THE BLUEPRINT TO TRIAL – HERE TO STAY?

Since the "*blueprint to trial*" concept arose in collective proceedings in 2022, it has become an increasingly important concept in the certification of collective actions. The Competition Appeal Tribunal ("**CAT**") has now repeatedly highlighted the need for a Proposed Class Representative ("**PCR**") to come prepared with a methodology prepared by the instructed expert economist, setting out how the claim will be advanced at trial (a so-called 'blueprint'), ahead of the certification stage – the aim being to safeguard against unmanageable cases coming to trial.

On 5 October 2023, the CAT's judgment in *Walter Hugh Merricks CBE v Mastercard Incorporated and Others, Merchant Interchange Fee Umbrella Proceedings* [2023] CAT [60] (the "**Merricks**" and "**MIF**" proceedings) helped to clarify at least one aspect – the blueprint to trial requirement is expanding and looks as though it is here to stay. However, despite its seemingly increasing importance, a number of questions, such as the exact scope of the blueprint and whether the obligations imposed are too onerous, remain.

Background to the Blueprint

The concept of a blueprint to trial was brought to the fore in *London & South Eastern Railway Limited, First MTR South Western Trains Limited & Stagecoach South Western Trains Limited v Justin Gutmann* [2022] EWCA Civ 1077 ("**Gutmann**"). In this case at first instance, the CAT granted two applications by a PCR for Collective Proceedings Orders (a "**CPO**") on an opt-out basis against two rail franchises.

Under the Competition Act 1998, for a collective claim to be certified, the CAT must assess (i) whether the issues are the "*same, similar or related*", i.e., common issues; and (ii) whether the claim is "*suitable*" for certification as a collective action. In *Gutmann*, the Court of Appeal explained that, to enable the CAT to form a judgment on commonality and suitability, the PCR is required to "*put forward a 'methodology' setting out how the issues that they have identified will be determined or answered at trial*". This methodology should be prepared by an expert economist instructed by the PCR and "*posits how the market would operate absent the alleged unlawful conduct and provides a benchmark against which to measure a defendant's actual conduct*". In considering whether the proposed methodology is adequate, the CAT will apply the test in *Pro-Sys Consultants Ltd v Microsoft Corp* [2013] SCC 57 (the "***Pro-Sys test***").

The appellants argued that the CAT had erred in finding that the methodology advanced by the PCR satisfied the *Pro-Sys* test. Given this methodology "*acts as a broad blueprint identifying the issues for trial and how they are to be resolved and provides important material from which the CAT can determine whether the issues are*

"common" and "suitable" for certification, it will "therefore be relevant to a range of issues including breach of duty, causation, proof of loss and quantum".

The Court of Appeal made a number of important observations on the application of the *Pro-Sys* test:

- **Factual basis** - while addressing the counterfactual, which is necessarily hypothetical, the *Pro-Sys* test does require a factual basis for the assumptions and models deployed, it cannot be purely theoretical.
- **Provisional** - given the methodology is subject to a certification assessment prior to disclosure, the methodology is necessarily provisional and refinements may need to be considered following disclosure.
- **Workable** - at the certification stage, the methodology must identify the issues and demonstrate that the methodology proposed for determining those issues is workable at trial. It does not need to provide the answers.
- **Broad axe** - the CAT must bear in mind at the certification stage that it has a broad axe at trial by which it can fill gaps and plug lacunae in the methodology. The CAT can use this axe to do the best it can with limited material to achieve practical justice.
- **The height of the bar** - *in Mastercard Incorporated and others v Walter Hugh Merricks CBE [2020] UKSC 51* ("***Merricks 2020***"), the Supreme Court clarified that the threshold for certification should not be onerous. The Court of Appeal explained that the Supreme Court did not intend to indicate that the *Pro-Sys* test was toothless - the CAT still has an important gatekeeper role to play.

In *Gutmann*, the Court of Appeal ultimately found that the appellants' criticisms of the CAT were misplaced. The Court of Appeal found that the CAT had carefully examined the methodology and satisfied itself that both (i) the level of detail provided at that stage was appropriate; and (ii) that the methodology could be adapted if necessary, and so the blueprint provided was adequate.

McLaren

The blueprint concept was then further developed by the Court of Appeal in *MOL (Europe Africa) Ltd v Mark McLaren Class Representative Ltd* [2022] EWCA Civ 1701 ("**McLaren**"). In this case, the CAT made a CPO, relating to follow-on claims for damages caused by alleged antitrust infringements.

