Neutral citation [2024] CAT 31

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1440/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

3 May 2024

Before:

ANDREW LENON KC
(Chair)
THE HONOURABLE MR JUSTICE RICHARDS
PROFESSOR ANTHONY NEUBERGER

Sitting as a Tribunal in England and Wales

BETWEEN:

CLARE MARY JOAN SPOTTISWOODE CBE

Applicant / Proposed Class Representative

– and –

(1) NEXANS FRANCE S.A.S.
(2) NEXANS S.A.
(3) NKT A/S (FORMERLY NKT HOLDING A/S)
(4) NKT VERWALTUNGS GMBH (FORMERLY NKT CABLES GMBH)
(5) PRYSMIAN CAVI E SISTEMI S.R.L.
(6) PRYSMIAN S.P.A.

Respondents / Proposed Defendants

Heard at Salisbury Square House on 11 April 2024

JUDGMENT (COLLECTIVE PROCEEDINGS ORDER)

APPEARANCES

Mr Daniel Jowell, KC, Mr Nicholas Bacon, KC, and Mr Gerard Rothschild (instructed by Scott+Scott UK LLP) appeared on behalf of the Proposed Class Representative.

Mr Paul Luckhurst (instructed by White & Case LLP) appeared on behalf of the First and Second Proposed Defendants.

Ms Victoria Wakefield, KC, and Mr Michael Armitage (instructed by Addleshaw Goddard LLP) appeared on behalf of the Third and Fourth Proposed Defendants.

Ms Jemima Stratford, KC, and Ms Fiona Banks (instructed by Macfarlanes LLP) appeared on behalf of the Fifth and Sixth Proposed Defendants.

CONTENTS

A. INTRODUCTION

1. This reserved judgment follows a certification hearing at which the Tribunal made a Collective Proceedings Order ("**CPO**") and gave directions for the future conduct of the proceedings.

2. The claim is a 'follow-on' claim arising out of the European Commission's (the "**Commission**") infringement decision dated 2 April 2014 in Case AT.39610 *Power Cables* (the "**Decision**"). The Defendants are addressees of the Decision. The Commission found that a number of companies including the Defendants operated a cartel in the market for the supply of various types of underground and submarine high voltage power cables contrary to Article 101 of the Treaty on the Functioning of the European Union (the "**Cartel**"). The Commission found that the Cartel operated between 18 February 1999 and 28 January 2009. According to the Decision, the Defendants (along with the other cartelists) shared markets, allocated projects and exchanged information on prices and other commercially sensitive information in order to ensure a coordinated outcome to the tenders for the power cable projects.

3. The stated objective of the proceedings, which are proposed to take the form of "opt-out" collective proceedings, is to seek redress for loss caused by the Cartel to a defined "Class", the definition of which will be considered later in this decision, but which can broadly be understood to consist of consumers of domestic electricity in Great Britain on or after 1 April 2001 with certain exceptions. The Proposed Class Representative's ("**PCR**") best estimate of the size of the Class is that it is likely to have in excess of 30 million members.

4. The PCR's case is that, as a result of the Cartel, companies involved in the transmission, distribution and generation of electricity in Britain bought cables at a higher price than they otherwise would have done. The difference between the inflated price paid by these companies for cables and the price that would have been paid absent the Cartel was then passed on to British consumers of

electricity, including domestic consumers. The PCR alleges that the overcharge was passed on, first, via the charges which the transmission and distribution companies levied on suppliers, and, second, via the payments made by suppliers in respect of offshore windfarms pursuant to the UK government's scheme known as the "Renewables Obligation Scheme". The PCR's case is that the suppliers then passed on the overcharge to their customers by way of increased electricity bills.

5. The main issues for trial will be: (a) the extent to which British electricity transmission and distribution companies and offshore windfarms were overcharged for high-voltage power cables and associated services as a result of the Cartel; and (b) the extent to which such overcharge was passed on to Class members.

6. The amount claimed in damages including interest is between £286.3 million and £790.2 million if calculated as at 31 March 2025.

B. LEGAL PRINCIPLES

7. Pursuant to section 47B of the Competition Act 1998 (the "**1998 Act**") and Rules 78 and 79 of the Competition Appeal Tribunal Rules 2015 (the "**Tribunal Rules**"), two conditions must be satisfied before the Tribunal may make a CPO:

   (1) The PCR must be authorised by the Tribunal on the basis that it is just and reasonable for that person to act as a representative in the collective proceedings (section 47B(8)(b) of the 1998 Act and Rule 78).

