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COLLECTIVE ACTIONS

THE IMPLICATIONS OF "CLAIMANT-FREE" ACTIONS

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INTRODUCTION

Collective proceedings can be seen as "claimant-free" because represented class members are not before the Court as parties or substantively directing the course of the litigation. Once a collective proceedings order (**CPO**) is made in the Competition Appeal Tribunal (**CAT**) class members are represented as a class by the class representative (**CR**) and are not formally parties.[2] This reflects a deliberate policy choice to facilitate access to justice where individual claims have proved inadequate.[3] Furthermore, given the size of classes asserted in the CPO applications made to date, it would not be feasible for all class members to participate in the proceedings as if they were direct claimants even if they wanted to. In the case of opt-out actions, class members may not even be aware of the claim.

This approach has implications for the operation of the collective action regime in the CAT as it gives rise to a number of considerations which do not arise in "ordinary" litigation.

First, there is the principal-agent problem; that is the risk that the interest of the CR and class are not aligned. This is explicitly addressed in the statutory regime where the suitability of the proposed class representative (**PCR**) is assessed as part of the CPO application.[4] For example, the CAT has to consider whether the PCR will adequately and fairly represent the interests of the class (including ensuring that there are no material conflicts of interest with the class);[5] how the PCR intends to communicate with the class about the conduct of proceedings; and the proposed governance and consultation mechanisms taking into account the size of the class.[6] To address the same concern settlements in opt-out proceedings are subject to the approval of the Tribunal to ensure the terms are just and reasonable.[7]

Second, there is a risk of conflicts within the class, for example, where a class consists of both direct and indirect purchasers. This is not addressed expressly in the CAT Rules but it is acknowledged in the Guide and the CAT has had to grapple with the possible divergence of interests of class members in at least two CPO applications.[8] The CAT has also considered the interests of the class against individual class members in the context of settlement discussions (see below).

Third, and relatedly, there is the need to ensure fairness between class members in the manner of distribution of settlements or a damages award. That is specifically addressed by the CAT Rules.[9]

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2 Paragraph 6.71 of the CAT Guide to Proceedings 2015 (the "**Guide**"). Before the CPO is made they are effectively not represented at all.

3 *Mastercard Incorporated and others v Walter Hugh Merricks CBE* [2020] UKSC 51 at [45].

4 Section 47B(8), Competition Act 1998 ("**CA98**") and Rule 78 of the CAT Rules 2015 (the "**Rules**").

5 Rules 78(2)(a) and (b).

6 Rule 78(3).

7 Section 49A(5), CA98 and Rule 94(8) of the CAT Rules 2015.

8 Paragraph 6.35 of the Guide. The cases are *UKTC/RHA* [2022] CAT 25 at [247] – [252] and *O'Higgins/Evans* [2022] CAT 16 at [283] – [284].

9 See Rules 92 and 93 as to distribution of award of damages and Rules 94 and 96 relating to the approval of settlements.

Fourth, "claimant-free" actions may create practical issues for the conduct of proceedings or fairness to the parties not explicitly acknowledged in the Rules or the Guide which will need to be addressed through case management. The Tribunal has stated that it has a particular responsibility to provide ongoing supervision of collective proceedings as cases move past the making of a CPO and ensure that the collective actions jurisdiction is exercised properly.[10]

Finally, and more generally, the making of a CPO constrains the individual rights of class members, in the case of a opt-out claim, it limits their ability to bring their own claim (unless they opt-out) and in the case of an opt-in claim, they lose a degree of control over their claim (once they opt-in).[11]

This paper examines three aspects of the collective action regime where these issues arise because the class members are not in the position of direct claimants, addresses how the CAT has dealt with these issues to date, and discusses some considerations for the future:

- Carriage disputes;
- Disclosure and evidence; and
- Settlement.

CARRIAGE DISPUTES

Introduction

Carriage disputes arise where there are two overlapping (and therefore competing) applications for a CPO. These are a feature of a system where claims are developed by the PCR and their lawyers supported by funders without the involvement of the class. Similar claims may be developed in parallel without knowledge of the other claim, or a PCR may be aware of other claims but consider that they can better represent the class.

In resolving carriage disputes the Tribunal is required by the Rules to choose the PCR which *would be the most suitable.*[12] The CAT in doing so will seek to arrive at a conclusion that is in the best interests of the class and is fair to defendants; the Guide states that relevant factors will likely include the proposed class definition and scope of claims; the quality of the PCRs' litigation plan and the experience of the PCRs' lawyers.[13]

Approach to date

The CAT held in *O'Higgins/Evans* that the question of which of the competing PCRs for an opt-out action should be certified only arises once it has satisfied itself that each application individually meets the authorisation and eligibility conditions.[14]

As to both the authorisation and eligibility conditions, it found that they each have absolute and relative qualities. They are absolute in the sense that, if one or both applications fails to satisfy the conditions, then they cannot be certified. They are relative in the sense that it is the relative qualities of the two applications, assessed against the authorisation and eligibility criteria, which inform the CAT's determination of which of the two applicants is *most suitable*. This includes an appraisal of

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10 See recently e.g., *Boyle v Govia* [2023] CAT 19 in particular at [7(3)] and [12(3)] dealing with the special responsibilities of the CR in the conduct of the claim and the responsibility of the Tribunal to the parties to ensure the "unusual and important jurisdiction is exercised properly".

