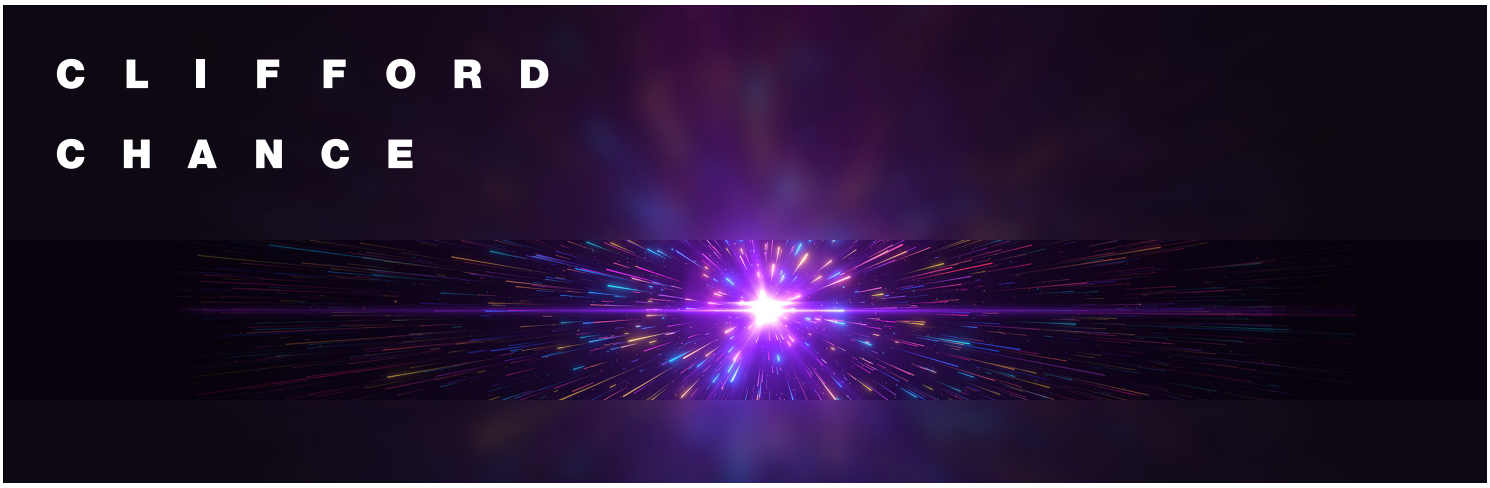

UK COMPETITION APPEAL TRIBUNAL REFUSES TO CERTIFY FACEBOOK COLLECTIVE ACTION IN DR LIZA LOVDAHL GORMSEN V META PLATFORMS, INC. AND OTHERS

On 20 February 2023, the Competition Appeal Tribunal (the "**Tribunal**") delivered judgment in the collective proceedings application of *Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and Others ("**Meta**").*

The panel, comprised of President of the CAT Sir Marcus Smith, Derek Ridyard and Timothy Sawyer, ruled that the application of Dr Lovdahl Gormsen, the Proposed Class Representative ("PCR"), to commence opt-out collective proceedings, should not be granted at this stage. The Tribunal found "issues with the methodology advanced by the Proposed Class Representative" and concluded that "[w]ithout significantly more articulation, there is no blueprint to trial." The application has been stayed for the PCR to re-articulate its proposed blueprint for trial.

Key issues

- Meta serves as a warning to potential CPO applicants that the Tribunal will closely scrutinise a proposed methodology in considering whether the PCR has satisfied the Pro-Sys test, and that a robust blueprint to trial is necessary for a CPO application to proceed.

THE *META* CLAIM

The PCR sought a Collective Proceedings Order ("**CPO**") for an alleged abuse of dominance by Meta, the parent company of Facebook. The PCR claims that in exchange for 'free' access to Facebook, a user had to agree to Facebook's Terms of Service, or would in any event be deemed to have accepted them. These included giving Facebook permission to collect, share, and otherwise process users' personal data, both on- and off-platform, and to view targeted advertising alongside other content on the social network platform, without payment. The PCR alleges that this amounts to an abuse of Meta's dominant position in the Personal Social Network Market and Social Media Market, by making users' access to Facebook contingent on the provision of personal data, by demanding an unfair 'payment in kind' for the provision of social networking services, and imposing other unfair trading conditions.

THE '*PRO-SYS* TEST'

Meta argued that the PCR failed to meet the *Pro-Sys* test – a test derived from the Canadian Supreme Court case of *Pro-Sys Consultants v. Microsoft* ("***Pro-Sys***"). This case held that the expert methodology of a class representative must offer a realistic prospect of establishing loss on a class-wide basis so that, if an overcharge (or loss) is eventually established at trial, there is a means by which to demonstrate that it is common to the class. The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. Meta argued that the PCR in this case had failed to meet the *Pro-Sys* test and that the PCR's application for a collective proceedings order should be refused.

The Tribunal noted that in the UK collective proceedings regime, the *Pro-Sys* test "*serves as a requirement…to ensure that before a claim is certified so as to proceed to trial, the parties satisfy the Tribunal as to the steps that need to be undertaken in the future so as to ensure that the claim, if certified to proceed, can be heard in an efficient manner, consistent with the Tribunal's governing principles.*"

The Tribunal emphasised that "*properly articulated pleadings…enable an arguable case to be tried*" and that this was also the purpose of the *Pro-Sys* test. The Tribunal explained that the reasons for a specific test, over-and-above pleadings, are threefold:

- In collective proceedings, there is less "*claimant control*", as "*conduct of the litigation vests in the class representative*". Therefore it is "*entirely right and proper that the class representative's intentions as to the future conduct of the litigation (including how the claim will be made good) receive a scrutiny that is higher than that facing the individual claimant.*"
- Assessing damages in collective proceedings "*involves a degree of uncertainty that cannot usually be unpicked or crystallised in conventional pleadings*", and the Tribunal must be "*satisfied that the proposed class representative knows how it is proposed to make the claim good.*"
- Finally, the Tribunal considered that "*[t]he Pro-Sys test serves as an excellent articulation of what the Tribunal ought to be doing in every case*", not only in collective proceedings.

THE *META* APPLICATION

In this application, the Tribunal took the view that the *Pro-Sys* test had "*not even been addressed - let alone any kind of "blueprint" to trial provided…*", and, in light of this, noted "*significant methodological difficulties*" that the PCR would need to rectify before the claim could proceed. For example, when considering the nature of the loss to the class, as set out in the Claim Form, the Tribunal noted that the PCR "*seeks to recover from Meta not the loss to the class, but the gain accruing to Meta through its unlawful conduct.*" The Tribunal made clear that, in consideration of the *Pro-Sys* test, it does "*not consider that the Claim Form can properly assert a claim to Meta's gains, as opposed to the class' loss*", although it did not go as far as to say this was a "*deficiency that renders the claim unarguable.*" The Tribunal ultimately concluded that "*the PCR has unequivocally failed the Pro Sys test*", and invited the PCR to conduct a "*root-and-branch*" evaluation of the methodology, including filing additional evidence, in order to provide a "*new and better blueprint leading to an effective trial of these proceedings.*"

WHAT HAPPENS NEXT?

The Tribunal did not refuse the PCR's application at this stage, as Meta had requested. A stay of six months was ordered, with the Tribunal indicating that, absent a new and better blueprint, the application will be rejected once the stay is lifted, as the Tribunal sees "*no point in permitting an untriable case to proceed to trial*."

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