



Neutral citation: [2017] CAT 9

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1257/7/7/16

Victoria House
Bloomsbury Place
London WC1A 2EB

31 March 2017

Before:

THE HON. MR JUSTICE ROTH
(President)
DERMOT GLYNN
JOANNE STUART OBE

Sitting as a Tribunal in England and Wales

B E T W E E N:

DOROTHY GIBSON

Applicant /
Proposed Class Representative

-and-

PRIDE MOBILITY PRODUCTS LIMITED

Respondent /
Proposed Defendant

Heard at Victoria House on 12 to 14 December 2016

JUDGMENT
(APPLICATION FOR A COLLECTIVE PROCEEDINGS ORDER)

APPEARANCES

Mr Thomas de la Mare QC, Mr Tristan Jones and Mr Daniel Cashman (instructed by Leigh Day) appeared on behalf of the Applicant / Proposed Class Representative.

Mr Alan Bates, Mr Michael Armitage and Mr Jack Williams (instructed by Band Hatton Button LLP) appeared on behalf of the Respondent / Proposed Defendant.

INTRODUCTION

1. The Consumer Rights Act 2015 (the “CRA”) significantly amended the competition law regime in the UK as regards private actions, as set out in the Competition Act 1998 (the “CA”), with effect from 1 October 2015. In particular, the jurisdiction of the Competition Appeal Tribunal (the “CAT”) was expanded to cover all private claims, not only follow-on actions; an entirely new procedure was created in the form of collective proceedings brought by a representative on behalf of a defined class of claimants, either on an opt-in or an opt-out basis; and there was introduced a similarly novel jurisdiction for the CAT to approve a collective settlement.
2. Collective proceedings are commenced by the person who proposes to be the class representative, but may be continued only on the basis of a collective proceedings order (“CPO”) made by the CAT: sect 47B(2), (4) CA. This is the first application for a CPO to be made under this new regime. It seeks the grant of a CPO on an opt-out basis.
3. The Respondent to the application and proposed defendant to the action (“Pride”) was at the material time the largest supplier of mobility scooters in the UK, holding about one third of the market in terms of sales volume and supplying its products under the “Pride” brand. Mobility scooters are battery-powered vehicles which are used by persons who have restricted mobility, who are therefore either elderly or otherwise physically impaired. Pride is a wholly owned subsidiary of the US manufacturer of the scooters.
4. The Applicant, Ms Dorothy Gibson, who seeks authorisation as the class representative, is the General Secretary of the National Pensioners Convention (the “NPC”), an umbrella organisation for around 1000 pensioners’ groups across the UK which campaigns about issues of concern to older people.
5. The class on behalf of whom Ms Gibson seeks to bring the claim is defined as comprising any person who purchased a new Pride mobility scooter other than in the course of a business in the UK between 1 February 2010 and 29 February 2012. It is estimated that the class comprises some 27,000 – 32,000 people.

6. As the application for the CPO (the “Application”) makes clear, this is purely a follow-on claim which seeks damages resulting from the infringements of the Chapter I prohibition under the CA found by the Office of Fair Trading (the “OFT”) in its decision dated 27 March 2014 (the “Decision”). In summary, the OFT held that Pride and each of eight of the independent dealers selling its mobility scooters had entered into bilateral agreements or concerted practices covering some or all of the period February 2010 - February 2012, whereby the dealers would not advertise certain models of Pride scooters online at prices below the Recommended Retail Price (“RRP”) set by Pride. The Decision as to infringement of the Chapter I prohibition is binding in respect of the present claim: sect 58A CA. As the Decision is the foundation of these proposed proceedings, it is necessary to describe it in somewhat more detail.

THE DECISION

7. The Decision was issued following an investigation lasting almost two years. The OFT found that Pride was by volume much the largest supplier of mobility scooters in the UK, with a market share of 26-31% in 2010-11. The next largest supplier (by volume of sales) was less than half its size. Pride was one of the few well-known brands among consumers.
8. Pride also had the largest dealer network in the UK, supplying about 600-700 retailers (out of a total of 800-1,200). It was found that Pride effectively operated a system of selective distribution, choosing its retailers on the basis of both qualitative and quantitative criteria. The Decision records that the evidence in the OFT’s possession suggested that Pride prefers not to supply more than one retailer in any given catchment area.
9. Although mobility scooters are sold through a range of sales channels (viz. ‘bricks-and-mortar’ retail premises; the internet; mail, catalogue and telephone order; and doorstep sales), the OFT found that over the relevant period about 70-75% of sales were made through bricks-and-mortar (i.e. physical) retail premises.
10. In September 2011, the OFT had published a market study on Mobility aids (OFT 1374), carried out because of concerns that the sector may not be working

well for consumers. The Decision drew on the findings in the market study. It was found that consumers in the sector are often first-time buyers and that due to their impaired mobility, which is why they needed a mobility scooter, the extent to which they are able to shop around physically is often limited. The internet therefore played a particularly important role as a source of information about prices.

11. The Decision records that the OFT was informed that local bricks-and-mortar retailers have been facing growing pressure on prices as a result of retailers advertising and/or selling mobility scooters online, which led to certain retailers complaining to Pride that they were unable to compete with ‘internet prices’ (para 2.50). The OFT found that Pride was concerned about low internet retail prices for its scooters from as early as 2006, and thereafter sought various ways to counter this.

12. Although a significant presence, Pride did not hold a dominant position in the supply of mobility scooters in the UK. Accordingly, there would only be an infringement of competition law if Pride and one or more of its dealers entered into an agreement or participated in a concerted practice with an anti-competitive object or effect. As noted above, the Decision found that Pride entered into such agreements and/or concerted practices with eight specific retailers, which are referred to in the Decision as “Retailers” (in distinction to “retailers”) but which we shall call for clarity the “Relevant Retailers”. Those arrangements covered seven specific models in the Pride range of mobility scooters (“Relevant Models”). The offending arrangement was a prohibition of online advertising of prices below the RRP set by Pride (the “Below-RRP Online Price Advertising Prohibition” or “BROPA Prohibition”). The duration of each of the eight agreements/concerted practices differed but overlapped, within the overall period February 2010 to February 2012, as set out in the table below:

Relevant Retailer	Duration of infringement
Careco (UK) Ltd (formerly Discount Mobility Direct Ltd)	March 2011 (at the latest) to February 2012 (at the earliest)
Discount Mobility Plus Ltd / Rutland Mobility Ltd	March 2010 (at the latest) to March 2011 (at the earliest)

Mobility 4 U Ltd	June 2010 (at the latest) to June 2011 (at the earliest)
MT Mobility Ltd / Hooplah Ltd	March 2011 (at the latest) to June 2011 (at the earliest)
Robert Gregg Ltd	February 2010 (at the latest) to January 2012 (at the earliest)
Hartmond Ltd	December 2010 (at the latest) to January 2012 (at the earliest)
Milton Keynes Mobility Ltd	May 2010 (at the latest) to January 2012 (at the earliest)
Better Mobility Ltd	May 2011 (at the latest) to February 2012 (at the earliest)

13. Further, the OFT found as follows (para 1.12; repeated at para 3.15):

A. While it may have been introduced earlier, Pride started to communicate the existence of the Below-RRP Online Price Advertising Prohibition to Retailers by 28 January 2010.

B. The Retailers agreed to abide by, or acquiesced in, Pride’s requests and/or instructions not to advertise prices below the RRP online, although not all Retailers complied with Pride’s requests and/or instructions at all times.

C. To comply with the Below-RRP Online Price Advertising Prohibition, a Retailer could, if it did not wish to advertise the product at RRP, use the phrase ‘call for best price’, ‘value special’ or similar on its website(s). A Retailer could also comply with the Below-RRP Online Price Advertising Prohibition by not displaying any price or any such phrase on its website(s).

D. From 25 June 2010 at the latest Pride had in place a system of monitoring whether its retailers were complying with its Below-RRP Online Price Advertising Prohibition (those retailers that were not, at times, complying with Pride’s policy were referred to internally as ‘internet rogues’).

E. Those Retailers which were identified as ‘internet rogues’ were contacted by members of the external sales team and/or their respective Area Sales Manager and requested and/or instructed to:

- (i) remove the below-RRP price from the Retailer’s website; and/or
- (ii) increase the online price advertising to the RRP...”

14. However, it is important to appreciate the context in which the OFT expressed these findings. The Decision states (para 1.11):

“Whilst Pride’s policies concerning the online advertising of prices below the RRP in respect of certain mobility scooters applied to its dealer network generally, the OFT’s finding, based on the evidence in its possession, is that the Retailers were party to agreements and/or concerted practices with Pride in

respect of the Below-RRP Online Price Advertising Prohibition. The OFT has identified the Retailers from the generality of Pride's dealer network on the basis of the strength of the evidence in its possession. While the OFT makes no findings in respect of other members of Pride's dealer network, no inference should be drawn from any part of this Decision that the Retailers constitute the only dealers to whom the Below-RRP Online Price Advertising Prohibition related. Likewise, this Decision should not be understood as excluding the possibility that the Below-RRP Online Price Advertising Prohibition resulted in further agreements and/or concerted practices between Pride and other members of its dealer network."

15. Furthermore, the Decision includes the following (para 3.225):

"The OFT considers that Pride's strategy in relation to implementing the Below-RRP Online Price Advertising Prohibition was intended to apply to the whole dealer network and was widespread, going well beyond the Retailers named in this Decision:

- (i) The overall strategy could only have worked if the majority of retailers adhered to it. As described at paragraphs 3.26 to 3.30 above, Pride monitored its retailers' websites to assess which were advertising certain of its Pride-branded scooters below-RRP online. A Pride employee regularly prepared a list of non-compliant websites (referred to as 'internet rogues'). When asked for advice by a Pride Internal Sales Team Member [name redacted] on how to deal with specific 'internet rogues', Pride's Managing Director [name redacted] responded that *'if a Dealer continues to advertise below RRP then there [sic] price structure will change to the T List, just make sure that the relevant sales guy is informed prior to any change, **one rule for all**'* [emphasis added].
- (ii) The Below-RRP Online Price Advertising Prohibition had the potential to encompass all dealers within Pride's network and indeed Pride's monitoring and enforcement of the Below-RRP Online Price Advertising Prohibition extended far wider than the Retailers addressed by this Decision. Moreover, there is no evidence in the OFT's possession to suggest that certain retailers were exempt from the application of, or from Pride's monitoring and enforcement of, the Below-RRP Online Price Advertising Prohibition. The Rogue Reports in the OFT's possession do not only cover the eight Retailers addressed by this Decision. To take one illustrative example from June 2011, a Rogue Report lists 27 retailers actively being monitored through the Rogue Reports for compliance with the Below-RRP Online Price Advertising Prohibition at this time.
- (iii) Furthermore, retailers were themselves monitoring the Below-RRP Online Price Advertising Prohibition. In some cases, these retailers contacted Pride to let them know about their competitors' advertising activities and request that Pride enforce the Below-RRP Online Price Advertising Prohibition against the competitors...."

16. The OFT determined that this was an infringement by object (i.e. with the object of restricting or distorting competition). The agreements and/or concerted practices to operate the BROPA Prohibition by their very nature or in their

obvious consequence were detrimental to competition. It is appropriate to quote the OFT's reasoning (paras 3.199-3.202):

“3.199 The advertising of price information allows consumers to compare the various offers available in the market and to determine which retailer offers the best price. Where retailers are able to signal to consumers (through advertising) that their prices are lower than those of their competitors, they can win the custom of consumers who would otherwise have made a purchase from a higher-priced competitor. The prospect of increased sales, and the threat of price competition by rival retailers, will incentivise retailers to lower their prices, thereby promoting price competition in the sector. Such price competition in the supply of products serves as an incentive for retailers to act efficiently and ensures that lower prices are passed on to consumers.