   (2) The claims must be considered by the Tribunal to raise the same, similar or related issues of fact or law and to be suitable to be brought in collective proceedings (section 47B(6) of the 1998 Act and Rule 79).

8. To enable the Tribunal to form a judgment on commonality and suitability the PCR is required to put forward a methodology setting out how the issues that they have

identified will be determined or answered at trial. The PCR's proposed expert methodology must satisfy the so-called "***Pro-Sys* test**", developed by the Canadian Supreme Court in *Pro-Sys Consultants v Microsoft* 2013 SCC 57 at paragraph 118, i.e. it must offer a realistic prospect of establishing loss on a class-wide basis grounded in the facts of the particular case in question, providing a "blueprint" of the way ahead to trial, (*MOL (Europe Africa) Ltd & Others v Mark McLaren Class Representative Ltd* [2022] EWCA Civ 1701, [45] – [47]).

C. ISSUES

9. By the time of the hearing, the Defendants had dropped their opposition to the CPO. The absence of objection does not, however, make certification automatic. As noted in *Gormsen v Meta Platforms Inc and others* [2024] CAT 11 at [2], the Tribunal must consider the making of a CPO of its own motion, having regard to all matters, whether raised by the parties before it or not, while paying particular regard to those matters actually raised.

10. In this case, the Defendants drew the attention of the Tribunal to the following matters:

    (1) The definition of the Class.

    (2) The inclusion of minors in the Class.

    (3) The status of the PCR's Litigation Funding Agreement in the light of the judgment in *R (PACCAR Inc) v. Competition Appeal Tribunal and others* [2023] UKSC 28 ("***PACCAR***").

    (4) The adequacy of the PCR's litigation budget.

    (5) The need for directions for the trial of a preliminary issue.

11. The Tribunal of its own motion raised a sixth issue as to the methodology to be applied in distributing any future settlement or damages award to the Class.

(1) Definition of the class

12. In order to certify the proceedings, the Tribunal must be satisfied that the claims are brought on behalf of an "identifiable class of persons" (Rule 79(1)(a)). Further, in determining whether the claims are suitable to be brought in collective proceedings, the Tribunal must take into account "whether it is possible to determine in respect of any person whether that person is or is not a member of the class" (Rule 79(2)(e)).

13. As the Tribunal observed in *Commercial and Interregional Card Claims I Ltd v Mastercard Incorporated and others* [2023] CAT 38 at [62(6)], Rules 79(1)(a) and 79(2)(e) have overlapping but distinct functions. Rule 79(1)(a) is a hurdle to bringing a collective action. It is about the design of the proposed class definition and whether, on its face, it is capable of sensibly identifying a class. By contrast, Rule 79(2)(e) is a factor to consider among other factors when considering suitability. It is dealing with the mechanics of a particular person verifying whether or not they are included in the class. That is a question of methodology and may be important in relation to issues such as registration of class members and the distribution of any award of damages:

> "Despite having distinct functions, rule 79(1)(a) and 79(2)(e) are inherently linked. A poor class definition will make it more difficult to reach a reasonably evidenced conclusion about class membership of a person, while a well-thought-out one will likely lead to ease of verification of a person's membership of the class."

14. The PCR's proposed definition of the Class was as follows:

> "All people alive who bore (and personal representatives of deceased people who had borne) the cost of paying for domestic consumption of electricity supplied via the distribution network in Great Britain on or after 1 April 2021."

15. Her rationale for the words "bore the cost of" rather than "directly paid", which was the alternative wording proposed by the Fifth and Sixth Defendants, was that the definition should include not only the persons who actually paid the

electricity bill but also household members who contributed to the costs of electricity as part of their domestic arrangements, for example spouses or adult children from whom rent was collected or roommates sharing accommodation, and would avoid issues of further pass-on.

16. In the Tribunal's view, the PCR's proposed definition was unsatisfactory. First, her proposed formulation lacks the necessary precision to enable putative class members, the parties and the Tribunal to determine whether or not they are members of the Class. We can see that the definition might cover a household member who made an actual contribution to payment of an electricity bill by paying cash to the person named on the bill each time an electricity bill was delivered. However, other arrangements might be more difficult to analyse. Suppose that one flatmate agrees to pay the electricity bill in return for another agreeing to pay the gas bill. In reality both are contributing to shared household expenditure, but have both "borne the cost" of the electricity bill? Second, it would be inherently difficult for someone other than a direct payer to establish that they had contributed to payment for electricity since it is unlikely that their contribution would have been recorded or documented. Direct payment of an electricity bill can be more easily evidenced and validated.

