Neutral Citation Number: [2023] EWCA Civ 875

Cases No: CA-2022-002254, 002257 AND 002264

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
ROTH J, DR WILLIAM BISHOP AND PROFESSOR STEPHEN WILKS
[2022] CAT 25

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/07/2023

Before:

SIR JULIAN FLAUX CHANCELLOR OF THE HIGH COURT
LORD JUSTICE GREEN
and
LORD JUSTICE SNOWDEN

- -

Between:

UK TRUCKS CLAIM LIMITED	**Appellant**
- and –	
STELLANTIS NV (FORMERLY FIAT CHRYSLER AUTOMOBILES NV) AND OTHERS	**Respondents**
And between:	
TRATON SE AND OTHERS	**Appellants**
-and-	
ROAD HAULAGE ASSOCIATION LIMITED	**Respondent**
VOLVO LASTVAGNAR AKTIEBOLAG	**Intervener**

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

THE KING

(On the application of UK TRUCKS CLAIM LIMITED)

Claimant

-and-

THE COMPETITION APPEAL TRIBUNAL

Defendant

STELLANTIS NV (FORMERLY FIAT CHRYSLER AUTOMOBILES NV) AND OTHERS

Interested Parties

-and-

THE KING (On the application of TRATON SE AND OTHERS)

Claimant

-and-

THE COMPETITION APPEAL TRIBUNAL

Defendant

-and-

ROAD HAULAGE ASSOCIATION LIMITED AND OTHERS

Interested Parties

- -
- -

Daniel Jowell KC and Jonathan Scott (instructed by **Slaughter and May**) for **Traton SE and the other MAN Appellants**
Meredith Pickford KC and Nikolaus Grubeck (instructed by **Travers Smith LLP**) for the **DAF Appellants**
Rhodri Thompson KC, Nicholas Gibson and Niamh Cleary (instructed by **Weightmans LLP**) for **UK Trucks Claim Limited**
Tony Singla KC and James White (instructed by **Herbert Smith Freehills LLP**) for **Stellantis NV and the other Iveco parties**
Paul Harris KC, Ben Rayment and Alexandra Littlewood (instructed by **Macfarlanes LLP**) for **Daimler**

Mark Hoskins KC and Jacob Rabinowitz (instructed by **Freshfields Bruckhaus Deringer LLP**) for the intervener **Volvo**
James Flynn KC, David Went and Emma Mockford (instructed by **Backhouse Jones Solicitors and Addleshaw Goddard LLP**) for **Road Haulage Association Limited**

Hearing dates : 9 to 11 May 2023

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Approved Judgment

This judgment was handed down remotely at 10:30am on Tuesday 25 July 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

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Sir Julian Flaux C:

Introduction and background

1. The principal issue on this appeal from the judgment of the Competition Appeal Tribunal ("CAT") is whether the CAT erred in law in deciding to grant a Collective Proceedings Order ("CPO") pursuant to which the Road Haulage Association Limited ("the RHA") was made the class representative in preference to UK Trucks Claim Limited ("UKTC") although both proposed class representatives satisfied the statutory criteria for certification. The issue of law, in broad terms, is whether a single class representative can represent a class in relation to a common issue in circumstances where there is an actual or potential conflict of interest between two groups of class members.

2. The collective proceedings in respect of which both the RHA and UKTC sought to be class representative were follow-on claims from a settlement decision of the European Commission in Case 39824-Trucks. By that decision the Commission found that five European group companies of truck manufacturers ('original equipment manufacturers' or 'OEMs') to whom I will refer individually by the abbreviations DAF, MAN, Iveco, Daimler and Volvo, had continuously infringed Article 101 TFEU and Article 53 EEA Agreement between 17 January 1997 and 18 January 2011 (with MAN's period of infringement having ended on 20 September 2010). The finding, as to which the OEMs admitted liability, was that they had exchanged information on future gross prices and colluded on the timing and passing on of the costs of the introduction of emission-reduction technologies mandated by the EURO 3 to 6 standards for trucks weighing 6 or more tonnes.

3. UKTC is a special purpose vehicle incorporated for the purpose of pursuing collective proceedings seeking follow-on aggregate damages from the OEMs on the basis of the Commission's decision. On 18 May 2018 it filed with the CAT an application under section 47B of the Competition Act 1998 ("the 1998 Act") for a CPO on an opt-out basis for a proposed class consisting of those who, during the infringement period and for a run-off period until 31 December 2011, had acquired new trucks from the OEMs in the UK. The proposed class excluded those who acquired trucks for leasing out under operating leases of at least 12 months and those who had rented trucks for less than 12 months.

4. UKTC's economic expert, Dr Andrew Lilico, proposed simulation modelling, a somewhat novel approach for cartel litigation, as his primary method of calculating the loss suffered by the proposed class members ('PCMs'). He would construct a simulation model of how the market would have operated in the infringement period in the absence of the cartel, and compare this model with the actual prices during that period. In doing so, he said that he would use nine sub-classes to account for the diversity between the PCMs. The aggregate damages would then be quantified by applying the percentage difference to the estimated amount paid by the PCMs as a whole.

5. The RHA is a trade association that promotes the interests of the road haulage industry. It issued collective proceedings seeking an award of non-aggregate damages on an opt-in basis. Unlike UKTC's claim, its proceedings included a claim specifically for loss alleged to have been caused by delay in the introduction of new EURO emissions

technology. The RHA filed its own application under section 47B on 17 July 2018 for a proposed class comprising those who during the infringement period (and during a run-off period ending on 17 May 2019) had acquired new or used trucks from the OEMs in the UK or, where the purchaser's group had also purchased trucks from the OEMs in the UK, in the EEA. The RHA's proposed class excludes those who derive more than half their turnover from selling or leasing trucks.

6. To calculate the loss allegedly suffered by its PCMs, The RHA's economic expert, Dr Peter Davis, proposed to use econometric estimation of prices during and after the infringement period. This would allow the use of control variables to strip out the various determinants of price unrelated to the cartel. Dr Davis also suggested taking account of the varied composition of the class by conducting separate regression analyses for a series of sub-classes, defined essentially in terms of types of truck and truck transaction. This methodology, he says, will enable the estimation of the damage for each truck bought by each PCM, and the total damages for each PCM can then be quantified by aggregating the predicted damage for each truck on a 'bottom up' approach.

Issues before the CAT and the CAT judgment

7. The principal issues before the CAT were:

(1) In each case should it authorise the proposed class representative ('PCRs') to be the class representative under section 47B(8) of the 1998 Act, read with rule 78 of the Competition Appeal Tribunal Rules 2015 ("CAT Rules")?

(2) In each case, does the methodology for calculating loss proposed by the economic expert satisfy the viability test formulated by the Supreme Court of Canada in *Pro-Sys Consultants Ltd v Microsoft Corpn* 2013 SCC 57 (*"Microsoft"*) which is now applied under the collective proceedings regime in this jurisdiction?

(3) In each case, are the proceedings eligible for inclusion in collective proceedings under section 47B(6) of the 1998 Act, read with rule 79 of the CAT Rules?

(4) Could the CAT certify both sets of claims so that there were two overlapping sets of collective proceedings and if so, should it do so in the present case?

(5) If the CAT should not certify both sets of claims, which of the sets of proceedings should it certify?

8. The CAT answered those questions in a lengthy and detailed judgment dated 8 June 2022. As in the case of the CAT judgment in *O'Higgins v Barclays Bank plc and others* and *Evans v Barclays Bank plc and others* (respectively *"O'Higgins"* and *"Evans"*) [2022] CAT 42 in respect of which the same constitution of this Court heard the appeal shortly before the present hearing (and in respect of which we will hand down judgment at the same time as the present judgment), the present case was heard by the CAT before the guidance of this Court in *BT Group plc v Le Patourel* (*"Le Patourel"*) [2022] EWCA Civ 593; [2022] Bus LR 660 (handed down on 6 May 2022) and *London & South Eastern Railway Limited v Gutmann* (*"Gutmann"*) [2022] EWCA Civ 1077 (handed down on 28 July 2022) as to the correct approach which the CAT should adopt to certification hearings and the grant of CPOs. The judgment of this Court in *Le*

Patourel came out shortly before the judgment of the CAT and is referred to once at [223] in that judgment, which follows the decision of this Court that there is no presumption in favour of opt-in over opt-out proceedings. However, the guidance which this Court provided in *Gutmann* was not available to the CAT in this case. This explains for example why the CAT analysed the Canadian jurisprudence in detail at [40] to [50] and elsewhere in its judgment. In *Gutmann* this Court pointed out at [41] and [42] (approving the analysis of the CAT in that case) the differences between the Canadian collective proceedings regime and our regime. Those differences highlight that (other than in relation to the *Microsoft* test which we have adopted) the Canadian jurisprudence only provides general guidance and regard must always be had to the fact that the legislative regimes are different (not least because the regime in Canada is exclusively opt-out).