3.200 Retailers who have the freedom to advertise their actual selling prices on the internet are better able to attract and win (a) customers who make use of the internet to compare product offerings and prices, and (b) customers who are located in more distant territories than those within which the retailer's bricks-and-mortar store(s) is/are easily accessible by its potential customers. As regards the latter, customers who are located in territories beyond the retailers' bricks-and-mortar catchment areas are less likely to be able to access or act on price information contained in in-store or 'shop-window' displays or in local print or broadcast advertising. By prohibiting retailers from online advertising of below-RRP prices, retailers who would otherwise advertise at a lower price are unable (or at least significantly less able) to signal to consumers that they are offering better value. Therefore, such a prohibition prevents customers from easily shopping around for lower-priced retailers (for example, through the use of 'Google shopping').

3.201 The Below-RRP Online Price Advertising Prohibition hampers Retailers in using the internet as a method of marketing. Where a Retailer adopts a selling price that is below-RRP, it cannot display this price information online; it can only inform consumers as to how they might obtain this price information (e.g. instructing consumers to 'call for best price'). For consumers, this makes shopping around and price comparison more difficult, and search costs are increased given the need to make a number of phone calls to retailers. For retailers, 'call for best price' instructions are likely to be far less effective in attracting interest from customers who are located in territories beyond the retailers' bricks-and-mortar catchment areas, or from internet customers more generally, than the displaying of actual selling prices online.

3.202 The OFT concludes that, by reducing price transparency between Retailers, and by limiting the geographic and demographic reach of Retailers' price signalling, the Below-RRP Online Price Advertising Prohibition is likely significantly to eliminate incentives on the part of retailers to engage in price competition with other retailers selling, whether online or otherwise, certain Pride mobility scooters and is thereby liable to lead to consumers paying higher prices. Therefore, the OFT concludes that the Below-RRP Online Price Advertising Prohibition is liable to prevent, restrict or distort competition between retailers.”

17. The OFT considered the subjective intentions of Pride as regards the BROPA Prohibition, and concluded on the evidence that:

“it was Pride’s intention to introduce the Below-RRP Online Price Advertising Prohibition to reduce price competition from the internet in order to protect its brand and maintain retailer margins, thereby enabling Pride to achieve its ‘biggest revenue gain’, by maintaining demand for and sales of its products” (para 3.215).

18. Having found that the arrangements constituted an infringement by object, it was not necessary for the OFT to make detailed findings as to their actual effect. The OFT also found that the Relevant Retailers did not fully respect the agreements and/or concerted practices at all times (paras 3.25, 3.36). However, the OFT nonetheless found that the impact of the agreements and/or concerted practices was “not insignificant” (para 3.220), having regard to the relative size and prominence of Pride in the UK market for mobility scooters.
19. Since the combined turnover for each Pride-Relevant Retailer combination at all relevant times did not exceed £20 million, Pride and the Relevant Retailers were immune from any penalties in relation to the infringing conduct: sect 39(3) CA. However, as well as directing the parties to bring the infringements to an end, the OFT directed that:

“Pride shall within 20 working days from the date of this Decision write to each of the Retailers listed in paragraph 1.9 of this Decision *and any other retailers in respect of which it operates a Below-RRP Online Price Advertising Prohibition in relation to mobility scooters*, to inform them that it no longer operates such a prohibition.” [emphasis added] (para 4.3).

COLLECTIVE PROCEEDINGS

20. Damages resulting from an infringement of competition law may be claimed before the CAT pursuant to sect 47A CA. Collective proceedings involve the combination of two or more claims to which sect 47A CA applies: sect 47B(1) CA. The making of a CPO is governed by sect 47B (5) – (9). In summary it requires two conditions to be satisfied:
 - a. the claims must be considered by the CAT to raise the same, similar or related issues of fact or law (“common issues”) and to be suitable to be brought in collective proceedings: sect 47B(6) CA; and
 - b. the proposed class representative must be authorised by the CAT on the basis that it is just and reasonable for that person so to act in the proceedings: sect 47B(8)(b) CA.

21. The statutory procedure for such collective proceedings is radical in several respects. In particular, the class representative need not him or herself be a member of the class and the many individual claimants within the class do not need to be identified in order for the representative to start proceedings: sect 47B(8)(a), (11)-(12). Furthermore, the CAT can award aggregate damages in favour of the represented class, i.e. without undertaking an assessment of the amount of damages recoverable in respect of the claims of each represented person: sect 47C(2) CA. These features are the more striking where the proceedings are brought on an opt-out basis, in which case the represented members of the class need not identify themselves individually until after a judgment in their favour,¹ when they come forward to seek their share of the aggregate damages awarded.
22. One of the main purposes of the introduction of collective proceedings for competition law claims was to provide an effective mechanism for consumers and smaller enterprises to recover compensation for loss which, although significant for the victim, is individually not of such an amount as could justify bringing such a claim but which, taken together, constitute an appreciable sum. See *Private Actions in Competition Law: A consultation on options for reform – government response* (January 2013), which preceded the introduction of the CRA (at p. 6):

“Breaches of competition law, such as price-fixing, often involve very large numbers of people each losing a small amount, meaning it is not cost-effective for any individual to bring a case to court. Allowing actions to be brought collectively would overcome this problem, allowing consumers and businesses to get back the money that is rightfully theirs – as well as acting as a further deterrent to anyone thinking of breaking the law.”

The approach to estimation of damage on behalf of the Applicant in the present case will be considered further below, but in essence, on the revised, provisional figures put forward by her economic expert for the hearing of the Application, each purchaser of a Pride mobility scooter was estimated to have suffered average loss, depending on the model purchased, of £195 or £40 (before interest).

¹ Other than those domiciled outside the UK at the material time: CA sect 47B(11)(b).

THE APPLICATION

23. With the Collective Proceedings Claim Form, there was filed a witness statement from the Applicant, a full witness statement from the solicitor conducting her case explaining how it was intended that the proceedings would be handled, and an expert economist's report from Mr Robin Noble of Oxera Consulting LLP. With its Response, Pride served witness statements from Mr Nicholas Allen, its managing director from 2007-2016; its current managing director, who exhibited Pride's raw invoice data for the period 2008 to 2016; one of its area sales managers, who exhibited a table of models of mobility scooters of other manufacturers that compete with particular Pride models; its solicitor, concerning correspondence with a number of Pride retailers; a director of one of the Relevant Retailers, Ms Dunn; and an expert's report from Mr David Parker of Frontier Economics Ltd. Mr Noble filed a second, supplementary report, in part responding to Mr Parker but also taking account of the further factual evidence on prices adduced by Ms Dunn. There were also brief supplementary witness statements from the Applicant and her solicitor.
24. The hearing of the Application took place over three days, of which well over a day was devoted to arguments concerning human rights and EU law. The only witness to give evidence was Mr Noble, at the request of the Tribunal. We considered it appropriate and necessary for Mr Noble to answer questions concerning his methodology and the feasibility of approaching damage as a common issue. Those questions came in the first instance from the Tribunal, followed by limited cross-examination by Counsel for Pride. There was no other oral evidence. In particular, we did not consider it appropriate for Mr Parker's expert evidence in his written report to be tested by oral examination. This was not a mini-trial, and the essential question is whether the Applicant has established a sufficiently sound and proper basis for the case to proceed, having regard to the statutory criteria. We return to this question in more detail below.
25. Pride submitted that the claims made by the members of the class in this case are not appropriate for collective proceedings for various reasons, having regard to the manner in which the loss is alleged to have been caused. But Pride raised an entirely distinct objection based on the fact that both the infringement and then the Decision on which the collective proceedings are based occurred before the

CRA introducing this new regime came into force. Pride submitted that to allow this claim would infringe Pride's human rights under Article 1 of Protocol 1 to the European Convention on Human Rights (the "Convention"), and further or alternatively the fundamental principle of EU law against retrospective legislation and/or the EU Charter of Fundamental Rights ("the Charter"). Accordingly, it is appropriate to address those issues first.

RETROSPECTIVITY AND HUMAN RIGHTS

26. The question of limitation in relation to claims brought after the new competition provisions in the CRA came into force (i.e. 1 October 2015) but arising before it came into force, is governed by transitional provisions in rule 119 of the Competition Appeal Tribunal Rules 2015 (the "CAT Rules 2015"). In effect, such claims are subject to a two year limitation period, which for any follow-on claims arising before 1 October 2015 means that they must be commenced within two years of the date when the decision of the competition authority became final (i.e. when any appeal has been disposed of or the time period for bringing an appeal has lapsed).
27. Here, as noted above, the infringement found by the Decision took place in the period February 2010 to February 2012. The Decision was issued on 27 March 2014 and since no appeal was brought, it became final two months later. The present collective proceedings were issued on 25 May 2016, at the end of the relevant two-year limitation period.

Article 1 of Protocol 1 to the Convention ("A1P1")

28. A1P1 provides:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

29. A person's financial resources clearly constitute possessions so as to come within the scope of this provision. However, Pride contends that the

retrospective application of sect 47B CA, making it subject to liability by way of an opt-out collective action for past conduct, involves an interference with Pride's enjoyment of its possessions.

30. In advancing that case, Pride relied strongly on the judgment of the Supreme Court in *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3 (“*Wales*”). That concerned a Bill introduced into the Welsh Assembly which provided that if a person treated by NHS Wales for an asbestos-related disease received compensation from a former employer or other body (“compensators”) for contracting the disease, the costs of treatment could be recovered by the Welsh Ministers from that compensator; and that any insurance policy held by the compensator to cover its liability to the victim, whether issued before or after enactment of the Bill, was to be treated as also covering this liability so that NHS Wales could seek recovery from the insurer. On a reference by the Counsel General for Wales, the Supreme Court held that the Bill fell outside the specified legislative competence of the Welsh Assembly. Although that effectively disposed of the case, the Court nonetheless fully considered the further question of the Bill's compatibility with A1P1, since the Assembly also had no competence to legislate inconsistently with the Convention.
31. The Bill only applied where a compensator paid future compensation to a victim and in respect of future medical costs, but the Court unanimously held that the legislation engaged A1P1, both as regards the provision imposing liability on compensators and, additionally, as regards the provision concerning insurance contracts. As Lord Mance stressed (at [6]-[7]) in giving the majority judgment, as regards compensators, the Bill imposes:

“a novel statutory or ‘quasi-tortious’ liability towards the Welsh Ministers on compensators... This liability is a liability for pure economic loss which does not exist and has never existed at common law.”

And as regards the insurers, the Bill imposes:

“a new contractual liability ... on any insurer whose policy would to any extent cover the compensator for any liability which the compensator has or would (if established) have towards the victim irrespective of any policy exclusion or restriction.... The Bill thus imposes new liabilities on compensators in respect of past conduct and on liability insurers under past insurance contracts.”

32. Those features of the legislation were the basis of Lord Mance’s conclusion regarding A1P1. He thus stated, at [41]:

“In my opinion, ... A1P1 is engaged as regards both compensators and their liability insurers. Both are affected and potentially deprived of their possessions, in that the Bill alters their otherwise existing legal liabilities and imposes on them potentially increased financial burdens arising from events long-past and policies made long ago.”

And further, at [43]:

“Moreover it imposes liabilities on both not only in conjunction with existing liabilities, but in addition to them. It does so in the case of compensators by making it irrelevant whether the compensation reflects any actual or admitted liability. It does so in the case of insurers by making them liable in circumstances where the insurance cover which they granted would not apply. For all these reasons, both compensators and insurers are in my opinion entitled to be regarded as victims for the purposes of A1P1.”

