Class Actions in the English Courts – Update

There have been two interesting recent decisions in the English courts which cast an interesting light on the English judiciary's approach to collective redress.

MasterCard

Following the EU Commission decision that interchange fees charged by MasterCard on the use of its debit and credit cards were anticompetitive and in breach of EU legislation, consumers are seeking to bring a class action against MasterCard comprising approximately 46.2m class members seeking damages estimated at £14bn.

The UK's Consumer Rights Act 2015 introduced an opt-out collective redress regime for competition claims. This permits a claimant representative to bring an action on behalf of a group of individuals where this follows-on from an 'infringement decision' or 'an alleged infringement' of anti-competitive behaviour prohibited by the Competition Act 1998 or EU law.

The opt-out nature means that claimants are included in the group unless they expressly opt-out. However, claims can only proceed if they are certified as suitable by the Competition Appeal Tribunal (CAT) and this requires a formal hearing before the CAT to determine (i) whether the claims raise the same, similar or related issues of fact or law and (ii) it is 'just and reasonable' that the person representing the class is a suitable representative. If this stringent eligibility criteria is met, a Collective Proceedings Order (CPO) is issued and the class action may continue.

Since the legislation was introduced, no case has been certified as 'suitable', but this may be about to change. Last month, the English Court of Appeal ruled in a landmark judgment that it will hear an appeal challenging the CAT's refusal to grant a CPO in the MasterCard battle. If the appeal is successful, the largest class action ever brought in the UK will be allowed to continue.

Representative, Walter Merricks, applied for a CPO allowing him to bring an "opt-out" class action on behalf of all UK consumers who purchased goods and services sold by businesses accepting MasterCard between 1992 and 2008.

In July 2017, the CAT rejected the application due to the scale and size of the class. It held that it would be unworkable to calculate an individual's actual purchases and the different levels of pass through of the interchange fee for the various retailers in the UK over the 16 year period. Accordingly, there was no way of calculating the losses suffered by the claimants on an aggregate or individual basis. The CAT also held that there was no right to appeal its decision.

Mr Merricks sought the permission of the Court of Appeal to hear an appeal on grounds the CAT's decision was wrong in law. Last month, the Court unanimously ruled that it has jurisdiction to hear appeals from CAT decisions under the collective regime, and granted permission. The appeal is set for the first week in February 2019.

Google and the Safari Workaround

It is alleged that in 2011/2012, Google obtained information about an individual's internet usage through cookies without their knowledge or consent, bypassing Safari's privacy settings. Litigation was commenced earlier this year against Google in the English courts seeking to establish a class action for affected users with damages alleged of up to £3bn. The case, *Lloyd v. Google* [2018] EWHC 2599, was before the High Court in England in October, which decided that the requirements for a collective action were not met and the action could therefore not proceed on that basis.

The representative claimant sought damages arising from the alleged breaches of data protection principles set down in the Data Protection Act 1986. Section 13 of the Act provides data subjects with a means of obtaining compensation where they have suffered damage as a result of such breaches.

Although the case did not determine the merits of the alleged claim, but the Judge did accept that it may well be a claim that could succeed. However, in this case, the claimant had not sought to allege what harm had occurred, instead, it was alleged that commission of the breach was sufficient to sound in damages. This was rejected.

The way in which the claim was pleaded may have been driven by an attempt to persuade the court that the claim should be granted permission to continue as a representative action. To proceed, a representative claimant must have "the same interest" in the claim as those in the class to be represented. The English court held that this was not met in this case. Many claimants would not have suffered any damages at all and those who has suffered damage would not be considered to have suffered the same damage, given that each person's position is inherently fact specific. Had the court been persuaded that damages could be claimed simply by reference to the breach, then the issues relevant to the representative action application would have been different – all claimants would have suffered from the same breach.

In its judgment the English Court expressed the following view as to the attempt, in this litigation, to bring a claim on an opt-in representative class basis:

"It would not be unfair to describe this as officious litigation, embarked upon on behalf of individuals who have not authorised it, and have shown no interest in seeking any remedy for, or even complaining about, the alleged breaches…. the Representative Claimant should not be permitted to consume substantial resources in the pursuit of litigation on behalf of others who have little to gain from it, and have not authorised the pursuit of the claim, nor indicated any concern about the matters to be litigated."

Comment

In the MasterCard litigation, the claimants will still need to persuade the Court that the eligibility criteria have been met for a CPO and the CAT's refusal was wrong in law. There are some indications in the judgment that the Court may be more sympathetic than the CAT when applying the criteria. It appreciates that aggregate damages is a new remedy that is a critical component to the new regime for competition claims, and it is fully alive to the "difficulties inherent in the bringing of individual claims" in consumer cases generally.

However, in the Safari Workaround litigation, there is a clear indication as to the English court's approach more generally to actions which seek collective redress on an opt-out basis.

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