9. We expect and hope that, in the light of the guidance given by this Court in *Le Patourel* and *Gutmann* and in the present judgment and the judgment in *O'Higgins* and *Evans*, the issues of certification, carriage and other issues raised by applications for CPOs can be dealt with by the CAT at shorter hearings and in shorter judgments. Since the CAT hearings in this case and in *O'Higgins* and *Evans*, the CAT has acquired considerable experience of dealing with applications for CPOs. In the light of that experience and with the guidance provided by appellate judgments, the CAT should be able to hold shorter hearings and produce shorter rulings in such cases, which this Court would encourage. Appeals to this Court should be limited to genuine issues of law as opposed to challenges to the exercise of the broad discretion and case management powers afforded to the CAT in this area dressed up as errors of law. This was a point which this Court made very clearly in [44]-[45] and [55]-[57] of *Le Patourel*, but it merits re-emphasising. A number of the arguments raised by the parties in this case fell into the category of matters which were not properly the subject of appeal (or of judicial review, of which more below) but were within the broad discretion and case management powers of the CAT as a specialist tribunal.

10. In view of those observations, it is neither necessary nor appropriate to cite at great length from the judgment of the CAT in the present case, but I will seek to summarise the principal conclusions and focus on the matters relevant to the appeal/judicial review.

11. Having set out the background and the legal framework, at [23]-[34] of its judgment, the CAT determined that both the RHA and UKTC satisfied the authorisation condition under section 47B(8) of the 1998 Act. The CAT then went on to consider whether the issues raised by the claims were *"common issues"*, that is whether the claims: *"raise the same, similar or related issues of fact or law"* within the meaning of section 47B(6) of the 1998 Act.

12. In relation to overcharge issues, the CAT determined that these were common issues provided that there was a method of economic analysis which satisfies the *Microsoft* test and enables them to be addressed on a common basis ([74] of the judgment). At [75] the CAT determined that the alleged overcharge on used trucks raised as an issue by the RHA claim was a common issue, subject to the fundamental objection raised by the OEMs and UKTC that there was a conflict of interest between PCMs who purchased new trucks and PCMs who purchased used trucks, since the latter would wish to argue that the overcharge on new trucks had been passed on by way of enhanced resale or buy-back prices obtained for those trucks, hence the purchasers of used trucks suffering an overcharge, whereas the new truck purchasers would wish to minimise the extent to

which the overcharge they had faced was passed on, given that it would otherwise reduce their damages. The CAT went on to deal with that question of alleged conflict of interest later in its judgment.

13. In relation to pass-on, the CAT noted at [77] that UKTC did not seek to identify this as a common issue, submitting that it would be premature to do so before the OEMs pleaded their defences. The RHA did not seek to do so at this stage, but accepted that it might be appropriate to consider whether it could be a common issue as more facts emerge. The aspect of pass-on concerning resale of the truck itself was effectively encompassed within the common issues proposed in the RHA application. The CAT considered that since the UKTC action sought aggregate damages it was essential to address the question now, it seeming inevitable that the OEMs will plead pass-on as a defence.

14. The CAT noted at [79] that in *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2020] UKSC 24 (*"Sainsbury's"*), the Supreme Court held that pass-on in a competition case can be estimated by use of the "broad axe". *Merricks v Mastercard Inc* [2020] UKSC 51 (*"Merricks SC"*) demonstrated that pass-on, however much it might vary as between members of the class, will be a common issue if it can be addressed on a common basis. In relation to the UKTC claim, the CAT therefore held that it will be necessary for pass-on to qualify as a common issue. The RHA action is different because aggregate damages are not sought and only opt-in proceedings are proposed. Re-sale pass-on is put forward as a common issue by the RHA, but the other species of pass-on, downstream pass-on of charges to customers, could be approached on a more individualised basis once the primary loss has been established, for example by considering PCMs in different commercial sectors. So the CAT held that it was not necessary to decide whether in the case of the RHA action downstream pass-on gave rise to a common issue.

15. The CAT went on to determine that the EURO emissions claim gave rise to a common issue in the RHA action, but not in the UKTC action and that compound interest was not a common issue in either. The CAT then went on to address various respects in which the class in each case could be said to be over-inclusive, narrowing the two classes. Nothing turns on that question before this Court.

16. The CAT considered at [117] to [157] of its judgment the detail of the expert methodology of each of the two experts, Dr Davis for the RHA and Dr Lilico for UKTC. The CAT was clearly impressed by Dr Davis and his methodology, concluding at [139] that it clearly satisfies the *Microsoft* test. The CAT had misgivings about Dr Lilico's methodology, noting at [147] the strong criticism of his approach by the OEMs in which the CAT thought there was considerable force. It is evident that Dr Lilico effectively redeemed himself so far as the CAT is concerned by his explanations during his oral evidence and, ultimately, despite its concerns and since (as Lord Briggs JSC said at [41] of *Merricks SC)* the *Microsoft* test is not intended to be onerous, at [157] the CAT concluded that Dr Lilico's methodology is sufficiently plausible to cross the *Microsoft* threshold. Although Daimler was critical of this conclusion in its Respondent's Notice and Mr Paul Harris KC's oral submissions, contending that the CAT should not have reached this conclusion and should have declined to certify the UKTC action, I do not consider it necessary to examine Dr Lilico's methodology in any greater detail in this judgment, essentially for two reasons. First, the criticisms made by Daimler fall squarely within an attempt to dress up as an error of law or as alleged irrationality

matters which are quintessentially the exercise of discretion and judgment by an expert tribunal as to whether to grant certification. Second, the criticisms are academic since, for reasons developed hereafter, I have concluded that the CAT did not err in its conclusion that the RHA and the RHA alone should be the class representative.

17. The CAT then considered the suitability requirement in section 47B(6) of the 1998 Act. It rejected the OEMs' argument that the claims in both actions were more suitable for individual determination. In relation to the RHA class, the CAT said at [165] that it was fanciful to suppose that, save for a few exceptions, the PCMs could bring independent individual actions. It said:

> "The potential damages recovery on an individual basis for such claimants is dwarfed by the vast cost of such damages proceedings, and it is unrealistic to expect small businesses to take the risk of litigation of this nature against major and very well-resourced defendants."

The correctness of that observation was confirmed by the array of parties and lawyers present at the appeal hearing, confirming the vast cost of these proceedings.

18. The CAT then dealt with three specific matters to be addressed in the context of suitability: tax, the RHA claim for "foreign trucks" and the RHA quantification method and the compensation principle. None of the CAT's conclusions on those matters were challenged on appeal, so that it is not necessary to address them, save to record that the CAT rejected the OEMs' arguments other than in relation to non-UK trucks which it said should be excluded from the class. The CAT also rejected arguments by Iveco and Daimler that the class definitions were insufficiently clear, which again was not challenged in this Court.

19. The CAT dealt with the issue as to whether it should certify two class representatives in circumstances where the RHA and UKTC applications, although not identical, substantially overlap. It noted at [193] the submissions by the OEMs that it was clear from Rule 78(2)(c) of the CAT Rules that it is not possible to authorise two representatives for the same or overlapping classes. UKTC submitted that there was no bar to having opt-in collective proceedings alongside opt-out collective proceedings. At [194] the CAT concluded that, whatever the jurisdictional position, it would be wholly inappropriate to approve both applications. They would have to be heard together, which would substantially increase the cost and complexity of the proceedings, contrary to the governing principle in rule 4 of the CAT Rules.

20. The CAT then had to make its choice between the RHA application and the UKTC application. It noted at [197] that there was nothing to choose between them in terms of the quality of their legal representation and at [198] that the different character of the proposed class representatives, an SPV with an experienced board of directors as against an established not-for-profit trade organisation, offered certain advantages in each case so that this was a neutral factor.

21. The CAT dealt with a number of other factors starting with class definition, noting that the UKTC class excludes claims by those who rented trucks for less than a year, who might well have suffered an overcharge. In contrast the RHA class includes lessees of trucks as well as purchasers, but excludes truck rental companies. At [202] the CAT

said this contrast in treatment of truck rental cuts both ways. Both classes were likely to leave some potential claimants without an effective remedy. There was no evidence as to whether those renting out trucks or those who rented trucks comprise a greater proportion of SMEs.

22. The CAT noted at [203] that the RHA class includes the purchasers of used trucks whereas the UKTC class does not. It considered it clearly plausible that an overcharge on a new truck was to some degree passed on when it was sold and noted that the OEMs would contend strongly to that effect. Furthermore, the inflation of truck prices resulting from any overcharge may have affected the prevailing prices for used trucks which, as the CAT said, is a very significant category. It referred to the RHA research to the effect that around 50% of truck operators only operated used trucks, so that inclusion in the class of used trucks provided the many SMEs who only acquired used trucks with effective access to justice for potential claims. It also captures the resale pass-on element of an overcharge on new trucks which would otherwise reduce the OEMs' liability and avoid their taking into account all the loss they have caused. The CAT indicated that for reasons it came onto, it did not consider that the conflict between purchasers of new trucks and of used trucks in the RHA class precluded the grant of a CPO. On the basis that the conflict problem was not a valid objection, the CAT considered that the inclusion of used trucks was a significant advantage of the RHA application, because it will enable a large number of potentially affected SMEs to pursue their claims.

23. Next the CAT dealt with the run-off period under each application concluding at [213] that the period should be limited for the RHA to 31 January 2014 for new trucks and any EURO emissions claim and 31 January 2015 for used trucks to allow a modest extension for resale. The CAT then noted that the RHA put forward a method for claiming damages for increased costs resulting from the delayed introduction of EURO emission compliant trucks whereas UKTC did not. The CAT concluded that it could not reach even a preliminary view as to whether such a head of loss is sustainable but noted that collusion regarding the introduction of emission compliant trucks was a significant aspect of the European Commission Decision. This was therefore a factor favouring the RHA proceedings.