17. The PCR objected to a formulation based on "direct payment" on the ground that it would give rise to contentious pass-on issues if the Defendants argued that "direct payers" had passed on all or some of the cost to others. However, we considered that objection had little weight given that such issues might also arise on a formulation based on "bearing the cost". For example, an employer who reimbursed part of the cost of domestic heating incurred by an employee working at home might be said to have "borne the cost" of that domestic heating. In principle a defendant might argue that the employer has passed that cost on to its customers. A similar issue might arise if a property owner makes short-term lets of properties without charging separately for electricity usage: the property owner could be said to have "borne the cost" of the domestic electricity consumption with a question being how much of that cost was passed on to the short-term lessee.

18. For these reasons the Tribunal approves the definition of the class as being "all people who directly paid" electricity bills in the relevant period. The Defendants will have to confirm in their Defences the extent to which any "pass-on" point is being taken.

(2) Minors

19. Rule 77(2)(b) states:

> "If the Tribunal makes a collective proceedings order it may attach such conditions to the order or give such directions as it thinks fit, including— …
>
> (b) directions regarding any class member who is a child or person who lacks capacity."

20. The Third and Fourth Defendants drew to the Tribunal's attention that the proposed class includes minors (i.e. those aged under 18 in England and Wales, and under 16 in Scotland), in order that the Tribunal can verify that the PCR's approach to the inclusion of minors is appropriate.

21. The PCR submits that very few under-18s/under-16s pay for electricity and therefore the number of minors affected is very small. An even smaller number will be under 18 or under 16 by the time of the opt-out deadline four months after the CPO. Those who reach the age of legal capacity after the deadline can seek permission to opt out later on if they are so minded pursuant to Rule 82(2). The Tribunal is satisfied that this is a practical and proportionate approach.

(3) The Litigation Funding Agreement

22. A PCR's proposed funding arrangements are relevant to whether the Tribunal should authorise the representative to act pursuant to Rule 78. The Tribunal must consider whether the PCR will be able to pay the Defendants' recoverable costs if ordered to do so (Rule 78(2)(d)). A PCR's ability to fund its own costs of bringing the collective proceedings is also relevant. The Tribunal's Guide to Proceedings (2015) (the "**Guide**") provides that, in considering this aspect, the Tribunal will have regard to the PCR's financial resources, including any

relevant fee arrangements with its lawyers, third party funders or insurers. The costs budget appended to the collective proceedings planlikely to assist the Tribunal's assessment. The Tribunal's concern is to ensure that class members will have the benefit of effectively conducted proceedings; *UK Trucks Claim Limited v Fiat Chrysler Automobiles NV and others* [2019] CAT 26 at [52].

23. The PCR entered into a financing agreement with BC Investments Ltd ("**Burford**"), a subsidiary of Burford Capital, dated 20 June 2018 (the **"LFA"**). The LFA has been varied from time to time to take account of developments in case law on litigation funding.

24. Pursuant to the LFA as varied, Burford has committed to provide up to an aggregate maximum amount of £30,715,000 to fund the costs of the Collective Proceedings, subject to the Collective Proceedings reaching various procedural stages. That figure includes £10 million of adverse costs cover in addition to after the event insurance cover which the PCR has obtained. In return for its investment in funding the action, if the Collective Proceedings are successful and an award of damages is made to the Class, Burford would be entitled to receive both repayment of all sums invested in the case pursuant to the LFA and an amount equal to three times the capital invested out of the damages and costs awarded to the Class. The payment structure is set out in Schedule 3 to the LFA as varied as follows:

> "**Allocation of Proceeds and Costs Awards**
>
> 1. Subject to and in accordance with any order by the Tribunal, the Class Representative shall pay (or procure that the Payment Agent pays) Proceeds and any Costs Award:
>
> (a) first, to the Claimants; and
>
> (b) secondly, on a *pari passu* basis:
>
> (i) to Burford in an amount equal to the Total Invested Amount; and
>
> (ii) to the ATE Insurer in an amount equal to the sum of any payments actually made by the ATE Insurer pursuant to the ATE Policy;

(c) thirdly, on a *pari passu* basis:

(i) to Burford in an amount equal to a multiple of three-times the Total Invested Amount

