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**Certification, Pass-on and other issues: where are we now?**

**Speakers:** Kate Vernon ("**KV**") (Quinn Emanuel Urquhart & Sullivan LLP),

Daniel Jowell QC ("**DJ**") (Brick Court Chambers) and

David Parker (**DP**") (Frontier Economics)

**Date:** 7 June 2017 at 6.00 pm

**Venue:** Ashurst LLP, Broadwalk House, 5 Appold Street, London

**Kate Vernon's presentation entitled 'Collective Proceedings under CRA 2015: Applications for Certification'**

1. KV began by introducing the legislative background of collective actions in the UK, and explaining that two opt-out applications for Collective Proceedings Orders ("**CPO**") have now been made in *Pride* and *Merricks*. KV noted that, in *Pride*, the CAT described collective proceedings as a "*radical*" and "*an effective mechanism for consumers and small enterprises to recover compensation for loss*".

**Practicalities of the CPO application process**

2. KV highlighted the key issues when applying for CPO, which include which class of claimants are being represented, the common issues of fact or law between them, if the claim is opt-in/opt-out and the suitability of the class representative. KV further explained that a substantial part of the CPO Claim Form in *Merricks* was devoted to a plan for communicating with its proposed class members, for example, on approaching elderly people living in care homes or people now living abroad. KV advised engaging with experts on claims administration and noticing and currently they are predominantly based in the United States, the country with the most experience in running this aspect of collective claims.

3. KV emphasised that a significant budget was needed to operationalise the claim. In this regard, the CAT expect the funding to be outline and a cost-benefit analysis as part of the CPO application, weighing between the costs of the application and the likely award of damages. KV explained that the *Pride and Merricks* CPO hearings lasted three days, and addressed a myriad of detailed issues including the substance of the claim, despite not being intended to be a merits review of the case.

**Criteria for the CPO application**

4. KV observed that, when applying for certification at the initial CPO hearing stage, opt-out claims are likely to face greater scrutiny and CAT involvement.

5. KV explained that when the CAT applied the eligibility criteria in *Pride*, it considered why an opt-out claim would be more suitable than an opt-in claim, whether there was sufficient commonality between class members and whether loss (in aggregate, rather than individually) justified the claim. KV noted that applying the class representative criteria presented no real issues in *Pride* (or in *Merricks*), and that the class representative did not give evidence in either case at the CPO hearing. KV further noted that future cases will determine the specific application of this criteria.

**Daniel Jowell QC's presentation entitled 'Pass-on after Sainsbury's v Mastercard'**

**Conclusions from Mastercard**

6. DJ introduced the presentation by noting that there has been an emerging consensus that the pass-on defence did apply to competition damages claims and that it came as some surprise that damages were not abated at all for pass on in Mastercard. DJ noted that the meaning of the Mastercard judgment was uncertain in many respects.

7. DJ summarised the four alternative effects of overcharge identified by the CAT in Mastercard: (i) lower profits; (ii) lower costs; (iii) lower expenditure; or (iv) higher prices by way of pass-on. DJ noted that the first question for the CAT was which of these effects constituted genuine damage to the claimant business for which it could claim and which of these effects result in avoided loss. DJ noted that the CAT held that (i) was recoverable, but excluded (ii) and (iii) as potential categories of avoided loss, while accepting that (iv) was, in theory at least, a form of avoided loss. The CAT also found that it was likely that Sainsbury's would have passed on a substantial amount of any overcharge in the form of higher prices. He noted, however, that the CAT then said that it considered it "impossible to say" which proportion related to (iv) (as opposed to (ii) or (iii)) - and suggested that Mastercard had not sought to disaggregate those effects in its evidence.

**The test for proving pass-on**

8. DJ turned to the 2 cumulative conditions for pass-on apparently imposed by the CAT. He noted that the first condition requires "identifiable increases in prices by a firm to its customers" which were "causally connected with the overcharge, and demonstrably so". DJ explained that although unclear, reading the entire Judgment suggests that this condition requires defendants asserting a pass-on defence to be able to identify individual downstream products or product lines and attribute a percentage of the price of those specific products to the overcharge. Turning to the second condition for pass-on (that the Defendant must have identified a purchaser or class of purchasers from the Claimant to whom the overcharge has been passed "who would be in a position to claim damages"), DJ explained that it remains unclear as to whether such downstream potential claimants must be in the process of submitting claims, likely to do so, or are simply able to do so.

9. DJ commented that the first condition is likely to prevent pass on as a defence in any complex situation where you have a firm with multiple products and where one cannot trace through the overcharge into the price for particular product lines. The second condition is liable to make the pass on defence rather futile, except as a means of ensuring that a defendant does not suffer multiple liability.

**Precedent value of Mastercard in the wider context of English civil law**

10. DJ then considered the likely implications of Mastercard in the future. DJ noted that the judgment will not strictly bind the High Court or future CAT tribunals, but insofar as it relates to points of law, the judgment will be accorded great persuasive authority and respect by them. He suggested that it might be possible to argue that the Mastercard judgment is not purporting to make any findings of law but is rather establishing a methodological preference and can therefore be distinguished on particular facts and evidence in future High Court or CAT cases. DJ also noted that there is currently an

application for permission to appeal to the Court of Appeal, which is pending, following a refusal for permission to appeal from the CAT.

