Neutral citation [2024] CAT 47

Case No: 1339/7/7/20

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

12 July 2024

Before:

HODGE MALEK KC
(Chair)
WILLIAM BISHOP
EAMONN DORAN

Sitting as a Tribunal in England and Wales

BETWEEN:

MARK McLAREN CLASS REPRESENTATIVE LIMITED

Applicant and Class Representative

- and -

(1) MOL (EUROPE AFRICA) LTD
(2) MITSUI O.S.K. LINES LIMITED
(3) NISSAN MOTOR CAR CARRIER CO. LTD
(4) KAWASAKI KISEN KAISHA LTD
(5) NIPPON YUSEN KABUSHIKI KAISHA
(6) WALLENIUS WILHELMSEN OCEAN AS
(7) EUKOR CAR CARRIERS INC
(8) WALLENIUS LOGISTICS AB
(9) WILHELMSEN SHIPS HOLDING MALTA LIMITED
(10) WALLENIUS LINES AB
(11) WALLENIUS WILHELMSEN ASA
~~**(12) COMPANIA SUDAMERICANA DE VAPORES S.A.**~~

Non-Settling Defendants

Heard at Salisbury Square House on 30 April 2024

Judgment (Related Costs Application)

APPEARANCES

Nicholas Gibson and Sarah O'Keeffe (instructed by Scott+Scott UK LLP) appeared on behalf of the Class Representative.

Robert Marven KC appeared on behalf of Woodsford Group Limited, Litica Ltd and Lakehouse Risk Services Limited ("the Interested Parties").

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A. INTRODUCTION

1. This is an application by the Class Representative ("the CR") for an order that the costs and part of the damages paid to it by the Twelfth Defendant ("CSAV"), pursuant to a settlement agreement, be used at this stage to cover a portion of the CR's relevant costs, fees and disbursements incurred in connection with these proceedings ("the Related Costs Application" or "RCA"). This raises issues as to the basis and principles to be applied in approving such payments, including the stage at which such payments should be approved. The proceedings continue against the remaining Defendants and it may well be that, absent settlement, they will continue for a significant period of time. The substantive trial has been set down for a 10-week hearing commencing 13 January 2025.

2. The relevant costs, fees and disbursements are those owed by the CR to third parties who have taken a stake in these proceedings ("the Stakeholders"), namely (i) the claim's litigation funder ("Woodsford"), (ii) the insurers that provided after-the-event adverse costs insurance ("the ATE Insurers"), (iii) the CR's solicitors ("SSUK"), and (iv) relevant counsel. The total sum due to the Stakeholders as at the date of the application, and as a result of these contractual commitments, was said to be £24,170,142.

3. The background to the RCA is as follows. On 20 February 2020, the CR filed an application to commence collective proceedings combining follow-on claims against twelve defendants under section 47A of the Competition Act 1998. On 20 May 2022, the Tribunal certified the claims as eligible for inclusion in opt-out collective proceedings. The proceedings follow from an infringement decision of the European Commission adopted on 21 February 2018 in Case AT.40009 (Maritime Car Carriers), following a settlement between the Commission and various shipping companies. The settlement involved admissions of a breach of competition law, that the companies acted as a cartel in relation to the shipping charges imposed for deep sea carriage of new motor vehicles on various routes to and from the European Economic Area, which at that time included the UK. The class comprises all persons who purchased new vehicles of different brands in the UK in the period 18 October 2006 to 6

September 2015. As at the date of the RCA, the number of vehicles has been estimated by the CR to be 17.8 million, of which 6.9 million were registered to private purchasers. The estimate of the aggregate loss claimed (not including interest) is between £57 million and £115 million, the range reflecting the uncertainty as to the applicable overcharge figure. The claim increases to between £71 million and £143 million if simple interest is included. Given the large number of potential claimants, and the relatively small loss in respect of each individual vehicle relative to the costs of the proceedings, it was clearly desirable that these claims be pursued by way of opt-out collective proceedings and that the CR is able to be properly represented and funded in the process.

4. On 19 July 2023, the CR and CSAV reached an agreement in principle to settle the Collective Proceedings as against CSAV. The terms of the agreement were set out in a settlement proposal dated 27 September 2023 (the "CSAV Settlement"). On 5 October 2023, the CR and CSAV jointly applied to the Tribunal for a Collective Settlement Approval Order ("CSAO") (the "CSAO Application"), which was approved. The CSAV settlement sum was £1,500,000 split between £1,120,000 in damages, £280,000 in costs of the proceedings against CSAV and £100,000 to cover the costs of the CSAO Application itself. In the scheme of things, a settlement in the sum of £1.5 million with a damages element of only £1.2 million is only a small sum relative to the amount of the damages claimed against all of the Defendant shipping companies. The level of the settlement reflects that it is estimated by the CR's expert, Mr Tom Robinson of BDO LLP that the overall market share of CSAV relative to the other shipping companies in the market was only 1.7%. In his report at the certification stage, he estimated that the total quantum was £147 million, albeit the Defendants contend that this figure is exaggerated and based on incomplete information. Pursuant to clause 6 of the CSAV Settlement, on 18 October 2023, the CR filed a separate and unilateral application relating to costs, fees and disbursements (i.e. the Related Costs Application) to be paid from the damages paid by CSAV prior to the distribution of any proceeds to the class in the Collective Proceedings (clause 6).

