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Collective Proceedings under CRA 2015 Applications for Certification

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S.47B Consumer Rights Act 2015

- ▶ CRA 2015 introduced collective actions into the UK private competition litigation landscape
- ▶ Previously only representative bodies could bring an opt-in claim
- ▶ S.47A CA 1998 already provides for private damages actions resulting from an infringement of competition law to be commenced in the CAT
- ▶ S.47B CA 1998 allows for two or more claims under S.47A to be combined into a “collective” action which can be commenced on an opt-in or opt-out basis and are suitable for an aggregate award of damages
- ▶ Collective actions are a “new form of procedure” and not a new cause of action
- ▶ Collective proceedings are commenced in the CAT by a person who proposes to act at the class representative but require the CAT to grant a Collective Proceedings Order (“CPO”) in order to proceed (see s.47B(5)-(9))
- ▶ Two conditions must be satisfied to obtain a CPO:
 - ▶ The claims must raise the same, similar or related issues of fact or law (common issues) and be suitable to be brought in collective proceedings (“eligibility criteria”); and
 - ▶ The proposed class representative must be authorised by the CAT on the basis that it is just and reasonable for that person so to act (“class representative criteria”)

S.47B Consumers Rights Act 2015 : Current Cases

- ▶ Two applications for a CPO have been made to date:
 - ▶ *Dorothy Gibson v Pride Mobility Products Limited* (Case 1257/7/7/16)
 - ▶ *Walter Hugh Merricks CBE v MasterCard Incorporated & Ors* (Case 1266/7/7/16)
- ▶ *Gibson* case has just been withdrawn following a judgment ([2017] CAT 9) of the CAT which adjourned the CPO application and permitted the applicant to file amended CF, further expert evidence, a revised costs budget and (if desired) apply for third party disclosure
- ▶ *Merricks* case is awaiting judgment
- ▶ Key issues for any CPO application are:
 - ▶ Common Issues
 - ▶ Suitability of Class Representative
 - ▶ Process for filing a CPO application and supporting evidence and materials required

CPO Application: process, evidence and materials required

▶ CAT Rules 2015

- ▶ Part 4 applies in its key constituent parts
- ▶ Part 5 contains the detailed and prescriptive rules on the process, evidence and materials required to be filed with a CPO application
 - ▶ Collective Proceedings Claim Form requires usual matters to be addressed together with *inter alia*:
 - ▶ A description of proposed class and any sub-classes; a summary of the basis on which the proposed class rep. seeks authorisation; a summary of the basis on which certification criteria are met; estimate of damages claimed and whether the claim is opt-in or opt-out;
 - ▶ Annexed to CP CF must be a draft CPO and a draft CPO Notice (the form of notice to class members informing them a CPO has been granted)
 - ▶ Proposed class rep. must also provide a Plan for the collective proceedings (which must contain certain other documents)

▶ CAT Guide to Proceedings Section 6

Practicalities of applying for a CPO

- ▶ Who is your proposed representative? Are they suitable? They will need to provide a witness statement explaining their suitability and addressing any potential conflict of interest and how they intend to manage the litigation
- ▶ Detailed legal, factual and economic analysis is required in the CF addressing the eligibility criteria and setting out the core issues and why a CPO should be granted
- ▶ Expert evidence is required on the common issues together with proposed methodology for analysing the common issues and proving loss / quantifying loss
- ▶ CPO application also requires detailed Plan to be produced for the proceedings that covers:
 - ▶ Notifications and communications with class members
 - ▶ Procedure for governance and consultation with the proposed class
 - ▶ Costs budget and how the claim will be financed
 - ▶ Proposals for the management of disclosure, expert and factual witness evidence
 - ▶ How an aggregate award of damages should be distributed
 - ▶ Litigation timetable

Eligibility Criteria

- ▶ **The eligibility criteria involve two key constituent parts:**

- ▶ The claim must raise common issues; and
- ▶ The claims must be suitable to be brought in collective proceedings

- ▶ **It is also necessary to address at this stage opt-in or opt-out**

- ▶ **Common issues: same, similar or related issues of fact or law:**

- ▶ *Infringement*
- ▶ *Causation*
- ▶ *Pass on*
- ▶ *Loss and quantum*

- ▶ **Predominantly a matter for expert evidence where follow on claim (para 104 *Gibson*)**

- ▶ **Methodology for proving pass on is key – more Canadian approach than US – more than theoretical (para 105 *Gibson*)**

Suitability of Class Representative

- ▶ The CAT must consider it is “just and reasonable” for proposed representative to act
- ▶ Class members must be adequately and appropriately represented
- ▶ Class representative can be a class member but does not need to be
- ▶ CAT Rules (fleshed out in Guidance) require that the representative:
 - ▶ Would fairly and adequately act in the best interests of the class members;
 - ▶ Has a detailed plan for the proceedings
 - ▶ Does not have a conflict of interest
 - ▶ Is the most suitable if more than one representative is proposed
 - ▶ Has adequate financial resource/funding in place
- ▶ The proposed class representative must provide a witness statement addressing these issues and be prepared to give evidence at CPO hearing if the CAT requires