11 Commercial and Interregional Card Claims I Limited v. Visa Inc & Ors [2023] CAT 38 at [145].

12 Rule 78(2)(c).

13 Paragraph 6.32 of the Guide.

14 *O'Higgins/Evans* [2020] CAT 9 at [69].

the relative merits of the competing applications (but not a conclusion on the substantive merits, i.e. the prospects at trial).[15]

In two recent decisions (*Pollack/Arthur*[16] and *Hammond/Hunter*[17]) the CAT has determined that carriage disputes should be heard as a preliminary issue and resolved ahead of and not as part of the determination of certification as this would save time and money by removing one of the PCRs from the scene before carriage is addressed. In doing so the CAT was clear that the questions that would arise on carriage were different from certification and that there would be no prejudice to the defendant from following such a course; indeed defendants were free not to participate in the carriage issue at all and reserve their position until the certification hearing.[18]

Where there is one application for opt-out proceedings and another application for opt-in, the CAT has suggested that the Rules do not prevent both applications from proceeding. However, this is likely to happen only in an exceptional case and the CAT held in *UKTC/RHA*[19] that, even if it was possible to certify both an opt-in and an opt-out proceeding, it would be *wholly inappropriate* to approve both applications as the two cases would have to be heard together, which would substantially increase the cost and complexity of the proceedings, certification of both proceedings would be confusing for the proposed class members, and there would be an additional burden on the proposed defendants having to defend two sets of proceedings.[20]

The CAT has not yet had to directly confront the choice between two opt-out claims. In *O'Higgins/Evans*, the CAT viewed "carriage" as the final issue for it to consider, once it had considered whether they should be certified, and if so whether on an opt-in or opt-out basis. Having concluded that certification on an opt-in basis was appropriate, the CAT stayed the applications to allow each applicant to submit a revised application on an opt-in basis.[21] The carriage question therefore did not arise, although the CAT did offer an *obiter* view on how it would have decided the matter.[22] As noted above carriage disputes in *Pollack/Arthur* and *Hammond/Hunter* (all of which are primarily opt-out claims) are pending.

In assessing carriage in *O'Higgins/Evans,* the CAT did not place weight on the fact that the applicant in *O'Higgins* was *first to file*, having filed its application almost five months before the applicant in *Evans*.[23] The CAT noted that, while this may be a relevant factor in future cases, it cancelled itself out on the facts. First, although the application in *Evans* came later and may have been said to prejudice the conduct of proceedings, in practice it did not do so as the hearing was adjourned in any event to allow for the judgment of the Supreme Court in *Merricks*. Second, the application in *O'Higgins* was, on one view, premature as it predated access to the infringement decisions on which it was founded (as a follow-on case), instead relying only on the Commission's press release, and therefore it required significant subsequent amendment.[24] Similarly in its case management decision in *Pollack/Arthur* the CAT noted that a 4 month filing gap between the two CPO applications was not of itself determinative of carriage but also stated that *"the greater the gap in procedural development*

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15 *O'Higgins/Evans* [2022] CAT 16 at [54(2)] and [58] – [64].

16 *Pollack v. Alphabet Inc. and Ors* and *Arthur v. Alphabet Inc. and Ors* [2023] CAT 34.

17 *Hunter v. Amazon.com Inc. and Ors* 1568/7/7/22 and *Hammond v. Amazon.com Inc and Ors.*

18 *Pollack* at [25]. The approach of addressing carriage first was endorsed by the Court of Appeal in *O'Higgins/Evans* [2023] EWCA Civ 876 at [154].

19 *UK Trucks Claim Limited v Stellantis N.V. (formerly Fiat Chrysler Automobiles N.V.) and Others*, Case 1282/7/7/18; *Road Haulage Association Limited v Man SE and Others*, Case 1289/7/7/18.

20 *UKTC/RHA* [2022] CAT 25 at [194] – [195].

21 In ruling that carriage could not be determined as a preliminary issue (prior to the certification hearing) on the facts of the *O'Higgins/Evans* case, the CAT said this did not mean that the same would necessarily be the case in future. However, that view may be superseded in the light of the CAT's approach in its certification judgment.

22 *O'Higgins/Evans* [2022] CAT 16 at [388].

23 O'Higgins/Evans [2022] CAT 16 at [389].

24 *O'Higgins/Evans* [2022] CAT 16 at [348] – [349].

(unless it can be justified), and the closer the applicant first to file is to a substantive resolution the harder it will be to displace that applicant".[25]

The CAT has also noted that future applicants contemplating filing a competing application and therefore initiating a carriage dispute would be *well advised* to seek permission to appear at the first CMC in respect of the application against which they will be competing. This would maximise the CAT's ability to case manage carriage as part of the certification process. Foregoing this opportunity is likely to increase the weight the CAT will place on *first to file* as a factor in favour of awarding carriage.[26]

Whilst the CAT expressly did not determine the carriage question in *O'Higgins/Evans*, it did offer a view on how it would have answered that question had it fallen to be decided. The CAT stated that it favoured the *Evans* application on the basis that it considered the claims of the *Evans* applicant to be *better thought through*, notwithstanding its conclusion that those claims (as with those covered by the *O'Higgins* application) failed to meet the strike-out threshold. In reaching this view, the CAT asked itself the question: *which Applicant will better serve the interests of the victims that comprise the class(es) for whom the proposed class representatives wish to act?* Whilst, given its views on the strike-out question the CAT thought the answer was in fact *neither* (albeit it did find that both passed the authorisation and eligibly conditions), it determined that the relative answer was the *Evans* applicant.[27]

In *UKTC/RHA* the CAT considered a distinct but related issue where one applicant seeks certification on an opt-out basis and the other on an opt-in basis. The CAT decided that, even if it was possible to certify both opt-out and opt-in proceedings, it would only certify one.[28] The CAT considered several factors in deciding which claim to certify, not all of which pointed in the same direction. The factors that the CAT held were in favour of the RHA opt-in claim being certified were: (i) the class definition included used trucks as well as new trucks (which would enable a larger number of SMEs to pursue their claims);[29] (ii) the longer run-off period proposed by the RHA;[30] (iii) the inclusion of damages claims for the Euro emissions delay;[31] (iv) the CAT's greater confidence in the expert methodology proposed by the RHA's expert;[32] and (v) that the RHA was proposing an opt-in claim, which the CAT considered to be preferable to opt-out in this instance.[33]

The Issue

The resolution of the carriage dispute should result in the selection of the PCR which would better serve the interests of the class whilst at the same time ensuring fairness for the defendant(s). However, carriage disputes also raise issues of case management and proportionality.

First, procedurally resolving the carriage dispute adds complexity to the proceedings. In *O'Higgins/Evans* the CAT addressed carriage at the same time as the related CPO applications which requires a tripartite hearing and multiple pleading rounds with scope for further expert reports to be filed.[34] This issue can be addressed by dealing with carriage ahead of certification.

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25 *Pollack* at [21]. The Court of Appeal in *O'Higgins/Evans* at [153] considered that first to file was an irrelevant consideration and systematically according it weight risked encouraging premature and ill-thought out claims.

26 *O'Higgins/Evans* [2022] CAT 16 at [350].