5. Clause 6 was not a term of the CSAV Settlement in the sense that the settlement was not conditional on the success of the RCA. CSAV had no involvement in

the RCA, other than agreeing not to make any oral or written submissions in relation to it unless directed to do so by the Tribunal. Rather, the term was included to reflect the CR's obligations under agreements with the Stakeholders, which arise in the event of a successful outcome (as defined, in various different ways, in those agreements).

6. These obligations are reflected in Clause 10.1 of the Revised LFA, which requires the CR, when making an application for a Collective Settlement Approval Order, also to apply to the Tribunal for an order approving defrayment of part of any proceeds paid by a settling party in order to pay the CR's relevant costs, fees and disbursements.

7. On 6 December 2023, the Tribunal gave its ruling on the CSAO Application approving the settlement and setting out directions for the hearing of the Related Costs Application (*Mark McLaren Class Representative Ltd v MOL (Europe Africa) Ltd* [2023] CAT 75) ("the CSAO Judgment"). In crafting its directions, the Tribunal was mindful of the fact that the CR was required to make the RCA to satisfy its obligations to the relevant Stakeholders; at the same time, it has an obligation to always act in the best interests of the class. Those obligations are not necessarily compatible. On that basis, the Tribunal directed that the CR's submissions in relation to the RCA should adopt a "warts and all approach", meaning they should identify both the advantages and disadvantages of granting the application. The Tribunal also expressed concern as to the timing of the application and the stage at which the CR was seeking to pay, out of damages, sums to the Stakeholders. The proceedings against the remaining Defendants continue and, whilst the outcome is uncertain, they carry the potential of generating very substantial damages for the class if successful or swallowing up even the modest damages and costs recovered from CSAV, leaving the funders out of pocket, in the event that the remaining Defendants succeed in the defences at trial.

8. The Tribunal's CSAO provided for settlement by payments made on the following basis:

(1) £1,120,000 in full and final settlement of the claims for damages as against CSAV in these collective proceedings (the "Damages Sum"). This sum was to be held in an escrow account until further order (and, in any event, until final determination of the Funding Matters (including any appeal).

(2) £280,000 in respect of CSAV's share of the Class Representative's costs of these proceedings (excluding any costs awards already made and settled between the Class Representative and CSAV and/or the other Defendants) ("the Proceedings Costs Sum"). This sum was to be held in escrow and unallocated pending determination of the RCA. The Tribunal was not satisfied that this sum, once received, should be allocated to the costs of the proceedings against all the Defendants, which was the intention of the CR, rather than simply as against the costs of the claim against the settling party, CSAV.

(3) £100,000 by way of contribution to the Class Representative's costs of this CSAO Application or, in the event that such costs were less than £100,000, as an additional payment towards the CR's costs of proceedings so far ("the Application Costs Sum"). This sum was not required to be held in escrow and the Tribunal approved the distribution of this sum to cover the costs of the CSAO Application.

B. THE RELATED COSTS APPLICATION

9. The RCA is made pursuant to rules 53(2)(n), 98(1) and/or 104(2) of the Competition Appeal Tribunal Rules 2015 (the "Rules"), and by analogy with rule 93(4) and 94(4)(b). Each of those provisions is considered separately below, but the fact that so many different provisions are relied upon reflects an uncertainty on the part of the CR at least as to which are properly applicable in this case.

10. The RCA is supported by the following evidence:

(1) The third witness statement of Mark McLaren ("McLaren 3"), dated 17 October 2023, who is the sole director of the Class Representative, setting out his various funding arrangements, the costs he is seeking at this stage and the reasoning behind the RCA.

(2) The fifth witness statement of Belinda Hollway ("Hollway 5"), dated 17 October 2023, who is a partner in the law firm representing the Class Representative, setting out the rationale for the RCA as well as the legal and factual backdrop against which the RCA is made.

(3) The first witness statement of Steven Friel ("Friel 1") dated 16 October 2023, who is the chief executive officer of Woodsford, summarising the basis and terms of the LFA.

(4) The first witness statement of Jonathan Simon ("Simon 1"), dated 17 October 2023, who is an Executive Director at the firm which brokered the ATE insurance arrangements between Woodsford and the ATE Insurers. His statement sets out the process by which the ATE policies entered into with the ATE insurers were brokered.

(5) The various funding agreements with the Stakeholders including (i) the Revised LFA with Woodsford; (ii) Scott+Scott's Discounted Conditional Fee Agreement and (iii) Counsel's Discounted Conditional Fee Agreements.

11. As the CR has been successful as against CSAV in that a figure in damages has been paid, this triggers entitlements to claim very substantial sums by the Stakeholders from the CR, which must be funded out of any recoveries made in the proceedings. The CR is in principle under an obligation to apply for an order permitting payment of the full amount said to be currently owed to the Stakeholders, i.e. £24,170.142. That sum is formed of 8 separate entitlements (the "Stakeholder Entitlements"):

(1) the funder's outlay and the funder's appeal outlay (minus costs already recovered) pursuant to clauses 1.33 and 1.27 of the Revised LFA.

(2) the funder's fee (i.e. Woodsford's entitlement to a return on investment) pursuant to clauses 1.29 and 11 of the Revised LFA.

(3) the adverse costs fee pursuant to clauses 1.6 and 8.2 of the Revised LFA.

