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Complex Antitrust Damages Claims:
the interchange litigation and certifying collective proceedings

Speakers: Mark Humphries, Humphries Kerstetter LLP
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Venue: Brick Court Chambers

The purpose of the seminar was to learn more about complex antitrust damages claims, with a particular emphasis placed on the Interchange litigation.

Topics

Interchange cases

MH explained that the Interchange litigation came out of the European Commission's findings on Interchange fees. The basic problem with such fees are that the merchant has no say as to whether to pay the fees or not and no option to negotiate the level of such fee; as such, they result in a breach of competition law.

The Commission found that certain types of Interchange fee (multilateral Interchange fees, otherwise known as MIFS) and some domestic fees relating to smaller European countries were in breach. After the findings, an OFT report suggested that the findings regarding MIFS could be read-across to apply to domestic MIFS. The litigation followed.

There have so far been two judgments, one by the CAT and the other by the commercial court.

The CAT decided the case of *Sainsbury's v MasterCard* and found that Article 101 had been infringed. The CAT was convinced by a counterfactual not pleaded by the parties, but one that came out of its questioning of the parties: that if no Interchange fee were imposed on the parties, the banks would team up with the acquirers and agree to decide a level of the fee. This counterfactual was not properly pleaded and not tested in expert evidence. The first ground of the appeal of this case is that this was wrong.

The commercial court decided the case of *ASDA v MasterCard*. The court found there had not been an infringement of Article 101. In the case, the judge wanted to know whether his counterfactual assumption should be that the Interchange fee would be reduced by the introduction of regulation or a court finding, or whether it would remain the same. If the latter, then this would lead to banks stopping issuing MasterCard Interchange fees. This is called the 'reverse network effect' or, more colloquially,

the 'death spiral'. The court adopted the latter counterfactual: that other Interchange fees would remain the same and the death spiral would occur.

There is another judgment due anytime soon from the commercial court, likely to be called *Sainsbury's v VISA.*

In the CAT case, one difficulty was that Sainsbury's was making more money in Interchange fees as a group (given that its group included Sainsbury's banking offers) than it lost.

The question of pass-on was a problem in both the cases: can a merchant have lost as a consequence of the scheme, when it passed on the cost of the Interchange fee to its customers. MasterCard argued that there was no loss: in a competitive environment, a merchant must pass on supplier costs, and the rivals of that merchants will do the same. In the CAT, the burden of proof was on MasterCard to prove the pass-on.

In both cases, permission to appeal has been granted. They will be heard together. In strict legal theory, this should not be the case: these are different facts involving different claimants. But there is a clear policy reason to get the claims heard at the same time – otherwise, claims have the potential to go on forever.

Class action procedure

DRW explained that the class action procedure is designed to ensure socially expensive litigation can be managed efficiently, without undermining the rights and obligations of those involved in litigation. There are at least two hurdles to any class action: to prove commonality and to establish a way of calculating aggregate damages.

The commonality analysis in US law focusses on whether resolution of the common issue is central to the validity of every class member's claim in one stroke. In Canada, the commonality analysis focusses on whether the resolution of an issue advances the resolution of every class member's claim. Therefore, in Canada there must be something in common somewhere, to permit the action to be better resolved as a class. Aggregate damages is not a calculation of the total damages claimed. It is a method of proving an individual's entitlement to damages without requiring individual proof of those damages. It requires a common mechanism to establish the entitlement of each individual.

The CAT has dealt with two class action cases in 2017.

The first class action of the year, *Gibson v Pride*, was declined a CPO in March 2017. The claim followed the OFT's finding that Pride, a mobility scooter producer, had agreed with eight of its retailers that they would not advertise the scooters online for prices under Pride's RRP. The CPO was declined partly on the basis that sufficient commonality between the claimants had not been established.

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The second class action, *Merricks v MasterCard*, was declined a CPO in July 2017. The claim followed the European Commission's finding that MasterCard's multilateral interchange fees infringed competition law. The CPO was declined because the CAT rejected the applicant's experts' method of quantifying the aggregate damages claimed.

DRW observed that each case could have been better applied for. In *Gibson*, the issue to be established was 'who was doing the misleading?' When this was clear, the commonality would have been obvious and the damages would have flowed from this. In *Merricks*, the assessment should have started in the opposite way, by establishing the largest realistic amount of damages that could be assessed on an aggregate basis, and then building a common pool of claimants from that. As a principle, class actions should be built on a sound economic analysis, without greed leading to an unwarranted extension of the damages claimed. Applicants who are not avaricious in the amount of damages they claim, and who can establish based on a robust analysis of why such damages are claimed on an aggregate basis, are more likely to be granted a CPO.

DRW noted that in both cases, the CAT applied the lower Canadian procedural standard against a rigorous substantive legal framework to block class actions and questioned whether this is how the certification requirement of the collective proceedings regime was designed to operate.

Note

Neither speaker used slides in their presentations.