24. The CAT then considered the question of aggregate versus individual damages. It noted at [215] that aggregate damages offer the benefit of a single, final quantification and in some cases a simpler and more efficient procedure but that the quantification process for an aggregate award is more challenging because it makes greater demands on the method of quantification. Also, although UKTC had not sought to have pass-on approved as a common issue, the CAT had concluded that could not be avoided. The CAT considered that the relative benefits of aggregate compared with individual damages were closely tied to the relative strengths of the alternative expert methodologies to which it then turned. At [216] it concluded that although both passed the *Microsoft* test, it had more confidence in the robustness of Dr Davis' methodology. This was partly because the use of regression analysis is well tested and widely acknowledged but more significantly because the RHA opt-in proceedings will give Dr Davis access to a significant volume of data from class members which he can deploy for a sophisticated analysis taking more account of the heterogeneity of the trucks market.

25. The CAT then turned to the issue of opt-out versus opt-in which it regarded as perhaps the most fundamental difference between the two applications. It considered that it was practicable for the proceedings to be brought as opt-in proceedings, which was the view of Mr Burnett of the RHA in his witness statement which the CAT quoted at [219]. It considered that the view of the RHA was reasonable and well-founded. It referred to the website dedicated to the proceedings established by the RHA in June 2017 and that when the application for a CPO was issued a year later, some 3,500 operators had formally signed up. By March 2021 this had risen to some 15,700, over 10,000 of which are firms operating 10 or fewer trucks. The RHA has also succeeded in reaching out to non-members as some 45% of the PCMs were not members of the RHA.

26. The CAT cited at [221] Lord Briggs JSC's observation in *Merricks SC* at [92] that opt-out proceedings are:

> "designed to facilitate access to legal redress for those who lack the awareness, capability or resolve required to take the positive step of opting in to legal proceedings."

As the CAT observed, that characterisation clearly applied to a gargantuan class of individual consumers with very small claims as in *Merricks* but the potential class and likely amounts involved here are very different. Even very small firms or individual traders are likely to become aware of the proceedings and, if interested in recovery, take the initiative to join in.

27. The CAT noted at [223] that there was no presumption under the legislative scheme in favour of opt-in over opt-out proceedings, citing this Court in *Le Patourel*. However, in the present case it considered that opt-in proceedings have the considerable advantage of giving the expert economists access to a very significant source of data from the claimants to inform and support their quantification of damages. They are not only practicable but the more sensible and reasonable way of proceeding.

28. The CAT dealt finally in conducting this weighing exercise with the funding arrangements, noting at [224] that UKTC contended that its funding arrangements were considerably more favourable. In the case of the UKTC opt-out proceedings, the funder's remuneration and ATE premium would fall to be paid from any sum ordered by the CAT after the appropriate damages had been paid to claimants seeking payment. In the case of the RHA opt-in application, the funder and insurance premium would be paid out of the damages recovered for all individual claimants so diminishing the amount available.

29. It said at [229] that it was necessary to consider this in concrete not abstract terms. The funding agreement between the RHA and Therium provides for a "waterfall" in relation to Therium's remuneration. The percentage paid to Therium decreases as the amount of damages increases. Thus, if the total damages reaches £3 billion, Therium's remuneration is 6% whereas if the damages are £2 billion it is 8%. It is only if the total recovery is no more than £150 million that the remuneration reaches 30%. As at 28 January 2021 PCMs signed up and registered for the RHA action accounted for some 315,000 trucks and that figure had increased before the CAT hearing. At [230] the CAT said that it did not consider there was a realistic concern that the Therium remuneration arrangements would operate unfairly as regards class members or that if their claims are successful, they are likely to be deprived of a significant part of their damages.

30. In conclusion on which class representative to choose, at [231] the CAT said it had reached the clear view that the RHA opt-in proceedings are preferable to the UKTC opt-out proceedings or even to the UKTC proceedings on an opt-in basis. That determination was however based on the RHA action comprising both new and used trucks and the CAT turned to consider that issue, which is central to this appeal.

31. The CAT noted at [232] the OEMs' argument that the RHA application was unsustainable because the inclusion of claimants for both new and used trucks gave rise to an irreconcilable conflict of interest on the part of the RHA. The CAT said at [233] that it was in the interest of those claiming for new trucks to argue that there was no or little pass-on whereas the interest of those claiming for used trucks was precisely the reverse. On that basis it was submitted that the RHA cannot fairly represent both interests and the requirement of rule 78(2)(a) that the RHA "would act fairly and adequately in the interests of the class members" cannot be satisfied. It was also argued that the question of overcharge on used trucks does not constitute a "common issue" if the class members have opposing interests as to its resolution. The OEMs argued that the RHA action could not be approved insofar as it covers both new and used trucks.

32. The CAT then referred to Canadian jurisprudence on conflicts within two classes for which a proposed representative was seeking to act. It noted at [236] the reliance placed by Mr Daniel Jowell KC for MAN on the Alberta case of *Elder Advocates of Alberta Society v Alberta* (2008) ABQB 490 at [521] as a convenient summary of the position in Canada:

> "Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests…"

33. The CAT then dealt in detail with the decision of the Supreme Court of Canada in *Infineon Technologies v Option Consommateurs*, 2013 SCC 59 on which Mr James Flynn KC for the RHA relied. In that case the proposed class included both direct and indirect purchasers where the issue arose as to whether an overcharge was passed-on from direct to indirect purchasers. The judge at first instance refused to authorise the class action on the grounds that the interests of the class representatives conflicted with those of the non-consumer members of the proposed class. That decision was reversed on appeal. The CAT noted at [243] that the OEMs sought to distinguish *Infineon* from the RHA action on the basis that it was a case seeking aggregate damages so that the conflict concerning whether the overcharge was passed-on and, if so, to what extent, did not arise until the distribution stage once aggregate damages had been determined. The CAT considered that there was force in the OEMs' submissions on the Canadian authorities.

34. However, the CAT considered that there were two important and related distinguishing features of the RHA action which are very relevant. The first was that the RHA action involved opt-in proceedings, whereas in Canada only opt-out proceedings are possible, a distinction which the CAT regarded as fundamental. The CAT said this about the distinction, at [246]:

> "In opt-out proceedings, the class representative has no direct engagement with the class members it is representing; and they will nonetheless be bound (subject to any contrary direction by the Tribunal) by the judgment in the action: s. 47B(12). That is a feature which opt-out collective proceedings shares with representative actions pursuant to CPR r. 19.6. By contrast, in opt-in proceedings, each class member has expressly decided to have their claim included in the action, and for the purpose of taking that decision they can be expected to have regard to the information provided by the class representative. Here, PCMs who acquired new trucks and PCMs who acquired used trucks have the same common interest in seeking to maximise the overcharge claimed on the original sale of the trucks by the OEMs. Their interests may then diverge on the quantification of pass-on by resale of the truck. But as the RHA explained, the position which it adopts on the level of pass-on for the purpose of the action will be governed by the expert advice which it receives from Dr Davis, who will be considering the matter on the data, without a predisposition one way or the other."

35. The CAT then quoted what Dr Davis said about this in his second report and continued at [247]:

> "In our view, it is not difficult for the RHA to explain this in its notice to PCMs and to provide that if a PCM opts in to the proceedings it agrees to accept the determination of the RHA, following expert advice, as to the appropriate or acceptable level of new-used pass-on. In our judgment, such informed consent to the position avoids the RHA and its professional advisors being placed in a position of conflict and enables them to act in the interests of the class as a whole."

The CAT noted that it would have to approve the notice under Rule 81 and would expect it to explain the position in "easily understood language" (Rule 81(2)(c)).

36. Mr Jowell KC who led on this issue for the OEMs submitted that this would not work in practice, given the manifold ways in which conflicts could arise in the course of pursuing the claim for an overcharge on used trucks. However, the CAT said at [249] that it did not think it appropriate to base its decision on speculation as to potential conflicts that might occur. It noted that there was no suggestion that the RHA was not acting in good faith or bringing the proceedings for personal gain. The CAT expected it to be able to resolve such matters on a sensible and proportionate basis should they arise.

37. The second distinguishing feature from the Canadian authorities was dealt with by the CAT at [250], which was the substantial overlap between PCMs who acquired new trucks and PCMs who acquired used trucks. Of the PCMs who had signed up to or registered for the RHA proceedings, about a quarter acquired only used trucks, a third acquired only new trucks and some 40% purchased both. The OEMs still submitted that within that 40% group there was a conflict as the interests of those who bought a preponderance of new trucks and those who bought a preponderance of used trucks

were "diametrically opposed". The CAT said at [251] that this highlighted the practical unreality of those submissions. Elsewhere in their submissions the OEMs emphasised that trucks were heterogeneous and far from being fungible goods. The application had to be assessed on the basis that there was an arguable claim as regards both used and new trucks. The OEMs argued that there had to be a separate class and a separate representative for new and used trucks and, even, a separate third-party funder and yet there were a substantial number of claimants who would come within both classes. The hypothetical class representative of the new trucks class would on the OEMs' approach be conflicted because many of the class it represented would also be members of the used trucks class. The CAT pointed out that the logic of this approach would equally preclude the pursuit of parallel collective actions, one for new and one for used trucks, which was an outcome very much in the OEMs' interests.