(4) the funder's appeal fee pursuant to clause 1.26 of the Revised LFA.

(5) ATE deferred and contingent premia pursuant to clause 4.2 and paragraph 5 of the Schedule of the ATE policy.

(6) SSUK's conditional solicitor's fees and uplift on fees.

(7) junior counsel's conditional fees and uplift on fees; and

(8) senior counsel's conditional fees and uplift on fees.

12. The funding arrangements with the Stakeholders had been revised by the CR and the Stakeholders in the light of the Supreme Court decision in *R (oao PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28; [2023] 1 WLR 2594 and of the Tribunal in *Alex Neill Class Representative Ltd v Sony Interactive Entertainment Europe Ltd* [2023] CAT 73. At the time of the CSAO, these revised arrangements were under challenge by the remaining Defendants. This challenge was resolved in the CR's favour by the Tribunal in its ruling on 7 February 2024 ([2024] CAT 10). There has been no appeal against this ruling. The Tribunal therefore proceeds on the basis that the funding arrangements themselves are valid for the purposes of the present application.

13. Clearly the CR is not in a position to satisfy the Stakeholder Entitlements in full out of the proceeds of the settlement with CSAV. Nor is it known at this stage whether or not the proceedings overall will be successful.

14. The CR had, by the time of the RCA hearing, reached an agreement with the Stakeholders whereby it would only seek to recover costs, fees and disbursements in a way which was commensurate with the proportion of the Collective Proceedings which had been settled. The RCA therefore only sought

to recover 1.7% of the monies owed from the Damages Sum (reflecting CSAV's 1.7% market share during the relevant period), i.e. £410,892. That agreement was only for the purpose of the RCA; the Interested Parties have reserved their right to claim the difference at some point in the future, if so advised.

15. The amount sought was also subject to the Tribunal's determination of whether the Proceedings Costs Sum could be approved to be paid out of the escrow account to the CR as 'Recovered Costs', as defined in the LFA. If that were not approved, then the amount sought from the Damages Sum would be £415,652. The exact breakdown of that figure is discussed below.

16. In this judgment the following issues arise for consideration:

    (1) What is the jurisdiction in the Tribunal to order the payments of costs and expenses in favour of the Stakeholders?

    (1) Should the Tribunal exercise its discretion to permit the use of the damages and costs paid by CSAV at this stage, and if so in what sum?

C. THE TRIBUNAL'S JURISDICTION TO MAKE THE ORDER SOUGHT

17. Collective proceeding are subject to the close supervision of the Tribunal, not just because of their complexity, but also because of the inherent potential conflicts of interests between the class members and those who work together to make such proceedings possible in a practical sense. The CR cannot realistically bring these proceedings without lawyers, funders and insurers. The lawyers all need to be paid and funders must have a good chance of recovering their outlay, plus interest and any funders fees for it to be worthwhile for them to put their capital at stake. Funders work on a portfolio basis recognising that they may lose some actions, but in others they may do well such that as a minimum they make a reasonable rate of return. Lawyers and funders may agree terms with the CR, but at the end of the day the payment of costs and expenses is subject to the approval of the Tribunal, which must balance the interests of not just the class members and the stakeholders, but in doing so must bear in

mind the importance of having a workable collective proceedings regime. As noted by Green LJ in *Le Patourel v BT Group plc* [2022] EWCA Civ 593 ("Le Patourel"), at [29]:

> "29. Pulling the threads together, the principal object of the collective action regime is to facilitate access to justice for those (in particular consumers) who would otherwise not be able to access legal redress. Embraced within this broad description is the proposition that the scheme exists to facilitate the vindication but not the impeding of rights. Also included is the proposition that a scheme which facilitates access to redress will increase ex ante incentives of those subject to the law to secure early compliance; prevention being better than cure. Finally, emphasis is laid on the benefits to judicial efficiency brought about by the ability to aggregate claims."

18. The Supreme Court in *Mastercard Incorporated v Merricks* [2020] UKSC 51 ("Merricks SC") at [73], has identified the barriers class members would face without third-party funding in the following terms:

> "73. […] In the context of suitability for collective proceedings or aggregate damages, it is no answer to say that members of the class can bring individual claims. They would face the same forensic difficulties in establishing merchant pass-on, and insuperable funding obstacles on their own, litigating for small sums for which the cost of recovery would be disproportionately large."

19. As noted by Green LJ in *Le Patourel* at [77]:

> "77. […] It is self-evident that in many large-scale consumer based collective actions the availability or non-availability of third party funding might be dispositive of whether the claim ever gets off the ground."

20. The importance of the Tribunal's supervision of costs has been highlighted by Green LJ in *London & South Eastern Railway Ltd v Gutmann* [2022] EWCA Civ 1077 ("Gutmann CA") at [83]:

> "83. By way of preface to our conclusions we acknowledge that it is important for the CAT to exercise close control over costs. There are conflicting considerations at play. On the one hand to enable mass consumer actions to be viable *at all* will invariably necessitate the

> assistance of third-party funders (see the discussion in *Le Patourel* (ibid) at paragraphs [75]-[85]) and the CAT must therefore recognise that litigation funding is a business and funders will, legitimately, seek a return upon their investment. On the other hand there is a risk that the system perversely incentivises the incurring or claiming of disproportionately high costs. And there is also the risk, highlighted in Canadian literature, that third-party funders have an incentive to sue and settle quickly, for sums materially less than the likely aggregate award. This, if true, risks undermining important policy objectives behind the legislation which include properly rewarding the class and creating *ex ante* incentives upon undertakings to comply with the law".

