

Class war

The first opt-out collective action case – mobility scooters

June 2017



The market

Pride is a manufacturer of mobility scooters

- Three types of scooter (Travel, Pavement and Large) & a large number of models (c.30)
- Pride's market share was 25%-30%, c. 10 manufacturers
- 750 retailers in the market
- Pride sells through a wide retailer network (600+ retailers, 300 "core"), separately owned



The Policy and the Infringements



Pride's policies [restricting] the online advertising of prices below the RRP in respect of certain mobility scooters applied to its dealer network generally



The OFT's finding, based on the evidence in its possession, is that [eight] Retailers were party to agreements and/or concerted practices with Pride in respect of the Below-RRP Online Price Advertising Prohibition.



While the OFT makes no findings in respect of other members of Pride's dealer network, no inference should be drawn... that the Retailers constitute the only dealers to whom the Below-RRP Online Price Advertising Prohibition related.

The time periods covered by the infringement varied across the 8 retailers

Exhibit 2. Summary of retailers and time periods

Retailer	Time period of the Infringements
Careco (UK) Limited (formerly Discount Mobility Direct Limited)	March 2011 to February 2012
Discount Mobility Plus Limited/Rutland Mobility Limited	March 2010 to March 2011
Mobility 4 U Limited	June 2010 to June 2011
MT Mobility Limited/Hooplah Limited	March 2011 to June 2011
Robert Gregg Limited	February 2010 to January 2012
Hartmond Limited	December 2010 to January 2012
Milton Keynes Mobility Limited	May 2010 to January 2012
Better Mobility Limited	May 2011 to February 2012

Source: OFT Decision, paragraph 1.9 for retailers; paragraphs C18, C27, C45, C54, C66, C75, C83, and C94 for relevant periods of infringement.

- Infringements applied to 7 models

The Claim

1

Class Representative:

Dorothy Ruby Gibson,
General Secretary of the
National Pensioners'
Convention

2

Class:

Any person who purchased a
new Pride mobility scooter
between 1 February 2010
and 29 February 2012

- Total class was estimated to be c.30,000 individuals
- This wide group was split into four sub-classes based on whether the type of model purchased was subject to BROPA and whether the purchase as online or offline.

The Tribunal's methodology – the “credible or plausible” test



Certification of claims for a CPO must be rigorous and... we cannot simply take at face value whatever may be said on behalf of the Applicant (102)