38. At [252] the CAT noted that all PCMs share a common interest in establishing as high a level of overcharge on the sale of new trucks as possible. It considered that if the divergence of interest as regards the level of resale pass-on was fairly disclosed so that those opting-in gave consent, it would be contrary to the objective of the collective proceedings regime to find that the RHA could not fairly represent the whole class.

39. At [253] the CAT noted what the RHA said in its response to this point in its Reply:

> "To the extent the Tribunal has any concerns as to a potential conflict arising during the Proposed Collective Proceedings in respect of new and used Relevant Trucks, the RHA would be willing to commit to having a separate team of lawyers who have not otherwise worked on this matter and a second economic expert providing independent advice to those class members who purchased used Relevant Trucks in respect of the regression analyses aimed at determining the overcharge on used Relevant Trucks as compared with the regression analyses aimed at determining the overcharge on new Relevant Trucks."

It noted that the RHA was proposing as one of its sub-classes PCMs who purchased used trucks from any sales channel in the UK. The CAT set out para 6.35 of the Guide:

> "The use of sub-classes may be appropriate where there is a potential conflict between the interests of members of the broader class. For example in cartel damages claims, different categories of purchasers may have conflicting interests that require separate representation."

40. The CAT went on to conclude that it was not appropriate to identify sub-classes in the CPO at this early stage but noted at [255] the extensive case management powers given to the CAT for active case management including Rule 88 under which it could direct the class representative to give notice to class members of any steps it was taking in the proceedings. If the CAT considered at any stage that diverging interests as regards new and used trucks caused problems, it could vary the CPO to define a sub-class covering used trucks and it could consider authorising someone other than the RHA to act as class representative for that sub-class. It doubted that that course should prove necessary.

41. The CAT concluded that with certain modifications, the RHA application for certification should be granted and the UKTC application dismissed.

42. Somewhat surprisingly, given that almost a year had passed between the judgment of the CAT and the hearing of these appeals/judicial reviews, there is no order of the CAT. There is a draft order but its terms have yet to be agreed. We were informed that this was essentially because of inability to agree the form of notice to be sent out by the RHA to PCMs in relation to the conflict of interest in relation to the used truck overcharge.

Grounds of appeal and Respondent's Notices

43. MAN and DAF pursue one ground of appeal for which the CAT gave permission to appeal in its further judgment of 28 October 2022 ([2022] CAT 48) which is that the CAT erred in (i) holding that it was "*just and reasonable*" under section 47B(8)(b) of the 1998 Act for the RHA to represent a class that included used truck purchasers and new truck purchasers; (ii) deciding that the claims of such purchasers were suitable for inclusion in a single collective action with a single class representative; and (iii) identifying as a "*common issue*" the issue of the alleged overcharge on used trucks or the amount of resale pass-on.

44. The CAT gave UKTC permission to appeal on its grounds 1 and 2 which can be summarised as follows:

(1) The CAT erred in law in granting a CPO to the RHA in a form that is not eligible for inclusion in collective proceedings because the conflict of interest between purchasers of new as opposed to used trucks prevents the CPO from satisfying Rule 79(1)(b) of the CAT Rules.

(2) The CAT erred in law in failing to consider the possibility of granting only part of the RHA's application to allow both applications to proceed and avoiding inter-application overlap and intra-class conflicts of interest.

45. The CAT refused UKTC permission to appeal on its ground 3 and UKTC renews its application for permission to appeal on that ground. Further UKTC raised for the first time before this Court a further ground (ground 4). Grounds 3 and 4 can be summarised as follows:

(3) The CAT erred in law in preferring the RHA's individuated opt-in application over UKTC's aggregate damages opt-out application without properly considering (i) the statutory purpose of the collective proceedings regime in follow-on damages claims, and (ii) the jurisprudence on the advantages of an aggregate opt-out action.

(4) The CAT was wrong in law to dismiss rather than stay UKTC's application.

46. In parallel with the appeals and applications for permission to appeal, MAN, DAF and UKTC protectively issued judicial review claim forms in September and December 2022, in case the Court of Appeal were to decide that it did not have jurisdiction to entertain their arguments as Grounds of Appeal (as opposed to Grounds for Judicial Review) under section 49(1A) of the 1998 Act.

47. Iveco and Daimler have filed Respondent's Notices in which they seek to uphold the CAT decision to dismiss the UKTC application on additional grounds which can be summarised as follows:

(1) The CAT erred in law in holding that downstream pass-on was a common issue within the meaning of Rule 79(1)(b) of the CAT Rules for the purposes of UKTC's claim.

(2) The CAT erred in law in holding that Dr Lilico's methodology for establishing loss to UKTC's proposed class satisfied the *Microsoft* test.

Jurisdiction

48. I propose to consider first whether the Grounds of Appeal and additional grounds in the Respondent's Notices fall within the jurisdiction of this Court under section 49(1A) of the 1998 Act. Analytically it makes little difference whether the challenges to a CAT decision are by way of Grounds of Appeal or Grounds for Judicial Review, since errors of law can be said, in public law terms, to be *ultra vires* and a decision outside the bounds of the discretion given to the CAT would almost certainly be irrational. However, given that there are limitations on the scope of the jurisdiction of this Court to hear appeals from the CAT, it is important to determine whether these challenges should be dealt with by way of appeal or by way of judicial review.

49. Section 49(1A) of the 1998 Act provides as follows:

> "An appeal lies to the appropriate court on a point of law arising from a decision of the Tribunal in proceedings under section 47A or in collective proceedings—
>
> (a) as to the award of damages or other sum (other than a decision on costs or expenses)…"

50. The meaning and extent of this provision were considered by this Court and the Supreme Court in *Merricks v Mastercard Inc* [2018] EWCA Civ 2527 and *Merricks SC*. In that case the CAT had refused to make a CPO under section 47B(4) of the 1998 Act on the grounds that the eligibility criteria had not been met. This Court held that it had jurisdiction to hear an appeal from that decision. At [27], Patten LJ said:

> "it is, in my view, nonetheless a decision in collective proceedings as to the award of damages within the meaning of s.49(1A)(a). The refusal of a CPO is a determination by the Tribunal that the eligibility criteria have not been met and the proposed representative is not therefore entitled to seek an aggregate award of damages under s.47C(2) which is a remedy unique to collective proceedings. As explained earlier in this judgment, this class remedy has been introduced by legislation as part of the collective proceedings regime in order to address some of the difficulties inherent in the bringing of individual claims and, as the experience in comparable jurisdictions has shown, is likely to be a critical component for addressing s.47A

> claims in the collective proceedings regime. As the Tribunal itself observed in [91] of its CPO decision, a refusal of a CPO is likely to prevent individual members of the represented class who have suffered loss from obtaining any compensation. It is therefore the end of the road for a class action of this kind and, as such, a decision as to the award of s.47C(2) damages."

51. This Court allowed the appeal from the CAT on the basis that it had made an error of law and that the claim should have been certified. The majority of the Supreme Court dismissed the appeal from this Court. It took a similarly broad view as to what constituted a point of law. In *Le Patourel* this Court sought to summarise the approach of the Supreme Court and interpret the guidance it gave at [52] to [55] in these terms:

> "52 … The Court treated the following as points of law: (i) whether the CAT correctly applied the "*common issue*" test (under section 47B(6) CA 1998 and Rule 79(2)(a)) as involving a series of hurdles to be overcome as opposed to merely a series of factors to be weighed in the balance; (ii) whether the test for "*suitability*" also under section 47B(6) CA 1998 was a relative one (where the decision to certify was to be taken with the counterfactual of individual proceedings as the relevant comparator) or an abstract one (where the decision whether the claim was suitable to be grouped together as a unit called for an assessment of whether there was or was likely to be a method available which could be used to assess loss suffered by the class with a reasonable degree of accuracy); (iii) the failure of the CAT to take account of the "*general principle*" that damages were to be quantified by the CAT doing "*what it can with the evidence*" with a "*broad axe*" or "*broad brush*" which thereby enabled the Tribunal to make allowances for a wide range of deficiencies and lacuna in the evidence; and (iv) the failure of the CAT to recognise that the compensatory principle of damages was not an essential element in the principles governing the distribution of aggregate damages. The Court decided that the following were <u>not</u> errors of law: (i) the decision by the CAT to conduct a "*trial within a trial*" at the certification stage involving the hearing of expert evidence; and (ii) having regard to the proposed method of distribution at the certification stage which had been argued to be premature. See generally paragraph [64(a) - (e)].
>
> 53 The majority treated as the most serious of the identified errors of law the failure of the CAT to find that "*the incompleteness of data and the difficulties of interpreting what survives*" amounted to a real obstacle (*ibid* paragraph [74]). The clear message of the judgment was that it was the "*duty*" of the Tribunal to the class to do the best it could on the available evidence applying the famous "*broad axe*" and the "*broad brush*" and if needs be by using ADR to "*help*".

> 54 In relation to complaints which were held not to amount to errors of law, the objection to the "*trial within a trial*" procedure directed by the CAT at the certification stage was held by the Court to be appropriate on the facts though it expressed the view that such steps would normally be rare given the broad axe nature of the test to be applied (*ibid* paragraphs [78] and [79]). In relation to whether it was premature to consider distribution at the certification stage the Court was also of the view that it was appropriate on the facts (*ibid* paragraph [80]).
>
> 55 In the light of this guidance, we treat as issues of law any issue of construction of the CA 1998 or the Rules or any issue as to the construction or probative weight of the Guide (which has the status of a practice direction). The proper construction of a document (for example an agreement) might also amount to an issue of law. We also recognise upon the basis of *Merricks* that the overall, high level, approach that the CAT should take is treated as an issue of law. Examples from *Merricks* include the interpretation of section 47C(2) on aggregate damages as a departure from the compensatory principle, and the requirement for the CAT to take the "*broad brush*", "*broad axe*, "*do the best you can*", approach to issues of evidence and quantification."