33. Lord Thomas (with whom Baroness Hale agreed), put the points similarly: as regards the employers/compensators (at [103]):

“Although the charges which can be recovered are only those that are incurred after the coming into force of the Bill and the liability to pay Ministers arises only where a compensation payment is made after the coming into force of the Bill, there is an element of retrospectivity in the imposition of the machinery of direct liability on employers. The liability imposed, though only in respect of future charges, is retrospective, as it is a new liability owed directly to Welsh Ministers which arises only by reason of negligence or breach of statutory duty which had occurred prior to the coming into force of the Bill. It is not simply an obligation to make future payments to an employee in respect of a recognised head of damages for an established liability, as would be the case if the machinery adopted had been to impose charges directly on the employees and recovery been obtained [by them] from employers. In the case of the employers, prior to the Bill, they would have had no such direct liability to Welsh Ministers. Thus the second aim and effect of the Bill has an element of retrospectivity.”

And as regards the insurers (at [133]-[134]):

“[these provisions] have the effect of extending the liability under the employers’ liability insurance policy to an extent greater than the liability would have been if any charges payable to the Welsh NHS had been paid as damages by the employer to the employee. In my view, the provisions would override deductibles and policy limits, as the effect of the provision as drafted is to extend the policy to indemnify the employer for all liability under [the provision imposing liability on employers], if the policy provides cover to any extent. ...

In whatever way [the provision] is drafted, ...[it] would retrospectively amend any policy which the employer has to indemnify the employer against his liability for asbestos-related disease by extending it to provide indemnity for payments

made to Ministers for charges payable to the Welsh NHS. The imposition of such liabilities retrospectively, in my view, could be seen as the “deprivation” of the “possessions” of insurers, so as to engage A1P1.”

34. In its Response to the Application, Pride stated (at para 37):

“If the legislation were to be interpreted and applied so as to permit the Applicant to bring an opt-out action against Pride, this would enable the Applicant to (subject to satisfying the statutory requirements for the grant of a CPO) bring claims for monetary compensation against Pride on behalf of the Proposed Class – something that she would not have been able to do before the amended version of section 47B came into force on 1 October 2015.”

35. Formally, that is correct, in that Ms Gibson would not have been able to bring proceedings against Pride prior to the CRA since she did not herself purchase a mobility scooter. But that is not the ground of Pride’s objection, since its case under A1P1 would be advanced as strongly if the proposed class representative was a class member. That exposes the fallacy of the argument. In sharp contrast with the situation in *Wales*, sect 47B does not give rise to any new or fresh liability. Each represented member of the class has a claim under sect 47A, which could have been brought at any time following the Decision.² That is fundamental to the collective proceedings regime, as made clear by 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”).”

The CAT’s *Guide to Proceedings*, 2015 (“*Guide*”), which has the status of a Practice Direction pursuant to r. 115(3) of the CAT Rules 2015, accordingly states, at para 6.3:

“... collective proceedings are a form of procedure and do not establish a new cause of action.”

36. In essence, sect 47B is a procedural mechanism to secure access to justice. Of course, as a matter of practical reality, the claims under sect 47A collected together in proceedings under sect 47B would in many cases not otherwise be brought. In that respect, the new mechanism will lead to increased financial

² In collective proceedings involving stand-alone claims there is similarly no additional liability on the defendant since although such a claim did not fall within the scope of the previous sect 47A (i.e. prior to amendment by the CRA), it could be brought in the High Court.

burdens on defendants, but those burdens arise through more effective enforcement of existing rights. Accordingly, it is analogous to many other procedural and legislative innovations that have been introduced to enable victims to obtain effective redress for losses they have suffered. Legal aid, conditional fees, damages-based agreements, and the introduction of group litigation orders in the High Court, have all been major developments intended to facilitate the bringing of claims which, without them, may well not have been pursued. While such new procedures or mechanisms generally apply only from a specified date, the cause of action forming the basis of the claim subject to that procedure or mechanism could have arisen prior to the legislative or procedural innovation coming into force. These developments therefore involved no retrospective imposition of liability. As with those examples, we do not consider that the introduction of opt-out collective proceedings in their application to claims arising prior to the enactment of the CRA engages A1P1. Such proceedings have no legal effect on accrued or vested rights or liabilities: indeed, they are a means by which the pre-existing liability of the defendant to compensate victims of infringement of competition law may be enforced, and the pre-existing rights of such victims accordingly be upheld.

37. Pride emphasised that collective proceedings may result in the award of aggregate damages whereas previously each individual claimant would have had to prove their individual loss. However, the total damages calculated in aggregate can be no more than the estimated amount of loss which all the represented members in the class suffered, as a result of the violation of competition law by the defendant(s). Where different groups of individuals in the class suffered different levels of loss, that can be dealt with, for example, by defining sub-classes with the damages calculated on a different basis as between those sub-classes, as in fact is proposed in this case. Accordingly, we do not accept that this feature of collective proceedings means that they involve a change of substantive law to the disadvantage of defendants. Indeed, it is notable that exemplary damages are expressly not permitted in collective proceedings, even where they might otherwise be available in individual claims: sect 47C(1) CA.

38. That is of course sufficient to dispose of the case under A1P1. But as it was argued, we consider briefly the question of justification which arises only if A1P1 is engaged. In summary, this involves two broad issues: (i) whether the measure is rationally connected to a legitimate aim; and (ii) whether the measure is proportionate for that purpose.
39. As regards the first issue, Pride accepts that the facilitation of claims for redress by consumers who have suffered from a violation of competition law is a legitimate aim which sect 47B is designed to achieve. But as regards the second issue, Pride contended that the measure was not proportionate. It is well established that proportionality in this context involves striking a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. Pride submitted that, having regard to the Convention rights of defendants, a fair balance required opt-out claims to apply only in respect of infringements committed after the coming into force of the new legislation.
40. The assessment of proportionality here is assisted by another decision of the Supreme Court concerning the question whether legislation by a devolved legislature was compatible with the Convention: *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46. There, the legislature was the Scottish Parliament, which enacted the Damages (Asbestos-related Conditions)(Scotland) Act 2009 ("the Act") in order to reverse the effect of recent case law which had held that since asymptomatic pleural plaques did not increase susceptibility to other asbestos-related diseases or shorten life expectancy, they did not constitute an injury which could found a claim for damages. The Act provided that such asbestos-related pleural plaques constituted a non-negligible personal injury and therefore actionable harm, and were to be treated as always having had such effect. Several employers' liability insurers alleged that the retrospective nature of the legislation infringed their rights under A1P1 (and was accordingly outside the competence of the Scottish Parliament).
41. The Supreme Court held that A1P1 was engaged, but that it was not infringed since the tests of legitimate aim and proportionality were satisfied. On proportionality, the Supreme Court unanimously found that the legislation struck a fair balance between the demands of the general interest of the community and

the requirements of protection of the fundamental rights of the insurers. All the judgments referred to the fact that the law on actionability of pleural plaques was uncertain when insurers wrote their policies, so that it was only by a decision of the House of Lords in 2008 that this matter was determined – a decision which the Act was designed to reverse. The Act accordingly could not realistically be regarded as overturning well-settled law, disturbing the legitimate expectation of the insurers. Thus Lord Hope said, at [40]:

“The interference with the insurers’ possessions can therefore be seen to be within the area of risk with which they engaged when they undertook to indemnify the consequences of the employer’s negligence.”

See, similarly per Lord Reed at [128]-[129].

42. Moreover, Lord Reed emphasised that the Act was remedial social legislation, and explained that the court will have regard to the views of the legislature when the question of proportionality applies to a measure within the area of social or economic policy. Referring to the margin of appreciation applied by the European Court of Human Rights, he said, at [131]:

“The concept of the margin of appreciation reflects a recognition on the part of the Strasbourg court that in certain circumstances, and to a certain extent, national authorities are better placed than an international court to determine the outcome of the process of balancing individual and community interests. At the domestic level, the courts also recognise that, in certain circumstances, and to a certain extent, other public authorities are better placed to determine how those interests should be balanced. Although the courts must decide whether, in their judgment, the requirement of proportionality is satisfied, there is at the same time nothing in the Convention, or in the domestic legislation giving effect to Convention rights, which requires the courts to substitute their own views for those of other public authorities on all matters of policy, judgment and discretion. As Lord Bingham of Cornhill observed in *Brown v Stott* [2003] 1 AC 681, 703:

“Judicial recognition and assertion of the human rights defined in the Convention is not a substitute for the processes of democratic government but a complement to them. While a national court does not accord the margin of appreciation recognised by the European court as a supra-national court, it will give weight to the decisions of a representative legislature and a democratic government within the discretionary area of judgment according to those bodies.”

The intensity of review involved in deciding whether the test of proportionality is met will depend on the particular circumstances. As Lord Hope explained in *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 381, the relevant circumstances include whether, as in the present case, the issue lies within the field of social or economic policy.”

43. Lords Kerr, Clarke, Dyson and Mance agreed with the judgments of both Lord Hope and Lord Reed.
44. The introduction of collective proceedings on an opt-out basis for violations of competition law also amounts to legislation in the field of social or economic policy. Indeed, the new sect 47B CA replaced the previous provision which had allowed a designated body to bring claims under sect 47A collectively on behalf of consumers, but only on an opt-in basis, following the general recognition that that provision had not proved effective in securing redress. Under the transitional provisions, proceedings may be brought under the new sect 47B where the basis of the claims (either a final decision of infringement for follow-on claims or the acts said to violate competition law for stand alone claims) occurred up to two years before this new regime came into force. This is accordingly significantly different from the limitation period of six years from the date of infringement which applies to an individual claim in the High Court, where such a claim could always have been brought.³ And in contrast with the legislative provisions at issue in *AXA*, the legal liability of a defendant to compensate victims of its violation of competition law is unchanged by the collective proceedings regime. Taking all that into account, we think it is impossible to say that Parliament failed appropriately to balance the rights under A1P1 of defendants who had violated competition law and of the community at large. The latter here covers in particular the victims of that violation, whose rights the regime helps to vindicate, as well as the broader interest of society of establishing an effective redress mechanism for violations of competition law.
45. Accordingly, we find that in providing for opt-out collective proceedings covering claims arising prior to its enactment, the legislation does not infringe A1P1. However, even if that conclusion were wrong, *Pride* faces the difficulty that the regime which it seeks to challenge is enacted by primary legislation. In particular, the new sect 47B is enacted, by way of amendment of the CA, by the CRA sect 81 and Schedule 8. Schedule 8, para 5(1) provides for the substitution of the new sect 47B for the old; and para 5(2) states:

³ Or five years from the date of infringement in the case of a Scottish claim in the Court of Session. In the case of follow-on claims in the CAT, the two year period corresponds to the limitation period which applied prior to the amendments made by the CRA.

“Section 47B of the Competition Act 1998 (as substituted by sub-paragraph (1)) applies to claims arising before the commencement of this paragraph as it applies to claims arising after that time.”

46. Mr Armitage, who argued this part of the case on behalf of Pride, submitted that an outcome consistent with the Convention could nonetheless be achieved on the basis of sect 3, alternatively sect 6, of the Human Rights Act 1998 (the “HRA”), leading to the rejection of the Application.