(ii) to the ATE Insurer in an amount equal to any other sums due to be paid to the ATE Insurer under the ATE Policy (including any conditional premia payable thereunder); and

(iii) to the Solicitor its Conditional Fee (as defined in paragraph 4.1(a)(ii) of the Solicitor's Engagement Letter and excluding, for the avoidance of doubt, any Excess Solicitor's Fees) to the extent incurred in accordance with the Budget Plan,

(the sum of the amounts due to be paid to Burford under paragraphs 1(b)(i) and 1(c)(i) constituting ***Burford's Entitlement***); and

(d) fourthly, to the Solicitor: …

(i) its Success Fee and the balance of its Conditional Fee, if any (each as defined in the Solicitor's Engagement Letter) incurred in accordance with the Budget Plan; and

(ii) the Base Fee (as defined in the Solicitor's Engagement Letter) deferred on a 100% discounted basis in respect of any Excess Solicitor's Fees, and the 100% Success Fee applicable to the same.

provided in each case that a payment under paragraphs (b), (c) or (d) may only be made out of Undistributed Proceeds."

25. "Proceeds" are defined as meaning, in summary, all damages and costs awarded to the PCR. "Total Invested Amount" is defined as meaning (in summary) the aggregate of the funds advanced by Burford to the PCR up to a maximum aggregate amount of £30,715,000 plus up to £10,000,000 representing the maximum amount of capital committed by Burford in respect of the Defendants' costs.

<u>The status of the LFA post PACCAR</u>

26. A damages-based agreement ("**DBA**") is defined in s.58AA(3)(a) of the Courts and Legal Services Act 1990 ("**CLSA 1990**"):

> "a damages-based agreement is an agreement between a person providing advocacy services, litigation services or claims management services and the recipient of those services which provides that –

> (i) the recipient is to make a payment to the person providing the services if the recipient obtains a specified financial benefit in connection with the matter in relation to which the services are provided, and
>
> (ii) the amount of that payment is to be determined by reference to the amount of the financial benefit obtained."

27. A DBA relating to opt-out collective proceedings is unenforceable pursuant to section 47C(8) of the 1998 Act. The Supreme Court held in *PACCAR* (see per Lord Sales at [50] and [72]) that litigation funders provide "claims management services". Hence, the LFA would constitute a DBA if the conditions in sub-sections 58AA(3)(a)(i) and (ii) of CLSA 1990 are met.

28. Clause 2.1(a) of the LFA, as varied by the Second Deed of Variation dated 20 December 2022 (the "**Second Deed of Variation**"), at a time when the appeal to the Supreme Court in *PACCAR* was pending, made Burford's obligations under the LFA to be subject to the following condition ("the **Funding Condition"**):

> "(ii) unless waived by Burford in its sole discretion (which shall be exercised reasonably in accordance with Recital D above), the Tribunal or any other court of competent jurisdiction being satisfied that the Financing Agreement is not a DBA under the definition contained in Section 58AA(3) of the Courts and Legal Services Act 1990."

29. Accordingly, subject to waiver by the Funder, it is a condition of funding post the granting of a CPO that the Tribunal is satisfied that the LFA is not a DBA and that such ruling is secured at the earliest possible juncture in the proceedings.

30. The Defendants confirmed that, given the present state of the authorities, they would not oppose a positive determination of the Funding Condition or otherwise contest the PCR's funding arrangements at the certification hearing. They have, however, understandably said that they may wish to make further submissions should any of the relevant authorities be varied following appeals that are pending to the Court of Appeal. Nevertheless, given the terms of clause 2.1(a) of the LFA as varied, the PCR sought the Tribunal's positive confirmation that it is satisfied that the LFA is not a DBA such that Funding Condition has been met.

31. The Tribunal accepted the PCR's submission that the LFA is not a DBA, and gave the confirmation sought by the PCR in short, on the following grounds:

(1) A DBA, as defined in s.58AA(3)(a) of CLSA 1990, is an agreement which provides for the return to the funder to be determined by reference to the "amount of the financial benefit obtained" by the recipient of the funding.

(2) The LFA provides for a return calculated by reference to the amount of the funding provided, rather than a percentage of the recoveries.