52. A somewhat narrower approach to the interpretation of section 49(1A)(a) of the 1998 Act was adopted by this Court in *Paccar Inc v Road Haulage Association Ltd* (*"Paccar"*) [2021] EWCA 299, where at an earlier stage of the present proceedings, the CAT had approved the funding arrangements of the PCRs against objection by DAF that they were damages based agreements ("DBAs") which were likely to be unenforceable. DAF sought to appeal that decision but the CAT refused permission to appeal on the basis that it had no jurisdiction to grant permission. This Court concluded that this decision of the CAT had been correct and that, unlike a decision that the eligibility criteria were not satisfied, a decision that the funding arrangements were DBAs would have left it open to the PCRs to enter modified funding arrangements which were not objectionable and would have enabled the proceedings to continue. Although that judgment was handed down after the judgment of the Supreme Court in *Merricks SC*, it does not address the guidance given by the Supreme Court on this issue of the scope of an appeal.

53. Henderson LJ said at [59]:

> "I do not find this an easy question. If the effect of a ruling in favour of DAF on the DBA issue would have amounted to a final determination by the Tribunal that it could not authorise UKTC and the RHA to act as representatives, I would see much force in DAF's argument that this would have been the end of the road as matters then stood, and that there would then be no rational basis to distinguish the position from a decision that the eligibility condition was not satisfied. But approval of the proposed funding arrangements is only one part (albeit an important part) of the matters which the Tribunal has to consider in forming its judgment whether it is "just and reasonable" for the proposed

> representative to act as such, and if this were the only objection to the approval of UKTC and the RHA there is in my view every reason to suppose that an acceptable way of dealing with the problem would have been found. That was clearly the view of the Tribunal, which had considered and dealt with other objections to the proposed funding arrangements in the course of and after the hearing, without any of them proving insuperable. On a question of that sort, we should in my view be very slow to differ from the Tribunal's conclusion that a decision in favour of DAF on the DBA issue would not have marked the end of the road for the potential claimants in the collective proceedings, and (by inference) that a solution would probably have been found which would have enabled them to continue with modified funding arrangements which the Tribunal would be able to approve. On that basis, the decision would not have fallen within the principle established by the *Enron* and *Merricks (Jurisdiction)* cases, and there would be no other basis (the wider argument having been rejected) for treating the decision as being one "as to the award of damages"".

However, because of the omission from the judgment in *Paccar* of any reference to the Supreme Court in *Merricks SC*, *Paccar* should be seen as a decision on its own facts.

54. In their joint skeleton MAN and DAF submitted that the effect of the authorities is that where the subject of appeal is a decision of the CAT that the proposed collective proceedings cannot be certified then the Court of Appeal has jurisdiction to hear an appeal. This includes decisions as to aspects of certification, as in the opt-out versus opt-in decision in *Le Patourel*, as well as decisions as to whether the proceedings can be certified at all. I agree with that analysis. I also agree with their submission that a respondent can appeal a decision to grant certification where the decision would have been "the end of the road as matters then stood" if certification had been refused. The decision of this Court in *Gutmann* was just such a case where the appellants argued that the proceedings should not have been certified. Applying that reasoning to the present case, the MAN and DAF appeal which seeks to argue that the RHA proceedings should not have been certified at least in part is within the jurisdiction of this Court. If the CAT had refused to certify the proceedings as regards used trucks, that would have been the end of the road so far as those claimants' collective proceedings were concerned.

55. Equally, I consider that UKTC's grounds 1 and 2 are within the jurisdiction of this Court (as is ground 3 although for reasons I will come on to I would refuse permission to appeal) since they concern the refusal of the CAT to certify the UKTC proceedings, in whole or in part, the effect of which has been the end of the road for those proceedings. Ground 4 is in a different category to which I will return separately. The two grounds in the Respondent's Notices (although for reasons I will develop I consider they should be dismissed) are also aspects of certification and so within the jurisdiction of this Court. It follows that, in my judgment, all the matters before the Court can be dealt with by way of appeal or permission to appeal.

Summary of parties' submissions

56. The principal submissions in support of MAN and DAF's appeal were made by Mr Jowell KC. He took the Court to the expert reports of Dr Davis to demonstrate that there were two ways in which the owners of used trucks were said to have suffered an overcharge. One was the "umbrella" effect, that the increase in price of new trucks reduced the demand for new trucks but increased the demand for used trucks, thereby driving up the price of used trucks. The other was where new truck owners had suffered an overcharge when they purchased the truck which they sought to pass-on on resale or buy back by charging the used truck purchaser more than would otherwise have been the case. Mr Jowell KC submitted that the latter instance was, in a nutshell, the conflict because the overcharge on the used truck purchase is damage suffered by the used truck purchaser but is a benefit and thus a reduction in damage for the new truck purchaser effecting the resale or buy back.

57. He submitted that, in relation to the 60% of the RHA signed up PCMs who were either only new truck purchasers or only used truck purchasers, there was a clear conflict of interest on this used truck overcharge issue. He also submitted that many of the 40% in the overlap group will have bought a preponderance of new trucks or a preponderance of used trucks so will know where their interest lies. Either way there was a fundamental conflict of interest. Mr Jowell KC submitted that the two groups of new truck buyers and used truck buyers had to have separate class representatives, at least in relation to that issue, for three related reasons: (i) it is not just and reasonable under Rule 78(2)(a) for the RHA to represent both groups because they will not be able to act fairly and adequately in the interests of the class members because of the conflict; (ii) the claims do not raise a common issue under Rule 79(1)(b) since, following the Canadian jurisprudence, an issue is not common if victory for some members of the class will mean a loss for others and (iii) under Rule 79(1)(c) the claims of all those purchasers are not suitable for inclusion in single collective proceedings with a single class representative.

58. Mr Jowell KC relied upon the decision of the CAT in *Royal Mail Ltd v DAF Trucks Ltd* (*"Royal Mail"*) [2023] CAT 6 at [511] from which it was clear that used truck overcharge and resale pass-on are two sides of the same coin. The interests of the used truck purchasers would have been adverse to the position of the claimants there. As he pointed out however, in that case, the CAT concluded at [547] that, on a balance of probabilities, DAF did not establish a used truck overcharge so that the resale pass-on mitigation defence failed. He relied on that case in support of the submission that how that overcharge case was presented demonstrated that factual and expert evidence needed to be obtained and marshalled by the legal teams on both sides on instructions from their lay clients and the witness and documentary evidence obtained depends on which side the team is on and is not a neutral exercise.

59. Accordingly, he submitted that in relation to the issue of resale pass-on mitigation, since the interests of the two sub-classes of new truck purchasers and used truck purchasers were opposed, on that issue there needed to be separate class representatives, separate legal teams, separate experts and separate funders for the two sub-classes. If that were put in place, it would also deal with the overlap of PCMs who are both new truck purchasers and used truck purchasers, since the separate representatives would know in what capacity they were representing PCMs and there would be no actual conflict infecting the way in which they were represented.

60. On behalf of DAF, Mr Meredith Pickford KC emphasised the conflict of interest the RHA faced. He referred the Court to the explanation provided by the RHA in its Reply as to why there was no conflict of interest between new truck purchasers and used truck purchasers, which is that on its expert methodology, in other words the regression analysis conducted by Dr Davis, the degree of damage suffered by the two sub-groups can be estimated independently of each other. Mr Pickford KC submitted that this was a bad point because the two are intertwined: whilst the buyers of used trucks would have no interest in the overcharge on new trucks, the new truck buyers are interested in the regression analysis for used trucks. The new truck purchasers will want to criticise that regression analysis to minimise the extent to which their damages are reduced by pass-on.

61. Like Mr Jowell KC, he submitted that the conflict gives rise to a point of principle about the ability of the RHA to act for both sub-groups which must be resolved and addressed at the outset and cannot be resolved by the CAT through case management at a later stage as the CAT thought.

62. In his oral submissions, Mr Pickford KC focused on the need for separate funders. He posited the situation where, in relation to the used truck purchasers, the CAT reached the same conclusion as in *Royal Mail*, in which case they would recover nothing. In the event that the sub-class of used truck purchasers wanted to appeal, the RHA would need funding. Under the funding agreement in place, the funder has a complete discretion in regard to funding an appeal. It would be extremely unlikely that it would be in the funder's interest to pursue an appeal, because that would almost certainly reduce its overall recovery. Mr Pickford KC submitted that this demonstrated why there needs to be a separate funder for each of the two sub-classes.

63. On behalf of UKTC, Mr Rhodri Thompson KC submitted that the existence of the conflict for the RHA in relation to pass-on by new truck purchasers was not an issue which could be resolved by case management, as the CAT appears to have thought, but was a jurisdictional issue in the sense that the RHA was not suitable to be the class representative for both new and used truck purchasers in view of the conflict. The conflict was a present one, since the RHA's positive pleading and expert evidence to the effect that the claim of new truck purchasers should be discounted by reference to the claim of used truck purchasers was prejudicial to the entire new trucks claim.