Sect 3 HRA

47. Insofar as material, sect 3 HRA provides as follows:

“3 Interpretation of legislation

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”

48. Mr Armitage contended that the statute could be given a Convention-compliant interpretation in accordance with sect 3 by construing para 5(2) of Schedule 8 CRA as if it contained the proviso “except where the grant of an opt-out collective proceedings order would have retrospective effect, contrary to Article 1 Protocol 1 of the Convention.” Mr Armitage relied on the breadth of the interpretative obligation mandated by sect 3, as explained by the House of Lords in *Ghaidan v Godin-Mendoza* [2004] UKHL 30. In his speech, with which Lords Steyn and Rodger and Baroness Hale agreed, Lord Nicholls said this, at [32]-[33]:

“...Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is “possible”, a court can modify the meaning, and hence the effect, of primary and secondary legislation.

Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend, Lord Rodger of Earlsferry, ‘go with the grain of the legislation’.”

49. In his concurring speech, Lord Rodger (with whom Lord Steyn and Baroness Hale also agreed) sounded an important warning regarding sect 3, at [110]:

“... however powerful the obligation in sect 3(1) may be, it does not allow the courts to change the substance of a provision completely, to change a provision from one where Parliament says that x is to happen into one saying that x is not to happen. And, of course, in considering what constitutes the substance of the provision or provisions under consideration, it is necessary to have regard to their place in the overall scheme of the legislation as enacted by Parliament.”

50. Lord Rodger summarised the position, at [121]:

“...If the court implies words that are consistent with the scheme of the legislation but necessary to make it compatible with Convention rights, it is simply performing the duty which Parliament has imposed on it and on others. It is reading the legislation in a way that draws out the full implications of its terms and of the Convention rights. And, by its very nature, an implication will go with the grain of the legislation. By contrast, using a Convention right to read in words that are inconsistent with the scheme of the legislation or with its essential principles as disclosed by its provisions does not involve any form of interpretation, by implication or otherwise. It falls on the wrong side of the boundary between interpretation and amendment of the statute.”

This summary was adopted as encapsulating the governing approach by the Supreme Court in *McDonald v McDonald* [2016] UKSC 28, at [69].

51. Mr Armitage argued that the implication which he urged did not go against the scheme of the CRA and the new collective proceedings regime, since sect 47B could still apply to causes of action arising prior to 1 October 2015 (i.e. its commencement date) where the proceedings were brought on an opt-in basis.
52. However, para 5(2) of Schedule 8 CRA cannot be viewed in isolation. As mentioned at the outset, the CRA made several significant changes in the regime governing private actions in competition law. This was achieved by sect 81 and Schedule 8 CRA, which substituted or inserted various new sections in the CA. The scheme of Schedule 8 is that each new provision is introduced by a distinct paragraph, of which the second sub-paragraph specifies the temporal application of the provision. Hence, sect 47A is introduced by para 4, sect 47B by para 5, and so forth. The specification of the temporal application in each case in the second sub-paragraph clearly represents the considered view of the drafters of the legislation. Thus the new sect 47E concerning limitation, which substitutes the limitation periods applicable in the ordinary courts for the special limitation period previously applicable to private claims in the CAT, is enacted by

Schedule 8, para 8(1), and para 8(2) provides – in contrast to para 5(2) concerning sect 47B – that sect 47E does not apply to claims arising before 1 October 2015.

53. Moreover, one of the provisions introduced by Schedule 8 CRA concerns a collective settlement procedure. Schedule 8, para 10(1) brought in a new sect 49A CA, which provides for collective settlements where a CPO has been made. Approval by the CAT of a collective settlement under this provision applies only where the CPO specifies that the proceedings are opt-out collective proceedings: sect 49A(1)(b). And Schedule 8, para 10(2) CRA mirrors Schedule 8, para 5(2) in providing that sect 49A “applies to claims arising before the commencement of this paragraph as it applies to claims arising after that time.” Therefore, since sect 49A applies only to opt-out proceedings, Parliament expressly envisaged and intended that collective proceedings on an opt-out basis could be brought for claims arising before 1 October 2015. Any other view would be inconsistent with para 10(2).
54. Accordingly, even allowing for a broad and expansive application of sect 3 HRA and applying the guidance in *Ghaidan*, we consider that it is not possible to interpret Schedule 8, para 5(2) CRA in the manner urged on behalf of Pride. Such an approach falls on the wrong side of the boundary set out by Lord Rodger.

Sect 6 HRA

55. Pride alternatively relied on the obligation imposed on the courts by sect 6 HRA, which provides, insofar as material:

“6 Acts of public authorities.

- (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
- (2) Subsection (1) does not apply to an act if –
 - (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
 - (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

- (3) In this section “public authority” includes–
 - (a) a court or tribunal,...

56. Mr Armitage emphasised the word “may” in sect 47B(5) CA, which provides that the Tribunal “may make a collective proceedings order only” if the necessary conditions are satisfied regarding both the proposed class representative and the eligibility of the claims sought to be included. This is reflected in rule 77 of the CAT Rules 2015. Further, rule 79 provides as follows:

“Certification of the claims as eligible for inclusion in collective proceedings

79.—(1) The Tribunal may certify claims as eligible for inclusion in collective proceedings where, having regard to all the circumstances, it is satisfied by the proposed class representative that the claims sought to be included in the collective proceedings—

- (a) are brought on behalf of an identifiable class of persons;
- (b) raise common issues; and
- (c) are suitable to be brought in collective proceedings.

(2) In determining whether the claims are suitable to be brought in collective proceedings for the purposes of paragraph (1)(c), the Tribunal shall take into account all matters it thinks fit, including—

- (a) whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues;
- (b) the costs and the benefits of continuing the collective proceedings;
- (c) whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class;
- (d) the size and the nature of the class;
- (e) whether it is possible to determine in respect of any person whether that person is or is not a member of the class;
- (f) whether the claims are suitable for an aggregate award of damages; and
- (g) the availability of alternative dispute resolution and any other means of resolving the dispute, including the availability of redress through voluntary schemes whether approved by the CMA under section 49C of the 1998 Act or otherwise.

(3) In determining whether collective proceedings should be opt-in or opt-out proceedings, the Tribunal may take into account all matters it thinks fit, including the following matters additional to those set out in paragraph (2)—

- (a) the strength of the claims; and
- (b) whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover.”

57. On this basis, Mr Armitage contended that the CAT has a discretion, to be exercised by reference to “all matters it thinks fit”. He submitted that the CAT is therefore bound by sect 6(1) HRA to exercise that discretion by refusing to grant a CPO where that would infringe Convention rights: i.e. on an opt-out basis in respect of claims arising prior to 1 October 2015.
58. We do not accept that submission. Sects 3 and 6 HRA complement one another, and indeed are to be read alongside sect 4 HRA which empowers specified courts (but not the CAT) to make a declaration of incompatibility but provides, in sect 4(6)(a), that such a declaration does not affect the continuing operation or enforcement of the provision in respect of which it is given. As sect 6(2)(b) makes clear, sect 6(1) does not apply when the authority (i.e. here the CAT) is acting to give effect to primary legislation which cannot be read in a manner compliant with the Convention. By reason of our conclusion above as regards Schedule 8, para 5(2) CRA and sect 3 HRA, that is the position here.
59. Sect 6 HRA is not to be used as a means of circumvention of sect 3 by the back door. While the word “may” in the statutory sub-section and the rules can be regarded as giving an element of discretion, it is axiomatic that the statutory power must be exercised purposefully in accordance with the overall objective of sect 47B. And while the expression “all matters it thinks fit” is broadly inclusive, it nonetheless applies in the context in which it appears. Rule 79(2) is referring expressly to the consideration in rule 79(1)(c): i.e. whether the claims “are suitable to be brought in collective proceedings.” As Mr de la Mare QC on behalf of the Applicant pointed out, the topics addressed in rules 79(2) and (3) have nothing to do with commencement or retrospectivity or limitation, but concern the substantive characteristics of the particular claims and whether the action is therefore suited to collective proceedings at all; and if so, whether those should be opt-in or opt-out. As Mr de la Mare put it, these provisions are not a Trojan horse by which to import considerations that would not lie under the governing statute itself.
60. The impermissibility of such an approach is supported by the decision of the Court of Appeal upon two conjoined appeals in *R (on the application of Reilly) v Secretary of State for Work and Pensions* [2016] EWCA Civ 413 (“*Reilly No 2*”). There, the primary issue was whether a 2013 statute (the “2013 Act”),

which retrospectively purported to validate the imposition of sanctions on claimants for jobseeker's allowance which had been held by the courts to be invalid, would contravene the claimants' rights under the Convention; and if so, whether its provisions could be 'read down' pursuant to sect 3 HRA to avoid that contravention. One of the two appeals concerned a decision of the Upper Tribunal (Administrative Appeals Chamber)(the "UT"), determining appeals from the First-tier Tribunal. Having held that reading down as proposed was impermissible as going "against the grain" of the 2013 Act, the Court of Appeal considered an alternative argument advanced under sect 6 HRA. This was based on the language of sect 12 of the Tribunals, Courts and Enforcement Act 2007 concerning the powers of the UT when determining an appeal. Where the UT finds that the decision of the First-tier Tribunal involved an error on a point of law, sect 12(2) provides that the UT "may (but need not) set aside the decision of the First-tier Tribunal." It was therefore argued that even if the UT was bound to find that the decision of the First-tier Tribunal was wrong, it was nonetheless also bound by sect 6(1) HRA to exercise this discretion to avoid setting that decision aside since it would thereby avoid acting contrary to the Convention. The UT had robustly rejected that submission, holding that "[i]f we did that then we would be using a judicial discretion to act unlawfully, which cannot be a proper exercise of that discretion": see at [146]. The Court of Appeal upheld the UT's reasoning and conclusion, stating at [147]:

“... in the light of sects 4(6)(a) and 6(2) of the HRA it would be wrong in principle to use that discretion for the purpose of undermining the effect of the 2013 Act.”

61. We of course appreciate that in *Reilly No 2* the discretion being relied on was in a wholly discrete statute, whereas here reliance is placed on provisions in the CAT Rules 2015, which although not made under the CA are made under the Enterprise Act 2002 which may be regarded as a closely related statute, and which were clearly made for the purpose of the collective actions regime introduced into the CA. Nonetheless, we consider that the succinct statement by the Court of Appeal in *Reilly No 2* underlines the governing approach once it is found that the relevant provisions of the primary legislation cannot be given a Convention-compliant interpretation.

62. Accordingly if, contrary to our primary conclusion, we had found that A1P1 would be infringed by the making of a CPO in this case, we would have held that we could not on that basis refuse to grant a CPO, having regard to the terms of the CRA Schedule 8, and the HRA.

EU law

63. Pride submits that granting a CPO to permit the Applicant to bring opt-out collective proceedings against it in respect of the claims here would be contrary to (a) general principles of EU law, in particular legal certainty and legitimate expectation, and/or (b) the EU Charter of Fundamental Rights (“the Charter”).
64. However, the Decision on the basis of which the Applicant brings these proceedings found an infringement of domestic competition law. The OFT considered whether EU competition law might also be infringed and expressly held that the evidence did not suggest that the agreements had any (potential or actual) effect on trade between Member States: Decision, paras 3.188-3.190. Therefore, Pride’s submission raises the threshold question whether EU law is applicable in this case at all.
65. Pride submits that it is, relying on the ‘consistency principle’ in sect 60 CA, which provides insofar as material:

“60 Principles to be applied in determining questions.

- (1) The purpose of this section is to ensure that so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising under this Part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community.
- (2) At any time when the court determines a question arising under this Part, it must act (so far as is compatible with the provisions of this Part and whether or not it would otherwise be required to do so) with a view to securing that there is no inconsistency between—
 - (a) the principles applied, and decision reached, by the court in determining that question; and
 - (b) the principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in Community law...”

