Neutral citation [2017] CAT 21

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1266/7/7/16

Victoria House
Bloomsbury Place
London WC1A 2EB

28 September 2017

Before:

THE HON. MR JUSTICE ROTH
(President)
PROFESSOR COLIN MAYER CBE
CLARE POTTER

Sitting as a Tribunal in England and Wales

BETWEEN:

WALTER HUGH MERRICKS CBE

Applicant

- v -

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE S.P.R.L

Respondents

RULING (PERMISSION TO APPEAL)

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1. By a judgment handed down on 21 July 2017 (the "Judgment"), the Tribunal dismissed the Applicant's application for a collective proceedings order ("CPO") under sect. 47B of the Competition Act 1998 as amended ("CA"). The Applicant seeks permission to appeal to the Court of Appeal against that decision.

2. Pursuant to rule 108(1) of the Competition Appeal Tribunal Rules 2015, such an application may be decided without a hearing unless the Tribunal considers that "special circumstances render a hearing desirable." At the conclusion of its written application for permission (the "Application"), the Applicant suggests that a hearing should be held in this case. The Respondents ("Mastercard") have submitted written observations in response to the Application and dispute the need for an oral hearing. Given the full submissions in the 15 page Application, the Tribunal does not consider that a hearing is necessary and it is accordingly determining the Application on the papers.

Jurisdiction

3. As the Applicant recognises, a threshold question is whether there is jurisdiction to appeal the refusal of a CPO to the Court of Appeal or whether such a decision can be challenged only by judicial review. That depends entirely on the construction of the governing statute.

4. As noted in the Judgment, the Consumer Rights Act 2015 ("CRA") made substantial amendments to the CA as regards private actions in competition law. The new sect. 47A CA enlarged the jurisdiction of the Tribunal in private actions to cover stand-alone as well as follow-on claims and enabled the Tribunal to grant injunctions (except in Scottish proceedings). Collective proceedings before the Tribunal were introduced by the new sect. 47B: see para. 16 of the Judgment. We repeat here for convenience only sect. 47B (1):

> "Subject to the provisions of this Act and Tribunal rules, proceedings may be brought before the Tribunal combining two or more claims to which section 47A applies ("collective proceedings")."

5. By para. 9 of schedule 8 CRA, sect. 49 CA was amended to insert new subsections (1A), (1B) and (1C) as follows:

"(1A) An appeal lies to the appropriate court on a point of law arising from a decision of the Tribunal in proceedings under section 47A or in collective proceedings –

(a) as to the award of damages or other sum (other than a decision on costs or expenses), or
(b) as to the grant of an injunction.

(1B) An appeal lies to the appropriate court from a decision of the Tribunal in proceedings under section 47A or in collective proceedings as to the amount of an award of damages or other sum (other than the amount of costs or expenses).

(1C) An appeal under subsection (1A) arising from a decision in respect of a stand-alone claim may include consideration of a point of law arising from a finding of the Tribunal as to an infringement of a prohibition listed in section 47A(2)."

6. The structure and language of the new sect. 49(1A) is significant. We consider that the provisions of sub-paragraphs (a) and (b) cannot be ignored. The subsection cannot be read as if it ended with the words "or in collective proceedings": the further sub-paragraphs define the nature of the decisions of the Tribunal which are susceptible to appeal.

7. As stated in the Judgment at para. 18, the statutory regime for collective proceedings constitutes a new procedure and not a new form of claim. As the opening of sect. 47B(1) makes clear, it involves a combination of two or more claims which fall within sect. 47A. That procedure may be pursued only when the Tribunal determines, by the grant of a CPO, that the statutory conditions prescribed under sect. 47B are satisfied.

8. Accordingly, refusal of a CPO is not a decision as to the award of damages or other sum in collective proceedings. On the contrary, it is a decision that the proposed manner of pursuing in combination claims, which may in themselves be valid claims for damages, should not be permitted. The decision to refuse a CPO may be made because the Tribunal considers that the person proposed to act as the class representative should not be authorised: see sect. 47B(5)(a); or because the Tribunal considers that the claims are not "eligible" for inclusion in collective proceedings: see sect. 47B (5)(b) and (6); or for both those reasons. Depending on the grounds on which the Tribunal refused to grant a CPO (and of course any question of limitation), a different person may commence proceedings and seek authorisation as a class

representative for the same claims, or the claimants (or some of them) may start proceedings as a differently defined class or a series of smaller classes, even where it is not practicable for them to bring claims individually.