64. The essence of the UKTC case on the appeal was that the CAT had made two related errors of law: (i) in concluding that there should only be one class representative and (ii) in concluding that that class representative should be the RHA for both new and used truck purchasers notwithstanding the roadblock of the conflicts issue. What the CAT should have done is to make UKTC the class representative for the class of new truck purchasers and the RHA the class representative for the class of used truck purchasers. This would have had the benefit of avoiding the conflict and would have furthered the statutory objectives, identified by the Supreme Court in *Merricks SC* and by a succession of Court of Appeal decisions since, of having an opt-out aggregate assessment of the total loss in relation to the purchase of new trucks in the cartel period, the very products that were the subject-matter of the cartel decisions and of the admissions made by the cartelists.

65. In relation to UKTC's first ground of appeal, Mr Thompson KC agreed with and adopted the submissions made on behalf of MAN and DAF, subject to five points

specific to UKTC. First, the common issues criterion for eligibility has both a positive and a negative aspect, as demonstrated by the Canadian authorities: the issue must be common to the class and the resolution of the issue in favour of one class member must not lead to the failure of another class member's claim. He submitted that this was true under the statutory criteria and reflects the position of the RHA as a fiduciary on behalf of its class members. Under section 47B of the 1998 Act, the CAT has to look carefully at the overall class to see whether the PCR can act fairly for all class members. The immediate problem is that the RHA advances a positive case of overcharge to used truck members. Mr Thompson KC submitted that this was the clearest possible case where the RHA cannot act on both sides of the case. It fails the principles of the Canadian cases and the Supreme Court in *Lloyd v Google LLC* [2021] USC 50; [2022] AC 1217.

66. Second, the authorisation of the RHA as class representative would be prejudicial to the new truck purchasers, as demonstrated by its positive pleading of the used truck overcharge and its expert methodology. Third, he submitted that the conflict could not be addressed by a notice to the new truck purchasers as is proposed by the CAT. He argued that the CAT had significantly understated the nature of the conflict: there is an actual conflict, both as to the existence and the extent of resale pass-on. Any notice would have to inform the new truck purchasers that its proposed class representative was positively pleading that their damages should be reduced to the extent that they resold their trucks and that the expert proposed to calculate their damages on the basis that the resale pass-on mitigation defence succeeds, as admitted in Dr Davis' second report. In the light of *Royal Mail*, it would be naïve to assume that the new truck purchasers would just concede this complex factual issue if properly advised.

67. Third, given the actual conflict, the problem cannot simply be dealt with by notice or informed consent. The RHA had a fiduciary relationship with its class members and actual conflicts require the fiduciary to cease to act for at least one and preferably both of its principals. Mr Thompson KC relied on the judgment of Millett LJ in *Bristol and West Building Society v Mothew* (*"Mothew"*) [1998] Ch 1 at 18H-19H.

68. Fourth, as Mr Jowell KC had submitted, Mr Thompson KC submitted that the CAT was wrong to say that the conflict would not persist if there were separate class representatives for new truck purchasers and used truck purchasers given the overlap of entities which would be members of both classes. Fifth and finally, the RHA and the CAT were wrong to suggest that this issue of conflict could be postponed or left to ad hoc arrangements at a later stage. The conflict has already materialised on the pleadings and needs to be addressed now.

69. Mr Thompson KC accepted that his second ground of appeal is ancillary to the first ground and only arises if it is found that the RHA cannot continue to represent both new and used truck purchasers because of the conflict. He submitted that the CAT made a clear error of law in failing to consider the possibility of addressing the conflict by having two class representatives, UKTC for new truck purchasers and the RHA for used truck purchasers. There would be no confusion or overlap: someone who bought both would simply be in both classes with separate class representatives.

70. Mr Thompson KC sought permission to appeal on his third ground, refused by the CAT. He submitted that there were advantages to aggregate damages awards in opt-out proceedings, relying on what this Court said in *Gutmann*. He submitted that the CAT

should have concluded that the advantages of a claim for aggregate damages in opt-out proceedings in this case outweighed the individual damages claims in opt-in proceedings. The CAT analysis at [218] to [223] of its judgment ignored the guidance of appellate courts on the advantages of opt-out proceedings for an aggregate damages award and effectively reinstated an unauthorised presumption in favour of opt-in. The CAT also wrongly used its preference for Dr Davis' methodology over that of Dr Lilico to favour the RHA when the expert issue was irrelevant to the relative merits of aggregate damages or an opt-out claim. The CAT wrongly concluded that opt-in proceedings gave better access to data from class members. That should not be regarded as a relevant factor as in opt-out proceedings the CAT had a broad discretion to order disclosure by class members as recognised by the CAT in *Mark McLaren Class Representative Ltd v MOL (Europe Africa Ltd) & ors* (*"McLaren"*) [2022] CAT 10 at [168]-[170].

71. In relation to his ground 4, that the CAT should have stayed UKTC's application rather than dismissing it, Mr Thompson KC submitted that there was currently a stay in place anyway pending this appeal and submitted that the stay should remain in place until the decision of the Supreme Court on funding in *Paccar* and until the issue in relation to whether the RHA could act for new truck purchasers was resolved. It would be contrary to the statutory objective if the RHA application foundered but UKTC's application stood dismissed so that a substantial number of new truck purchasers could not proceed by way of collective proceedings.

72. Mr Tony Singla KC, instructed by the Iveco parties, made submissions on behalf of the OEMs in opposition to UKTC's grounds three and four. In relation to Mr Thompson KC's submissions on ground three, he submitted that they effectively amounted to the contention that the CAT erred in not preferring UKTC's application because of an inherent advantage in favour of opt-out or aggregate damages claims. That contention is contrary to what this Court said in *Le Patourel* at [68] which made clear that the legislative starting point is neutrality with no predisposition one way or the other. He also submitted that the CAT decision to prefer the RHA application over that of UKTC was a classic example of a multifactorial assessment by the CAT which disclosed no error of law and with which this Court should not interfere, as was made clear in [55] to [57] of the judgment in *Le Patourel*. UKTC was simply seeking to reargue the points on which it had lost before the CAT.

73. He submitted that the decision of the CAT preferring the RHA application was made on the basis of the evidence before it. In particular on practicability at [217] to [223] which UKTC criticised, the CAT referred to and relied on the evidence of Mr Burnett. Given the RHA estimate for damages recovery of an average of £10,000 per truck, this case was very different from cases like *Merricks*, *Le Patourel* and *Gutmann* where the individual claims would be very small. An important part of the multifactorial assessment was the assessment by the CAT of the relative merits of the expert evidence. The CAT was impressed by Dr Davis and his methodology but had concerns about Dr Lilico and his methodology. They had more confidence in the robustness of Dr Davis whose regression analysis is well-tested. The suggestion that the CAT had erred in not having in mind the potential benefits of aggregate damages was misconceived. The CAT had recognised the potential benefits of aggregate damages but concluded that they were outweighed by the RHA's expert having a superior methodology. The

preference for the RHA's expert disclosed no error of law. It was open to the CAT with its expertise to weigh up the two methodologies and prefer Dr Davis.

74. Mr Singla KC contended that UKTC's submission, by reference to [479] of *Royal Mail*, that regression analysis does not work, is hopeless. The CAT there was simply saying that no regression model could reach a definitive solution yet the CAT in that case was still able to wield the broad axe. As the CAT rightly found in the present case, regression analysis is well-tested and widely acknowledged. Furthermore, the submission by Mr Thompson KC that Dr Lilico and his simulation model had been vindicated by the *Royal Mail* judgment was a misreading of that case.

75. Mr Singla KC submitted that in relation to data, the CAT was entitled to conclude in [132], by reference to the sampling exercise already undertaken, that the RHA class members would yield a rich data set and at [150] that obtaining data from class members in the UKTC proposed opt-out proceedings would be challenging.

76. He referred to the fact that UKTC criticised the CAT for taking an inconsistent approach in noting the additional cost and complexity of two overlapping CPOs, whilst failing to take account of the guidance in *Merricks SC* and the recent decisions of the Court of Appeal in recognising the savings in costs associated with a single aggregate award. He submitted that this was premised on a misreading of the authorities which do not say that aggregate damages are always to be preferred, but in any event, at [215] the CAT took note that aggregate damages awards were potentially simpler and more efficient but concluded that the RHA had the superior expert methodology.

77. UKTC's final point concerned funding, it being contended that whereas the RHA funding arrangements will give the funder the right to recover in priority out of the damages payable to class members, UKTC's funder, its proposed proceedings being on an opt-out basis, will only recover out of undistributed damages. UKTC contended that the CAT failed to take account of this obvious advantage of its funding arrangements. However, Mr Singla KC pointed out that the CAT did expressly address this issue at [224] to [230], as I noted at [29] above, concluding that there was no realistic concern that the RHA's funding arrangements would operate unfairly as regards class members or that they would be deprived of a significant part of their damages.

78. In relation to UKTC's fourth ground that there should be a stay pending the service of the RHA notice under Rule 81 and resolution of any issue in relation to the conflict, Mr Singla KC submitted it was far too late to raise this point for the first time before this Court. Even if UKTC had sought a stay from the CAT, that application would have been a bad one. The CAT made findings that the RHA proceedings were practicable and viable which were not challenged on this appeal and, although Mr Thompson KC suggested there might be an issue about the drafting of the RHA notice under Rule 81, the idea that the RHA proceedings might not proceed for that reason is fanciful.