27 *O'Higgins/Evans* [2022] CAT 16 at [389].

28 *UKTC/RHA* [2022] CAT 25 at [194].

29 *UKTC/RHA* [2022] CAT 25 at [204].

30 *UKTC/RHA* [2022] CAT 25 at [213].

31 *UKTC/RHA* [2022] CAT 25 at [214].

32 *UKTC/RHA* [2022] CAT 25 at [216].

33 *UKTC/RHA* [2022] CAT 25 at [222].

34 This is evident from *O'Higgins/Evans* [2022] CAT 16 at Annex 2 setting out the material before the Tribunal (although not limited to the carriage issue).

Second, inevitably these disputes delay the progress of proceedings (assuming a CPO is ultimately granted). It may take time for a second CPO application to emerge and the determination of the carriage dispute by the CAT may be the subject of further challenge which effectively stays the underlying collective proceedings. Moreover, it is unclear whether addressing carriage first avoids these delays.

Third, the dispute can be substantial (and potentially more substantial than the certification dispute) and therefore involve significant cost to all parties. For the competing PCRs (and their funders) it is a high stakes, all or nothing, battle. Where this is dealt with at the same time as certification defendants are required to respond to two CPO applications at the same hearing in circumstances where at least one of these will not proceed, and are exposed to the risk of being liable for two sets of adverse costs (as was the case in *UKTC/RHA*).

Fourth, the dispute can be substantively hard to decide. In *Evans/O'Higgins* the CAT was faced with very similar applications and its (*obiter*) preference for Evans was said to be an *extremely marginal call*.[35] This is not surprising; the CAT is undertaking a high-level review of the relative merits of the competing applications without seeking to assess their substantive merits. Moreover, the competing PCRs during the carriage dispute can address any differences between them, for example, by amending funding arrangements or pleadings (indeed, in *Evans/O'Higgins*, one of the PCRs made amendments to improve its funding package after the certification hearing).[36]

Fifth, carriage disputes (or their possibility) effectively eliminate scope for settlement before the carriage dispute (including challenges to the outcome) is finally determined and therefore before certification because there is uncertainty as to which PCR will ultimately secure carriage. Whilst there have been no pre-certification collective settlements to date they are expressly provided for in the legislation and from the perspective of the class might be a desirable outcome in some cases.[37]

Overall whilst carriage disputes are a feature of the system and have to be resolved in a way which is for the benefit of the class and is fair to the parties, it is not clear that they result in benefits to the collective action system as a whole which outweigh their costs. In particular, the system was not set up as (and is ill-suited to) a system for the promotion of competition between PCRs to generate better claims.

Discussion

At the heart of the carriage dispute is the question of which PCR is *most suitable.* The case management objective is to efficiently arrive at an answer which is in the best interests of the class and fair to defendants.

The CAT will consider these questions at a very early stage in the case where it is only in a position to take a high-level view of the relative merits (but without assessing the substantive merits of each application). In these circumstances it is suggested that the CAT can properly decide carriage on the basis of which application is *materially better.* Where carriage is being addressed ahead of certification this would involve comparing the *relative* merits of the applications without assessing whether either would meet the certification criteria and would have to be as the Court of Appeal has stated a rough and ready exercise.[38] This would allow the CAT to focus on material differences between the respective applications and avoids the difficulty and complexity associated with drawing

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35 *O'Higgins/Evans* [2022] CAT 16 at [389] and [409].

36 Here, the CAT held that this additional funding amendment was admissible but ultimately immaterial in the carriage issue. The CAT also noted that in future if a PCR amends its funding post-certification, the other PCR would have the (final) opportunity to match or beat the improved offer to win carriage – to avoid continuous late changes / "gaming" of the system: *O'Higgins/Evans* [2022] CAT 16 at [391] - [409].

37 Section 49B CA98.

38 *O'Higgins/Evans* at [154].

fine distinctions between applications at an early stage which would not necessarily reflect how they might evolve over time.

This then leaves the question of how the CAT should deal with cases where there is no material difference between the two applications. One way to address this is to give weight to the first to file as a factor. As noted above the Tribunal has not excluded giving weight to first to file as a factor. Clearly the obligation under the Rules to select the *most suitable* PCR would be inconsistent with an absolute rule that the first PCR to file should secure carriage. However, where there is no material difference between the two applications there should be no objection to using it to decide carriage.

There is the often-cited concern that giving weight to first to file provokes a rush to the CAT with ill-conceived applications.[39] However, it is understood that PCRs already seek to issue quickly where there is a concern about a competing application. Moreover, filing too early could be self-defeating as it carries the risk that a later application will be materially better.

It is suggested this approach would also set appropriate incentives for the collective actions jurisdiction which are better aligned to efficient case management. First, it would encourage the prompt filing of CPO applications and serve to flush out competing applications. In some instances a second application might be deterred on the basis that the putative PCR considers that they have nothing material to add which would avoid unnecessary carriage disputes. Second, it would promote a focus on the quality of the application, as the CAT has stated *"where a proposed class representative has spent time and money in framing a carefully considered standalone claim some credit ought to be given for framing the claim first."*[40] Third, it would promote (at least at the margin) collaboration between lawyers (co-counselling) and funders in developing claims which ultimately benefit the class without the delay and costs of the carriage dispute.

DISCLOSURE AND EVIDENCE

Introduction

There is nothing in the Rules or Guide conferring a specific responsibility on the CAT to manage the disclosure and evidence processes in collective proceedings differently from individual proceedings. However, the dynamics of disclosure in collective proceedings will be different with the burden primarily falling on defendants and particular challenges in obtaining disclosure and evidence from class members. This asymmetry is likely to require a flexible and innovative use of case management by the CAT.

Nature of disclosure process generally in collective proceedings

In most collective proceedings, the burden of disclosure will fall heavily on the defendant rather than on class members or the CR. One reason is that the enquiry in collective proceedings will be principally about what the defendant did or did not do: for example, how the defendant charged for residential landline services (*Le Patourel*),[41] the operation of the defendant's app store (*Kent*, *Coll*),[42] or the defendant's selling practices in relation to train fares (*Gutmann*).[43] In such circumstances, the defendant will often have custody of a large volume of potentially relevant documentation. Ensuring that the CR has access to such documentation addresses the information asymmetry which can

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39 *O'Higgins/Evans* Court of Appeal at [153] and *Pollack* at [20].

