Competition Appeal Tribunal grants Collective Proceedings Order in the 'Ro-Ro' shipping follow-on collective claim

By Alex Leitch, Harry Denlegh-Maxwell & Alison Morris

Case Summary

- The Competition Appeal Tribunal ("**CAT**") has granted a Collective Proceedings Order ("**CPO**") in the so-called 'Ro-Ro' shipping follow-on damages claim brought by class representative, Mr McLaren, against a number of providers of international shipping services. The preliminary estimate of the damages is in the region of £57m to £115m (before interest).

- The claims 'follow-on' from an infringement decision of the European Commission adopted on 21 February 2018[1], in which it was determined that the defendants had infringed Article 101 of the Treaty on the Functioning of the European Union by participating in the co-ordination of prices and the allocation of customers with regard to 'deep-sea' carriage of new motor vehicles between October 2006 and September 2012 (the "**Commission Decision**").

- Mr McLaren's claim is the fifth opt-out collective claim to be certified by the CAT and so offers further important guidance on the test to be applied at the certification stage.

What does this mean for you?

- This decision is particularly notable as it is the first to consider whether so-called 'Large Business Purchasers' of vehicles could be included in the same class as individual purchasers. The CAT considered that separating out 'Large Businesses' (which had been defined as businesses which had purchased over 20,000 vehicles) would lead to arbitrary distinctions and potential unfairness, and could cause confusion as to which class a business would fall within.

- In addition, the CAT provided some helpful guidelines as to the correct approach to the Tribunal's assessment of the proposed class representative's methodology for the purposes of establishing class-wide loss as part of the 'Eligibility Condition'. In overview, the CAT found that it was not the role of the Tribunal to determine the merits and robustness of the expert methodology at the certification stage. The proposed methodology may only be provisional and subject to adaption as the proceedings progress, and it is not fatal to a claim if some members of the class may ultimately not be proved to have suffered loss under the proposed methodology. For prospective defendants in these sorts of opt-out class-action claims, this suggests that the now routine challenges to the proposed methodology may well fall flat, and proposed class representatives will face a lower hurdle than previously anticipated in obtaining a CPO, as the strength of the methodology will not be examined under a microscope at this early stage in proceedings.

Case overview

- Mr McLaren, an individual with substantial experience in consumer protection (including nine years working for consumer association 'Which?'), incorporated a special purpose vehicle, of which he is the sole director and member, in order to bring the claim on behalf of consumers who had purchased new vehicles (of certain makes and models) which were transported by deep-sea shipping during the infringement period established by the European Commission. Substantial funding was obtained from Woodford Litigation Funding to bring the claim.

- Mr McLaren has argued that the claim should be heard on an opt-out collective basis as the full effects of the cartel were passed down the supply chain to all of the final purchasers of the new vehicles and proposed a methodology by which the full delivery charges imposed by the shipping companies was assumed to have been passed to the end-purchaser.

- In order to assess whether the claim should be certified as an opt-out collective action, the CAT had to assess:

  - Whether the person who has brought the proceedings is one who could be authorised to act as a class representative (the "**Authorisation Condition**"); and

  - Whether the claims are of the sort which are eligible for inclusion in collective proceedings (the "**Eligibility Condition**").

- In respect of the Authorisation Condition, the CAT considered that, in light of Mr McLaren's substantial experience in consumer protection, the special purpose vehicle which he had incorporated for bringing the claim was undoubtedly one which could be authorised to act as class representative.

- In relation to the Eligibility Condition, the main objection to certification raised by the prospective defendants was that there had been no pass-on of any price impact of the cartel to the end-purchasers, and therefore there was no common issue between the claims so as to make the claims eligible for opt-out collective proceedings. The prospective defendants argued that the methodology put forward by Mr McLaren, in order to demonstrate that the prospective class members had indeed suffered loss and that 'pass-on' of the inflated prices to end consumers was a 'common issue' between the claims, was inadequate.

- In addressing this argument, the CAT considered the recent Supreme Court decision in *Merricks v Mastercard*[2], in which the Supreme Court held that the CAT had erred in treating the suitability of aggregate damages as a statutory hurdle rather than merely one issue within a multi-factorial assessment and had afforded undue weight to perceived forensic difficulties in quantifying damages. For more information on this decision, see our update here.

- With that decision in mind, the CAT noted that it is not the role of the Tribunal at the certification stage to test the robustness of the expert methodology. Instead, the correct approach is to assess whether the methodology offers a "realistic prospect" of assessing loss on a class-wide basis. The Tribunal also noted that this does not mean that the methodology proposed by the class representative must be the best methodology available, and the methodology may only be provisional. The Tribunal recognised that at such an early stage of proceedings, when there may be limited factual evidence available to support the development of a methodology, that any methodology may need to be adapted to reflect as proceedings progress.

- In addition, the Tribunal confirmed that it would not be fatal to an opt-out collective claim if some members of the class cannot ultimately be proved to have suffered loss under the chosen methodology.

- Overall, this claim follows the general upwards trajectory of the opt-out collective proceedings regime post the Supreme Court decision in *Merricks*. This decision, combined with the other CPOs recently granted in *Merricks*[3], *Le Patourel v BT*[4] and *Trains*[5], will provide a real stimulus to this sort of collective action, and give confidence to the class representatives bring the claims.

For the full case transcript, see here: *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and others* [2022] CAT 10

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Alex Leitch

Partner
Litigation and Investigations
T: +44 (0)20 3023 5188
alexleitch@paulhastings.com

Jack Thorne

Senior Associate
Litigation and Investigations
T: +44 (0)20 3023 5155
M: +44 (0)7841 584814
jackthorne@paulhastings.com

Harry Denlegh-Maxwell

Associate
Litigation and Investigations
T: +44 (0)20 3021 1008
M: + 44 (0)7500 848498
harrydenlegh-maxwell@paulhastings.com

Alison Morris

Associate
Litigation and Investigations
T: +44 (0)20 3023 5143
M: +44 (0)7523 131903
alisonmorris@paulhastings.com

Jonathan Robb

Associate
Litigation and Investigations
T: +44 (0)20 3023 5110
M: +44 (0)7498 930035
jonathanrobb@paulhastings.com

Gesa Bukowski

Associate
Litigation and Investigations
T: +44 (0)20 3023 5169
gesabukowski@paulhastings.com

1 Case AT.40009 – Maritime Car Carriers

2 *Mastercard Incorporated and ors (Appellants) v Walter Merricks CBE (Respondent)* UKSC [2020] UKSC 51

3 *Merricks v Mastercard* [2021] CAT 28 – for more information on the CAT's certification decision, please refer to our Stay Current article: available here

4 *Le Patourel v BT* [2021] CAT 30

5 *Gutmann v South Western Trains Limited* [2021] CAT 31