66. Pride argues that the question whether a CPO should be permitted in the retrospective manner proposed here is a “question ... in relation to competition within the United Kingdom” within the scope of sect 60(1). It relies on *Pernod Ricard SA v OFT* [2004] CAT 10, where the Tribunal applied sect 60 in determining the procedural rights of a complainant to the UK competition authority as regards alleged anti-competitive conduct.
67. However, the *Pernod Ricard* case was addressing the application and enforcement of the competition rules by the competition authority, where the question of the procedure applied by the UK authority had a direct analogy with the approach applied by the EU authority. That is a wholly different situation, in our view, from questions concerning a private action for damages, which cannot be brought in the EU courts at all. All kinds of rules and procedural issues may apply to such private actions, including such matters as limitation, security for costs (and indeed the costs rules themselves), admissibility and handling of evidence (including expert evidence), and rights of appeal. We consider that questions arising thereunder cannot sensibly be regarded as questions “in relation to competition”. The collective proceedings regime brought in by the CRA is a uniquely UK regime. Moreover, “the provisions concerned” in the UK legislation include Schedule 8, para 5(2) CRA, which expressly specifies the temporal application of sect 47B. By contrast, in *Pernod Ricard* the UK legislation was silent regarding the rights of third party complainants. See further the explanation of *Pernod Ricard* set out by the CAT in *Quarmby Construction Co Ltd v OFT* [2011] CAT 11, at [44]-[46].
68. Accordingly, we have no hesitation in deciding that the question of retrospectivity raised by Pride in the present case does not fall within sect 60 CA, at least in a case where EU competition law is not engaged.
69. That is an end of Pride’s arguments under EU law. However, there will be cases, whether stand-alone or follow-on, where the infringement will concern EU as well as domestic competition law, or indeed EU law alone. In such cases, the principles of EU law will apply not by reason of sect 60 CA but because of the primacy of EU law. We recognise that it would be altogether undesirable if this matter were determined differently where EU law was engaged, and as we

have heard full argument upon it we think it is helpful and appropriate to address it.

General principles of EU law

70. Pride relied in particular on the elucidation of the general principles of EU law concerning legal certainty and retrospectivity in Case C-368/89 *Crispoltoni* [1991] ECR I-3695 and Case 224/82 *Meiko-Konservenfabrik v Germany* [1983] ECR I-2539.
71. *Crispoltoni* concerned the EU regulations providing for guaranteed premiums paid to tobacco producers for their crop. In April and July 1988, the EU Council published new regulations which amended the prior regulation by restricting the maximum guaranteed amount. Those regulations were adopted and published after the producers had determined their production for the year and (as regards the second regulation) after the harvest had begun. It was accordingly clear that in substance the regulations had retroactive effect. The ECJ stated, at [17]:

“... the Court has consistently held that, although in general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected. That case-law also applies where the retroactivity is not expressly laid down by the measure itself but is the result of its content.”
72. The Court proceeded to hold that since the purpose of the amending regulations was to discourage the growing of certain types of tobacco, that purpose clearly could not be achieved for the year in which the regulations were introduced since by that time the planting out of the crops had already taken place. Further, tobacco producers were entitled to expect that they would be notified in good time of any measures to limit tobacco production which would affect their investments, so their legitimate expectations were also infringed.
73. *Meiko-Konservenfabrik* similarly concerned an amending regulation, in that case dealing with the rules for the system of aid in respect of certain products processed from fruit and vegetables. In order to claim such aid, in each marketing year the contracts had to be concluded within specified time-limits and a copy of the contracts had to be forwarded to the relevant national agency before the date on which they took effect. Recognising that the weather

conditions for the 1980 harvest made it very difficult for processors to comply with the time-limit in the existing regulations, the Commission by further regulation extended the time-limit for conclusion of contracts to 31 July. Subsequently, by regulation adopted on 2 October 1980, the Commission made a further amendment, allowing the contracts to be forwarded after they took effect but “not later than 31 July 1980”.

74. This was accordingly a clear case of a regulation taking effect prior to the date of its publication. Applying the fundamental principle in the same terms as it was subsequently articulated in *Crispoltoni*, the Court considered the question of legitimate expectation and held (at para 14):

“It must also be recognized that by retroactively subjecting the payment of aid to the forwarding of the contracts by 31 July 1980 the Commission acted in breach of the legitimate expectations of the persons concerned, who, having regard to the provisions in force at the time the contracts were concluded, could not reasonably have anticipated the retroactive imposition of a time-limit for forwarding the contracts which coincided with the time-limit for their conclusion.”

75. While these cases concern EU regulations, we accept that the same approach applies to national legislation which gives effect to EU law. However, both these decisions show the significance of the legitimate expectations of the persons adversely affected by the impugned measure.
76. In its Response to the Application, Pride argued that its legitimate expectations were breached because no collective proceedings existed in UK law at the time when Pride was considering, in April 2014, whether or not to appeal to the CAT against the Decision. Pride relied on a witness statement from Mr Nicholas Allen, its managing director at the material time, to assert that:

“If Pride had thought, at that time, that legislation permitting opt-out actions would come into force in October 2015 allowing actions in respect of damage said to have been caused between 2010 and 2012, then its internal deliberations as to the ‘costs vs. potential benefits’ of appealing against the OFT Decision would have been very different.”

77. However, whatever may have been the subjective belief of those responsible for the management of Pride, this ground of legitimate expectation is unsustainable. Pride very properly recognises that in the application of this principle of EU law, “where a prudent trader could have foreseen the adoption of an EU measure likely to affect his interests, he cannot plead that his legitimate expectations have

been frustrated if that measure is adopted.”⁴ The legislation which became the CRA was published as a draft Bill by the government in June 2013, and para 5 of Schedule 7 to the draft Bill set out a proposed new sect 47B CA on collective proceedings, including provision for opt-out proceedings. Para 5(2) in the draft is identical to para 5(2) of Schedule 8 as subsequently enacted: i.e., it provides that the collective proceedings regime will apply to claims arising before the commencement of the new provision in the same way as it applies to claims arising thereafter: see para 45 above. Furthermore, the Bill had its first reading in the House of Commons on 23 January 2014 and second reading on 28 January 2014, two months before the Decision and well before Pride was considering whether to appeal. And the legislative proposals to introduce such collective proceedings were widely discussed at the time. Pride had two months in which to appeal against the Decision, i.e. by 27 May 2014: r. 8 of the CAT Rules 2003. Accordingly there is no reason why Pride, which had the benefit of legal advice, should not have been aware of the risk of private claims by way of opt-out collective proceedings.

78. Faced with this information, Mr Armitage shifted his emphasis in oral argument to contend that it was nonetheless contrary to Pride’s legitimate expectation because it could not have been aware of this possibility at the time the infringement was committed in 2010-2012. In effect, that amounts to the contention that an undertaking should not be liable for loss caused to others by its unlawful action if it could not have appreciated at the time that those affected would seek to recover compensation, even though they had the right to do so. We unhesitatingly reject that argument. It has been clear since the judgment of the House of Lords in *Garden Cottage Foods v Milk Marketing Board* [1984] AC 130 that breach of competition law gives rise to a cause of action for breach of statutory duty, and the right to bring a follow-on claim in the CAT for breach of the Chapter I prohibition was introduced by the original sect 47A CA which came into effect on 20 June 2003. Accordingly, even if Pride had expected when entering into the offending arrangements with its dealers that it would not be sued by purchasers of scooters who may have paid a higher price as a result, because of the practical disincentives to bringing individual proceedings, such an expectation cannot be regarded as “legitimate” such as to justify protection

⁴ Pride’s Response, para 60(b)(i).

under this principle of EU law. We should add that there is no suggestion in the evidence of Mr Allen that Pride had any such considerations in mind at the time of the conduct in question.

79. Accordingly, we find that these proceedings would not violate the EU principles of legal certainty and legitimate expectation, even if they applied.

The Charter

80. Pride relies on Article 17 of the Charter, concerning the “Right to property”. However, Mr Armitage acknowledged that this provision is to be interpreted in the same way as A1P1 of the Convention. Accordingly, since we have concluded that A1P1 is not engaged (and if engaged, is not violated), there is no infringement of the Charter.

Conclusion

81. It follows that there is no fundamental obstacle on human rights or EU law grounds to the making of an opt-out CPO in this case. We turn to consider whether we should grant the Application on the basis of the criteria in sect 47B and the CAT Rules 2015.

SHOULD A CPO BE GRANTED?

82. As noted at the outset, there are two statutory conditions which must be satisfied for the CAT to make a CPO. It is convenient to repeat them:
- a. the claims must be considered by the CAT to raise the same, similar or related issues of fact or law (“common issues”) and to be suitable to be brought in collective proceedings: sect 47B(6) CA; and
 - b. the proposed class representative must be authorised by the CAT on the basis that it is just and reasonable for that person so to act in the proceedings: sect 47B(8)(b) CA.
83. Accordingly, to adopt the headings in the CAT Rules 2015, the first condition requires certification of eligible claims and the second condition requires authorisation of the class representative. Pride contends that neither condition is

satisfied, although the brunt of its challenge is directed at the first condition. We address them in turn.

Certification of Eligible Claims

84. The certification requirement in turn involves two elements:

- (i) that the claims raise common issues; and
- (ii) that the claims are suitable to be brought in collective proceedings.

A further question, which sensibly falls to be considered under this head, is whether the proceedings should be opt-in or opt-out: sect 47B(7)(c).

Common issues

85. As noted at the outset, the Applicant proposes to define the class as:

“any person who purchased a Pride mobility scooter other than in the course of a business in the UK between 1 February 2010 and 29 February 2012”.

The Applicant’s submissions

86. The way the Applicant puts the case is summarised in the Claim Form, as follows (at para 72):

“a. At least some internet sales are likely to have been at the price actually advertised by infringing retailers on the internet. Some online sales of scooters directly affected by the Infringements will therefore have been *at* the RRP whereas, absent the Infringements, they would have been at lower prices.

b. In the absence of the Infringements, Pride would have needed to adopt a commercial strategy which did not involve the Below-RRP Online Price Advertising Prohibition. It would not, therefore, have been able (in the counterfactual) to maintain online prices at the RRP.

c. Internet prices also affect offline prices. The internet is particularly important in intensifying competition between retailers. Information available on the internet enables consumers to shop around, and it also provides retailers with an additional channel through which to compete for customers. These factors are of particular importance in the context of mobility-restricted customers (Decision, paras 1.13-1.15).

d. Shops will generally not know whether a customer will look at prices online before making a purchasing decision. The price offered to customers who do not check prices online is therefore likely to be affected by the existence of customers who do.

e. Higher online prices also act as an ‘anchor’ for higher offline prices.

f. Furthermore, mobility scooters of different models sold through different channels are all substitutes. An increase in the price of one model can cause consumers to switch to another model, causing the price of that other model to increase. That is the ‘umbrella effect.’ The Applicant will contend that the effect of the Below-RRP Online Price Advertising Prohibition was to increase the price not only of the directly affected models, but also of other Pride models to which consumers switched.”

87. However, since only the Relevant Models were the subject of the Prohibition, the Applicant recognises that a different analysis should apply as regards purchases of those models and of other models of Pride scooters. Furthermore, the effect on online purchases is likely to be different from the effect on sales made in physical stores. In accordance with rule 75(3)(b) of the CAT Rules 2015, and following the economic advice of Mr Robin Noble, the Claim Form accordingly proposes that there should be four sub-classes:

- a. consumers who purchased Pride scooter models that were subject to the online price advertising restriction (i.e., the BROPA Prohibition), in physical stores;
- b. consumers who purchased Pride scooter models that were not subject to the online price advertising restriction, in physical stores;
- c. consumers who purchased Pride scooter models that were subject to the online price advertising restriction, online; and
- d. consumers who purchased Pride scooter models that were not subject to the online price advertising restriction, online.