The core issue between the parties concerned how, in collective proceedings, loss was to be determined in the case of an overcharge and how the proof of loss should be assessed in a pass on case. This essentially came down to two competing theories on pricing. In its decision awarding the CPO, the CAT identified fundamental differences between the approach to pricing advanced by the PCR and defendants respectively, and significant challenges raised by the defendants as to the PCR's approach. However, on the basis that (i) it was not the purpose of the CPO application to scrutinise the merits of the case (or decide, at that time, on which was the best pricing methodology), and (ii) the threshold to be overcome was a low one, the CAT took the approach that these points were best addressed at trial, and issued the CPO.

The Court of Appeal first examined the CAT's observations on the proposed methodology. The Court of Appeal agreed with the CAT that proportionality and practicality govern the construction of a methodology, for instance, a methodology can only be suitable if there is the ability to obtain the data it needs to work - the existence of a theoretically preferable methodology cannot be selected over one that would be practical and proportionate to run.

Referring to the Supreme Court in *Merricks* 2020, the Court of Appeal noted that, once the CAT had concluded that a claim was arguable and was not to be dismissed on the merits there was an entitlement or right on the part of the PCR to have the claim tried. It found that the CAT had correctly identified that there was an issue to be tried and that the PCR has established a plausible cause of loss. There were therefore no grounds for strike out or setting aside the certification.

However, the Court of Appeal ultimately found that the CAT had made an error of law in the way that it understood and approached its gatekeeper and case management responsibilities. The Court of Appeal noted that the CAT should have given greater scrutiny to the difference in approach between the parties, and to what it referred to as the likely "*evidential lacuna*" in relation to pricing at the certification stage. The Court of Appeal referred to the *Pro-Sys* test, to which the CAT had also referred, interpreting it as emphasising the need for a clear methodology which provides a "*blueprint to trial*" for the PCR's case on pricing, which addressed the ramifications of the challenges to its methodology and which was not purely theoretical or hypothetical, but instead grounded in the facts of the case.

The Court of Appeal was therefore clear that the CAT's role as a gatekeeper in collective proceedings requires proactive consideration of case management issues. It noted that the "*level of detail of a methodology required by the CAT will always be fact and context sensitive and will turn upon such matters as the availability of evidence. However, underlying the Microsoft [Pro-Sys] test is the proposition that if a claim is certified then the methodology offered by the class representative will provide an initial blueprint for the parties and the CAT of the way ahead to trial.*" Given the starkly opposing pricing theories, the Court of Appeal remitted the case to the CAT, before additional significant steps were taken by way of preparation for trial.

Meta

Following McLaren, the CAT took what appeared to be a more stringent approach to certification in its 2023 *Dr Liza Lovdahl Gormsen v Meta Platforms* [2023] CAT 10 ("***Meta***") judgment (see our previous briefing, here). In reaching its decision, the CAT, drawing again on the *Pro-Sys* test, emphasised the importance of a blueprint to trial, noting that, absent such blueprint, the collective proceedings would not be certified as there was "*no point in permitting an untriable case to proceed to trial.*" The CAT noted that the PCR could not simply rely on future documentary disclosure to account for how any identified problems would be resolved at some future juncture in the proceedings – rather there must be a clear plan in place, at the time of certification, as to how any problems would be resolved.

In *Meta*, the CAT applied a stay of 6 months, enabling the PCR to provide an improved blueprint. The CAT clarified that the PCR only needed to show how a disputed point could and would be addressed, noting that no answers needed to be provided at the certification stage. Relatedly, the CAT clarified that that the merits of a case should not be for review at any stage prior to trial (except in determining a strike-out application).

The Blueprint debate

Despite assurances provided by the CAT and the Court of Appeal that certification still does not involve a full examination of the merits, questions are being asked as to whether the CAT is nonetheless effectively employing a merits test at the certification stage, and whether this is ultimately undermining the primary aim of certification under the CPO regime. And, plainly, claimants and defendants perceive these issues differently.

The blueprint should not detract from or undermine the central aim of antitrust collective actions. The CPO regime came into force in 2015 and, following the Supreme Court judgment in *Merricks 2020*), it appeared as though the CPO regime could address existing procedural challenges and fill a perceived gap that existed for claimants to bring large scale competition law claims.

The previous group litigation options such as group litigation orders ("**GLOs**") and representative actions, arguably failed to provide sufficient access to justice for a wide class of claimants:

- GLOs were confined to opt-in claims, thus potentially limiting the size of a class and damages claimed, and in turn making it more difficult for claimants to attract funding.
- Representative actions extended to opt-out claims, but necessitated that claimants within the class demonstrate that they shared the "*same interest*" in the claim.

Under the CPO regime, the Supreme Court in *Merricks 2020* found that, when PCRs were proposing a plan as to how the quantification and assessment of aggregate damages should be approached, this needed only be in the form of a methodology that the CAT found to be sufficiently credible as to merit closer examination at trial. If the CAT was to take an approach closer to this test, there would be greater flexibility for methodologies to adapt between certification and trial, thereby not imposing a higher degree of scrutiny such that it precludes an action from being certified.

