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Alerter

Group Actions

17 April 2019

CAT litigation with nine lives: The rebirth of the class action?

By Noel Dilworth

This short alerter considers the decision of the Court of Appeal on 16 April 2019 in the MasterCard litigation (*Walter Merricks v MasterCard Inc & ors* [2019] EWCA 674), which allowed the Applicant's appeal and remitted the application for a collective proceedings order ("CPO") for reconsideration by the Competition Appeal Tribunal (CAT). Subject to any appeal to the Supreme Court, this is a significant decision.

CAT Decision

1. The collective redress system applicable in cases of "follow-on" damages claims under s.47A of the Competition Act 1998 (the "CA 1998") was the subject of examination by this alerter in the context of looking at the CAT decision in the MasterCard litigation reported at [2017] CAT 16.

2. To summarise, the grounds on which the CAT had refused to certify the action for a CPO were that (1) there was a perceived lack of data to operate the proposed methodology for determining the level of pass-on of impugned overcharges to consumers; and (2) there was an absence of any plausible means of calculating the loss of individual claimants so as to devise an appropriate method of distributing any aggregate award of damages.

3. The Court of Appeal acceded to the Appellant's attacks on both grounds. Firstly, it established that the test for assessing the methodology of data analysis for the purposes of granting the CPO was akin to summary judgment, not a mini-trial. Second, the Court of Appeal relaxed the requirements for proposals as to the distribution of an aggregate award of damages, such that it is not strictly compensatory.

Quality of Data

4. The CAT had refused to grant the CPO because, as it held at para [78], it was "*unpersuaded on the material before us that there is sufficient data available for this methodology to be applied on a sufficiently sound basis.*"

5. On appeal, the Court of Appeal confirmed that the CAT was "*entitled to satisfy itself that the experts' proposed methodology was credible*", but it was "*not appropriate at the certification stage to require the proposed representative and his experts to specify in detail what data would be available for each of the relevant retail sectors in respect of the infringement period.*" (see para [51] of the Court of Appeal decision). In drawing that conclusion, Patten LJ, giving the Court's judgment, noted that the CAT had engaged in precisely the sort of mini-trial that it had expressly disavowed (see para [52]). The CAT was entitled to rely on its "*substantial expertise*", but not to subject the application to "*a more vigorous process of examination than would have taken place at a strike-out application.*" (see para [53]). The Court of Appeal held that the "*the proposed representative should not, in our view, be required to demonstrate more than that he has a real prospect of success.*" (see para [54]).

Distribution

6. The second ground of the CAT's refusal to certify was because the proposed method of distributing any aggregate award of damages would bear no relation at all to the loss suffered by individual members of the presented class (see para [88] of the CAT decision).

7. The Court of Appeal's approach to this issue was encapsulated at paragraphs [56] – [58] of its decision. It focussed on rules 92 and 93 of the Competition Appeal Tribunal Rules 2015 (2015 No. 1648), the provisions governing the distribution of an aggregate award. The Court of Appeal latched onto a crucial concession made by the Defendants that these rules do not require that the award should be distributed according to what each individual claimant has lost. It explicitly rejected the suggestion that a loss-based method of distribution was mandated by the provisions, although it acknowledged that, "*where that is readily calculable, it will probably be the most obvious and suitable method of distribution.*" (see para [57]). It therefore held that the CAT's conventional, compensatory approach to loss was a misdirection (para [58]).

8. In espousing a broader approach, the Court of Appeal drew, at paras [59] – [60], on wider policy aims: (i) the likely scale of loss to any individual consumer, coupled with the costs of the proceedings made litigation by way of individual claims a practical impossibility; (ii) the intention behind the reforms introduced by the Consumer Rights Act 2015 to widen the power to bring collective proceedings was not fettered by the application of conventional calculations of loss; (iii) the fact that the rights of individual claimants would be vindicated by the fact of the aggregate award itself. It left decisions as to distribution "*for the trial judge to consider following the making of an aggregate award.*" (see para [62]).

Conclusions

9. The relaxation of the test to be applied by the CAT for assessing data is important, but perhaps unsurprising. Maintaining a high threshold for certification would have rendered the 2015 reforms of the Competition Act nugatory. More significant, however, is the explicit endorsement of a non-compensatory approach to the distribution of aggregate awards. The Court of Appeal observed that Parliament had not expressly restricted the means of distribution by reference to conventional approaches to compensation. However, the Court was silent on how the CAT (or "trial judge", in the language of the Court of Appeal) should handle questions of appropriateness of the proposals for non-compensatory distribution of the aggregate award. It will be necessary to await the next instalment to see how, in practice, non-compensatory distribution can function in a principled and predictable way.

10. Subject to any appeal to the Supreme Court, this is a significant decision. The interest of claimants' firms and funders in the CPO actions in the CAT is likely to be revived. Monopolies and market operators with dominant positions are likely to be exposed to greater risks of collective redress.

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