88. The Applicant points out that there is no conflict between these sub-classes such that they need separate representation.

89. The essential question in the claims is whether the consumer paid a higher price for the Pride scooter by reason of the BROPA Prohibition, and if so by how much. It is the Applicant’s contention that as regards each of these sub-classes, this question constitutes a common issue.

90. Since it is accepted that the prices paid for Pride scooters are often the subject of individual negotiation, the Applicant recognises that within the sub-classes there will be some differences in the individual loss suffered. But it is argued that this

is almost inevitable in collective proceedings, where an element of generalisation is therefore appropriate. The statutory regime provides that the CAT may make an aggregate award of damages without undertaking an assessment of the amount recoverable in respect of the claim of each represented member of the class: sect 47C(2). The quantification of an overcharge resulting from infringement of competition law always involves estimation and Mr de la Mare draws attention to the observations of Arden LJ in *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2008] EWCA Civ 1086 at [110], applying to competition law damages the celebrated dictum of Lord Shaw that the difficulties of quantifying compensation are to be dealt with “by the exercise of a sound imagination and the practice of the broad axe”. On that basis, it is possible here to arrive at a fair approximation of the estimated individual loss on a common basis within the sub-classes.

91. The Applicant relied for this purpose on the expert reports of Mr Noble. It was emphasised that these were only preliminary reports, prepared at the outset of the litigation for the purpose of demonstrating a methodology whereby the losses could be fairly estimated, and to give initial estimates of the amount of the claim. Mr Noble explained on the basis of the evidence in the Decision and wholesale sales volumes provided by Pride that the total class numbers between 27,200 and 32,400.⁵ Further, a reasonable estimate was that 27.5% of scooters were purchased online. On that basis, the numbers within each sub-class are as follows:

	Physical outlet store	Online
Relevant Models	7,500 – 8,900	2,800 – 3,400
Other Pride models	12,200 – 14,600	4,600 – 5,500

92. Mr Noble sought to estimate the over-charge for each sub-class, based on assumptions intended to reflect the purchases within each group, on a broad basis. He used the prices advertised by the “rogue dealers”, which were obviously less than the RRP, as reflecting an average internet price, and as a reasonable proxy for the prices in physical stores, took a weighted average of their prices of the Relevant Models, and applied a “before-and-after”

⁵ A main reason for the range is the uncertainty of the exact number of scooters purchased by leasing companies, which are not included in the class.

methodology to assess the differential between prices during the overall period of the infringements found in the Decision and subsequently. After actual sales prices of Pride scooters by one of the Relevant Retailers, MT Mobility Ltd, were made available in a witness statement by its director, Ms Jemma Dunn, Mr Noble produced a second report in which he revised his calculations using those pricing data to compare prices in the periods February 2010-February 2012 with a period immediately thereafter (March 2012 to December 2014). On this basis, his revised estimate was that the overcharge for Relevant Models was 16.2% and for the other Pride models (“umbrella models”) was 4.6%.

93. Obviously, these estimates were arrived at using limited pricing data, but they led Mr Noble to make a preliminary estimate of the overall damage at between £2.7 million and £3.2 million, before interest.

Pride’s submissions

94. Mr Bates, who conducted this part of the case on behalf of Pride, submitted that the CAT should adopt a rigorous approach to the certification of claims as appropriate for collective proceedings on an opt-out basis, referring to various authorities from Australia, Canada and the US. The burden was on the Applicant, and the CAT should not simply take at face value the assertions made by her and her economic expert. The application of a “broad axe” to the calculation of damage was not a dispensation from the requirement on the Applicant to demonstrate a strong, or at least a credible, case for a substantial award of damages.
95. He emphasised that this was not a ‘normal’ case of price-fixing or even vertical resale price maintenance. The infringements found in the Decision were an advertising restriction of limited scope. It applied only to the seven Relevant Models and to the eight Relevant Retailers, whereas some 250-300 retailers (of the 600-700 supplied by Pride) regularly sold Pride scooters (of which there were some 38 models) at the material time. Even the Relevant Retailers were not required in their online advertising to quote the RRP: they were prohibited from quoting any lesser price, and their web page could simply state: “call for best price.” Moreover, the period of infringement was not the same in each case: although the periods overlapped, no more than six Relevant Retailers were

committing an infringement at any one time: see the Table at para 12 above. And even during the period that each Relevant Retailer was found to have infringed (the “Relevant Period”), the Decision recognised that the Relevant Retailers did not always adhere to the arrangement.

96. Although the findings of infringement are binding, the OFT held that they were infringements by object and so was not required to make any finding of actual effect. It was for the Applicant to prove the extent of the overcharges, if any, which were caused by the infringements.
97. A mobility scooter is a significant purchase, given the expenditure involved, the importance of the product for the consumer and the fact that it is typically used for several years. It was not disputed that this is a market where consumers negotiate and pay different individual prices.
98. Pride denied that the infringements had any effect on prices at all, but if they did, the overcharge varied by individual customer. Pride summarised its case in this regard as follows in its Response (at para 8(b)):

“any such loss was confined to only a small number of consumers, representing only a very small proportion (probably less than 1 percent) of the members of the Proposed Class. Those consumers would be a sub-set of those who (i) bought a scooter of a Relevant Model during the Relevant Supra-Period from a Relevant Retailer, and (ii) did so after seeing that model on a Relevant Retailer’s website during its Relevant Period, in circumstances where the webpage did not show a specific below-RRP price for that model, and (iii) did not see that model being advertised on any website of any retailer that was advertising the scooter at a specific below-RRP price (i.e. a retailer that was, to use the term employed by Pride at the time, an “internet rogue”), and (iv) did not see, in relation to that model, in any other advertising (e.g. print, in-Showroom, direct mailshot, etc.) indicating a price for that model which was at the level of the prices being advertised for that model by the “internet rogues” (the “Internet Rogue Advertised Price”), and (v) bought the scooter at a price that was higher than the Internet Rogue Advertised Price.”

Accordingly, to determine whether any consumer suffered damage it was necessary to ascertain each consumer’s ‘buying story’; and that could not be done on a common basis.

99. For this purpose, Pride relied on the report by Mr Parker, in response to Mr Noble’s report. Mr Parker challenged Mr Noble’s methodology both conceptually and empirically. He considered that it is necessary to distinguish the “direct effects” of the infringements, which he defined as the effect on

“customers that saw Policy-compliant advertising for the Relevant Models at the Relevant Retailers” during the Relevant Period “and so would have seen lower advertised prices in the counter-factual.” These effects are to be contrasted with the potential “indirect effects”, being the effect on customers who “did not see Policy-compliant advertising.” The indirect effects therefore covered both a market-wide effect on the prices of Relevant Models, and the market-wide effect on the prices of other Pride models. On this approach, even the direct effects depended on the search behaviour and preferences of the individual customer.

100. Mr Parker developed his analysis in terms of the price comparisons a customer may have seen, both with Relevant Models from other Pride dealers and competing models from other manufacturers. Using the “Wayback Machine” archiving service to examine the results that would have been generated by internet searches at the material time, he sought to show that it was overwhelmingly likely that if a consumer searched for a Relevant Model he or she would have seen it advertised at prices substantially below the RRP.
101. Mr Parker considered that his “direct effects” were therefore limited to sales of Relevant Models made by Relevant Retailers within the Relevant Period. Based on Pride’s data of wholesale sales to the Relevant Retailers, these comprised only 944 sales. Further, Mr Parker took the view that the direct effects applied only to online sales, which he estimated at 260 (i.e. out of the 944). He considered that the internet rogue prices provided a reasonable basis for determining the counterfactual prices (i.e. prices that would have been charged in the absence of the infringements) and estimated the upper bound of any damages at £312,000 before interest, calculated on the assumption (which on the evidence of Ms Dunn was unlikely) that all those customers paid the RRP. Given the very limited scope of the direct effect, Mr Parker considered that there was no likelihood of there being any indirect or umbrella effect on sales from other retailers or of other models.

Discussion

102. We accept that the approach of the CAT to certification of claims for a CPO should be rigorous and that we cannot simply take at face value whatever may be said on behalf of the Applicant. However, while it can be helpful to be

referred to US authorities, we consider that the US approach to certification of common issues for the purpose of class actions is of limited assistance. Certification of class actions in the United States involves extensive discovery, deposition and cross-examination of witnesses and long hearings. The American Bar Association's *Antitrust Class Action Handbook* (2010) states (at p 33):

“Modern class certification proceedings routinely involve long evidentiary proceedings preceded by massive discovery efforts, expert economists, and *Daubert* motion practice. Filing an antitrust case as a class action and properly following through with a motion with any reasonable chance of success should be expected to be a multi-year, multi-million dollar proposition.”

103. Moreover, a critical question in many US certification proceedings is whether the common issues “predominate” over individual issues, as required by rule 23(b)(3) of the Federal Rules of Civil Procedure. There is no corresponding requirement under sect 47B CA: see the *Guide* at para 6.37.

104. The approach under the UK regime of collective proceedings is intended to be very different, with either no or only very limited disclosure and shorter hearings held within months of the claim form being served. We consider that more appropriate guidance can be derived from the position in Canada, where almost all the provinces have had a class action procedure for at least a decade (in Ontario since 1993) and the character of certification applications does not assume the pattern prevailing in the United States. In *Pro-Sys Consultants Ltd v Microsoft Corp.* [2013] SCC 57, the Supreme Court of Canada addressed the approach that should be applied to expert evidence concerning the overcharge when determining whether to certify a class action in an antitrust case. The judgment of the Court was delivered by Rothstein J, who noted (at para 113) that:

“[t]he loss-related common issues, that is to say the proposed common issues that ask whether loss to the class members can be established on a class-wide basis, require the use of expert evidence in order for commonality to be established.”

105. Rejecting the argument of the defendant that the court should weigh the competing expert evidence adduced by both sides and apply a robust or rigorous standard, Rothstein J continued (at para 118):

“In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide

basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case is question. There must be some evidence of the availability of the data to which the methodology is to be applied.”

We consider that this is the approach which should similarly apply under the UK regime.

106. We have given only a summary of some of the key points made by the experts. While we can see force in some of the points made by Mr Parker, and developed in argument by Mr Bates, it is not the role of the Tribunal at this stage of the proceedings to choose between the approaches of the two expert economists. Mr Noble expressly recognises that the prices paid by consumers were subject to individual negotiation and that there are accordingly “person-specific factors” affecting the size of individual overcharges. The method he proposes critically does not depend on establishing the actual prices paid by individuals in the class, but focuses on estimating the *differential* shift in prices across the various sub-classes. We further note Mr Noble’s criticism, in his supplementary report, of the approach of Mr Parker as ignoring the dynamic response of retailers to the pricing of the Relevant Retailers and the conduct of consumers. Thus it is by no means clear that the rogue internet prices during the period of the infringements should correspond to the counterfactual prices (as Mr Parker has assumed). The prices posted by the internet rogues may also have been influenced by the BROPA Prohibition if that Prohibition affected the competitive climate: indeed, Mr Noble in his first approach sought to estimate the overcharge in part by comparing the prices of the internet rogues during and after the period of the infringements.
107. However, as Mr Noble himself pointed out in his supplementary report, a fundamental difference between him and Mr Parker is that he did not distinguish between the eight Relevant Retailers and the rest, but treated all Pride retailers equally. Mr Noble focused on the effects of the market-wide policy applied by Pride as regards online advertising, as compared to a counter-factual where there was no such policy.