40 *Pollack* at [20].

41 *Justin Le Patourel v BT Group PLC*, Case 1381/7/7/21.

42 *Kent v Apple*, Case 1403/7/7/21; *Elizabeth Helen Coll v Alphabet Inc. and Others*, Case 1408/7/7/21.

43 *Justin Gutmann v London & South Eastern Railway Limited* and *Justin Gutmann v First MTR South Western Trains Limited and Another*, Cases 1305/7/7/19 and 1304/7/7/19.

often exist between claimants and defendants in competition litigation and is consistent with the English *cards on the table* approach to litigation.[44]

Conversely, individual class members will generally hold fewer relevant documents, and the CR may hold little or no relevant documentation at all (unlike in the US class action regime for example, there is no requirement for a CR to have suffered any alleged loss, or if they have - no requirement for that alleged loss to be representative of the class as a whole).

This dynamic is by no means exclusive to collective proceedings: it can exist in individual private proceedings in certain circumstances, and also to a certain extent in other forms of group action in the UK.[45] However, the issue is particularly acute in opt-out collective proceedings for the following reasons:

- First, there is an early focus as part of the CPO application on setting out a blueprint to trial which includes showing that there is a methodology available to demonstrate loss on an aggregate basis and that there is data available to operate that methodology. That in turn leads from the start to extensive requests by the CR for disclosure from the defendant(s).
- Second, because the claim seeks aggregate damages, questions of individual causation and quantification of loss which can drive disclosure by claimants in individual damages actions do not apply. In terms of disclosure from the class: even where class members do hold potentially relevant information, there are likely to be significant practical challenges in obtaining disclosure from them. Moreover, there is a policy question of whether seeking disclosure from class members in opt-out collective proceedings is appropriate, given that opt-out class members are represented without having taken any positive steps to join the proceedings (and indeed they may not even be aware of the proceedings). The CAT considered this issue in *McLaren* and noted that it may well be that disclosure would not ordinarily be granted from members of an opt-out class.[46] The consequences of this are considered further below.

The lack of adversarial balance in the disclosure process in collective proceedings

The CR will necessarily seek extensive disclosure from the defendant whereas the defendant's ability to seek disclosure from the class even where the class holds potentially relevant documentation will be limited.

This lack of reciprocity means that the disclosure process in collective proceedings does not benefit from the checks and balances which otherwise exist in the adversarial process of litigation, and which operate to control the scope of disclosure without intervention from the CAT. Two examples of this in practice are as follows.

Proportionality

It is well-established that the CAT will only order disclosure which is reasonably necessary and proportionate. However, determining what constitutes proportionate disclosure in practice can be extremely challenging. In individual competition proceedings, some level of substantive disclosure is usually given by both the claimant and defendant, which acts as a general constraint on each party

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44 *Davies v Eli Lilly* [1987] 1W.L.R. 428, 432, CA.

45 For example, in the *Ingenious Media film partnerships litigation*, in which claims were brought by over 500 individual claimants in relation to their investments in the Ingenious Media film partnerships, Nugee J commented that it was not surprising that the burden of disclosure would fall much more heavily on the defendants than on the claimants. They would have to give extensive disclosure as to the intended and actual operation of the Ingenious schemes, whereas the claimants were individuals and were bound to have far fewer relevant documentation: see *Rowe v Ingenious Media Holdings plc* [2020] EWHC 1731 (Ch) (at [13]).

46 *McLaren v MOL and others* [2022] CAT 10 at [169].

because any positions taken by either party on the proportionality of disclosure sought by them may be relevant to disclosure which is ultimately sought from them.

This constraint does not generally exist in collective proceedings. The CR can claim that extensive disclosure is proportionate, without any negative repercussions in relation to its own disclosure obligations.

Negotiation to narrow scope of disclosure

In practice, the claimant and the defendant will usually negotiate over disclosure requests: it is rare that both parties ultimately obtain all the disclosure they seek (in the scope and exact form initially sought). The ability to properly negotiate in relation to disclosure is only possible where disclosure is a two-way process as it usually is in individual actions.

In collective proceedings on the other hand, this balance does not generally exist – which means that negotiated resolution of the scope of disclosure is harder to achieve.

The CAT's role in managing disclosure in collective proceedings

This lack of reciprocity is an additional reason for the CAT to manage the disclosure process closely in collective proceedings. The Tribunal's disclosure ruling in *Ryder* (which has been cited and followed in a number of other cases) strongly emphasises the need for reasonableness and proportionality.[47] However, in collective proceedings, the CAT has a particular role to play in filling the gap created by the lack of balancing factors which would otherwise exist in typical adversarial proceedings.

One manifestation of this issue is the indication from PCRs at the certification stage that they will make disclosure requests once the claims are certified. These requests are often contained in a litigation plan, and in any expert report accompanying the CPO application. In *Gormsen*, the CAT noted that it was concerned with the open ended and uncertain nature of the disclosure requests in the PCR's litigation plan.[48]

The CAT has shown a willingness to address the issues outlined above creatively, and to make the disclosure process in collective proceedings more streamlined and manageable.[49] Two possible tools the Tribunal could utilise to a greater extent in the future in the context of collective actions are as follows.

Statements in lieu of disclosure

This approach was most notably used in the *Trucks* individual proceedings.[50] The essence of the approach is that the CAT orders a defendant to produce a general description of a particular part of its business which is relevant to the claim (in *Trucks* – statements were ordered on the pricing process for the sale of trucks by the defendant truck manufacturers) supported by a statement of truth, on a *best endeavours* basis.[51]

In the appropriate circumstances, making an order of this nature is a creative way of avoiding the major pitfalls of a full-blown disclosure exercise: documents are often very expensive to retrieve,

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47 *Ryder Ltd and another v MAN SE and others* [2020] CAT 3 at [35].

48 *Gormsen v Meta Platforms Inc. and others* [2023] CAT 10 at [40(3)(i)]. The CAT will expect the PCR to set out as part of the blueprint to trial a clear articulation of the disclosure required to make good its case.

49 See, for example, the Tribunal's approach to disclosure in *Boyle v Govia* (Case 1404/7/7/21), set out at page 46 onwards of the transcript of the CMC which took place on 14 October 2022.