9. In its submissions on jurisdiction, the Applicant relies on the judgment of the Court of Appeal in *Enron Coal Services Ltd (in liquidation) v English Welsh and Scottish Railway Ltd* [2009] EWCA Civ 647. That case concerned the former sect. 49 and the regime for private actions under the CA prior to amendment by the CRA. Under that old regime for private actions, sect. 47A CA was limited to a follow-on claim for damages (or other sum of money). The Tribunal had no jurisdiction in stand-alone claims or to grant injunctions. Under the old sect. 47B CA, a specified body had the right to bring proceedings comprising two or more "consumer claims" before the Tribunal: a consumer claim was a claim to which sect. 47A applied brought by an individual other than in the course of a business. Moreover, the body specified by the Secretary of State (i.e. the Consumers' Association) had an absolute right to bring such proceedings, which therefore did not involve any grant of permission by the Tribunal.

10. The jurisdiction for appeals from the Tribunal under sects. 47A and 47B was set out in the old sect. 49 CA which, insofar as material, provided as follows:

> "(1) An appeal lies to the appropriate court –
> …
> (b) from a decision of the Tribunal as to the award of damages or other sum in respect of a claim made in proceedings under section 47A or included in proceedings under section 47B (other than a decision on costs or expenses) or as to the amount of any such damages or other sum;…"

11. In *Enron,* the defendant sought permission to appeal against the refusal of the Tribunal to strike out part of a damages claim under rule 40 of the Tribunal's then Rules, on the basis that it fell outside the limited, follow-on jurisdiction of the Tribunal under the then sect. 47A. In raising a preliminary point about the jurisdiction of the Court of an Appeal to hear such an appeal, the claimant accepted that a decision to strike out such a claim would be a decision "as to the award of damages" because it would amount to a rejection of the claim. However, it argued that a refusal to strike out did no more than leave the pleaded claim intact and allow it to proceed to

adjudication at a full hearing, and so was not a decision "as to the award of damages" within sect. 49(1)(b).

12. The Court of Appeal rejected that submission. Holding that the concession that a decision striking out a claim would be susceptible to appeal had been rightly made, Patten LJ (with whose judgment Jacob and Carnwath LJJ agreed) continued, at [24]:

> "…it is difficult to believe that Parliament intended an unsuccessful claimant to be able to appeal against the dismissal of his claim after a full hearing but not to do so against its dismissal under rule 40. Once one accepts that the wording of section 49(1) is wide enough to cover a rule 40 determination against the viability of the claim it is hard to identify any linguistic or policy barrier to the inclusion of a decision to the opposite effect. In my view, the language of the subsection covers both."

13. A decision by the Tribunal refusing an application for a CPO presents a very different situation. Contrary to what the Applicant states at para. 18(c) of the Application, it is not "a rejection of the claim for damages under section 47A". The Tribunal has made no determination as regards the individual claims for damages under section 47A. The decision refusing a CPO is a decision either that the proposed class representative should not be authorised or, as in the present case, that the conditions for combining the individual claims in collective proceedings as proposed do not satisfy the requirements of sect. 47B(6) CA.

14. The introduction of a regime for collective proceedings (sects. 47B-47C) and for collective settlements (sects. 49A-49B) involved major changes to the CA. It appears indisputable that the novel form of decision by the Tribunal making or refusing an order approving a collective settlement under sect. 49A(1) or 49B(1) is not susceptible to appeal, although such a decision may undoubtedly be very significant for the parties. Having regard to the structure and framing of the reformulated sect. 49 CA, we consider that if the legislature had intended that the novel form of decision by the Tribunal making or refusing a CPO should be subject to appeal, the section would have included express provision enabling an appeal to the appropriate court from a decision as to the grant of a collective proceedings order.