(3) The fact that the Funder's return is paid out of and effectively capped by the amount of the undistributed damages does not result in the Funder's return being "*determined by reference to the financial benefit obtained*": *Alex Neill Class Representative Limited v Sony Interactive Entertainment Europe Limited* [2023] CAT 73 and *Dr. Rachael Kent v Apple Inc. & Apple Distribution International Ltd* [2024] CAT 5; see also *Justin Gutmann v Apple Inc. & others* [2024] CAT 18, at [42]:

(4) The Litigation Budget

32. The Costs Budget annexed to the Litigation Plan was as follows:

COST BUDGET (GBP)	
PRIOR TO CPO	
Class Representative's Costs	200000
Solicitor's Costs	1120000
Counsel's Costs	550000
Experts' Costs	635000
Public Relations Costs	25000
Distribution Costs	60000

Transaction Costs		40000
Other costs		20000
SUB-TOTAL		**£ 2,650,000**
COSTS FROM CPO		
Class Representative's Costs		450000
Solicitor's Costs		
	Pre-judgment	4900000
	Post-judgment	400000
Counsel's Costs		3485000
Experts' Costs		3120000
Public Relations Costs		300000
Distribution Costs		
	Pre-judgment	300000
	Post-judgment	3700000
Disclosure Costs		1800000
Transaction Costs		350000
Other costs		140000
SUB-TOTAL		**£ 18,945,000**
TOTAL BUDGET		**£ 21,595,000**

33. It was submitted on behalf of the Third and Fourth Defendants that the Tribunal should satisfy itself as part of its "gatekeeper function" that the detail in the PCR's budget was sufficient to enable the Tribunal to discharge its statutory function. Although not formally objecting to certification, the Third and Fourth Defendants submitted that the PCR's litigation budget was considerably less detailed than is usual in cases of this nature including *Mastercard v Merricks* [2020] UKSC 51 ("***Merricks***"), *BT Group v Le Patourel* [2022] EWCA Civ 593 ("***Le Patourel***") and *Coll v Alphabet Inc* [2022] CAT 6.

34. It was submitted on behalf of the PCR that there was no requirement in the Rules or the Guide for the budget to have any greater level of detail than had been provided. In *UK Trucks Claim Limited v Stellantis NV & others* [2022] CAT 25, the Tribunal made it clear (at [31]) that a CPO application does not involve a full costs budgeting exercise. The Tribunal's steer in that case was that: "*At the certification stage, the standard that a litigation plan must meet is not one of perfection*". The plan need only set out "*a framework within which the case may proceed*" and "*demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case*". In the present case, the budgets have been signed off by the PCR's legal team and the funder as representing their considered view of the financial demands of the proposed proceedings.

35. In the Tribunal's view, the PCR's litigation budget has a number of functions. First, it enables the Tribunal to determine at the certification stage whether the PCR has made a realistic, albeit preliminary, estimate of the future costs of the proceedings. Second, it assists the Tribunal in exercising control over costs and in making the cost/benefit assessment which it is required to make under Rule 79(2)(b). Third, it enables the Tribunal to determine, as the proceedings progress, whether the litigation budget needs to be revised to take account of unanticipated developments in the proceedings as happened in *Boyle v Govia Thameslink Railway Ltd* [2023] CAT 19 at [9(3)] and [13(3)(iii)]. It is not necessary for the budget to have the same level of detail as would be needed for cost budgeting under the Civil Procedure Rules.

36. The Tribunal does not consider that it is necessary at this stage for the budget to include charging rates, but it would be useful to understand what assumptions have been made in relation to the stages of the proceedings and a breakdown of the costs that are anticipated to be incurred at each stage. Further details should be included as to how the disclosure and transaction costs have been computed. These details should assist the Tribunal in understanding, when making future case management decisions, whether those decisions are likely to change assumptions on which the litigation budget has been based. That in turn will

enable the Tribunal to consider whether the budget needs to be revised subsequently.

(5) Directions for a preliminary issue

37. As noted above, the claim seeks, *inter alia*, to recover losses which the Class incurred in respect of Renewables Obligation payments made by suppliers. There is an issue in these proceedings as to whether the alleged overcharge on cables had an effect on electricity suppliers' Renewables Obligation payments, which were passed on to the Class within their domestic electricity bills. The Defendants contend that the alleged overcharge, even if established in the highest amount claimed, was too small, as a proportion of offshore wind costs, to have had any effect.