50 *Ryder Limited and Another v MAN SE and Others*, Case 1291/5/7/18 (T).

51 See e.g., the Tribunal's order made 19-20 September 2019 in *Ryder Limited and Another v MAN SE and Others*, Case 1291/5/7/18 (T).

often there are gaps in the coverage provided by the documents, and sometimes the documents are difficult to interpret without factual witness evidence.[52]

The use of statements does not mean that no documentary disclosure is ordered in relation to a particular issue, but that any disclosure which is ultimately ordered is more targeted. As the CAT explained in the *Ryder* proceedings, *sometimes you need to look at the pricing statement or whatever the statement is, and then decide, "Oh yes, we do need the documents after all" or "We do need some documents after all", and if we are going to defer that type of statement to exchange of witness statements later, we may be finding that we will be having disclosure applications for further documents too far down in this process. That is why we are going down that route*.[53]

In relation to collective proceedings, statements of this nature have the added benefit of being able to describe a particular issue over the course of a claim period, in respect of the entire class in general terms (noting where there have been material changes over the course of the claim period) – something which may be very challenging to achieve on the basis of documents alone, and therefore having a narrative document which has had factual input from the relevant individuals in a business can be a very useful tool to both the CR and the CAT.[54]

The explanatory nature of such statements (which are not witness statements) is explicitly recognised by the CAT. In *Trucks* it was noted that the statements were to a certain extent going to be rough and ready and a defendant could not be criticised if it needed to clarify issues further down the line.[55]

Data sampling

Another approach the CAT could potentially make use of is data sampling, rather than ordering the disclosure of an entire dataset for a particular issue (also a technique used in *Trucks* in conjunction with the statements in lieu of disclosure).[56]

The disclosure of raw, technical data is often not capable of being readily understood (or if it is – is not capable of being manipulated or analysed to produce any sensible analysis).[57] It may therefore be that the sample disclosure of a dataset allows the CR to determine whether the rest of a dataset will actually be useful, before a defendant embarks on an expensive and onerous data extraction exercise.

Alternatively, it may be that the sample disclosure of a raw dataset is sufficient for the CR to determine that no further disclosure is required on a particular issue. In collective proceedings, the CR is often claiming on behalf of a very large class for an extensive period of time. It is highly likely that the defendant will not have a "perfect" dataset covering the entire claim period. For example, the defendant's internal systems may have changed during the claim period which means that there are different datasets for different parts of the claim period which cannot be analysed together. Or it may be that a defendant does have one entire dataset which is in theory extractable but the dataset is so vast that disclosing it in its entirety would be disproportionate.

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52 *Ryder Limited and Another v MAN SE and Others*, Case 1291/5/7/18 (T), page 43 of the transcript of the CMC which took place on 6 May 2021. See also *Veolia Environnement S.A. and Others v Stellantis N.V. (formerly Fiat Chrysler Automobiles N.V.) and Others* [2021] CAT 6, at [44] – [45] in particular.

53 *Ryder Limited and Another v MAN SE and Others*, Case 1291/5/7/18 (T), page 44-45 of the transcript of the CMC which took place on 6 May 2021.

54 See for example, how the Tribunal was assisted by the "Guide to Facebook" submitted by Meta in the *Gormsen* proceedings, *Gormsen v Meta Platforms Inc. and others* [2023] CAT 10 at [5].

55 *Ryder Limited and Another v MAN SE and Others*, Case 1291/5/7/18 (T), page 71 of the transcript of the CMC which took place on 6 May 2021.

56 See *Veolia Environnement S.A. and Others v Stellantis N.V. (formerly Fiat Chrysler Automobiles N.V.) and Others* [2021] CAT 6, at [45].

57 See e.g., *Dawsongroup Plc v DAF Trucks NV Ruling: Disclosure* [2021] CAT 13 at [20].

It is clear from the Supreme Court's judgment in *Merricks* that the fact that some data is incomplete or difficult to interpret is not fatal to a CR's case, and the CAT must do what it can with the evidence available when quantifying damages.[58] This principle cuts both ways. Just as the CR's case should not fail if it does not have the perfect dataset at its disposal because of the CAT's ability to wield a broad axe in assessing loss, so too there should not be a burden on defendants to produce the perfect dataset, in circumstances where doing so would be disproportionately onerous and the CR can make their case with appropriate data samples.

Disclosure and evidence from class members

The discussion above focusses on managing the disclosure sought from a defendant. In the more limited circumstances where class members hold relevant documents, there is both a practical and a policy question of whether disclosure can and should be sought from such class members in opt-out collective proceedings.

Notwithstanding these challenges, there may be circumstances in which some form of disclosure or evidence from the class is necessary to fairly resolve an issue in dispute (or put another way, where absence of disclosure or evidence from the class means the CAT will have to draw adverse inferences).

This was an issue considered by the CAT at certification in *Evans/O'Higgins*, in which both PCR's causation theories were based on *in essence no factual evidence* and were *pleaded at the level of economic theory only*.[59] This was a relevant factor in the CAT finding that both PCR's causation theories were so weak that the applications could be struck out (but the CAT ultimately declined to exercise its jurisdiction to do so).[60] A related point was briefly considered in the Court of Appeal's judgment in *McLaren*, in which the Court noted in the context of the defendants' pass on defences that if it turned out the CR did not adduce any or any significant relevant direct disclosure, that might affect how the CAT evaluates the defendants' evidence on this issue.[61]

Another example of why this matters in practice is contained in the CAT's first judgment on the merits in the individual *Trucks* proceedings (in the R*oyal Mail/BT* proceedings).[62] In that judgment, the CAT explains how DAF, the defendant truck manufacturer, adduced no direct evidence as to how the competition law infringement (principally the exchange of gross list truck prices between competitor truck manufacturers) operated within DAF and what the individuals who were party to the infringement were hoping to achieve by being so involved.[63] DAF did however adduce expert evidence which it argued demonstrated the infringement did not cause the claimants any loss. The CAT criticised DAF for speculating as to how the infringement operated,[64] and noted that DAF's expert evidence on theory of harm was based on speculation and then draws conclusions on such speculation as to how the infringement would have had an effect on prices.[65] The CAT noted that any theory would be more soundly based on what actually happened factually within DAF in terms of how the information was used and how the infringement managed to continue over such a long period.[66]