21. In cases where there is a successful outcome, whether by way of settlement or judgment against defendants, it is for the Tribunal to determine how any damages are to be dealt with in terms of distribution to class members, and payments of costs and expenses, including any return for funders. How that exercise is to be carried out is very much fact and case specific, and the Tribunal would endeavour to act fairly to all those concerned, mindful of the incentives and the need for a funding market for collective proceedings. Funding will dry up if funders are unable to recover their costs and disbursements and make a profit even on cases where there is a successful outcome overall. The importance of funders to collective proceedings and of proceedings being economically viable for them has been repeatedly remarked upon in the authorities, including *O'Higgins v Barclays Bank plc* [2020] EWCA 876 at [129]; *Consumers Association v Qualcomm* [2022] CAT 20 at [100]; and *UK Trucks Claim Limited v Stellantis* [2022] CAT 25 at [110].

22. We now turn to the question of the Tribunal's jurisdiction to make the order sought. This entails consideration of the various rules relied upon in the application, namely rules 53(2)(n), 98(1) and/or 104(2), and by analogy rules 93(4) and 94(4)(b).

(a) Rule 104(2)

23. Part 6 of the Rules (comprising rules 99 to 105) applies generally to proceedings before the Tribunal, whereas Part 5 (comprising rules 75 to 98) makes specific provision for collective proceedings and settlements. Reference was made by

the CR to rule 104 (2) as providing jurisdiction to make an award of costs, but it was accepted in the CR's submissions that this could not form the basis for an award covering all the various categories of costs and expenses sought in the application.

24. Rule 104 so far as material provides as follows:

> "104. (1) For the purposes of these rules "costs" means costs and expenses recoverable before the Senior Courts of England and Wales, the Court of Session or the Court of Judicature of Northern Ireland, as appropriate, and include payments in respect of the representation of a party to proceedings under section 47A (claims for damages) or 47B (collective proceedings) of the 1998 Act(a), where the representation by a legal representative was provided free of charge.
>
> (2) The Tribunal may at its discretion, subject to rules 48 and 49, at any stage of the proceedings make any order it thinks fit in relation to the payment of costs in respect of the whole or part of the proceedings.
>
> (3) For the purposes of paragraph (2), applications made under rule 62 or 63 are considered to be proceedings of the Tribunal.
>
> (4) In making an order under paragraph (2) and determining the amount of costs, the Tribunal may take account of—
>
> (a) the conduct of all parties in relation to the proceedings;
>
> (b) any schedule of incurred or estimated costs filed by the parties;
>
> (c) whether a party has succeeded on part of its case, even if that party has not been wholly successful;
>
> (d) any admissible offer to settle made by a party which is drawn to the Tribunal's attention, and which is not a Rule 45 Offer to which costs consequences under rules 48 and 49 apply;
>
> (e) whether costs were proportionately and reasonably incurred; and
>
> (f) whether costs are proportionate and reasonable in amount.
>
> (5) The Tribunal may assess the sum to be paid under any order under paragraph (2) or may direct that it be—
>
> (a) assessed by the President, a chairman or the Registrar; or
>
> (b) dealt with by the detailed assessment of a costs officer of the Senior Courts of England and Wales or a taxing officer of the Court of Judicature of Northern Ireland or by the Auditor of the Court of Session, as appropriate.
>
> (6) The power to award costs under paragraphs (1) to (5) includes the power to direct any party to pay to the Tribunal such sum as may be appropriate in reimbursement of any costs incurred by the Tribunal in connection with the

> summoning or citation of witnesses or the instruction of experts on the Tribunal's behalf; and any sum due as a result of such a direction may be recovered by the Tribunal as a civil debt due to the Tribunal."

25. Rule 104(2) grants the Tribunal a broad power to make any order it thinks fit in relation to costs. It is, however, expressly subject to rules 48 and 49 on settlements, dealing with rule 45 Offers, which themselves are excluded from Part 5 by virtue of rule 74(3)(c). More significant for current purposes is that the term "costs" in rule 104(2) is limited by the definition provided in rule 104(1). It was decided at the first CMC in this case, on 19 March 2021, that these proceedings would be treated as proceedings in England and Wales. On that basis, the appropriate analogy for the purpose of rule 104(2) is the recoverability of costs before the Senior Courts of England and Wales. As recognised by Popplewell LJ in *Rowe and others v Ingenious Media Holdings plc and others* [2021] EWCA Civ 29, [2021] 1 WLR 3189 ("*Rowe*") at [45]-[53], there is a distinction between the costs of conducting litigation and the expenses or losses incurred by reason of funding those costs. The former would be recoverable before the Senior Courts of England and Wales whereas the latter would not. It follows that several of the Stakeholder Entitlements would not fall within the ambit of costs as envisaged in rules 104(1) and 104(2).