38. The Defendants submit that the issue concerning whether the alleged overcharge had any effect on payments by suppliers under the Renewables Obligation scheme (the "**ROC issue**") should be resolved as a preliminary issue on the ground that it accounts for a substantial proportion of the overall loss claimed. It is common ground that the ROC issue is also of potential relevance to Case No. 1518/5/7/*22 London Array Limited and ors v Nexans France SAS and ors* (the "***London Array Proceedings***"), a follow-on claim based on the same Commission Decision as the claim in the present proceedings. That claim is brought by entities involved in the development and operation of the London Array windfarm. The First and Second Defendants are also defendants in the *London Array Proceedings*. The London Array claimants' case is that the cartel caused an overcharge affecting the cables which they purchased and that they did not receive any offsetting benefit because any overcharge would not have led to increased subsidies under the ROC scheme.

39. The Defendants therefore propose that the ROC issue be treated as a common issue and determined together with the trial of the claim brought by London Array which is listed to commence on 29 April 2025, with a time estimate of six weeks.

40. The PCR's position is that, but for the existence of the *London Array Proceedings*, it would not be appropriate or efficient for the ROC issue to be determined as a separate preliminary issue but, given the overlap between the present case and the *London Array Proceedings* and the potential for double recovery and/or inconsistency between two sets of proceedings, the PCR does not object to that course in principle.

41. The Tribunal has accordingly directed that a Case Management Conference should be held attended by the parties in these proceedings and the parties to the *London Array Proceedings* in order to consider whether it would be appropriate to direct a joint determination of the ROC issue and any other issue.

(6) Distribution plan

42. The Tribunal raised an issue as to the need to plan for the future distribution of any future settlement or damages awarded to members of the Class.

43. It is axiomatic that, in order for collective proceedings to fulfil their primary objective of compensating members of the Class, there must be an effective method of distribution, enabling members of the Class to be identified and contacted and maximising the take-up of compensation.

44. As noted by the Court of Appeal in *Le Patourel* there is almost nothing in the 1998 Act or the Tribunal Rules which addresses the actual process or modus operandi of distribution. That lacuna is to be filled by the exercise of the Tribunal's broad case management powers. Rule 93(1), replicating the effect of Section 47C(3) and (4) of the 1998 Act, simply requires the Tribunal, where it makes an award of damages in opt-out proceedings, to 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. Rule 93(4) and (5) make provision for the eventuality that might arise at the end of the distribution process where an award of damages is not fully distributed, creating a default position whereby undistributed funds can be allocated to a nominated charity.

45. The Tribunal considers that there may well be particular challenges to effective distribution in this case, given the large size of the class and the potential difficulties for consumers in recalling and proving what, if any, electricity bills they paid over the course of an infringement period going back over twenty years, as well as recalling and proving when they first started paying, which may be relevant for limitation purposes.[1] Even if the aggregate amount of any settlement or damages award is large, there is a risk that if that aggregate award is simply distributed in cash among all members of the Class, each individual member might regard the amount receivable as small and so may not be sufficiently incentivised to engage actively in the distribution process leading to a small take up. It would obviously be unattractive if tens of millions of pounds of legal and funder's fees, and lots of Tribunal time, are spent on complicated proceedings only to find that few consumers actually come forward to claim damages. If that were the outcome, it might fairly be said that the litigation has benefitted no-one but the lawyers and funders.

46. A number of cases have emphasised the scope for creativity in devising effective methods of distribution. In *Gutmann v London & South Eastern Railway Ltd* [2022] EWCA Civ 1077, a case concerning train fares, the Court stated:

> "87. Thirdly, as to the appellants' pessimistic prognosis that an award will not be claimed, this is an untested premise. It assumes that the CAT lacks the ability to find creative ways of ensuring that the award is distributed so as to maximise the benefit to relevant consumers. Once an award has been made the choice of distribution is binary and lies between distribution to the class and distribution to the selected charity. Whilst we express no decided position upon the issue it certainly seems arguable that it is open to the CAT, if it accepts the appellants' gloomy forecast, to consider whether there are appropriate proxies to distribution to individual claimants such as ordering a prospective reduction in certain fares upon the basis that if it is impossible from a practical perspective to cure the past then a forward-looking remedy might suffice. This might be because it would capture a substantial portion of the consumers who had sustained a past loss but who, for whatever reason, would not come forward to make a claim, perhaps because, as the appellants argue, they no longer possessed proof of travel. Given the legally binary nature of the choice of distribution – class or charity – then a method of distribution which, albeit in a relatively rough and ready way, goes to future travellers might be a far

[1] One category of persons excluded from the Class comprises people who first paid for electricity in the period from 1 October 2015 to 9 May 2016 in respect of premises in England and Wales. This is because their claims are time barred by the application of section 47E of the 1998 Act.

better fulfilment of the purposes of the collective redress scheme than payment to the nominated charity."

