



RIAD: COLLECTIVE REDRESS AND CLASS ACTIONS

John Byrne
Therium Capital Management Limited

Berlin – 8th November 2019

Therium Capital Management Limited
11 Staple Inn, London, WC1V 7QH
john.byrne@therium.com
T +44 (0)20 3327 3460

THERIUM.

JOHN BYRNE - THERIUM.

- John Byrne is the CEO and Co-Founder of Therium.
- Therium is one of the world's largest litigation funders with over \$1 billion available for litigation funding.
- Therium has a presence in the UK, Continental Europe, the USA and Australia.

INTRODUCTION.

- Collective redress for whom?
- Consumers/Business/Others:
 - Michael O’Higgins FX Class Representative - v - Barclays Plc & Others**
 - Sister Marie Brigid (as Litigation Representative – v -Northern Territory of Australia)**
- The “Class” can be highly specific – see **Richard Lloyd –v – Google LLC.**

INTRODUCTION (continued).

Definition of the Class is as follows:

“all individuals who:

- (a) “at any date between 9 August and 15 February 2012 whilst they were present in England and Wales:
 - (i) had an “Apple ID”; and
 - (ii) owned or were in lawful possession of an iPhone 3G or subsequent model running iOS version 4.2.1 or later; and
 - (iii) used the Apple Safari internet browser version 5.0 or later on that iPhone to access a website that was participating in Google’s DoubleClick advertising service; and
 - (iv) did not change the default security setting in the Apple Safari internet browser and did not opt-out of tracking and collation via the Defendant’s “Ads Preference Manager”; and
 - (v) did not obtain a DoubleClick Ad cookie via a “first party” request made by their Safari browser of DoubleClick’s server; and
- (b) are resident in England & Wales at the date of issue or such other domicile date as the Court may order; and
- (c) are not a Judge of the Supreme Court, a Judge of the High Court (as defined in s.4 of the Senior Courts Act 1981) or a Master of the Queen’s Bench Division, who held office on or after 31 May 2017”.

COLLECTIVE REDRESS IN THE UK.

The UK allows for collective redress via three procedures:

- Group Litigation Orders (“GLO’s”);
- Representative Actions; and
- Competition Class Actions.

GROUP LITIGATION ORDERS.

- GLO's were added to the Civil Procedure Rules in 2000 (CPR 19.10)
- A Group Litigation Order is a form of class action.
- The High Court has power to make a GLO where there are claims with common or related issues.
- GLO's have an "OPT IN" procedure where claimants are registered.
- High degree of flexibility in how the litigation is managed.
- A GLO can only be brought with the permission of the Court.

REPRESENTATIVE ACTIONS.

- Representative actions have been possible for over 100 years.
- CPR 19.6 provides that:
 - (i) Where more than one person has the same interest in a claim:
 - (a) the claim may be begun; or
 - (b) the court may order that the claim be continued

by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.

- It is clear that (unlike a GLO), a representative action can be brought without the permission of the Court.
- A person can sue in a representative capacity without the authority of those they represent provide the conditions of CPR 19.6 are satisfied.

REPRESENTATIVE ACTIONS (continued).

RICHARD LLOYD – V – GOOGLE LLC

- Class size greater than 4,000,000 claimants.
- According to Google “a contrived and illegitimate attempt to shoehorn a novel “opt out” class action into the representative action procedure”.

REPRESENTATIVE ACTIONS (continued).

RICHARD LLOYD – V – GOOGLE LLC

First Instance

The Judge felt that this claim was “officious litigation” – where the main beneficiaries would be the funders and the lawyers.

Court of Appeal

The Court found “this case, quite properly, if the allegations are proved, seeks to call Google to account for its alleged wholesale and deliberate misuse of personal data it will ensure that there is a civil compensatory remedy for what appear, at first sight, to be clear, repeated and widespread breaches of Google’s data processing obligations”

REPRESENTATIVE ACTIONS (continued).

RICHARD LLOYD – V – GOOGLE LLC

First Instance

“The essential requirements for a representative action are absent. The representative claimant and the class do not all have the “same interest within the meaning of CPR 19.6(I)”

Court of Appeal

- “The represented class are all victims of the same alleged wrong, and all have sustained the same loss, namely control over their [browser generated information]”.
- “It is impossible to imagine that Google could raise any defence to one represented claimant that did not apply to all others”.

COMPETITION CLASS ACTIONS.

- Consumer Rights Act 2015 introduced opt-in and opt out collective redress mechanism.
- Proceedings brought in the Competition Appeal Tribunal (“CAT”).
- Breach of competition law.
- Claims can be brought by claimants or a body acting on behalf of consumers.
- CAT can make a Collective Proceeding Order (“CPO”) – group certification.
- In making a CPO the court considers:
 - does the claim concern the same or similar facts?;
 - is it just and reasonable for the representative to act on behalf of the class?; and
 - whether the action should be “opt in” or “opt out”.
- Limits of its use still being explored.

COMPETITION CLASS ACTIONS (continued).

- Seven cases to date:
 - *Dorothy Gibson v Pride Mobility Products Limited (2017)* – opt-out CPO refused.
 - *Walter Merricks v Mastercard* – opt out CPO granted by Court of Appeal; appeal pending to Supreme Court.
 - *Trucks* – two CPO applications (opt-in and opt-out) pending.
 - *Justin Gutmann v First MTR South Western Trains Limited* – opt-out CPO application pending.
 - *Justin Gutmann – v - London & South Eastern Railways Limited.*
 - *Michael O’Higgins FX Class Representative v Barclays and others* – awaiting opt-out CPO application.
- The Supreme Court decision on **Merricks** should provide clarity on the criteria for granting opt-out CPOs.

COMPETITION CLASS ACTIONS (continued).

Walter Merricks – v – Mastercard Incorporated & Anor

- Former financial ombudsman Walter Merricks has brought a claim on behalf of 46,000,000 consumers.
- Claim value estimated at £14billion.
- The Supreme Court will probably rule on this case before the end of the year.

COMPETITION CLASS ACTIONS (continued).

Walter Merricks – v – Mastercard Incorporated & Anor

Supreme Court to:

- Set the legal test for certification of class eligible for collective proceedings; and
- Resolve the correct approach to distribution of any award.

COMPETITION CLASS ACTIONS (continued).

Walter Merricks – v – Mastercard Incorporated & Anor

The High Court found:

- The claims were not suitable to be brought in collective proceedings and declined to make a CPO.

COMPETITION CLASS ACTIONS (continued).

Walter Merricks – v – Mastercard Incorporated & Anor

The Court of Appeal found in April this year:

- The CAT's self direction to the effect that it was required to scrutinise the applications ignore the facet of this process ... which is that certification is a continuing process under which the CPO may be varied or revoked at any time
- At certification, the proposed representative should not ... be required to demonstrate more than that he has a real prospect of success. This was not the text which the CAT applied.

NOTE: Permission has been given for this case to be appealed to the Supreme Court

COMPETITION CLASS ACTIONS (continued).

- CAT claims are attractive for funding:
 - Regulatory findings allow some claims to be brought on a “follow-on” basis, reducing legal risk.
 - Opt-out mechanism allows large claims to be brought without need to book build.
 - Aggregate damages mechanism facilitates loss assessment and proof on a class-wide basis.
 - Court of Appeal appears to be supportive of the regime, to make it work.

NOTE: No findings as yet on how multicity of claims will be resolved.

COLLECTIVE REDRESS & INSURANCE.

- Lack of capacity?
- Contract out claims - who is the insured?
- Security for costs and deeds of indemnity
- Who can claim in the Policy?
- Other related issues?