One can envisage a similar situation in collective proceedings where, notwithstanding the legitimate reasons why it is challenging for a CR to obtain factual evidence from the class in opt-out collective proceedings, if no such evidence is adduced from the class, the CAT will have to take this into

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58 *Mastercard v Merricks* [2020] UKSC 51 at [64(d)] and [73] – [74].
59 *O'Higgins/Evans* [2022] CAT 16 at [140], [196(1)], [203], [232] and [234(2)].
60 *O'Higgins/Evans* [2022] CAT 16 at [240] – [241].
61 *MOL and others v McLaren* [2022] EWCA Civ 1701 at [43].
62 *Royal Mail v DAF and others and BT v DAF and others* [2023] CAT 6.
63 *Royal Mail v DAF and others and BT v DAF and others* [2023] CAT 6 at [107].
64 *Royal Mail v DAF and others and BT v DAF and others* [2023] CAT 6 at [116].
65 *Royal Mail v DAF and others and BT v DAF and others* [2023] CAT 6 at [116].
66 *Royal Mail v DAF and others and BT v DAF and others* [2023] CAT 6 at [116].

account in evaluating the issue in dispute in order to dispose of the proceedings fairly and protect the defendant's rights of defence.

In terms of practical ways to manage this, in *McLaren*, the CAT at the certification stage noted that while it may be that disclosure is not ordinarily ordered from members of an opt-out class, nothing precludes it, and there are ways that reasonably necessary and proportionate disclosure could be ordered against class members to ensure the proceedings can be disposed of fairly.[67] For example, the CAT raised the possibility of offering some form of costs protection so the disclosure burden is not shouldered unfairly as between class members, or offering class members the option of excluding themselves from the claim even if the opt-out deadline had expired – so they are not forced to provide disclosure.[68]

For a consumer class where records of small transactions are less likely to be retained disclosure may not be particularly useful. Regardless, even where disclosure is useful clearly there are challenges to a CR's ability to adduce factual evidence from class members. It is therefore likely that CRs will seek to use proxies for factual evidence, such as industry experts. But for the reasons set out above this is not a direct substitute for factual evidence. In contrast to factual witness evidence, where opinion is inadmissible, expert evidence is fundamentally opinion evidence. Moreover, if a CR's case is driven by expert evidence alone, there is a risk that the theory of harm becomes purely theoretical and is not grounded in the facts of the case.

In *Gutmann* the Court of Appeal (in the context of an appeal on certification) noted that in an opt-out collective action there is no general requirement for the CR to call individual evidence from class members and that evidence from *carefully selected* class members will have strictly limited probative value. However, it stated that this does not preclude a survey of class members.[69] As noted above, there may be issues such as pass-on where the CR has to adduce evidence from the class and a survey may be a suitable vehicle for this.

SETTLEMENT

Introduction

Settlement in collective proceedings is of a fundamentally different nature to settlement in non-collective proceedings.

In typical inter-parties litigation, settlement discussions and the detailed outcome will be confidential. Typically, all that is revealed to the CAT (and ultimately to the wider world) is that the parties are seeking to engage in settlement discussions (when the parties seek a stay of proceedings to enable them to do so) and that a settlement has been reached (when the parties seek to have proceedings dismissed or discontinued).

In those discussions multiple interests are weighed and balanced in reaching a compromise position. Certainly the parties' respective assessments of the strength of the claim and its likely quantum are an important factor, but factors such as legal costs, appetite for litigation, the wider commercial relationship between the parties and a desire to dedicate management time and energies to other matters will also influence settlement strategy. These are factors which are notoriously difficult for the relevant party to value. Whilst the CAT may, purely for the purposes of assessing costs, compare the eventual outcome at trial with amounts previously offered by way of settlement, it is not called upon to assess, absent a full trial, whether an agreed settlement is suitable at any given point in time.

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67 *McLaren v MOL and others* [2022] CAT 10 at [169].
68 *McLaren v MOL and others* [2022] CAT 10 at [169].
69 *London & South Eastern Railway Limited and Others v Gutmann* [2022] EWCA Civ 1077 at [62].

Often central to the thinking of defendants in such instances is the ability to resolve the claim confidentially without any admission of liability and without any judicial comment on whether a claim is well founded. This is especially so in competition law cases which often produce complex webs of disputes, with multiple claimants seeking damages in respect of the same alleged anti-competitive conduct, across multiple sets of proceedings in multiple jurisdictions and sometimes at different levels of the supply chain or from different sides of a platform. Indeed, the vast majority of individual competition actions in England and Wales settle before trial.

The dynamics are, necessarily, different in collective proceedings.

Opt-out proceedings

In opt-out proceedings the challenges are obvious. No claimant has a seat at the negotiating table.[70] The parties who do, namely the CR and the defendant(s) will each have considerations other than securing the best redress for the claimants. This is perhaps an uncontroversial statement when applied to defendants. Defendants will naturally be looking to minimise their own exposure. In addition to this, collective settlements can be structured so that unclaimed damages revert to the defendants (an option not available for final damages awards and therefore an important incentivising mechanism).[71] Whilst this may assist in bringing defendants to the negotiating table, it also gives them an incentive to favour settlements which are not structured to maximise take-up. It is likely for this reason that the Guide identifies the disposition of the unclaimed balance as one of the areas likely to attract particular scrutiny by the CAT.[72]

The CR will also have considerations beyond the total settlement amount to consider. In particular, they will have to secure a return for their funders and potentially a payment for any of their legal team working on conditional fee arrangements. This is not in and of itself a problem and the institution of litigation funding has been acknowledged as an essential feature of the collective proceedings regime.[73] Nonetheless, the Guide makes clear that the amount allocated to legal costs will be scrutinised to ensure there is no conflict of interest.[74]

The solution to these challenges, and the necessarily unique nature of opt-out settlement discussions in collective proceedings, is the approval regime.[75] Collective settlements (which are available both pre- and post-certification) must be approved by the CAT which must be satisfied that the terms of the settlement are *just and reasonable*.