47. In *Le Patourel* the Court of Appeal rejected the argument that it was not open to the CAT to direct that damages be paid via a credit to customers' accounts:

> "91. Further, because BT's argument is based upon the proposition that it would be *ultra vires* the powers of the CAT to permit anything other than the distributing of a fixed, fungible, monetary sum the CAT could not make an order for distribution via an account credit even if (say) 2 million customers wrote to the CAT to say that this was exactly how they wished to be compensated. If BT is correct in a case with a large class, distribution could take years and entail the incurring of costs which would have to be deducted from the damages to be paid to the customer and would have the effect of reducing the ultimate aggregate sum to be distributed. In the present case the class comprises about 2.3 million customers; the damages claimed approach £600m. The average claim will be between £148 and £333. If customers prove hard to contact and/or then engage in correspondence about the claim including seeking proof that it is genuine and/or further correspondence about the method of payment, the administrative costs could rapidly eat significantly into the sum to be paid.
>
> …
>
> 94…The concept of "distribution" is not defined, and the law has very little to say about its mechanics. There is no prohibition (express or implied) on the party performing distribution using innovative methods to maximise the benefit to the consumer."

48. By analogy, there may be scope in the present case for the identification of class members to be done through the use of electricity suppliers' records rather than requiring class members to identify themselves. It may be appropriate for distribution to be effected by the damages award, subject to deduction of the PCR's costs, legal costs and payments to funders, being credited to consumers' electricity bills. This possibility is envisaged by the PCR in her Reply to the Defendants' responses to the CPO application.

49. It was submitted on behalf of the PCR that it was premature to consider issues of distribution at the certification stage and that the method of distribution should not be developed until after settlement or an aggregate award of damages has been made. The litigation plan simply envisages that, after an award has been made, members of the Class would be notified of their right to claim and would be directed to submit an online claim.

50. In support of the submission that it was premature to consider plans for distribution at the certification stage, the Tribunal was referred to the decision of the Supreme Court in *Merricks,* in particular to the following passage in the judgment of Lord Briggs:

> "80. Finally, the Court of Appeal regarded any consideration of distribution proposals at, and for the purposes of, the certification stage as premature. I agree that this will generally be true, not least because issues about distribution mainly engage the interests of the represented class inter se, rather than those of the proposed defendant. But there may be cases where the issues as to suitability of the claims for collective proceedings will be better addressed when the whole of the representative's proposed scheme, including distribution proposals, are looked at in the round. In the present case there was nothing in the proposals for distribution which militated against certification, and an inappropriate element in the distribution proposals would normally be better dealt with at a later stage."

51. As this passage makes clear, however, Lord Briggs did not regard it as inevitably premature for the Tribunal to have regard to a proposed distribution method at the certification stage (as expressly stated at [150]). Lord Briggs regarded consideration of distribution proposals at the certification stage as "generally" premature because such proposals tend to engage the interests of the represented class *inter se*. However, the Tribunal's concerns in the present case about distribution relate not to fairness as between members of the Class but a more fundamental question as to whether the proposed collective proceedings offer a real prospect of benefit to members of the Class as distinct from lawyers and funders.

52. Lord Briggs held that it was not necessarily premature to consider distribution at the certification stage (at [64 (g)]) and Lord Sales and Lord Leggatt, who were in the minority on other issues agreed with Lord Briggs on what was called the "Distribution Issue" (see [148]). The Tribunal in *Merricks* did not, therefore, err by considering questions of distribution at the certification stage. The Applicant in *Merricks* had accepted that the Tribunal was entitled to treat the way in which it is proposed that an award of aggregate damages should be distributed as a relevant factor when considering whether the suitability requirement is satisfied in order for a CPO to be made. The error of law found by the Supreme Court in the Tribunal's refusal to certify was not its taking into

account the PCR's proposals for distribution but its treatment of the compensatory principle as an essential element in the distribution of aggregate damages.