15. Accordingly, we conclude that there is no jurisdiction to grant permission to appeal under sect. 49(1A) CA.

16. We should add that this approach of the legislation appears to reflect a deliberate policy. If a decision refusing a CPO could be appealed by the applicant, then it would seem that a decision granting a CPO would similarly be susceptible to appeal by the respondent. Experience from other jurisdictions with a regime of certification of class actions, in particular the United States and Canada, shows that decisions refusing or allowing such actions to proceed typically generate appeals. In the attempt to craft an effective system of collective redress for the UK, the legislature has restricted this procedure to the specialist tribunal, so that although there is effectively a parallel jurisdiction in the ordinary courts for competition claims for damages only the Tribunal can hear collective proceedings; and, secondly, it has sought to confine the right of appeal in collective proceedings to decisions on the substantive claims and preclude prolonged litigation in the process of approving the use of the collective procedure for the pursuit of those claims.

Merits

17. In the light of our decision on jurisdiction, it may be inappropriate to say much about the two grounds of appeal set out in the Application. However, we should state that if we had considered that there was jurisdiction for an appeal, we would have refused permission in this case since we do not consider that the appeal would have any real prospect of success.

18. As regards the first ground (pass-on), we did not consider the question whether the claims in the proceedings should be struck out, e.g. on the basis that there was no arguable case that the EEA MIF caused the level of the UK MIF to be higher than it otherwise would have been. The question which we addressed was a very different one: i.e. whether the conditions for treating pass-on (or pass-through) as a common issue to be determined for all the claims collectively were satisfied. Secondly, the Applicant does not contend that the adoption by the Tribunal of the test set out by the Canadian Supreme Court in *Pro-Sys* was wrong as a matter of law. The question whether the Applicant had satisfied that test is not a question of law but a matter of evaluation of the nature and extent of the evidence which it put forward. Thirdly, as regards Mastercard's pleaded position regarding pass-on in other actions, the Tribunal did not express any view that there was no pass-through of damages by retailers to

consumers. On the contrary, the Tribunal accepted that there may well be pass-through but considered that the wide variation in potential pass-through as between different kinds of goods and services and different kinds of retail outlet made it impossible to determine pass-through as a common issue: see Judgment, paras. 63-67. Unlike the position in *Gibson v. Pride Mobility Products Ltd* [2017] CAT 9, the failure to satisfy the Tribunal on this issue in the present case was not based on any misapprehension by the Applicant's experts as to the approach to be taken to the underlying infringement decision of the competition authority. There was accordingly no justification for granting the Applicant any further opportunity to adduce evidence. In any event, no such opportunity was requested and a decision on any such request would not be a question of law.

19. As regards the second ground (distribution), the Tribunal held that the introduction of a collective proceedings regime has not changed the fundamental nature of damages for breach of competition law as being compensatory. The Applicant does not contend that this holding was wrong as a matter of law. Contrary to what is stated in the Application, the Tribunal did not find that it was necessary for the Applicant to assess the loss suffered by individual members of the class. As noted in the observations from Mastercard, it is a mischaracterisation of the Judgment to contend that the Tribunal found that there were "substantive legal requirements which the proposed distribution model must meet". The approach adopted by the Tribunal was accepted by the Applicant in the hearing as being correct. See the Judgment at para. 46:

> "…Mr Harris [leading counsel for the Applicant] very properly accepted that if it appeared at the outset that there is no methodology which can produce a fair distribution of an aggregate award of damages and therefore proper compensation, then that is a matter which the Tribunal can take into account in deciding whether to grant a CPO."

20. Here, the Applicant was unable to propose a method of distribution of an aggregate award of damages that would, even on a very rough and approximate basis, lead to payments on a compensatory basis. Leading counsel for the Applicant was given every opportunity to put forward potential methods of distribution and the matter was further canvassed by the Tribunal with the Applicant's two experts. In answer to the Tribunal's questions, the Applicant's experts agreed that the only proposed method of distribution put forward by the Applicant "bore no relation to the individual loss":

Judgment para. 85. In those circumstances, there is no potential error of law in the Tribunal finding that the claims were not "suitable to be brought in collective proceedings", as required by sect. 47B(6) CA.

21. As for the contention that the Applicant should have been given a further opportunity to address the question of distribution, no such request was made on behalf of the Applicant in the hearing and, again, that does not give rise to a question of law.

Conclusion

22. The application for permission to appeal is therefore refused.

The Hon. Mr Justice Roth President	Professor Colin Mayer C.B.E	Clare Potter

Charles Dhanowa O.B.E., Q.C. (*Hon*) Registrar	Date: 28 September 2017