UK COMPETITION APPEALS TRIBUNAL

OVERCOMING THE PROCEDURAL CHALLENGES FOR ALL STAKEHOLDERS

Authored by: Sarah Breckenridge (Investment Manager) - Erso Capital

In his speech to the Cambridge Forum on UK Competition Litigation[1] in September 2023, CAT President Sir Marcus Smith ended with what he described as a "cautionary note":

'As recent appellate decisions have shown, the collective proceedings regime in this country is still in its infancy, and fragile… For the CAT's part, we recognise that collective actions give rise to procedural challenges that are orders of magnitude harder than those which arise in "ordinary" bilateral litigation.'

The fragility and the out-of-the ordinary procedural challenges he identified will be familiar to anyone involved in bringing a collective action in the courts or the CAT in recent years. Long before issue of a claim, significant time, energy, and cost will be spent on project management of procedure, finance, communication, alongside the legal case theory and structure of the class. Caution does need to be exercised for all stakeholders. The effort and sunk cost may be for nothing if the case is ultimately stymied by those "harder" procedural challenges.

It has been suggested that, as a novel jurisdiction, the CAT is one in which "experimentation" with procedure may be unwise[2]. The converse view is that a novel jurisdiction is precisely where experimentation/innovation should be allowed. Over time its rules and practices are moulded to best fit the requirements of class-led competition actions and to meet the policy objectives of the Tribunal. It may even help inform the development of wider non-competition collective actions in England and Wales. Over the past year, the CAT has grappled with various hard procedural challenges; the decisions made may ease the progress of collective actions in the coming years.

Carriage as a preliminary issue

In the CAT, the risk of a competing claim (especially if both are proposed as opt-out) obtaining the CPO following a carriage dispute is a huge one. In May 2023, in Pollack v Google[3] the CAT, cognisant of the need to balance costs control with "ensuring the continued viability of the collective proceedings regime at all", ordered that carriage should be determined as a preliminary issue, thus leaving only one claim to incur the costs and time of going forward to a certification hearing.

1 The fill speech, on Collective Proceedings and Fungible Contracts is available on COLLECTIVE PROCEEDINGS AND FUNGIBLE CONTRACTS (catribunal.org.uk)

2 O'Higgins FX Class Representative Limited [2020] CAT 9; and 1572/7/7/22 Claudio Pollack v Alphabet Inc. and others; 1582/7/7/23 Charles Arthur v Alphabet Inc. & Others - Judgment (Case Management: Handling of Carriage Disputes) | 26 May 2023 (catribunal.org.uk) at [3]

3 1572/7/7/22 Claudio Pollack v Alphabet Inc. and others; 1582/7/7/23 Charles Arthur v Alphabet Inc. & Others - Judgment (Case Management: Handling of Carriage Disputes) | 26 May 2023 (catribunal.org.uk) at [12]

The Tribunal did not consider that the questions emanating in a carriage hearing would predispose it one way or another for a subsequent certification hearing. That was deemed likely to be the position in the case of most carriage disputes. However, at the hearing in October 2023 the CAT was in fact asked by the Pollack and the Arthur parties to consider an Amalgamation Application - whether, rather than determining carriage, the two claims could be consolidated and brought by a new Proposed Class Representative, Ad Tech Collective Action LLP (of which the two former PCRs are members). The CAT has so ordered. Those who were hoping to see whether carriage can practically be untangled from certification will have been disappointed. The opportunity for a preliminary hearing on carriage is still available, but this is one hard procedural difficulty where all stakeholders have been left waiting to see the theory played out in practice.

Increased emphasis on economic experts

There has been significant emphasis on the role expert economists play in competition infringement collective actions – the idea that competition law "depends for its very identity on economics"[4] was one of the foundation stones for the CAT itself.

Accordingly, in 2023 decisions such as Gormsen v Meta Platforms[5] and Commercial and Interregional Card Claims[6] cases there has been an increased scrutiny – and willingness to reject – the economic evidence prepared for certification on the basis that it must meet the Canadian Pro-Sys "blueprint" test.

Parties preparing for certification will give more attention to the economic theories and methodologies through to trial. This frontloading of expert work (and cost) is desirable to avoid cumbersome procedural difficulties – and risks later on which might be caused by imprecise economic evidence and unmanageable final hearings. The Pro-Sys model may assist the Tribunal in overcoming hard procedural challenges, but it has an obvious financial impact on early stage legal budgets. That additional risk is one which proposed class representatives, lawyers and funders will need to accommodate when considering issuing or supporting new claims.

The continuing blind spot

Challenges of a magnitude harder than ordinary litigation are inevitable when the CAT is first required to deal with damages awards and distribution of them. Whilst parties may be informed by claims management and distribution practices in other more developed jurisdictions, critical questions are at large: how hands-on will the Tribunal itself be? How might an aggregate award be fairly but efficiently divided across a class? How might findings on harm affect decisions on distribution?

The first settlement (against one defendant) in an opt-out CAT claim[7] was reported at the time of writing, and the CAT will be asked to approve it at a hearing at the end of 2023. Will that provide answers? Competition lawyers will be watching with interest but given the claim will continue against the remaining defendants, the Class Representative is proposing that the settlement funds should be held in escrow rather than distributed. It may still be some time yet before we have clarity on the key procedural issues around distribution which so many are asking for.

The challenge for funding

The number of collective actions issued in the CAT demonstrates that funders are willing to support claims in this novel jurisdiction despite its unknowns. Nevertheless, procedural issues surrounding carriage, expert evidence and the ultimate distribution of awards will be material factors in funders' consideration of whether to support a claim. The more clarity, the better equipped funders will be to identify realistic budgets and make decisions on supporting claims.

Funders are in the business of risk but there can only be so much appetite at an individual funder level for cases which can take unexpected (and costly) turns. The resolutions described above will not of themselves reduce the cost for a funder embarking on a case, but they should at least reduce the number of unknowns.

At a time when funders are also grappling with their own procedural challenge – notably the Supreme Court's judgment[8] that funding agreements may be classified as DBAs, which are prohibited for CAT collective actions- more certainty over the procedure of cases on their way to trial can only be a positive.

4 "Competition Decision Making and Judicial Control - The Role of the Specialised Tribunal" - Centre for Competition Policy UEA Annual Conference | 6-7 Jun 2013 (catribunal.org.uk)
5 1433/7/7/22 Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and Others - Order (Costs and Stay) | 24 Mar 2023 (catribunal.org.uk)
6 CICC (1441-1444) - Judgment (CPO Applications) | 8 Jun 2023 (catribunal.org.uk)
7 Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and others 1339/7/7/20
8 R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others [2023] UKSC 28