As we have seen, the CAT's current approach following *McLaren* and *Meta* arguably cuts across the Supreme Court's ruling, and indeed the last three collective actions before the CAT have now been sent back to the parties for further consideration, suggesting that a more prescriptive blueprint could delay or block claims. In practical terms, it is very difficult for PCRs to draft detailed methodologies at the early certification stage when the scope and methodology of experts' evidence will be influenced by how the case develops, including the nature of any documentary disclosure and witness evidence. This concern appears particularly pertinent following

the Court of Appeal's judgment in *Evans v Barclays Bank PLC & Ors* [2023] EWCA Civ 876 in which the Court of Appeal reemphasised the importance of access to justice in collective actions (see our previous briefing here).

On the other hand, given the complexity and considerable damages at stake, it is not unfair to hold claimants' feet to the fire and ensure that parties articulate the parameters of their case, thus ensuring that unsuitable claims do not progress post-certification stage.

The Blueprint Moving Forward

Despite the wider concerns regarding the blueprint, the CAT's recent judgment in the *Merricks and MIF* proceedings widens the scope of application, and reemphasises the continued place of the blueprint in the certification of collective proceedings.

Merricks and MIF

In *Merricks*, collective proceedings were commenced against Mastercard in order to combine follow-on actions for damages, pursuant to the European Commission's finding that Mastercard's MIFs breached Article 101 of the TFEU. Those proceedings have already been the subject of a CPO.

In the *MIF* umbrella proceedings, a large number of individual actions were brought against Mastercard and Visa, seeking damages arising from the allegedly anti-competitive MIFs charged by Mastercard and/ or Visa.

In both cases, a key issue was that of "pass-on", which examines whether any alleged loss has been passed on to another party. Under the Umbrella Proceedings Practice Direction 2/2022, the CAT President may group cases together under an "umbrella" where they raise issues that are not only particular to those proceedings but are also the same as, or similar to, issues or matters in other proceedings – those same or similar issues being referred to as "Ubiquitous Matters". The CAT President subsequently ordered that the precise method by which the pass-on issue in the *MIF Umbrella Proceedings* and the *Merricks* collective proceedings would be designated as a "Ubiquitous Matter", meaning it would need to be dealt with within the framework of the Umbrella Proceedings Practice Direction.

The CAT recognised that it was clear that the parties would not be able to agree an approach as to how pass-on should be assessed, as the parties considered that the method of establishing pass-on would have an effect on the substantive outcome of the proceedings. However, the CAT considered that, in a situation where there are many multiple claims raising the same issues, requiring collective case management, the CAT has a similar responsibility to that in collective proceedings - to ensure that there is a blueprint to trial.

The CAT ruled that, given the complexity of the case in *Merricks* and *MIF* and the scope of the difference between the parties, a sufficiently clear steer needed to be given to the parties as to what steps were required to allow the trial of the issues of pass-on (referred to by the CAT as "Trial 2") to go ahead. The parties have been required to:

I. establish an agreed list of the facts that are relevant to the question of pass on, following which the experts must identify the options for gathering evidence to determine the causative effect of those factors on pass-on rate and agree on an approach to each;

II. identify the relevant sectors relevant to the pass-on of costs, with experts articulating what evidence they are actually looking for and industry experts only brought in as a joint expert; and

III. circulate a questionnaire to all claimants to determine matters such as their acquiring banks and the way in which payments were made.

Given the inability of the parties and their experts to agree, the CAT was forced to take an even more proactive role in this process. Although the two exercises are not necessarily identical, the CAT clearly drew inspiration from the concept of a "blueprint", and one may expect to see some similarity in approach between the blueprint required in a CPO hearing and the types of directions that may be given in umbrella proceedings. The message in both proceedings seems clear - if the parties cannot create a blueprint to trial between them, the CAT will invoke directions which will force them to do so.

Conclusion

The concept of a blueprint to trial is one of the most interesting developments in relation to the CAT's management of collective and individual actions. The CAT has firmly laid out its requirements – a PCR must satisfy the court with a clear methodology of how the case will proceed, from certification to trial, without which the claim will not progress beyond the certification stage. It also appears to have extended the methodology beyond CPO applications to apply also to management of umbrella proceedings.

However, there are still unanswered questions regarding the scope and rigidity of the test. It remains to be seen whether the CAT expects the blueprint to encompass a prescriptive roadmap for a broader set of issues. A key remaining question is how, if at all, considerations of the merits of the case (and if so to what extent) are ultimately being baked into the blueprint.

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