26. Specifically, both the funder's outlay and the funder's appeal outlay would be excluded in part. Although they comprise some legal costs (which would be covered), they also include the payment of the upfront ATE insurance premium and payments to the CR for his role in these proceedings. For the purposes of this application, the CR accepted that neither of those would be recoverable as "costs" (although it reserved its position on this point generally). More particularly, the funder's fee, the adverse costs fee and the funder's appeal fee would all fall outside the *Rowe* parameters on the basis that they relate to the funder's return on investment. The ATE Insurer's deferred and contingent premia would fall outside the ambit of rules 104(1) and 104(2) for the same reason. Solicitors' and counsel's conditional and success fees fall into two separate categories. It is trite that conditional fees are treated as costs: they are part of the uplift from the discounted to the ordinary fee level (see *Gloucestershire County Council v Evans* [2008] EWCA Civ 21 at [22]-[25] and [37]-[39], and *The Winros Partnership v Global Energy Horizons Corporation*

[2021] EWHC 3410 (Ch) at [22]). The success portion, however, goes above and beyond ordinary costs and, for that reason, is not recoverable under rule 104(2).

27. Rule 104(2) is not the appropriate provision for this application. Not only is it in Part 6 covering proceedings before the Tribunal generally, when the current proceedings are Part 5 collective proceedings which has its own provision as to costs, but even if it were to be applicable, it does not grant the Tribunal the power to order the payment of anything other than costs as defined by rule 104 (1).

(b) Rule 98(1)

28. Rule 98(1) falls within Part 5 and provides as follows:

> "98.—(1) Subject to paragraph (2), costs may be awarded to or against the class representative, but may not be awarded to or against a represented person who is not the class representative, save that—
>
> > (a) if the Tribunal has approved the appointment of a class representative for a sub-class, costs associated with the determination of the common issues for the sub-class may be awarded to or against that person, and not the class representative for the whole class; and
> >
> > (b) costs associated with the determination of individual issues in accordance with rule 88(2)(c) may be awarded to or against the relevant individual represented persons."

29. Rule 98(1) relates specifically to the payment of costs in collective proceedings. It is framed in general terms and grants the Tribunal the power to award costs to or against the class representative. That being said, Mr Gibson on behalf of the CR acknowledged during the hearing that rule 98(1) can take the CR no further than rule 104(1) did, as it too is framed by reference to "costs". It would therefore be subject to the same limitations as rule 104(2).

(c) Rule 93(4)

30. The RCA was further made by analogy with rule 93(4). As a starting point, Mr Gibson took the Tribunal to rule 93(1), which is the provision that incorporates section 47C(3) of the Competition Act 1998 ("the Act") into the Rules. It provides as follows:

> "93. – (1) Where the Tribunal makes an award of damages in opt-out collective proceedings, it shall make an order providing for the damages to be paid on behalf of the represented persons to –
>
> (a) the Class Representative; or
>
> (b) such person other than a represented person as the Tribunal thinks fit.

31. Section 47C(3) is expressed in almost identical terms to rule 93(1), save that the word "must" is used instead of the word "shall", and the word "representative" instead of "class representative". Its meaning was recently considered by the Tribunal in *Gutmann v Apple Inc. and others* [2024] CAT 18 ("*Gutmann Apple*"), albeit at the certification stage. The issue in that case was whether the intended operation of a waterfall clause in the relevant LFA was contrary to public policy on the basis that it sought to allow the funder to take a share of the damages prior to distribution.

32. The Tribunal found at [31] that nothing in section 47C(3) (and by analogy rule 93(1)) in principle prevented it from ordering a payment of damages to litigation funders prior to distribution to class members. Specifically:

> "31. If the legislature had intended that costs or a funder's fee could not be paid out of damages, there is no reason why it would not have stated this. Moreover, section 47C(3)(b) plainly contemplates that the Tribunal can order the payment of damages to such other person as it sees fit, and we see no reason why this power could not extend to litigation funders in appropriate circumstances. Section 47C(3)(b) is consistent with the view that a class representative has (again subject to supervision by the Tribunal) the power to agree to pay a proportion of damages to a litigation funder".

33. This is a wide interpretation of Section 47C(3) insofar as it extends to payments to third parties other than for the benefit of the class members. An alternative view is that it is only aimed at transfers to facilitate payment for the *benefit of the class,* rather than anyone else. This narrower view is supported by the fact that the provision does not provide a discretion to make an order, but rather imposes a duty to make an order if the relevant conditions are met. If the narrower interpretation is correct, the provision does not permit the payment to a funder as opposed to a person such as a claims administrator who will facilitate any distribution process for the benefit of the class members.

34. The narrower interpretation is consistent with the Court of Appeal's reasoning in *Le Patourel*, which appears to proceed on the assumption that transfers under section 47C(3) are made in order to ensure better distribution to the class:

> "33. We turn to the rules on opt-out and opt-in. Sections 47C(3) and (4) create two slightly different rules. In the case of opt-out proceedings, where the CAT makes an award of damages it is under a duty ('must') to impose an order that the damages are paid either to the representative or to a third party authorised by the CAT […] The Act however does not indicate how, once the money is in the hands of the representative or authorised third person, the damages are thereafter in practical terms to be distributed to the class. […]".

35. In *Gutman Apple* the Tribunal went on to conclude at [35]:

> 35. We conclude there is a power for this Tribunal, at the conclusion of proceedings, to make an order that a funder's fee be paid out of damages awarded to the class and that it is not impermissible for a class representative to enter into a litigation funding agreement which contemplates this. There is no express prohibition under the Act or the Tribunal Rules which prevents this […]."