53. The issue raised by the Tribunal in this case is not as to whether the amount of damages received by class members will accord with common law principles but as to whether a practical and effective process will be found for distributing a settlement or damages award to the class as a whole. This is relevant to its assessment of "the costs and the benefits of continuing the collective proceedings" (Rule 79(2)(b)). The budgeted costs of these proceedings are very substantial. The absence of an effective method of distribution to the Class would call into question the suitability of the claims to be brought in collective proceedings. In *Consumers' Association v Qualcomm Incorporated* [2022] CAT 20 the Tribunal said this:

> "105. As the Tribunal noted in *Gutmann* at [171], it is relevant to consider whether the proposed collective proceedings are likely to benefit principally the lawyers and funder as opposed to the members of the class. In that regard, we do not exclude that in a particular case the cost-benefit analysis might so clearly weigh against certification that this might in itself be a ground for finding that the claims were not suitable to be brought in collective proceedings."

54. The PCR sought to downplay the significance of this factor by noting that, following *Merricks*, the question whether the proceedings are "suitable" for collective proceedings engages considerations of "relative suitability" by comparing them with the possibility of individual members of the Class bringing their own actions. We accept that *Merricks* does require an analysis of "relative suitability", but this does not answer the Tribunal's point. If only a small proportion of the Class take up any damages award, or if no viable method of distribution can be found other than a payment of relatively small sums to members of the Class on production of compendious documentation establishing entitlement to those sums, these proceedings would compare unfavourably with individual proceedings even in a relative sense as they would involve the expenditure of large legal and funder's fees without much practical benefit.

55. Having regard to the novelty of Collective Proceedings, the possible difficulties in distributing a settlement or damages award to the Class in this case, the need to explore innovative and creative methods of distribution and the substantial costs which are predicted to be incurred, the PCR should give detailed consideration to plans for the distribution now so that the Tribunal is in a position to make a properly informed assessment of the costs/benefit balance as the proceedings progress. It would be unsatisfactory to defer consideration of proposals for distribution until after an award has been made by which time the majority of the costs will already have been incurred. The Tribunal does not regard the current absence of a developed plan for distribution as precluding certification, but it has directed the PCR to report to the Tribunal within three months on her proposals. The PCR's response will be relevant to the Tribunal's ongoing "gatekeeper" function in relation to these proceedings. If a proposal for distribution does not emerge that addresses the Tribunal's concerns, one option available will be to revoke the CPO under Rule 85.

56. In the event that the Tribunal approves a method of distribution, such as account crediting, which does not leave any proceeds of a settlement or damages award undistributed, it will be necessary to make provision for payment to Burford. This is because, under the LFA, Burford's payment is to come from uncollected proceeds of the damages award. In this situation, the Tribunal would have the power to make an order that that payment be made to Burford out of damages awarded to the Class and it is not impermissible for a class representative to enter into a litigation funding agreement which contemplates this; see *Le Patourel* at [99] and *Gutmann v Apple Inc* [2024] CAT 18. The Tribunal notes that Clause 2.5 of the LFA requires the PCR, if the proceedings are successful or a collective settlement is approved, to use her best endeavours to obtain orders from the Tribunal that Burford's Entitlement be paid.

D. CONCLUSION

57. Having considered the Statements of Case, the PCR's witness statement, the expert evidence adduced by the parties and the oral submissions at the certification hearing, the Tribunal was satisfied:

(1) that it is just and reasonable for the PCR to act as a representative in the Collective Proceedings (section 47B(8)(b) of the 1998 Act and Rule 78);

(2) that the claims raise the same, similar or related issues of fact or law (being those specified in paragraph 50 the PCR's proposed amended Collective Proceedings Claim Form) and are suitable to be brought in collective proceedings on an opt-out basis (section 47B(6) of the 1998 Act and Rule 79);

(3) that the methodology proposed by the PCR provides a "blueprint" of the way ahead to trial in accordance with the *Pro-Sys* test;

and made a CPO.

58. We allow the PCR's application to re-amend her Collective Proceedings Claim Form, an application that was ultimately not opposed by any of the Defendants.

59. We make the case management and other directions referred to elsewhere in this decision including:

(1) the direction that the PCR provide further proposals as to distribution of any damages awarded (see paragraph 55 above);

(2) the direction for a joint CMC with the claimants in the *London Array Proceedings* (see paragraph 41 above);

(3) the direction that the PCR provide further information on her litigation budget (see paragraph 36 above); and

(4) the confirmation that the LFA is not a "damages-based agreement" (see paragraph 31 above).

Andrew Lenon KC
Chair

The Honourable Mr Justice Richards

Professor Anthony Neuberger

Charles Dhanowa, OBE, KC (Hon)
Registrar

Date: 3 May 2024