ALERTER

Loyalty Penalty claims certified: CAT allows post-October 2015 claims to proceed to trial

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The Competition Appeal Tribunal has granted CPOs in the *Loyalty Penalty* claims ([2025] CAT 77).[1] In certifying the claims brought by Mr Gutmann against Vodafone, EE/BT, Hutchison 3G and Telefonica, the Tribunal also dealt with two applications for strike-out/reverse summary judgment on limitation grounds. Ultimately, the Defendants' application for strike out in relation to claims before 1 October 2015 was granted, but the application concerning claims between 1 October 2015 and 8 March 2017 was refused, with the matter left open for trial. The Loyalty Penalty claims will now progress towards trial.

On 14 November 2025 the Competition Appeal Tribunal unanimously granted Collective Proceedings Orders ("**CPOs**") in the "Loyalty Penalty" claims, certifying Mr Justin Gutmann's standalone claims against four mobile network operators ("**MNOs**") in the UK (at [288 and 290]). The CPOs were granted for claims alleging damages, arising after 1 October 2015, due to the MNOs' alleged abuses of dominant positions resulting in higher prices being paid by customers for mobile telephony services (the "**Claims**"). Importantly, the Tribunal acknowledged that the tests set out in rules 79(1)(a) and 79(2)(e) of the Competition Appeal Tribunal Rules 2015 (the "**2015 Rules**") can accommodate a certain level of uncertainty, and proceedings can still be certified notwithstanding. The Tribunal continues to develop its case law post-*Merricks*, notably the emphasis on access to justice as a cornerstone of the UK collective proceedings regime.

BACKGROUND

The Claims allege that the MNOs (Vodafone, EE/BT, Hutchison 3G and Telefonica UK) abused dominant positions in breach of the Chapter II prohibition of the Competition Act 1998 (the "**CA 98**"). As a result, millions of consumers allegedly overpaid for mobile telephony services under Combined Handset and Airtime Contracts (the "**CHA Contracts**"). Whilst there are four standalone claims, the Tribunal noted that they were identical in substance, save for the identity of the relevant MNO (at [1] and [3-5]).

The CHA Contracts at issue required consumers to pay for the mobile handset/device *and* mobile telephony services over a minimum contractual term (the "**Minimum Term**"). Mr Gutmann, the class representative (the "**CR**"), alleges that after the expiry of the Minimum Term (and unless the consumer *immediately* terminated their CHA

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Contract) consumers were charged the same monthly price as during the Minimum Term, despite the mobile device having been paid off, and notwithstanding the availability of lower SIM-only prices (at [4-6]); a practice that is said to be abusive on the ground that the MNOs unfairly and exploitatively charged consumers "*something for nothing*". Mr Gutmann is seeking aggregate damages as redress.

In the hearing the Tribunal dealt both with the question of certification, and two applications by the Defendants for strike out and/or reverse summary judgment on the basis of limitation. The Tribunal's decision is an important one, touching upon the degree of certainty required for potential class members to ascertain, at the certification stage, their membership in the proposed class.

LIMITATION

Two separate applications were put before the CAT by the MNOs. The first application (the "**First Period Application**") consisted of a strike out and/or reverse summary judgment application by the MNOs on the basis that, having accrued before 1 October 2015, some of the claims were time-barred by the old limitation rules applying to such claims. 1 October 2015 is the date on which the collective proceedings regime came into force by virtue of the amendments to the CA98 made by the Consumer Rights Act 2015, as well as the 2015 Rules, changing the rules on limitation but applying savings for the old rules.

The second application (the '**Second Period Application**') concerned strike out and/or reverse summary judgment of the claims that arose between the period of 1 October 2015 and 8 March 2017. 8 March 2017 is the final date before Schedule 8A of the CA98 came into effect, changing again the rules on limitation for competition infringement claims.

The First Period Application

The MNOs applied to strike out the claims relating to the period prior to 1 October 2015, on the basis that rule 119(2) of the 2015 Rules preserves and continues to apply the old two-year limitation period under rule 31 of the 2003 Rules, meaning that all of the claims made by the proposed class in respect of losses before that date are time-barred (at [12-14]). The applicable limitation period was therefore the question before the CAT, and the parties did not dispute that it was a pure question of law capable of summary resolution (at [14]).