36. It should be noted that the Tribunal in *Gutman Apple* has granted permission to appeal the ruling on the basis that it was the first occasion on which these general points of principle were decided. On that basis, we treat the authority with some caution.

37. In any event, whether or not the wider interpretation is correct, rule 93(1) does not provide a basis for the Tribunal to grant the RCA. The discussion of the rule in *Gutmann Apple* is limited to the position at the conclusion of proceedings, i.e. after the Tribunal has made an award for damages, but prior to any distribution. The RCA addresses a different circumstance altogether: the Tribunal is being asked to permit defrayment without having itself made an award for damages, and while proceedings against the other eleven defendants are ongoing.

38. Turning against that background to rule 93(4) itself, which provides as follows:

> "93. -- (4) Where the Tribunal is notified that there are undistributed damages in accordance with paragraph (3)(b), it may make an order directing that all or part of any undistributed damages is paid to the class representative in respect of all or part of any costs, fees or disbursements incurred by the class representative in connection with the collective proceedings."

39. The statutory basis for rule 93(4) is section 47C(6) of the Act, which is framed in similar terms, but structured differently:

> "In a case within subsection (5) the Tribunal may order that all or part of any damages not claimed by the represented persons within a specified period is instead to be paid to the representative in respect of all or part of the costs or expenses incurred by the representative in connection with the proceedings."

40. The only significant difference between the two is the use of the term "instead" in section 47C(6), which is a reference to the default position under the Act for any residue to go to charity. Mr Gibson submitted that those words do not preclude the CR from applying for payment of costs and expenses from undistributed damages in favour of third-party funders.

41. It is clear that rule 93(4) provides the Tribunal with jurisdiction to make an order directing that undistributed damages which have not been claimed by class members may be paid to funders. In contrast with rule 104(2) considered above which merely refers to "costs" as defined, rule 93(4) refers to "costs, fees or disbursements incurred" by the Class Representative. In *Merricks v Mastercard*

Incorporated [2017] CAT 16 ("*Merricks*") at [109]-[115], the Tribunal examined the distinction between rules 93(4) and 104(2) in detail. In particular:

> "115. Section 47C CA introduced new and distinct provisions concerning the costs of collective proceedings. We see no reason to give the words used a special meaning or to treat them as terms of art governed by jurisprudence on very different statutory provisions. In the ordinary sense, if a third party agrees to provide substantial monies in order to fund litigation, the payment which has to be made to that third party in consideration of this commitment, whether out of the damages recovered or otherwise, is a cost or expense incurred in connection with the proceedings".

42. The Tribunal went on to say, at §117:

> "Mr Williams submitted that the CAT Rules cannot give the Tribunal a broader power than the governing statute. That is clearly correct, but our conclusion is entirely consistent with the CAT Rules. Rule 104(1) defines "costs" in terms of the costs and expenses recoverable in the proceedings in the civil courts. As the further sub-paragraphs in rule 104 show, that is clearly referring to an adverse costs order (e.g. *inter partes* costs). This definition is expressly "for the purpose of these rules". Rule 93(4) addresses specifically the operation of sect 47C(6) CA. It provides that an order can be made for payment in respect of the class representative's "costs, fees or disbursements". Since the word "costs" in that expression accordingly has the meaning defined by rule 104(1), "fees or disbursements" clearly refer to additional matters. They are apt to cover, for example, an ATE premium or the fee of a commercial funder".

43. Drawing those threads together, the CR's case is that, while *Merricks* provides authority for the general proposition that payment can be made to stakeholders from undistributed damages, *Gutmann Apple* goes one step further in allowing payment prior to distribution. The question, therefore, is whether anything in rule 93 allows the Tribunal to go two steps thereafter in allowing payment both (1) prior to distribution; and (2) in circumstances where no damages have been awarded by the Tribunal (but rather have been paid by way of settlement). In the Tribunal's view, it has no such jurisdiction deriving from rule 93 for the reasons summarised below.

44. First, there is an element of doubt as to whether or not rule 93(1) should be so widely interpreted to cover the payment of funders fees. Secondly, the principal rule relied upon – rule 93(4) – is expressly aimed at cases where there has been an award of damages by the Tribunal and the Tribunal has been notified that there are undistributed damages. This is not the scenario in the present case. Here, the damages have been paid by way of settlement, there has yet to be any distribution and no distribution plan has been provided to the Tribunal as it has been decided that distribution to class members is to be dealt with later. Rule 93 sits within Part 5 of the Rules entitled "Collective Proceedings and Collective Settlements". It is however located within the section relating to collective proceedings (i.e. rules 75 to 93) rather than collective settlements (i.e. rules 94 to 97). There is a distinction between awards of damages made by the Tribunal and collective settlements. As there has been a collective settlement of the proceedings against CSAV, the provision to look to in this case is rule 94 to see if that provides jurisdiction.

(d) Rule 94(4)(b)

45. Rule 94 sits within the provisions relating to collective settlements and governs the circumstances in which the Tribunal may make a CSAO. The statutory basis for that power is section 49A of the Enterprise Act 2002 ("the 2002 Act"). Rule 94 so far as is material to the present application provides as follows:

> "94.—(1) Where a collective proceedings order has been made and the Tribunal has specified that the proceedings are opt-out collective proceedings, the claims which are the subject of the collective proceedings, may not be settled other than by a collective settlement approval order issued in accordance with this rule.
>
> (2) Any offer to settle by a defendant in the collective proceedings shall be made to the class representative.
>
> (3) An application for a collective settlement approval order shall be made to the Tribunal by—
>
> (a) the class representative; and

(b) the defendant in the collective proceedings, or if there is more than one defendant, such of them as wish to be bound by the proposed collective settlement.