79. Mr Thompson KC also sought a stay until the judgment of the Supreme Court in *Paccar* heard in February this year on the funding issue. Mr Singla KC submitted that, if some issue still arose about this, it could be dealt with in written submissions hereafter.

80. Mr Harris KC on behalf of Daimler developed the Respondent's Notice arguments to the effect that the CAT had erred in law in holding that downstream pass-on was a common issue and in holding that Dr Lilico's methodology satisfied the *Microsoft* test.

He submitted that these were both issues of law. In *Merricks SC* at [64(a)] Lord Briggs JSC said that getting the common issue question wrong in relation to the issue of merchant pass-on was an issue of law, so likewise if the CAT got the common issue question wrong as regards downstream pass-on that was an issue of law. The issue as to whether Dr Lilico's methodology satisfied the *Microsoft* test was also an issue of law. Mr Harris KC relied on the judgment of this Court in *McLaren* at [9].

81. Mr Harris KC submitted that UKTC's opt-out aggregate damages claim did not put forward any methodology for dealing with downstream pass-on by PCMs to their customers. As is clear from the Supreme Court judgment in *Sainsbury's* in considering downstream pass-on there has to be a focus on the individual class members who may or may not have done a variety of things to mitigate their loss. The Supreme Court said at [216] that, where the defendants raise the issue of mitigation by way of pass-on, the claimants have a heavy evidential burden to provide evidence as to how they dealt with the recovery of costs. Here, the UKTC expert methodology simply did not deal with that issue at all. Dr Lilico did not address the issue of downstream pass-on because he was instructed not to do so. The CAT erred in law in concluding that this was a common issue, as it was not, because there was no methodology to address it.

82. In relation to the second ground of his Respondent's Notice, that the CAT erred in law in concluding that Dr Lilico's expert methodology passed the *Microsoft* test, Mr Harris KC noted that in its PTA ruling, the CAT had said that it had significant concerns regarding the primary approach of Dr Lilico. This ground had four facets. First was Dr Lilico's approach to downstream pass-on. He had not dealt with this in his reports, having been instructed not to do so, because he was told it was not relevant. He had dealt with it in his oral evidence to the CAT but did so in vague, hypothetical terms, to the effect that he would probably address pass-on by some form of econometrics, which was not sufficient to meet even the relatively low threshold of *Microsoft*, particularly given that UKTC had rejected econometrics as its methodology, preferring simulation or synthetic benchmarking.

83. Mr Harris KC also submitted that UKTC had not put forward any evidence of the availability of data as required by [118] of *Microsoft* endorsed by the Supreme Court in *Merricks SC* and had not put forward any coherent plausible credible methodology for getting hold of the data. In an opt-out case the class representative would not have contact with the class members, as this Court said at [62] of *Gutmann*. It might be very difficult if not impossible to get any disclosure from class members.

84. Mr Flynn KC on behalf of the RHA sought to downplay the impact of used truck overcharge, making the point that most new truck purchasers would sell their trucks later to a dealer and used truck purchasers were buying from the dealer, so that there was a series of transactions. He sought to defend the position that the RHA had adopted before the CAT (which the CAT had accepted), that if the issue of conflict arose at a later stage and turned out to be an intractable problem, it could be addressed by separate representation at that point. However, as the members of the Court pointed out, that did not really address the conflict of interest which is not simply potential but actual and needs to be addressed now.

85. Whilst accepting that, in a general sense, the RHA was in a fiduciary relationship with the PCMs, Mr Flynn KC submitted that its relationship as a class representative under the 1998 Act in circumstances where it was not itself a member of the class meant that

its duty to act fairly and adequately in the interests of class members under Rule 78 of the CAT Rules did involve the ability to reconcile divergent views within the class as a whole and could not be interpreted as a duty to maximise the damages of every single class member, in circumstances where there may well be trade-offs.

86. When the Court pressed Mr Flynn KC on whether the RHA would be able to organise two separate teams and a Chinese wall, he said that it was a sufficiently large and well-resourced organisation to do so.

87. Mr Flynn KC adopted the submissions of Mr Singla KC in relation to grounds 3 and 4 of the UKTC appeal on which UKTC needs permission to appeal. He resisted any suggestion that for pragmatic reasons the UKTC application should be kept on what he described as life support pending the Supreme Court judgment on funding, which he said would be the tail wagging the dog. He said that if the judgment went against the funders, the RHA funding arrangements could be easily adjusted to be compatible with the DBA Regulations.

Discussion

88. I am firmly of the view that the conflict between new truck purchasers and used truck purchasers over resale pass-on which the RHA faces can be addressed by the erection of a Chinese wall within the RHA organisation for the purposes of dealing with that issue. This will need to involve a separate team within the RHA acting for each of the two sub-classes, instructing different firms of solicitors and counsel and a different expert or experts. I also consider that a different funder will need to be involved for one of those sub-classes, given that the conflict potentially extends to funding. As Green LJ pointed out during the course of Mr Flynn KC's submissions, the RHA will have to be able to satisfy the CAT that the funding arrangements put in place do not interfere unreasonably with ordinary independent decision-making in the litigation including as to settlement. In my judgment, the safest way of ensuring that will be to have separate funders for the two sub-classes, thereby avoiding the risk of a funder siding with the members of one of the sub-classes.

89. Ultimately, at the appeal hearing, the OEMs accepted that, if an appropriate Chinese wall were erected, that would address the conflict and RHA could remain the overall class representative for both sub-classes in relation to all the other common issues, such as whether there was an overcharge for new trucks. Understandably Mr Jowell KC was not prepared to commit the OEMs to agreement to that course without seeing what precise form of Chinese wall is put in place and the RHA has yet to put forward any detailed proposals for dealing with the conflict. The details when worked out will need to be approved by the CAT and, to the extent that the OEMs have residual concerns, they can be raised with the CAT.

90. Only Mr Thompson KC on behalf of UKTC held out for two class representatives for all the issues, UKTC for new truck purchasers and the RHA for used truck purchasers. In my judgment this would be undesirable and the CAT was right to reject it. Despite Mr Thompson KC's attempt to argue the contrary, two class representatives with one class opt-in and individual damages and the other opt-out and aggregated damages with completely different expert methodologies would appear to be a recipe for confusion and unnecessary expense. The CAT rightly rejected this proposal at [194] saying:

> "Whatever the jurisdictional position, we have no doubt that it would be wholly inappropriate to approve both the RHA and UKTC applications. As we have noted, one of the significant benefits of collective proceedings is efficiency both for the parties and for the Tribunal. If there were two, overlapping collective actions, they would clearly have to be heard together, which would very substantially increase the cost and complexity of the proceedings generally and the trial in particular. As discussed above, the economic experts instructed by the two proposed class representatives put forward very different methodologies, each of which is complex and would then have to be analysed and considered. All this would be contrary to the governing principle in r. 4 that the case should be conducted at proportionate cost, which applies as much to collective proceedings as to other proceedings before the Tribunal".

91. Mr Thompson KC's argument, in reliance on Millett LJ's classic judgment in *Mothew*, that the existence of an actual conflict meant that the RHA, since it is in a fiduciary relationship with class members, cannot act on behalf of both sub-classes, is misplaced. Millett LJ was dealing with the position of an individual solicitor fiduciary. He was not dealing with a corporate fiduciary such as the RHA which has the personnel and resources to put an appropriate Chinese wall in place so as to eliminate the conflict and ensure that the separate representatives on either side of the Chinese wall act in the best interests of their principals.

92. On the basis that the RHA will be able to put a Chinese wall and the necessary safeguards of the respective interests of the two sub-classes in place to eliminate the conflict over resale pass-on, I see no reason to disturb the CAT's decision that there should be only one class representative authorised and that that should be the RHA, not UKTC.

93. However, I do consider that the CAT erred in some of its conclusions in the section of the judgment dealing with the conflict.

94. First, I consider that the CAT erred in its conclusions at [253] to [255] that (i) there was only a potential conflict of interest at this stage; (ii) that it was not necessary to identify the sub-classes of new truck purchasers and used truck purchasers in the CPO at this stage; and (iii) that the potential conflict could be dealt with in the future by active case management by the CAT. In my judgment, the OEMs and UKTC are right that there is an actual conflict already (demonstrated by the RHA's pleading of the used truck overcharge and Dr Davis' second expert report). Indeed as Mr Jowell KC pointed out in his reply submissions, Dr Davis fairly and properly acknowledged in his oral evidence the direct nature of the conflict between new truck purchasers and used truck purchasers. That obvious conflict requires to be addressed at the start of the proceedings when PCMs opt in, rather than at an indeterminate point in the future; and it requires the RHA to put in place separate representation and a Chinese Wall of the kind I have described, and then to obtain the informed consent of the PCMs to the RHA acting for them under that arrangement.

95. Second, I consider that the CAT was wrong to accept the suggestion that Dr Davis could be the expert for both sides of the new/used divide, and it was also wrong to suggest, in

[247], quoted at [35] above, that a suitably worded Rule 81 notice would mean that there was informed consent on the part of the PCMs to abide by the determination of the RHA, following Dr Davis' expert advice, as to the appropriate or acceptable level of new-used pass-on to be advocated in the proceedings.

