



UK collective actions: the suitability of the class representative in CRA claims

Introduction: the legal framework

On 1 October 2015, the UK introduced a collective action regime (i.e. a class action regime) for competition law, which allows classes of victims to claim losses suffered as a result of breaches of competition law. The regime was introduced by the Consumer Rights Act 2015 (“CRA”) and claims are brought in the Competition Appeal Tribunal (the “Tribunal”).

Any such damages action “*must be commenced by a person who proposes to be the representative in those proceedings*”. The Tribunal then decides whether to authorise the person to represent the class and make a collective proceedings order (“CPO”) to allow the claim to go forward as a collective action. The Tribunal will only issue a CPO if it is persuaded that the proposed class representative meets the various requirements of the Competition Act 1998, the Competition Appeal Tribunal Rules 2015 (the “2015 Rules”), and the guidance in the Competition Appeal Tribunal Guide to Proceedings 2015 (the “2015 Guide”).

The profile of the class representative

The class representative does not have to be a member of the class, and does not even need to be a natural person. It can be a company, either a pre-existing one such as an industry association, or one formed specially to bring the claim.

The Tribunal may authorise a person to act as the class representative (i.e. through the granting of a CPO) only if it considers that it is “*just and reasonable for the applicant to act as a class representative*”. The factors that the Tribunal is to take into account in determining whether it is just and reasonable for a proposed class representative to act include:

- a. whether the applicant would fairly and adequately act in the interests of the class members;
- b. whether the applicant has, in relation to the common issues for the class members, a material interest that is in conflict with the interests of class members; and
- c. whether the applicant will be able to pay the defendant’s recoverable costs, if ordered to do so.

In this article, we focus on the first criterion. To address the second and third factors briefly, however:

- The 2015 Guide identifies two examples of the types of potential conflicts that may arise between the applicant and the class they seek to represent: (i) where the class representative

has a stake in the legal fees incurred on behalf of the class; or (ii) where the class representative represents the class in a separate but related collective action which might affect the class recovery in the instant proceedings.

- Point c. above relates to the funding arrangements and adverse costs protection organised by a class representative when bringing the claim. This protection will generally come in the form of “after the event” (“ATE”) insurance, which is a type of insurance that will pay the defendant’s costs if the class representative loses. You can find more information about litigation funding and ATE [here](#).

The factors the Tribunal must take into account when determining whether a class representative would act fairly and adequately in the interests of class members include:

- a. whether the proposed class representative is a member of the class, and if so the proposed class representative’s suitability for managing 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; and
- c. whether the proposed class representative has prepared a plan for the proceedings which satisfactorily includes (i) a method for bringing the proceedings on behalf of the proposed class and process for notifying the proposed class of the progress of the proceedings; (2) a procedure for governance and consultation which takes into account the size and nature of the proposed class; and (3) an estimate of and details of arrangements as to costs, fees or disbursements.

In considering the suitability of an applicant, the Tribunal will consider whether the proposed class representative is:

- competent to manage a complex piece of litigation, while also adequately representing the class members’ interests;
- able to provide proper instructions to its lawyers (who, themselves, should be of suitable standing and experience) and exert sufficient control over the legal work conducted and costs incurred; and
- able 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.

Proposed class representative examples

Scott+Scott are currently advising proposed class representatives in two separate collective actions before the Tribunal. In both proceedings, the decision was taken to establish special purpose vehicles (“SPV”) to serve as the class representative, (i.e., a new company specially for the purpose of bringing the claim). Among other things, establishing an SPV “future-proofs” the claim, as it means that the claim can carry on even if the natural person running the SPV has to stop doing so for some reason (such as ill health). It also helps to prevent any one person from exposure to any financial risk which might be associated with bringing the proceedings.

Full control of the decision making of the SPVs lies in the hands of their respective sole directors. As illustrated below, these individuals have extensive experience in the relevant markets affected by the respective anti-competitive conduct, the skills to manage the proceedings and the profile to engage actively with the members of the proposed classes for the benefit of the claims.

- **Mark McLaren Class Representative Limited** is seeking to represent UK consumers and businesses who purchased new cars, in a [claim against five international shipping companies](#). [Mark McLaren](#) is the sole director and member of the Mark McLaren Class Representative Limited. Mr McLaren is a consumer champion who has dedicated a large part of his career to fighting for consumers, across a wide range of sectors. Mark spent nine years working for The Consumers' Association, more commonly known as *Which?*. He currently sits on the Consumer Panel of the Legal Services Board, and is a director of The Property Ombudsman.
- **Michael O'Higgins FX Class Representative Limited** is seeking to represent a class which includes pension funds, hedge funds and multinational corporations in a claim against five of the world's largest banks for manipulating the [foreign exchange market](#).

[Michael O'Higgins](#), a former Chairman of the UK Pensions Regulator, is the sole director and member of the Michael O'Higgins FX Class Representative Limited. Mr O'Higgins is an economist who has extensive experience in business and the public sector, with a particular emphasis on pensions. He is the current Chairman of the Local Pensions Partnership. He has previously been Chairman of the Channel Islands Competition and Regulatory Authorities, Chairman of the Pensions Regulator, Chairman of the NHS Confederation, Chairman of the Audit Commission, a non-executive director and Chair of the Audit Committee for Her Majesty's Treasury, Chairman of Centrepont, Chairman of a venture capital trust, Managing Partner of PA Consulting, a partner at Price Waterhouse (now PwC) and an academic at various universities (including the University of Bath, the London School of Economics, the Australian National University, and Harvard University).

We await with interest the first the granting by the Tribunal of the first CPO and with it a clear indication of the rules and guidance as they apply to the authorisation of a proposed class representative.

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