The 'nub' of the dispute was found in rule 119(2) of the 2015 Rules, and its proper interpretation – essentially, whether or not it preserves the old two-year rule, which is critically different from the Limitation Act 1980 (at [51]).

As a savings provision of the old two-year limitation period, rule 119(2) read with rule 119(3) of the 2015 Rules maintains that two-year time limit for claims of issues arising before 1 October 2015 but commenced after 1 October 2015. The statutory language supported such a reading (at [51-62]), so too did a purposive reading of the provision, the CAT finding that the reference to section 47A in that rule is a reference to the post-CRA 2015 section 47A, capturing standalone claims which did not previously fall within the CAT's jurisdiction (at [18], [53]).

Accordingly, the CAT found in favour of the MNOs and acceded to their application to strike out the claims relating to the period prior to 1 October 2015 (at [78]).

The Second Period Application

Vodafone, EE/BT and Three (the '**SPA Applicants**') applied for strike out and/or reverse summary judgment in relation to claims that arose between the period of 1 October 2015 and 8 March 2017, insofar as such claims are subject to the Limitation Act 1980 (and the Northern Irish equivalent) (at [79-83]). That limitation period is for six years: the claim being issued in November 2023 (more than 6 years after 8 March 2017), all claims within that window were out of time, unless section 32 of the Limitation Act 1980 applied so as to extend time.

In order to extend time, therefore, the CR argued that, in accordance with section 32 of the Limitation Act 1980, the primary limitation period had been suspended on the grounds that: (i) the facts necessary to plead the claim were concealed, and (ii) those facts were not reasonably discoverable before 28 November 2017 (at [81]).

The SPA Applicants essentially argued that s.32 could not apply so as to extend time because of the class members' contracts and certain publicity materials (at [92-116]). Both parties relied selectively on evidence without a full disclosure exercise having been undertaken (at [143]).

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On this, the SPA Applicants failed before the CAT. The test of summary judgment was the oft-cited passage of Lewison J in *EasyAir*, which warns against mini-trials and summary disposals where a fuller investigation at trial may be needed (at [123]). The CAT found itself unable to summarily assess the section 32 extension, given the factual sensitivity of that assessment (as successfully submitted by the CR). As such, the strike out and/or summary judgment application was refused, noting that in doing so the CAT has "*reached no conclusion on what the ultimate merits of the [Proposed Defendants'] limitation defence might be once it is fully traversed at trial*" (at [171]). This leaves limitation for this period of claims open at trial.

CERTIFICATION

Having dealt with the limitation applications, the CAT went on to consider certification of the remaining claims. In what is often described as the CAT's 'gatekeeper' role, collective proceedings may only be brought if the CAT makes a Collective Proceedings Order. The twin requirements that must be met for the CAT to make a CPO are as follows:

(1) The Authorisation Condition: the CAT must be satisfied that the person bringing the proceedings can be authorised as the CR (section 47B(5)(a) and rules 77(1)(a) and 78).

(2) The Eligibility Condition: the claims must be eligible for inclusion in collective proceedings (s 47B(5)(b) and rules 77(1)(b) and 79). The Eligibility Condition comprises three cumulative requirements: (i) there must be an identifiable class of persons on whose behalf the proposed claims are brought (rule 79(1)(a)); (ii) the proposed claims must raise common issues (s 47B(6) and rule 79(1)(b)); and (iii) the proposed claims must be suitable to be brought in collective proceedings (s 47B(6) and rule 79(1)(c)).

When it comes to assessing suitability of claims for collective proceedings under rule 79(1)(c), the Tribunal is required to consider a number of factors. One of these is whether it is possible to determine in respect of any person whether that person is or is not a member of the class (rule 79(2)(e)).

The MNOs objected to certification in relation to both authorisation and eligibility. This Alerter only considers their objections in relation to the latter.