(4) The application referred to in paragraph (3) shall—

(a) provide details of the claims to be settled by the proposed collective settlement;

(b) set out the terms of the proposed collective settlement, including any related provisions as to the payment of costs, fees and disbursements;

(c) contain a statement that the applicants believe that the terms of the proposed settlement are just and reasonable, supported by evidence which may include any report by an independent expert or any opinion of the applicants' legal representatives as to the merits of the collective settlement;

(d) specify how any sums received under the collective settlement are to be paid and distributed;

(e) have annexed to it a draft collective settlement approval order; and

(f) set out the form and manner by which the class representative proposes to give notice of the application to—

(i) represented persons, in a case where it is expected that paragraph (11) will apply; or

(ii) class members, in a case where it is expected that paragraph (12) will apply.

…

(6) On receiving an application for a collective settlement approval order, the Tribunal may give any directions it thinks fit, including—

(a) for the confidential treatment of any part of an application for a collective settlement approval order;

(b) for the giving of or dispensing with the notice referred to in paragraph (4)(f);

(c) for further evidence to be filed on the merits of the proposed collective settlement;

(d) for the hearing of the application.

…

(8) At the hearing of the application, the Tribunal may make a collective settlement approval order where it is satisfied that the terms of the collective settlement are just and reasonable.

(9) In determining whether the terms are just and reasonable, the Tribunal shall take account of all relevant circumstances, including—

(a) the amount and terms of the settlement, including any related provisions as to the payment of costs, fees and disbursements;

(b) the number or estimated number of persons likely to be entitled to a share of the settlement;

(c) the likelihood of judgment being obtained in the collective proceedings for an amount significantly in excess of the amount of the settlement;

(d) the likely duration and cost of the collective proceedings if they proceeded to trial;

(e) any opinion by an independent expert and any legal representative of the applicants;

(f) the views of any represented person in a case to which paragraph (11) applies, or of any class member in a case to which paragraph (12) applies; and

(g) the provisions regarding the disposition of any unclaimed balance of the settlement, but a provision that any unclaimed balance of the settlement amount reverts to the defendants shall not of itself be considered unreasonable."

46. Unlike sections 47A and 47B, which are almost exactly replicated in the Rules, section 49A is substantially less detailed than its counterpart in the Rules. For example, section 49A(5) sets out the Tribunal's power to approve a collective proposed settlement when satisfied that its terms are "just and reasonable", but does not list any factors the Tribunal should take into account in deciding that question. Rule 94(9), on the other hand, lists 7 factors the Tribunal 'shall' consider in determining whether the terms of the proposed settlement are just and reasonable.

47. The reason rule 94 is significantly more detailed than its statutory counterpart is because paragraph 15C(2)(e) of Schedule 4 to the 2002 Act expressly requires the Rules to make provision as to "the factors which the Tribunal must take into account in deciding whether to approve a proposed collective settlement".

48. The Tribunal does have the power to approve the payment of costs fees and disbursements contained in a settlement that it is being asked to approve under a CSAO. The wording of rules 94(4)(b) and 94(9)(a) are sufficiently wide to include the payment to ATE insurers, funders and the like as they are expenses and disbursements of the CR. However, the Tribunal has already made a CSAO at the hearing on 6 December 2023, and it was not part of the settlement that CSAV was paying anything other than damages and costs, leaving open how those costs were to be used and allocated by the CR subject to the approval of the Tribunal.

49. Both the CSAO Application and the RCA Application were before the Tribunal at the hearing on 6 December 2023. The CSAO Application was made on 6 October 2023 and was followed by the RCA Application on 18 October 2023. The CSAO was listed for determination and the RCA Application was listed for directions on 6 December 2023. They could in theory have both been determined at the same hearing, but the Tribunal decided to determine the CSAO Application first with the benefit of all relevant parties being in court, including legal teams representing CSAV and the non-settling Defendants. Directions were given at the same hearing for the hearing of the RCA, at which only representatives for the CR were required to attend. The recitals to the CSAO refer to the RCA. However, the exercise contemplated by the CSAO

Application and the RCA Application are very different. In respect of the CSAO, the Tribunal was being asked to exercise its powers to approve the settlement between the CR and CSAV. As part of that, the Tribunal was required to take account of the terms of the settlement, which included the payment of damages and costs by CSAV. CSAV was not being asked as part of that settlement to make any payment to funders or any third parties, it simply agreed to pay damages and costs. CSAV itself has no interest as to how the damages or costs were to be ultimately distributed or allocated once they had been paid over.

50. Whilst it was argued by the CR and the funders that the Tribunal has the power to approve the RCA (including the payment to funders under rule 94) the Tribunal is not satisfied that that is correct. At the hearing of the CSAO, the Tribunal did take into account the terms of the settlement requiring the payment of costs by CSAV, but it only approved the use and payment of the £100,000 specifically hallmarked for the costs of the CSAO Application. The RCA itself was not part of the settlement approved by the Tribunal under rule 94.