It is also notable that many of the dynamics of 'ordinary' settlement negotiations will be missing from collective settlements. First and foremost, settlements require the approval of the CAT and the public scrutiny that attracts. But the differences go beyond this. For example, particularly in business-to-business claims (and there are a multiplicity of such collective proceedings and proposed collective proceedings before the CAT), the CR will not be able to speak to the commercial interests of all class members, who may have different interests in reaching a settlement given their commercial relationship with the defendant(s).

In part, these dynamics free class members from some of the drivers which lead claimants in non-collective litigation to settle (e.g. costs risk, management time, etc.). That may well be a feature, rather than a bug, of the regime and a crucial part of ensuring access to justice. But it something that the CAT should not lose sight of when critiquing settlement proposals that it is required to approve or in otherwise policing interactions between defendants and class members.

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70 Whilst in certain circumstances it may be that the class representative would also be a class member, they would be negotiating in their capacity as class representative, not claimant.

71 Rule 94(g).

72 Guide, paragraph 6.125.

73 E.g. *Le Patourel* [2022] EWCA Civ 593, [77].

74 Guide, paragraph 6.125.

75 Sections 49A-49B CA98.

At this stage, the collective settlement regime is untested and the CAT has made reasonably detailed provision in the Guide setting out the matters it will take into account when considering whether the terms are *just and reasonable*.

Opt-in proceedings

The position as regards opt-in proceedings is different and some interesting early issues have emerged. Settlement of opt-in collective proceedings does not require the approval of the CAT once the opt-in deadline has passed.[76] The purpose of that provision is to ensure that there are no 'absent' class members at the time of settlement.[77] That does not, however, mean that there is a reversion to conventional settlement dynamics. Indeed, the absence of the 'claimant' is the driving factor behind each of the two themes identified below.

The Guide provides that only the CR and the defendant(s) can make and accept settlement offers. That is because it is only they, and not the class members, who are parties to the collective proceedings.[78] That holds true irrespective of whether proceedings are opt-in or opt-out.

The Rules make specific provision for the situation where a CR who is also class member seeks to settle their individual claim. They are obliged to notify the class and the CAT, due to the risk of the individual settlement creating a conflict of interest.[79]

There is no provision permitting any other class member to settle their individual claim, and the statement in the Guide that only the CR and the defendant(s) can make and accept settlement offers would appear to exclude that possibility. It is, however, not at all clear why that should be the case. The CR does not settle their individual claim in their status as CR.

Moreover, there may well be reasons why both the defendant(s) and individual class members may wish to settle claims. For example, commercial drivers will apply to different class members at different times. Their interests may not be adequately served by channelling settlement discussions via the CR. For example, collective proceedings where a significant proportion of the aggregate claim value is vested within a relatively small number of class members will likely rely on that small number to create critical mass and make the claim financially viable. In such circumstances, the CR will have to act in the best interests of the class as a whole, not to support an individual settlement by such a class member irrespective of what is in the best interests of that specific class member.

It may be that this issue could be resolved by the use of sub-classes and the Guide allows for the possibility of settlements involving only part of the class.[80] However, that alone would not be enough to create a platform for free and open settlement discussions between class members in opt-in cases and defendant(s). That is because of the prohibition on communications between class members and defendant(s).

That prohibition was identified in *McLaren*.[81] There the CAT concluded that the Rules *preclude any communication between a defendant or that defendant's legal representative and a member (actual or contingent) of a class identified or identifiable under a collective proceedings order made by the Tribunal where that communication concerns those collective proceedings, unless the Tribunal otherwise orders or (subject always to the Tribunal's supervisory jurisdiction) the parties agree*.[82]

The facts of *McLaren* did not concern settlement discussions. In that case, the solicitors for one of the defendants wrote on behalf of all but one of the defendants to certain potential[83] class members,

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76 Rule 95.
77 Guide, paragraph 6.95.
78 Guide, paragraph 6.71.
79 Rule 86, Guide, paragraph 6.73.
80 See paragraph 6.126.
81 *McLaren v MOL*, Ruling (Communications with Class) [2022] CAT 53.
82 *McLaren v MOL* [2022] CAT 53 [14].
83 As, importantly in that case, the deadline for opting-out of the collective proceedings had not passed.

informing them that disclosure would likely be sought from them if they did not opt-out. The CAT was highly critical of the approach of the relevant defendants, observing that the letters *cut across and undermined the potential benefits of collective proceedings* and that, irrespective of whether the Rules contained the prohibition found by the Tribunal, *the Letters were such that they should plainly not have been written*.[84] Prohibiting such communications therefore appears the correct course given the factual findings of the CAT.

However, the ramifications of *McLaren* go far beyond its facts and the Tribunal's finding prevents settlement discussions between opt-in class members and defendants, notwithstanding the absence of any specific prohibition in the Rules.

This is demonstrated by a recent Ruling in the *CICC* CPO applications.[85] *CICC* concerns four CPO applications brought against MasterCard and Visa on behalf of proposed classes comprised of merchants, and in respect of commercial and inter-regional multilateral interchange fees. The Tribunal was confronted with the issue of the proposed defendants receiving communications from merchants who may be class members should the *CICC* applications be certified (and where relevant they choose to opt-in), seeking to settle their claims. The Proposed Defendants considered themselves constrained by the prohibition identified in *McLaren* in responding to such communications. The proposed defendants sought permission to respond to those communications and settle claims were so advised.[86]

The CAT's starting point in *CICC* was that, as confirmed by *McLaren*, the supervisory jurisdiction of the CAT requires defendants to seek the Tribunal's approval before communication directly with any class member and that relevant to how it should be exercised in that specific case were: (1) the fact that there were large number of existing cases brought by merchants seeking damages in respect of alleged anti-competitive conduct regarding multilateral interchange fees (**MIFs**) and how those claims interact with the proposed collective proceedings; and (2) the need to avoid fettering the legitimate interests of merchants in wishing to settle their claims whilst also ensuring that they are sufficiently informed about their ability to participate in collective proceedings and that settlements are not used as a pre-emptive tool to undermine the efficacy of the collective proceedings.[87]

The CAT then considered it appropriate to split communications into three categories:[88]

- First, those received by the proposed defendants regarding claims outside the scope of the proposed collective proceedings;
- Second, communications received by the proposed defendants regarding claims which are the subject of proceedings pre-dating the making of a CPO and are in the scope of the CPO; and
- Third, communications received by the proposed defendants regarding potential claims which are within or partially within the scope of the CPO and are not the subject to existing proceedings.

