

# IMAGINING ALTERNATE REALITIES

The future of collective  
proceedings in the UK

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## THE FUTURE OF COLLECTIVE PROCEEDINGS IN THE UK

In the Supreme Court's leading judgment in *Merricks*, the concept of relative suitability was found to be a key consideration in deciding whether to certify proposed collective proceedings.<sup>1</sup> This involves determining whether a case is more suitable to be brought as collective proceedings compared to the alternate reality that would prevail absent certification.<sup>2</sup> When considering certification in future, it may therefore be helpful for the Competition Appeal Tribunal (CAT) to explore, amongst other legal and factual issues, what this alternate reality might look like and whether certification represents a more or less suitable means of managing the relevant claims.<sup>3</sup>

The Supreme Court reached a view on this issue in *Merricks* that was fairly clear-cut: other proceedings were unlikely if certification were to be rejected, which suggested an alternate reality in which no proceedings would have been brought.<sup>4</sup> Whether or not this view was correct, exploring the alternate reality to certification may be a more complex exercise in other cases, and the framework laid out by the Supreme Court for determining relative suitability may require the CAT to engage with a number of considerations. For example:

- Where individual proceedings are deemed to be a realistic alternative to collective proceedings, how might the CAT evaluate the suitability of this scenario compared to certification?
- Where multiple collective proceedings are proposed, and an alternative to the certification of one might be the

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<sup>1</sup> We note that the dissenting judges held that absolute suitability is the relevant test at the certification stage. Under this view, the possibility that proposed collective proceedings may be more suitable than the alternative is not a sufficient justification to grant certification. See [2020] UKSC 51, paragraphs 117-119.

<sup>2</sup> [2020] UKSC 51, paragraph 56.

<sup>3</sup> These other legal and factual issues could include, for example, the extent to which the claims relate to common issues and the potential for conflicts to arise between the proposed class members.

<sup>4</sup> [2020] UKSC 51, paragraph 54.

## EXEC SUMMARY

The UK Supreme Court's leading judgment in *Merricks* provides guidance on the relevant standard for assessing proposed collective proceedings at the certification stage. However, given the nature of that case, there remains uncertainty as to how this guidance will be applied to cases with different characteristics. With certification hearings scheduled in several cases over the coming months, we explore the lessons that could be drawn from *Merricks*, and the challenges that the Competition Appeal Tribunal may face in seeking to apply these lessons.

certification of another, how might the CAT assess which is the most suitable?

In the following sections, we explore these issues in more detail.

## EXPLORING THE ALTERNATE REALITY TO COLLECTIVE PROCEEDINGS

In *Merricks*, the Supreme Court found that the proposed class members would have little incentive to bring individual claims in the absence of collective proceedings because the potential damages per individual were estimated to be relatively small.<sup>5</sup> This logic suggests that individual proceedings may be deemed a more likely alternative the greater the potential damages per class member. This may depend on, for example, the price of the product involved, the volume of purchases per proposed class member, and how these characteristics differ across the proposed class.

In most cases, one would expect the alternate reality absent certification to sit somewhere between the two extremes of none of the proposed class members bringing individual proceedings to all of them doing so. In considering issues of relative suitability at the certification stage, it may therefore be helpful to explore where on this spectrum the alternate reality might most likely sit. One may also wish to have regard to the question of which types of class members may be more or less likely to bring individual cases, and what this might imply for the ability of potential claimants to obtain redress (either through the courts or a settlement process). Although such an analysis may involve many complexities, it could potentially be informed by consideration of the characteristics of the proposed class members, including in relation to factors such as variation in the value of commerce and the potential effects of the infringement.

It may also be possible to draw some insights from any individual proceedings that are already being pursued for damages arising from the same infringement decision that forms the basis of the proposed collective proceedings. Such individual proceedings could, in theory, provide some indication as to which types of proposed class members may be more or less likely to bring individual proceedings absent the certification of any collective proceedings.

## ASSESSING THE RELATIVE SUITABILITY OF COLLECTIVE PROCEEDINGS

Where it is determined that there is some prospect of individual proceedings in the alternate reality, the CAT may wish to assess the relative costs and benefits of certification against this scenario. To the extent that there are public policy reasons for seeking to maximise the scope of the potential redress that could be achieved, a relevant consideration in this assessment may be any differences between the proposed collective proceedings and the alternative reality in coverage across potentially affected parties. Where litigation costs are likely to represent a significant deterrent to individual actions and collective proceedings can materially reduce these costs, the effect of certification may be to increase the number of potentially affected parties that are able to seek damages. In contrast, where it is believed that all proposed class members may pursue individual actions absent any collective proceedings, then there may not be scope for the collective proceedings to increase the potential level of redress that could be achieved.

Other considerations may also be relevant to determining relative suitability in situations where both collective and individual proceedings appear to be realistic possibilities. These might include:

- **Case management efficiency:** this may be an objective of collective proceedings in itself, given the potential to reduce court time and hasten resolution for the parties involved. In circumstances where collective proceedings are likely to deliver material efficiencies compared to individual actions, this might favour collective proceedings even if it were thought that an appropriate level of redress could be achieved through individual cases. In other circumstances, there may be

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<sup>5</sup> *Ibid.*

approaches to managing individual proceedings that allow similar or greater efficiencies to be achieved, or there may be scope for collective proceedings to increase complexity and introduce inefficiencies, leading to delays and/or increased litigation costs. All else equal, individual actions may be a more suitable approach in such situations.