(e) Rule 53(2)(n)

51. The final provision under which the RCA is made is rule 53(2)(n), which relates to the Tribunal's general case management powers. It applies to proceedings under Part 5 by virtue of rule 74 and, insofar as it is relevant, provides as follows:

> "53. – (1) The Tribunal may, at any time, on the request of a party or of its own initiative, at a case management conference, pre-hearing review or otherwise, give such directions as are provided for in paragraph (2) or such other directions as it thinks fit to secure that the proceedings are dealt with justly and at proportionate cost.
>
> 53. -- (2) The Tribunal may give directions -
>
> […] (n) for the award of costs or expenses, including any allowances payable to persons in connection with their attendance before the Tribunal.

52. The question is whether the phrase "award of costs or expenses" in subparagraph (n) is sufficiently broad to constitute the payment of stakeholder entitlements, including payments to funders. It is clearly desirable that a narrow interpretation is not given to this wide case management provision, particularly given the Tribunal's views on the other provisions relied upon in the RCA. There should be an ability for the Tribunal as part of its case management powers to permit the CR to pay third parties, like funders, without whom collective proceedings cannot be brought. As stated by Green LJ in *Le Patourel* at [99]:

> "99. Finally, we address for the sake of completeness an issue that arose briefly during the hearing concerning whether an order for an account credit provides opportunity for the class representatives and funders to be paid. The concern has arisen because the only occasion where costs are expressly dealt with in the context of the opt-out/opt-in regime is in relation to the allocation of undistributed damages to charity. Here the law empowers the CAT to make provision for costs in favour of the representatives out of the sum otherwise to be paid to charity: see s 47C(6) CA 1998 and r 93(5). We detect no difficulty here. It would defeat the purpose of opt-out proceedings, which might routinely require third party funding, if costs orders could not be made in any case where an account credit was the chosen means of achieving distribution. As to this the CAT has a wide discretion to make any case management order it sees fit and it is within its power to ensure that funders and representatives are paid. It also has a broad discretion to make orders as to costs under r 98 which applies to the collective action regime. The Tribunal could for instance make a sequential order that: (i) there be an award of damages; (ii) costs be defrayed from the award (before or after the damages are paid to the representative or authorised third party); and (iii) the residue is then to be distributed according to whatever method is considered by the CAT to be most appropriate be that a fixed sum, an account credit or by some other sensible means.[…]".

53. Although there is no similar account relationship in this case, there is a need to ensure that funding remains attractive to stakeholders for these types of cases going forward. A construction of "costs or expenses" which permits the Tribunal to approve payments to funders outside the context of damages awards by the Tribunal is appropriate, but going forward changes to the Rules should be considered as part of the current review of the Rules. Even if a payment to a funder may not be a cost in the same sense as in rule 104(1), it does amount to an expense.

D. WHETHER THE TRIBUNAL SHOULD EXERCISE ITS DISCRETION

54. Having determined that the Tribunal has the power to make an order that the Stakeholders Entitlements be paid in whole or in part, the following questions arise:

    (1) Should the Tribunal at this stage permit any payment out of the sums received from CSAV by way of £1,120,000 in damages and £280,000 in costs?

    (2) If so, what should the amount be and for what Stakeholder Entitlements?

55. There is a benefit for the CR, lawyers and funders in permitting payment out at this stage. In relation to funders in particular, it allows them to recoup part of their outlay at this stage, and it allows the CR to reduce any interest costs on funding. That said, there is clearly no pressing need to pay the funders at this stage in this case. The sums involved are small, and the funders continue to fund considerably larger expenses for the proceedings against the remaining Defendants. Payment now of relatively small sums does little to reduce the funder's exposure and duration risk. The trial is due to commence in January 2025, and the ultimate outcome should be known in the not too distant future.

56. Further, the best time to assess what sums should be paid to funders is once the outcome of these proceedings is known. If the proceedings lead to a substantial judgment or settlement with the remaining Defendants, there may well be a significant amount for both distribution to class members and for lawyers and funders. The proceedings may on the other hand result in failure with the Defendants succeeding at trial. The funders took the risk that the claims may fail and that they may lose their investment, but they did so knowing that there would be rewards in the event of a successful outcome. The settlement with CSAV represents only a very small part of the claim overall. Whether these proceedings will be a success overall remains to be seen and the damages sum potentially available for distribution to class members should not be eaten up at this stage.

57. The Tribunal is reluctant to permit the use of any part of the £1,120,000 sum paid in damages at this stage. It will be dealt with once the outcome of the proceedings is known. At that point, the level of recovery will be known and sensible decisions can be made as to distribution and payments for costs and expenses, including for funders. The interests of all concerned can then be considered and, where appropriate, balanced.

58. The Tribunal is prepared to apply an additional £71,000 from the Proceedings Costs Sum to be dealt with in the same way as the £100,000 Application Costs Sum to cover the CR's costs of the CSAO Application. As regards the Proceedings Cost Sum balance, the Tribunal gives liberty to apply for payment out of the balance to cover costs, either at the time of considering any further recoveries or in circumstances where the funds are needed to meet costs at the end of the proceedings. The Tribunal is willing to permit the payment of the CR's costs of the RCA itself out of the balance upon the approval of a costs schedule.

59. This decision is unanimous.

Hodge Malek KC
Chair

William Bishop

Eamonn Doran

Charles Dhanowa O.B.E., K.C. (*Hon*)
Registrar

Date: 12 July 2024