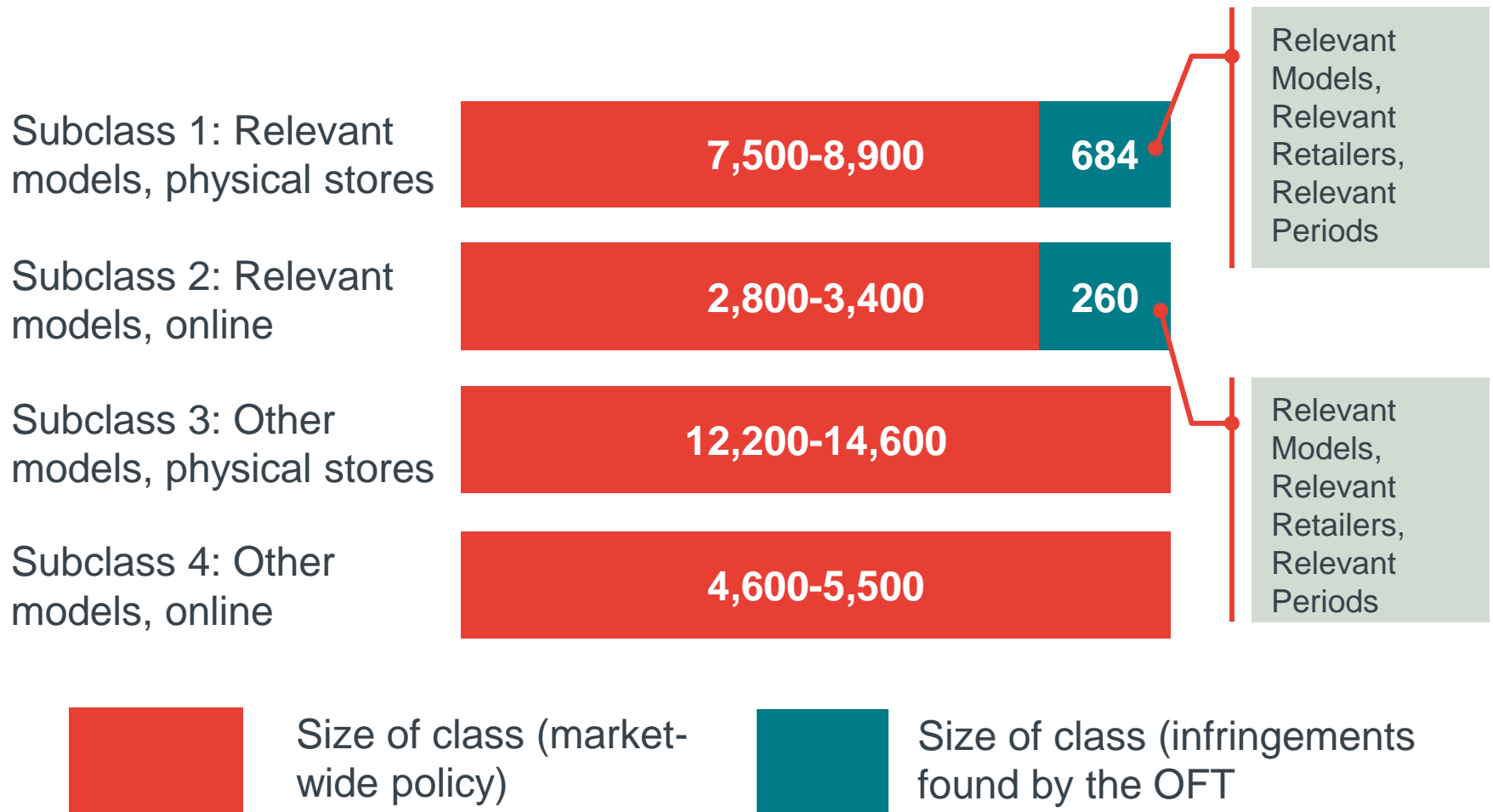


Appropriate guidance can be derived from the position in Canada (104)



... the expert methodology must be **sufficiently credible or plausible** to establish some basis in fact for the commonality requirement (105, quoting Rothstein J, Supreme Court of Canada, in Pro-Sys Consultants Ltd v Microsoft Corp.)

The Claimant's approach was wider than the OFT's infringement findings...



... which concerned the Tribunal



... a fundamental difference between [the Claimant's expert] and Mr Parker is that [the Claimant's expert] did not distinguish between the eight Relevant Retailers and the rest, but treated all Pride retailers equally. [The Claimant's expert] focused on the effects of the market-wide policy applied by Pride... as compared to a counterfactual where there was no such policy. (107)



However, Pride was not in a dominant position and that policy was not unlawful. The only breaches of competition law occurred when the assent by a retailer to the policy was communicated to Pride so as to reach the level of an agreement or concerted practice for the purpose of the Chapter 1 prohibition (108)

The Tribunal suggested an adjournment for the Claimant to reformulate its case...

- The Claimant's expert considered that it would be possible to put forward a methodology that would allow the estimation of follow-on and umbrella damages ("we felt it would be wrong to deny him this opportunity", 117a.)
- Tribunal identified that it may be possible for Claimant to get data under third party disclosure orders
- Tribunal stated that Claimant also needs to address causation, i.e. need to show that any fall in prices is attributable to the end of the infringements and not to other factors

... ultimately not taken up



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