108. It is of course correct that the OFT found that Pride had such a market-wide policy. It may be that a large number of Pride retailers indeed changed their online advertising under the influence of that policy. But Pride was not in a dominant position and that policy was not unlawful. The only breaches of competition law occurred when the assent by a retailer to the policy was communicated to Pride so as to reach the level of an agreement or concerted practice for the purpose of the Chapter I prohibition. The Decision found such unlawful arrangements with the eight Relevant Retailers over specific periods in each case. Since this is a follow-on claim, the question is what loss flowed from those infringements, not from Pride's policy.
109. Moreover, the OFT clearly envisaged that there may have been further infringements, beyond those which they established: see the Decision at paras 1.11 and 3.225, and the direction at para 4.3. The OFT confined its finding of infringement to the cases where the evidence was strong, and the OFT understandably did not see any need to go further, especially when it was not imposing any fines so that there was no practical concern about unequal treatment. As Mr de la Mare put it, the OFT chose "the low hanging evidential fruit". Indeed, since the policy applied across the dealer network and Pride had some 250-300 active dealers, it would be surprising if in fact only eight agreed to adhere to the policy.
110. The importance of this does not rest simply on the fact that the Claim Form expressly states that this is a follow-on claim. The transitional limitation provisions applicable to sect 47B CA permit a follow-on claim to be made from a decision which became final no more than two years before the new provisions came into force (i.e. 1 October 2015), or a stand alone claim where the acts complained of arose no more than two years before the same date: rule 119(2)-(4) of the CAT Rules 2015. Although Pride challenged that on human rights and EU law grounds, as discussed and dismissed above, that is why this claim is in time as a follow-on claim. But as Mr de la Mare rightly stated, it would not be possible for these proceedings to be brought as a hybrid, part follow-on/part stand alone claim, alleging also further infringements, since the latter allegations would be out of time. That may seem harsh in this particular case, but the degree to which collective proceedings could stretch back before 1 October 2015

is of wider significance and the transitional rule represents a policy decision by the Government, endorsed by Parliament.

111. Mr de la Mare argued strenuously that the matter should be approached on the basis that in the counter-factual, Pride would not have operated the policy at all. The infringements found in the Decision arose because of the policy, and the counter-factual world, in which there were no infringements, assumes that both Pride and the eight Relevant Retailers would have conducted themselves differently. He submitted that to seek to distinguish between the effect of the eight infringements and of the wider policy is artificial.
112. We can see the attraction of that argument, which was very ably presented. However, we have concluded that it is misconceived as a matter of law. We of course do not know if there were any other, and if so how many, infringements and we do not make any assumptions. But if we were to adopt the approach urged by Mr de la Mare, we would be enabling the Applicant to claim damages not merely for the result of the eight infringements but for a policy which was not unlawful and for any other infringements which were unlawful but for which a claim is time-barred. This would be to allow the Applicant to circumvent the boundaries of a follow-on action, and in effect recover for the represented class by the back door what she could not recover by the front. The fact that the infringements were *a consequence* of the policy does not mean that the loss recoverable for the infringements is equated to all the loss caused by the policy which was their antecedent. To accept the contrary would mean that the total damages would be the same even if only one Pride dealer (instead of eight) had agreed to the BROPA Prohibition, so that there was only one infringement of limited scope instead of the eight infringements found. That cannot be right.
113. Where does this leave the CPO Application? Mr Noble, in his very frank and helpful oral evidence, accepted that he had not approached the definition of sub-classes and thus the estimation of loss on this basis. He had not been instructed to do so. But in response to the Tribunal's questions he considered that this would be possible. He would need to consider separate sub-classes for those who purchased Relevant Models from the Relevant Retailers during the Relevant Period; those who purchased other Pride models from the Relevant Retailers; and then sub-classes for those who purchased from other Pride dealers

whose prices were affected by the BROPA Prohibition on the Relevant Retailers, which would be the ‘umbrella’ claims. Provided that sufficient data were available of prices at the relevant times from Relevant Retailers, of the kind already supplied by Ms Dunn for MT Mobility Ltd, Mr Noble considered that he would be able to revise his methodology accordingly.

114. We therefore invited the parties to consider whether the Application should be adjourned to enable the Applicant to reformulate her claim and definition of sub-classes accordingly. That might involve limited orders for third party disclosure, pursuant to rule 63 of the CAT Rules 2015. Although disclosure is not encouraged as part of a CPO Application, the CAT has recognised that it may sometimes be appropriate: *Guide*, para 6.28.

115. Mr de la Mare responded by requesting an adjournment, albeit arguing that Mr Noble should be able to take account of the effect of Pride’s policy on other retailers. Mr Bates for Pride strongly resisted any adjournment, which he said in effect, would be an unwarranted indulgence afforded to the Applicant. He submitted in particular:

- a. The Applicant had had ample time with the assistance of her legal advisers to prepare her claim and seek any disclosure that was needed. Pride is a small company which had devoted considerable effort to meeting the claim as framed, including the commissioning of a very full expert’s report. The regime under sect 47B CA whereby collective proceedings require the approval of the CAT was designed as a safeguard for defendants. To permit the Applicant now to reformulate her case gave rise to unfair prejudice to Pride.
- b. There was no realistic prospect that the Applicant could formulate a case that was suitable for an aggregate award of damages on the basis of these revised sub-classes. Having regard to the reality of consumer purchasing in this market and the small number of Relevant Retailers, there was no credible case that consumers purchasing from other retailers suffered any loss. Those umbrella claims constituted the overwhelming majority of the total class of 27,200-32,400, since only some 944 Relevant Models were sold by the Relevant Retailers over

the Relevant Period. Moreover, even if there was an average overcharge, the loss suffered by any consumer depended on his or her individual purchasing behaviour and so cannot constitute a common issue or enable proper distribution of any aggregate award.

116. As regards the first objection, we recognise that this is a burden on Pride, but that can be substantially mitigated by an order for costs if the Tribunal considers that appropriate. It must be remembered that Pride was found by the OFT to have committed a hard-core infringement of the Chapter I prohibition with the object of reducing price competition. Moreover, the present proceedings are only at the initial stage, and claimants are usually allowed to amend their case so far in advance of trial. We do not see that a harsher test should apply just because these are collective proceedings.

117. We are more concerned by the second objection, which Mr Bates developed in impressive submissions based on the analysis in Mr Parker's report. However, we have in the end concluded that it would be appropriate to grant the Applicant an adjournment and the opportunity to amend the Claim Form to propose revised sub-classes and a methodology which focuses on the effects of the agreements that were the subject of the Decision, provided of course that the other conditions for a CPO are satisfied. We reach this conclusion for several reasons:

- a. Mr Noble had not approached the estimation of loss on the basis that we have held to be correct, having regard to the limits of a follow-on case. Having considered it for the first time while in the witness box, he felt that it would be possible to put forward a methodology that would achieve this, on the basis that pricing data should be available from some other Relevant Retailers (beyond the limited data from MT Mobility Ltd), helped by the fact that their respective periods of infringement were not identical, and from some other retailers. Mr Noble has great experience in the quantification of competition law damages (he led the team from Oxera which worked with the European Commission to develop guidance on this topic) and he struck us as a careful and cautious witness. We think it would be wrong to deny him this opportunity.

- b. Although Pride itself does not have data on the prices at which its scooters were sold, beyond the ‘rogue reports’ which Mr Noble has already seen, there are grounds to expect that a number of retailers have retained data on their pricing, which could be obtained. Whilst two of the eight Relevant Retailers are no longer in business, MT Mobility Ltd appears to have full records as disclosed in Ms Dunn’s evidence, and the response of 21 other dealers to inquiries made by the Applicant’s solicitors suggested that they had records of their sales during the material period, although in many cases they would only disclose those pursuant to a judicial order or on payment of their administrative expenses.
- c. The OFT found that the agreements and/or concerted practices had a “not insignificant” impact on competition in the supply of mobility scooters in the UK, and concluded that the BROPA Prohibition was “liable to lead to consumers paying higher prices” for Pride scooters. Mr Bates did not accept that the latter was a specific finding of fact, and in any event contended that any such findings were not an essential part of the Decision since the OFT held that this was an infringement by object and not by effect. He pointed to the proviso in sect 58 CA, whereby this finding is binding in the present proceedings “unless the Tribunal directs” otherwise, in contrast to sect 58A CA, whereby the infringement decision is binding without qualification. In *Enron Coal Services Ltd v English Welsh & Scottish Railway Ltd* [2011] EWCA Civ 2, Lloyd LJ (with whom Jacob and Patten LJ agreed) explained, at [50]:

“That is a comprehensible regime because the regulator may make findings which are directly relevant to a decision as to infringement, but it may also make findings of much less direct relevance. Findings in the former category should be regarded as binding, because to challenge them would be tantamount to challenging the finding of infringement. However, if the finding is peripheral or incidental, on the one hand to question it may not involve subverting the infringement finding and on the other it may be fair and sensible because the undertaking may not have been concerned, for the purposes of the regulatory proceedings, to contest such a point, whereas if the finding is relied on in proceedings for damages it may have a much greater importance.”

Mr Bates submitted that the present was just such a case, where it was appropriate for the Tribunal to direct that any findings by the OFT of effect are not binding. However, we consider that it would be inappropriate to rule on that matter at this stage. And whether or not binding, it is nonetheless very relevant that the OFT reached the view, after a lengthy investigation, that the infringement had such an effect. We further note that in a letter dated 13 July 2016 to Pride's solicitors, a director of Discount Mobility Plus Ltd, one of the Relevant Retailers, stated:

“... our objective was to offer the best selling price to our customers and it was your client who was intent on stymieing this in order to protect the other “various retailers” to whom you refer.... who were seeking to maintain very high prices....”

- d. The class which the Applicant seeks to represent comprises many particularly vulnerable consumers. The amount of the loss said to have been suffered by each consumer may be small relative to the usual measure of competition law damages, but for many of the individuals concerned it may well be significant. If there is a plausible way in which the Applicant may be able to pursue collective proceedings on their behalf, it would be harsh to deny her that opportunity.

118. This conclusion does not pre-judge the outcome of an amended CPO Application. It will be necessary for the Applicant to address not only the question of quantification but also the question of causation, since much of the loss claimed relates to the umbrella effect of the infringements on the prices charged by other Pride retailers and also for other Pride models. Thus it will not be sufficient to establish a fall in prices after the end of the infringements; the Applicant will have to show that there is a basis for demonstrating that such a change is attributable to the end of the infringements and not to other factors. It may turn out that even an amended Claim Form and supported by expert evidence putting the claims on a revised basis still faces considerable difficulties.

119. We should add that we do not consider it is appropriate to require Pride's expert to meet with Mr Noble to discuss and seek to agree the additional evidence or

data required for Mr Noble to revise his approach and estimation of damages, as was suggested by Mr de la Mare. This is a matter for Mr Noble to consider with the Applicant and her advisers. It is for them to determine the evidence they seek and require in order to pursue the action.

120. As stated above, our decision is of course subject to the other conditions for a CPO being satisfied, and it is to those that we now turn.

Suitable for collective proceedings

121. Given the size and nature of the class, and the amount of loss allegedly suffered by individuals, it is not suggested that it would be cost-efficient or reasonable for the claims to be brought other than by way of collective proceedings. The real objections to the suitability of this case for collective proceedings advanced by Pride rest on the same grounds as are summarised above in connection with the common issues condition. To that extent, therefore, the suitability condition does not require further, independent consideration.