11. DJ turned to consider whether, and to what extent, Mastercard was correctly decided on the pass on issue. He commented that in Lowick Rose (a post-Mastercard judgment) the Supreme Court has clarified the common law approach to mitigated/avoided loss (and the related principle of res inter alios acta) by holding that loss which has been avoided is not recoverable, subject to an exception in relation to collateral payments. The Supreme Court clarified that, broadly speaking, collateral benefits are those whose receipt arose independently of the circumstances giving rise to the loss. For instance, receipt of a gift or indemnity insurance is not avoided loss, because they are regarded as arising independently. In those types of cases the law treats the receipt of the benefit by the claimant as tantamount to the claimant making good the loss from his own resources. The position may be different if the benefit is derived from steps taken by the Claimant in consequence of the breach. DJ noted that a similar approach was taken by the Court of Appeal in Fulton Shipping (now on appeal to the Supreme Court). DJ suggested that, in light of these principles, the CAT is probably correct to hold that lower costs and expenditure are not regarded as genuinely avoided loss: they are probably not regarded as properly causally related to the overcharge (and are something a business should rationally do anyway). By way of comparison, he noted that in a case for defective delivery of goods, a defendant could not plausibly say that a claimant had mitigated its losses because, prompted by the financial issues caused by the defective delivery, the claimant had cut the wages it paid to its own employees. DJ did not think, however, that the same conclusion applies to situations where there is passing on in the form of higher prices by a defendant to its own customers. In that situation, the ability to pass on (particularly an industry wide overcharge) is causally connected to the overcharge.

12. DJ noted, however, that the CAT's judgment seems to elide two quite different things. The first is the suggestion that it was impossible to tell what proportion of the overcharge was passed on in the form of higher prices as opposed to abated in the form of the lower costs or costs. The second is the suggestion that it must be necessary to tell what part of the price of any given product that Sainsbury's sold was attributable to the UK MIF.

13. As regards the suggestion that it was "impossible to say" what proportion of the overcharge was passed on in the form of higher prices as opposed to abated in the form of the lower costs or costs, DJ noted that this was hard to reconcile with the CAT's finding elsewhere in the Judgment relating to interest on damages that 50 per cent of the overcharge would have been passed-on.

14. As regards the CAT's first condition; that it must be necessary to tell what part of the price of any given product or product that Sainsbury's sold was attributable to the UK MIF, DJ queried why such a condition was necessary. If, for example, an ice cream maker paid an overcharge for its milk by reason of a milk cartel, DJ questioned why it should be necessary for the pass on defence to operate to have to show by how much the ice cream maker inflated the prices of each of its different flavours of ice creams or drinks. In principle, it should suffice that the defendant if the defendant could show the approximate extent by which the ice cream maker had inflated the price of its products overall (and thereby avoided or mitigated its loss).

15. As regards the CAT's second condition, the need to show a downstream class that could or would also claim, DJ identified that this could potentially over-compensate the particular claimant. This seemed to be difficult to reconcile with the common law approach articulated in Devenish that the law of damages is not in the business of transferring gains from one undeserving recipient to another. DJ noted that also the CAT refers to the EU principle of effectiveness in order to support its second condition, but queried whether this principle could plausibly apply in circumstances where no such condition was to be found in the recent Damages Directive (unless that directive was itself a violation of the principle of effectiveness).

**Conclusions**

16. DJ concluded that Mastercard and pass-on generally may have implications for Merrick. Specifically, if consumers are required to demonstrate individual levels of pass-on, this may become an obstacle to a successful collective claim. DJ noted that further difficulties may also arise when quantifying pass-on in cases where the overcharge forms a small proportion of the overall cost, as any quantitative analysis that sought to correlate the particular cost against prices would become lost in the "white noise".

17. In response to DJ's presentation, DP commented that the CAT's conclusion's in relation to avoided costs is difficult to reconcile, because lower costs are a variant of lower profit. DP explained, by way of example, that reducing marketing or employee expenditure may be a short-term cost-reduction leading to long-term profit loss. Secondly, DP suggested that when determining pass-on where overcharge constitutes a small proportion of overall cost, it will be necessary to rely on principles of economic theory. He noted that under the CAT's current approach, claims will be restricted to simple single-product markets.

**David Parker's presentation entitled 'Class war: the first opt-out collective action case – mobility scooters'**

18. DP provided an overview of the *Mobility Scooters* decision by the OFT. DP noted in particular that the decision found infringements in relation to eight retailers, but noted that the OFT stated that "*no inference should be drawn*" from rest of the market. Therefore, the OFT had identified (1) an anti-competitive agreement; and (2) a broader market-wide policy.

**The CAT's approach to certification**

19. DP noted that CAT found the US approach to certification of limited assistance, often leading to extensive and costly disclosure exercises and witness evidence gathering. Instead, DP noted that the CAT made greater recourse to Canadian jurisprudence, requiring "sufficiently credible or plausible" expert methodology. The precise meaning of that standard, however, remains unclear.

**The CAT's rejection of the claimant's formulation**

20. DP noted that, whereas Pride's expert provided an analysis of only the anti-competitive agreement, Dorothy Gibson's expert provided an analysis of only the market-wide policy. DP then explained that the CAT rejected Dorothy Gibson's formulation of its claim. Specifically, the CAT concluded that because Pride was not dominant, there was no evidence that the market-wide policy was unlawful. Furthermore, because Dorothy Gibson had not submitted a standalone claim, its claim was restricted to the class of members affected by the anti-competitive agreement. DP noted that, as a result of the CAT's conclusion, its case is now limited to the three per cent of the market affected by the infringement, and not the effects of the market-wide policy.

**Conclusions**

21. DP noted that, following the CAT's adjournment to allow Dorothy Gibson to reformulate its claim, the claim has now been withdrawn. DP commented that this is largely due to damages for the claim being substantially smaller, as well as practical difficulties in ascertaining the sale prices of scooters. However, in this latter regard, DP noted that the CAT acknowledged this problem and identified that it may be possible for third party disclosure orders to be awarded.