—It seems the CAT is willing to be quite flexible regarding who fills the role of class representative.
- Suitability of claims—An estimated class size of approximately 30,000 consumers with claims of about £100 each appears to be sufficiently large to justify an opt-out collective action.
- Funding—Undistributed proceeds can be used to provide a return on investment to a litigation funder. This is good news for the litigation funding industry in the UK.

It should be noted that both *Gibson* and *Merricks* were cases seeking certification on an opt-out basis. There has not yet been an application for certification on an opt-in basis, but it appears likely that the first such claim will be made by the Road Haulage Association in relation to the trucks cartel, in early 2018.[25] It will be interesting to see whether there is any difference in approach by the CAT in considering an opt-in claim as opposed to an opt-out claim. Getting this case "just right" will be critical in defining whether the class action regime in the UK is able to make it out of the woods and avoid being eaten by bears.

[21] *Merricks* [2017] CAT 16; [2017] 5 C.M.L.R. 16 at [127].
[22] Previously there had been concern that the language in the CAT procedural rules refers to "costs, fees or disbursements" rather than "costs or expenses", which some interpreted as a reference to legal fees and disbursements in a narrow sense rather than costs of funding.
[23] The overall test for the CAT to apply is whether it would be "just and reasonable" for the applicant to act as class representative. It appears the CAT does not want to see a practice develop where, as arguably tends to happen in class actions in the US, the class member acting as class representative is simply a front for the lawyers who are really bringing the action.
[24] *Gibson* [2017] CAT 9; [2017] Comp. A.R. 257; [2017] 4 C.M.L.R. 33 at [124].
[25] More information is available from the Road Haulage Association at *https://www.truckcartellegalaction.com/* [Accessed 7 February 2018].