The parties' arguments

The MNOs argued that the proposed class was not "*identifiable*" for the purposes of rule 79(1)(a) and that, relatedly, persons potentially falling within the proposed class would be unable to determine whether or not they fell within that class for the purposes of rule 79(2)(e). In particular, Mr Gutmann's case, which required a comparison between the prices *actually* paid under the CHA Contracts with the price consumers could have paid under a comparable SIM Only Contract, relied on the proposed class member ("**PCM**") being able to obtain the "*relevant SIM Only Price*". The MNOs argued that there was no workable means for the Tribunal or consumers to undertake this comparison at this stage, not least because of the vast number of SIM Only contracts on offer. It followed that it was impossible to determine whether any person was or was not a member of the proposed class.

Mr Gutmann argued that the MNOs' argument conflated the requirements of rules 79(1)(a) and 79(2)(e). Rule 79(1)(a) required the proposed class definition to be capable of being understood in objective terms, both by the Tribunal and by the PCMs. This requirement was clearly met here – the proposed class was persons for whom the charges levied under the CHA Contract after the expiry of the Minimum Term were higher than comparable SIM-only prices. As for the MNOs' argument about the alleged impossibility of the relevant comparisons, Mr Gutmann argued that these could be undertaken by reference to publicly available sources of information, along with further data that would be likely to be disclosed by the MNOs in due course.

The Tribunal's assessment of the interplay between rules 79(1)(a) and 79(2)(e)

The Tribunal, citing its earlier decisions in *Commercial and Interregional Card Claims I and II*, agreed with Mr Gutmann that the MNOs failed to properly distinguish the requirements of rules 79(1)(a) and 79(2)(e).

Whilst these rules were related, they performed distinct functions. Rule 79(1)(a) operated as a threshold for bringing collective proceedings. Its focus was on the design of the proposed class definition, which had to be objective, clear and "*on its face… capable of sensibly identifying a class*". Some ambiguity or uncertainty in a proposed class definition was permissible, but in making this assessment the Tribunal had to make "*reasonable assumptions based on common sense*".

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Rule 79(2)(e), by contrast, was one of several factors to consider in assessing the suitability of the claims for collective proceedings. It was concerned with the practicalities and mechanics of verifying whether a particular individual fell within the proposed class. Whilst the two rules were related, rule 79(2)(e) did not form part of rule 79(1)(a).

The Tribunal was satisfied that the class definition proposed by Mr Gutmann, viewed objectively, met the requirements of rule 79(1)(a). The proposed class definition was clear; it encompassed those consumers who, after the expiry of the Minimum Term, made a periodic payment to one of the MNOs that exceeded the SIM Only Price. It was inappropriate to adopt an overly prescriptive approach given the purpose of the collective proceedings regime, which was to facilitate access to justice.

In respect of rule 79(2)(e), the Tribunal took the view that the approach proposed by Mr Gutmann's expert was adequate for the purposes of self-identification. It disagreed with the MNOs' position that it was necessary for each PCM to identify the exact SIM Only Price in order to determine their membership in the proposed class; the absence of an exact comparator did not preclude meaningful comparisons, and the publicly available sources of information identified by the PCM were adequate for this purpose.

CONCLUSION

As regards the certification regime, consistent with *Commercial and Interregional Card Claims I and II*, the decision confirms the distinction between rules 79(1)(a) and 79(2)(e): rule 79(1)(a) is a conceptual test of the design of a proposed class (rather than a forensic inquiry into the feasibility of self-identification by PCMs), whereas rule 79(2)(e) concerns practicality. The Tribunal also confirmed that both provisions are capable of accommodating uncertainty in relation to data. More widely, the decision is another example of the CAT's application of its post-Merricks approach to certification, which emphasises the access to justice purpose of the UK collective proceedings regime. The decision adds another layer to the developing collective proceedings landscape - it will be interesting to see how these claims evolve now that they have passed the certification hurdle.

ENDNOTES

[1] James White of Henderson Chambers acted for the class representative, instructed by Charles Lyndon, led by Rhodri Thompson KC and Nicholas Gibson.

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