122. However, with a potentially more complex economic analysis, the costs of pursuing the proceedings may increase; and in limiting the claim to the losses resulting from the infringements, the aggregate damages estimate may decrease. Rule 79(2)(b) of the CAT Rules 2015 provides that in determining whether claims are suitable to be brought in collective proceedings one consideration to be applied is “the costs and benefits of continuing the collective proceedings”. In his submissions, Mr Bates contended that the present action would involve very substantial costs for what he submitted could only be very small damages. Until a revised approach to assessment is carried out, it is impossible to assess what the total damages might be. We therefore only observe that the question of suitability may need further consideration.

Opt-out proceedings: strength of the case

123. Rule 79(3) of the CAT Rules 2015 provides that in determining whether collective proceedings should be opt-in or opt-out, the CAT may further take into account the strength of the claims. As made clear by the *Guide* at para 6.39, this does not require a full merits assessment but rather a high level view of the strength of the claims. Here, the fact that this is a follow-on case is significant,

since the claimants do not have to establish a violation of competition law. Further, the finding in the Decision that the infringements had an effect on prices, whether or not binding, shows that the claim for loss cannot be dismissed as weak.

124. The real difficulties in the case are those discussed above under the head of common issues. If they can be overcome, the case justifies certification on an opt-out basis, given the size of the class, the fact that the class members are individual consumers, and the estimated amount that each represented class member could recover. It should be emphasised that approving collective proceedings on an opt-in instead of opt-out basis does not affect the requirement that the claims raise common issues.

Authorisation of class representative

125. The Tribunal must consider whether it is just and reasonable for Ms Gibson to act as the class representative: sect 47B(8)(b). The criteria to be applied in making this assessment are set out in rule 78(2) of the CAT Rules 2015, of which the relevant provisions for present purposes are the following:

“In determining whether it is just and reasonable for the applicant to act as a class representative in the collective proceedings, the Tribunal shall consider whether that person -

- (a) would fairly and adequately act in the interests of the class members;
- (b) does not have, in relation to the common issues for the class members, a material interest that is in conflict with the interests of class members;
- ...
- (d) will be able to pay the defendant’s recoverable costs if ordered to do so; [...].”

126. Pride advanced objections to the authorisation of Ms Gibson in its written Response to the Application. Pride’s skeleton argument for the hearing advanced only more limited objections and Mr Bates did not seek to develop them further in his oral submissions.

Act fairly and adequately in the interests of the class members

127. Rule 78(3) of the CAT Rules 2015 provides:

“In determining whether the proposed class representative would act fairly and adequately in the interests of the class members for the purposes of paragraph (2)(a), the Tribunal shall take into account all the circumstances, including—

- (a) whether the proposed class representative is a member of the class, and if so, its suitability to manage the proceedings;
- (b) if the proposed class representative is not a member of the class, whether it is a pre-existing body and the nature and functions of that body;
- (c) whether the proposed class representative has prepared a plan for the collective proceedings that satisfactorily includes—
 - (i) a method for bringing the proceedings on behalf of represented persons and for notifying represented persons of the progress of the proceedings; and
 - (ii) a procedure for governance and consultation which takes into account the size and nature of the class; and
 - (iii) any estimate of and details of arrangements as to costs, fees or disbursements which the Tribunal orders that the proposed class representative shall provide.”

128. Ms Gibson is not a member of the class: she did not herself purchase a Pride scooter. She commenced these proceedings by virtue of her position as General Secretary of the NPC, a position she has held since 2009. As noted above, the NPC is an umbrella organisation for around 1000 pensioners’ groups across the United Kingdom, which campaigns about issues of concern to older people. Ms Gibson says that the NPC’s member groups have between them some 1.2 million members. The NPC was formally constituted as an independent organisation in 1992, but it is an unincorporated association and so cannot bring legal proceedings itself. Ms Gibson states in her evidence that she was appointed by the National Council of the NPC to commence these proceedings.

129. From her evidence, it is clear that Ms Gibson is an experienced campaigner and spokesperson. She describes her role as “the public face” of the NPC and she regularly meets with government officials and other organisations to discuss issues concerning pensioners.

130. The NPC had expressed its concern in the press about the pricing behaviour of sellers of mobility scooters prior to any thought being given to collective proceedings, and indeed before the new regime for such actions came into force. Ms Gibson explains her motivation for herself and the NPC being involved in this case as follows:

“The NPC has been made aware of vulnerable people, a large number of whom are elderly, being taken advantage of. The NPC has been given an opportunity to do something about it. It is right for us to help and address these wrongs if we can. People often use mobility scooters because they are frail or living with a disability... If they were overcharged then that is wrong and should be put right. I want to lend my voice to those people and stand up for them. It is pretty plain that unless we or some other organisations acts, Pride will provide them with no redress.”

131. The *Guide* states at para 6.30:

“...Recognising the inevitable complexity of collective proceedings, the Tribunal is also likely to consider the suitability of the proposed class representative’s lawyers. The proposed class representative would usually be expected to have the ability to provide proper instructions to its lawyers and be capable of exerting sufficient control over the legal work conducted and costs incurred. Indeed, the Tribunal may require the proposed class representative to demonstrate at least a basic understanding of the facts relevant to the claim, and the nature of the claims themselves, so as to satisfy the Tribunal that it is capable of instructing its lawyers.”

132. Ms Gibson explained that in acting as class representative she will have the assistance of the NPC’s full-time national officer, Mr Duncan-Jordan, and receive administrative assistance from its part-time staff. She and Mr Duncan-Jordan have held numerous meetings with the solicitors instructed on her behalf, and she is being sent copies of the key documents and updates on the expenditure incurred. She has attended all the hearings to date before the Tribunal and says that she intends to continue to do so. She regularly reports on the progress of the case to the National Council and Executive Committee of the NPC.

133. The solicitors instructed by Ms Gibson are Leigh Day. That firm has extensive experience of group litigation and a dedicated International and Group Claims Department. Mr Christopher Haan, an associate of the firm in that department who has the conduct of this matter, made a witness statement setting out their experience. Leigh Day does not have significant experience of competition law cases, but on behalf of Ms Gibson it has instructed specialist leading and junior Counsel who do have such experience.

134. Mr Haan in his evidence satisfactorily describes the litigation plan prepared for the proceedings and covers such issues as disclosure and likely evidence. As regards notification to class members, Leigh Day was able to secure on

favourable terms the services of a US company with extensive experience of class action administration, Signal Interactive Media LLC (“Signal”), and if a CPO is granted Signal will manage a website (part of which is already live) on which regular updates on the litigation would be provided. As regards distribution of any award to class members, Mr Haan explains that it is intended to engage a neutral third party to assess and process the claims and determine disputes that may arise regarding proof of identity or proof of purchase.

135. With the Claim Form there was filed a comprehensive class notice plan prepared by Signal. Leigh Day also filed detailed costs budgets, prepared in accordance with Precedent H and the principles required by the Civil Procedure Rules. Mr Haan explains in his evidence that all the lawyers are acting on 100% conditional fee arrangements (i.e., no-win, no-fee), and that all disbursements, which include the expert’s fees, are being funded by Leigh Day.
136. Pride points out that Ms Gibson does not appear to have prior experience of managing litigation, and submits that for all Ms Gibson’s good intentions and good faith, her evidence suggests that she does not altogether understand the contested issues of fact and law in the case so as to be able sufficiently to control the lawyers. However, the legal and factual issues here are complex and any non-lawyer could be expected to understand them only on the basis of legal advice. We have no reason to think that Ms Gibson will be unable to understand that advice when it is given, or that in consultation as appropriate with the National Council or Executive Committee of NPC she will not be able to take appropriate decisions about the litigation in the interests of the represented class.
137. As for the question of what will happen if Ms Gibson ceases to hold office in the NPC, the CAT Rules 2015 make provision for variation of a CPO by authorisation of an alternative class representative: rule 85(2)(b).
138. Finally, in this regard, we do not regard the fact that the impetus for the collective proceedings came from Leigh Day as objectionable. This seems to us almost inevitable with collective proceedings in particular for consumers, most of whom would be unaware that it was practicable to bring proceedings of which the cost vastly exceeds the individual loss they suffered. The relevant question

is whether the class representative is able to ensure that the proceedings are then conducted in the interests of the class and not of the lawyers.

139. Accordingly, we find that Ms Gibson would act fairly and adequately in the interests of the represented class and that neither she nor the NPC to whom she reports has any interest in conflict with those of the class members.

Ability to pay Pride's costs

140. Neither Ms Gibson nor the NPC would be able to cover Pride's costs. Ms Gibson has accordingly arranged, through third party litigation funders, Burford Capital (UK) Ltd ("Burford"), an ATE insurance policy underwritten by Great Lakes Reinsurance (UK) SE ("Great Lakes"), a subsidiary of Munich Re, and a copy of the policy was exhibited by Mr Haan. It covers any liability to pay Pride's costs up to £1.08 million and Ms Gibson's own disbursements in the event that the claim is unsuccessful. Mr Haan confirms in his evidence that in the event that the indemnity in the policy is exceeded, Leigh Day will give priority to payment of Pride's costs over recovery of its own disbursements.
141. Pride has filed two detailed costs budgets: the first concerns the CPO application and totals some £477,000 (excluding a provision for costs of an appeal); the second, from the grant of a CPO to trial, totals some £951,000. The overall total is therefore well in excess of the cover under the ATE policy. Pride accordingly submits that the requirement under rule 78(2)(d) is not satisfied.
142. As noted in the *Guide* at para 6.7, collective proceedings require intensive case management by the CAT, and that includes costs management. The Applicant has issued a separate application for a costs management order, which has not been heard pending the outcome of the application for a CPO.
143. Pride's recoverable costs would generally be limited to what is reasonable and proportionate. In its application for costs management, the Applicant criticises various amounts in Pride's costs budget. It would be wrong for us to express a firm view on those matters when this aspect has not yet been fully argued. However, we note that the costs budgets for the Applicant, including for the CPO application, amount in total to just under £1 million (excluding the costs of class notification and distribution). It is not evident why the costs of Pride

should exceed those of the Applicant, particularly when Pride’s lawyers have already done a great deal of work in gathering documentation and responding to the inquiries made in the course of the OFT’s investigation, and the Applicant’s solicitors are in London whereas Pride’s solicitors are based in Coventry where rates should be lower.

144. Pride itself observes that at this stage there is “a high degree of uncertainty” as to how the proceedings will develop. The Applicant’s solicitor states that the chief risk officer of Burford has told him that Burford/Great Lakes are able to increase the insurance indemnity, depending on their assessment of the value and merits of the claim. Most immediately, the cost budgets are likely to be affected by any orders for costs that may be made following this judgment.
145. Taking all this into account, we do not at this stage consider that the question of her ability to pay Pride’s recoverable costs is a basis for refusing to authorise Ms Gibson to act as class representative. This particular aspect can, if necessary, be considered further at the renewed application for a CPO.

CONCLUSION

146. Accordingly, for the reasons set out above, the Application for a CPO is adjourned with permission for the Applicant, if so advised, to file and serve a draft amended Claim Form and further expert evidence in accordance with this judgment, accompanied by a revised costs budget. Before doing so, the Applicant may wish to apply for limited third party disclosure: see para 114 above. We will hear submissions from the parties as to the terms of the order that should be made.

The Hon. Mr Justice Roth
President

Dermot Glynn

Joanne Stuart OBE

Charles Dhanowa OBE, QC (Hon)
Registrar

Date: 31 March 2017