As regards the first, these have no impact on any potential collective proceedings and the prohibition identified in *McLaren* does not apply.[89]

As to the second category, the CAT was satisfied that potential class members who had already brought individual claims were likely to be adequately advised about their options. In addition, the

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84 *McLaren v MOL* [2022] CAT 53 [29(2)].

85 *CICC* proceedings [2023] CAT 1, concerning four separate CPO applications brought by Commercial and Interregional Card Claims I Limited (which brings two applications, one against proposed defendants in the 'MasterCard' group of companies, and one against proposed defendants in the 'Visa' group of companies) and Commercial and Interregional Card Claims II Limited (which also brings two CPO applications with a similar structure). That group of cases referred to together herein as "***CICC***".

86 *CICC* proceedings [2023] CAT 1 [8] to [10].

87 *CICC* proceedings [2023] CAT 1 [15] to [19].

88 *CICC* proceedings [2023] CAT 1 [21].

89 *CICC* proceedings [2023] CAT 1 [22].

benefits of resolving existing claims outweighs concerns about undermining proposed collective proceedings given such persons would have to choose between their own individual claims and participation in any collective proceedings at some stage in any event by virtue of Rule 82(4). The proposed defendants were therefore given permission to respond to such communications and settle the claims if so advised.[90] Notably the defendants were not given permission to initiate settlement discussions with claimants and it is not clear whether they would be entitled to serve Rule 45 Settlement Offers in the context of the pre-existing claims.

The CAT was not willing to grant the same permission in respect of the final category. First, the CAT could not be *confident* that a merchant who had not yet brought a claim was properly advised on their options or that the proposed collective proceedings were not being undermined. Moreover, the hearing of the *CICC* CPO applications was relatively close in time, making it preferable to deal with that application first rather than set up a parallel system for monitoring potential settlement discussions.[91]

Whilst the *CICC* ruling demonstrates a degree of permissiveness and flexibility by the CAT and turns on its very particular facts, it highlights a number of issues that remain and that are the product of the absent claimant and the impact this has on settlement discussions.

First, (and subject to the facts of the case) it places a moratorium on settlement discussions pending certification save where there is no overlap with the collective proceedings or where these are in respect of proceedings already commenced.[92] This could be for an extended period.

Second, it leaves open the question of when, if ever, it will be acceptable for defendants to engage in settlement discussions with class members since it only deals with the position pre-certification. The same questions as to confidence about the adequacy of advice will arise after certification but before the opt-in/opt-out date and it seems likely that a class member would want to communicate with a defendant before those dates to assess whether settlement was feasible. Also concerns regarding the risk of the collective proceedings being undermined loom in such scenarios and the ruling offers no guidance on how, if at all, such concerns can be overcome.

Third, it is not clear how and whether it is feasible for the CAT to monitor and assess whether class members are properly advised and informed either pre or post–certification. The Ruling refers to *a reasonably active and invasive degree of scrutiny by the Tribunal of the communications.*[93] That may be too difficult to implement and may be unnecessary. It would be possible to design mechanisms such as a requirement for independent advice which places the onus on defendants to ensure that settling class members are properly advised with the risk that, if not the settlement can be avoided.

Fourth, it is not clear where matters stand if the CAT can be satisfied that a particular class member is sufficiently adequately advised so as to make an informed choice on whether to settle, but the risk of the collective proceedings being undermined militates against a settlement. The CAT identified the *legitimate commercial interests of [claimants] wishing to settle their claims*[94] but only as a factor to be weighed, not as a paramount principle. Should this situation arise, the CAT will be forced to consider whether the collective proceedings regime, which was instituted to increase access to justice and facilitate compensation, can require a claimant to forego a settlement they believe to be in their own best interests at that point in time so as to further the interests of the class as a whole. Whilst it is important that class members should be appropriately advised, ultimately it should be possible (and desirable) for them to settle their claims outside the framework of a class settlement.

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90 *CICC* proceedings [2023] CAT 1 [23] to [27].
91 *CICC* proceedings [2023] CAT 1 [28] to [31].
92 Even for pre-existing proceedings the defendants cannot initiate settlement discussions.
93 *CICC* proceedings [2023] CAT 1 [29].
94 *CICC* proceedings [2023] CAT 1 [17].

Finally, the approach in *CICC* still requires a significant degree of transparency regarding settlement discussions, and obtaining approval beyond the Tribunal's narrow second category would appear to require greater transparency still, possibly even as to detail of the communications or the terms of settlement. It is perhaps no secret that the defendants in the interchange cases have engaged in settlements, but in scenarios with a less rich litigation history and better guarded secrets, the limited level of transparency demonstrated in *CICC* may be too great for the parties to bear.

CONCLUSION

In summary, (1) carriage disputes, (2) disclosure and evidence; and (3) settlement are three areas where the CAT has a responsibility to manage collective proceedings differently from individual proceedings because collective proceedings are 'claimant-free'. In the case of carriage disputes and settlement, the CAT's primary responsibilities are set out in the legislation, Rules and the Guide; whereas in the case of disclosure and evidence there is no express responsibility (specific to collective proceedings) conferred on the CAT from these sources, but the CAT nonetheless has a duty to case manage the proceedings to ensure the collective proceedings jurisdiction is used properly.

The CAT has already started to grapple with these issues in the case law to date. Having reflected on this existing case law, this paper discusses the following possible approaches to these issues:

- Carriage disputes can give rise to case management and can be difficult to resolve. One way to simplify the process and well as set incentives in line with the jurisdiction would be to assess which of the two competing CPO applications is *materially better*, and where there is no material difference between them, the CAT should give weight to the *first to file factor* as a "tie-breaker".
- On disclosure and evidence, creativity will be needed to address the lack of adversarial checks and balances in the disclosure process in collective proceedings when managing disclosure given by defendants and overcome the practical challenges to claimant disclosure, where some form of disclosure or evidence from the class is necessary to fairly resolve an issue in dispute.
- On settlement, there remain a number of open issues in relation to settlement by members of opt-in classes, in particular the extent to which the collective proceedings regime as a whole can require a properly advised claimant to forego a settlement (or the chance to explore a settlement) they believe to be in their own best interests, so as to further the interests of the class as a whole.