- **Damages assessment accuracy:** depending on the circumstances, it may be more difficult in collective proceedings to reflect in any assessment claimant-specific factors that may have had a material impact on the level of damages. To the extent that this is the case, any damages estimates from collective proceedings may be likely to be less tailored to individual class members than if they were to pursue separate claims, and they may be grounded in more limited and less individualised disclosure; as such, they may less accurately estimate the true value of any damages suffered, either at the aggregate level or the level of individual claimants. In certain cases, however, claimant-specific factors may be of limited relevance, or it may be feasible to incorporate these factors relatively straightforwardly within collective proceedings.

In order to assess these factors, the CAT may wish to seek to establish, to the extent possible, how a range of issues would be addressed if certification were to be granted compared to the alternate reality in which certain individual proceedings are brought. This could include:

- **The factual evidence:** under a series of individual proceedings, this evidence would need to be gathered and considered for each claimant in turn. It may therefore be possible in collective proceedings to consider the factual evidence at a less claimant-specific level, such as by considering a sample of the relevant information for some proposed class members and extrapolating to others. In determining the merits of such an approach, it may be relevant to weigh up, on the one hand, the extent to which it could lead to case management efficiencies that could not be achieved in individual proceedings and, on the other hand, any potential implications for the degree of accuracy of any damages assessment and the extent to which it is grounded in the factual evidence. This exercise is further complicated by the potential for there to be a spectrum of alternative approaches to considering factual evidence that involve different balances of efficiency-related benefits and accuracy-related costs. This implies that it may be necessary to consider multiple alternative approaches in order to determine which is likely to lead to the most appropriate balance.
- **The approach to damages estimation:** where it is not feasible to conduct a claimant-specific quantitative analysis, collective proceedings may be more attractive than individual actions in terms of case management efficiency. This could be the case where, for example, market or product complexities suggest that the purchases of individual class members do not form a sufficient basis upon which to conduct a statistically robust analysis. Where it would be possible to conduct claimant-specific analyses in individual proceedings, then it may be relevant to consider the approach proposed in the collective proceedings and the balance that this approach implies between case management efficiency and accuracy. Again, there may well be a spectrum of approaches to the damages estimation that involve different balances between these two objectives, and it may be necessary to identify the most appropriate combination.

In many cases, understanding and evaluating these considerations is likely to be a complex exercise, and the result is unlikely to be clear-cut. For example, some economic issues may be claimant-specific and others may be equally relevant to all proposed class members, or the required factual evidence may be similar within certain sub-groups of the proposed class members but different from other sub-groups. To

the extent that this proves to be the case, the CAT may wish to consider, at an appropriate stage of the proceedings, the potential role of sub-classes in structuring any collective claims. Whilst the outcome of this exercise may be to ensure efficient management of the proceedings, determining the correct number and scope of sub-classes could itself represent a challenging exercise.

In addition to these considerations, the CAT may consider other factors in its decision-making process at the certification stage. However, even if its analysis were to be limited to the issues described above, it is clear that this would involve considering a complex web of issues at a stage of the proceedings where there may be an inherently large degree of uncertainty as to the evidence and analysis that will ultimately be required as the case proceeds.

## THE CASE OF MULTIPLE PROPOSED COLLECTIVE PROCEEDINGS

The discussion above focuses on instances in which the alternative to collective proceedings is likely to include some individual proceedings. However, where multiple collective proceedings are proposed (leading to a so-called carriage dispute), it may be relevant to consider whether the alternative to one collective proceedings could include another set of collective proceedings.

Where this is the case, the CAT may need to understand the relative merits and feasibility of the economic approaches for each proposed collective proceedings in order to determine which – if any – should be certified. In theory, this could create a competitive dynamic at the certification stage between different proposed collective proceedings, resulting in a need to flesh out the experts' methodologies for estimating damages at a significantly earlier stage than would be required in a scenario in which there is only one proposed collective proceedings. Moreover, where the applicants propose different underlying economic approaches for estimating damages, the CAT may need to engage with the detail of the respective methodologies in order to reach an informed view on their relative strengths and weaknesses. However, given the early stage of proceedings at which certification is considered – in particular, with limited disclosure having occurred – there is an open question as to how definitive parties can be as to their preferred approach at that stage.

As a result of these issues, it is currently not clear how the CAT will assess competing applications for collective proceedings. The upcoming *Forex* and *Trucks* certification hearings, which will each involve consideration of two proposed collective proceedings, may provide insights in this regard.

## CONCLUSION

The Supreme Court's leading judgment in *Merricks* provides guidance on how the CAT may consider the question of certification for collective proceedings. However, given the nature of the *Merricks* case, it remains to be seen how this guidance will be applied where it may be considerably more challenging to reach a view on the relative suitability of certification. It will therefore be interesting to observe how the CAT seeks to implement the Supreme Court's guidance in such cases. A delicate balancing act across a range of complex issues could be required.

*Frontier Economics is advising a number of applicants and respondents involved in proposed collective proceedings before the CAT.*

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