96. This approach ignores the fact that any regression analysis and determination will be highly sensitive to the assumptions made and data input. There is an inevitable element of subjectivity both in the selection of the data and these assumptions. Without in any way being critical of or doubting the integrity of Dr Davis, complete objectivity in expert economic evidence cannot really be achieved. This was a point made by the CAT in *Royal Mail* in relation to the expert evidence there on overcharge at [475] to [480]. Since there is no single, objectively ascertainable, "right" answer to the overcharge pass-on issue, and the decision of how to advance an argument on this issue in the proceedings will inevitably involve some strategic considerations, it cannot be sufficient for the divided loyalty which the RHA owes to the two groups of PCMs to be resolved by a vague promise that the RHA will decide how to act on the basis of advice from Dr Davis.

97. In my judgment, the conflict can only be avoided, not just by an appropriately worded notice but by putting in place now of a Chinese wall and separate representation by a different team, as described in [88] above so that the best interests of both the new truck purchaser class members and the used truck purchaser class members are fully protected. Only through putting that in place now will the RHA comply with its duty to act in the best interests of all class members. In that respect I would reject Mr Flynn KC's submission (referred to at [85] above) that in some way RHA's position as class representative meant that it did not have to act in the best interests of all the class members. Whilst there may be situations in which, on minor or peripheral issues, a class representative may be entitled to act in the best interests of the majority of the class provided that it does not significantly harm the minority, where there is an identifiable conflict of interest on a major issue in the case, I do not consider that a class representative is entitled to prefer the interests of some members to the detriment of others. As Snowden LJ said when this submission was put forward, that was a pretty remarkable submission which was not improved by saying that the RHA is a trade association which is accustomed to acting for a diverse membership.

98. It follows that the notice of the CPO which the RHA has to give to potential class members under Rule 81 of the CAT Rules will be required to explain in detail to all class members in both the sub-classes the nature and extent of the conflict in relation to resale pass-on and how the RHA proposes to resolve the conflict by way of the Chinese wall and separate teams. It will be for the CAT to approve the notice under Rule 81. It should be apparent from this section of the present judgment what information is required to go into the notice. All I would say is that the current draft notice is nothing like adequate since it does not really explain the conflict or how it is to be resolved. It says no more than that the impact of the cartel on new and used truck prices and the relationship between them will be considered by the expert and that the position which the RHA adopts on the appropriate level of overcharge pass-on will be based on the advice it receives from its economic expert, i.e. Dr Davis. For the reasons I have given, this does not resolve or properly address the conflict which exists.

99. Accordingly, although I consider that the appeal of MAN and DAF and grounds 1 and 2 of UKTC's appeal should be dismissed, the matter should be remitted to the CAT for

it to give directions in relation to the separate representation and separate teams within the RHA for the two sub-classes in relation to the issue of resale pass-on and for it to approve the form of notice under Rule 81, all in accordance with the guidance in the present judgment.

100. So far as UKTC's third ground of appeal is concerned, it can be dealt with shortly. It is all founded on arguments which seek to challenge the decision of the CAT on matters which are quintessentially multifactorial assessments by a specialist tribunal with which this Court would not interfere unless there were an error of law demonstrated. There is no error of law identified in any of those arguments. I agree with Mr Singla KC that UKTC is simply seeking to re-run all the arguments it ran before the CAT for preferring its application to that of the RHA. The CAT dealt with all its arguments in detail, whether as regards practicability, expert methodology, data, the simplicity of aggregate damages awards or funding. The CAT weighed all those supposed factors against the countervailing factors favouring the RHA application and concluded that, whilst both applications could be certified, only the RHA should be the class representative. The CAT went through all the competing arguments fully and carefully (in the part of its judgment which I have summarised at [20] to [29] above). The assessment it made and the conclusions it reached are matters of discretion and case management for the CAT in circumstances where, as this Court made clear in *Le Patourel*, there is no presumption in favour of opt-in or opt-out proceedings. There was no error of law or irrationality by the CAT in its assessment. Accordingly permission to appeal on this third ground is refused.

101. So far as Daimler's Respondent's Notice is concerned, despite the strenuous efforts of Mr Harris KC to demonstrate that the CAT had erred in law, I do not consider that there was any error of law in either of the respects alleged. In relation to the alleged failure to appreciate that the UKTC expert methodology did not include any explanation as to how Dr Lilico would deal with downstream pass-on, it is important to note that the CAT was considering the expert methodologies at the certification stage. As Snowden LJ pointed out in the course of argument, the pass-on defence has yet to be pleaded and it is not appropriate that at the certification stage, a proposed class representative should have to put forward an expert methodology dealing with every point the defendants might raise.

102. At the certification stage, the CAT has in each case to determine what level of detail it requires from the parties and their experts and, as Green LJ said in argument, that implies that the CAT has a broad margin of discretion in relation to certification with which this Court should not interfere unless a clear error of law is identified. In my judgment, it is not for the PCR to produce an expert methodology which addresses every conceivable issue or defence which the defendants say they will or may run. To go down that route would be to encourage a plethora of expert evidence addressing every conceivable argument that might be raised, and a long drawn out and expensive certification process as in the United States. It is important that the CAT and this Court discourage that approach. As Lord Briggs JSC made clear in *Merricks SC* at [41], the *Microsoft* test is not intended to be onerous. It sets a fairly low threshold and simply does not require the PCR's methodology to anticipate and address at the certification stage every point that might be raised in defence.

103. If the UKTC application had succeeded and it appeared at a later stage that the issue of downstream pass-on depended on the position of individual truck owners, so was not

suitable for determination as a common issue, that problem could be addressed by the CAT by way of case management, if necessary by amending the CPO and directing the trial of sub-issues in relation to downstream pass-on. Given that, in the event that downstream pass-on was raised as a defence, UKTC would have to give disclosure from at least some of its PCMs, it would seem likely that in the exercise of its case management powers, the CAT would put in place a sampling regime of some kind.

104. A similar point can be made in answer to Daimler's second ground that the CAT erred in concluding that Dr Lilico's methodology was sufficiently plausible to cross the *Microsoft* threshold. The relevant passage of the CAT judgment which addresses Dr Lilico's methodology runs from [141] to [157]. It is a careful and nuanced assessment of his methodology which recognises its weaknesses whilst accepting that, in his oral evidence, he was able to address many of the concerns of the CAT. In my judgment, this is a quintessential example of a multifactorial assessment by an expert tribunal with which this Court should not interfere unless the tribunal was plainly wrong. Daimler adopted far too rigid and exacting an approach to meeting the *Microsoft* test, perhaps most clearly evident in relation to data.

105. Mr Harris KC sought to argue that there was a complete absence of evidence of the data to which Dr Lilico's methodology would be applied and that Dr Lilico had not explained how he would obtain data. However, this overlooks that the predicate for this whole issue is that UKTC, not the RHA, is the class representative for the class of new truck purchasers. As the members of the Court pointed out during argument, there would be a large number of new truck purchasers who were in the RHA class who would want to join the UKTC class if the UKTC proceedings were the only collective proceedings for new truck purchasers. Those class members would be interested in registering on a database and would very likely be a rich source of data. On that basis, the low threshold in the last sentence of [118] of *Microsoft* would be satisfied: "There must be some evidence of the availability of the data to which the methodology is to be applied."

106. It only remains to deal with UKTC's fourth ground of appeal which seeks a stay. I very much doubt whether this can properly be regarded as a ground of appeal at all. When the CAT determined that it preferred the RHA over UKTC as the class representative, it would have been obvious that it would dismiss UKTC's application unless UKTC sought a different order. That was the time when UKTC should have sought a stay and yet it never applied to the CAT for a stay. I have considerable sympathy with the argument that it is too late to make such an application now. However, it does seem to me that, given that the details of the RHA's mechanism for addressing the conflict between the sub-groups of new and used truck purchasers and its Rule 81 notice have yet to be resolved and the outcome of the Supreme Court case on funding is not known, it would be sensible for this Court to grant a stay pending those matters. If, as is likely, the notice issue is resolved and the RHA can make its funding arrangements compatible with any requirements of the DBA Regulations, then the stay can be lifted and the UKTC application dismissed. Mr Flynn KC was not able to demonstrate any real prejudice the RHA would suffer from our adopting this pragmatic approach which has the advantage that, in the albeit unlikely eventuality that the RHA application fell away, there would at least be an alternative CPO available for new truck purchasers.

Postscript

107. Notwithstanding that under the terms of the Directions Order made by Green LJ on 13 February 2023, the parties were required to file Core and Supplementary Bundles by 11 April 2023, the parties continued to file late documents in the days leading up to the hearing. This included replacement bundles being E filed on Thursday 4 May and Friday 5 May; the RHA seeking to add a document via email on Friday 5 May sent at 16.23 and saying hard copies would be brought to the Court on the first day of the hearing (Tuesday 9 May) to update the Court's hard copy bundles, and replacement authority bundles being E filed on 8 May (a Bank Holiday). This somewhat lax approach is very disruptive to the Court's preparation for the hearing and onerous for the judges' clerks and court staff for whom it is very time consuming, having to check, and recheck, the papers before passing them to the constitution. Care has to be taken to be sure that the electronic bundles and hard copy bundles marry up; a task made harder by late changes. There were similar problems, although not as acute, in the *Evans* and *O'Higgins* appeals.

108. For future reference, parties in competition appeals must comply with the orders made by the Court in relation to the filing of bundles. Permission is unlikely to be given to file additional documents late unless a very good reason for doing so is demonstrated in writing.

Lord Justice Snowden

109. I agree.

Lord Justice Green

110. I also agree.