The Competition Appeal Tribunal 20th Anniversary Conference

Collective Actions

The Implications of "Claimant-free" Actions

By Scott Campbell, Luke Grimes and Ginevra Bicciolo[1]

Introduction

1. Now that the threshold for certification of collective proceedings before the Competition Appeal Tribunal ("**CAT**" or "**Tribunal**") has had the benefit of judicial clarification[2], and 10 claims that were held to meet that threshold are due to proceed to trial, the focus will inevitably shift to other complex and, as yet, largely unexplored questions around issues such as case management, disclosure, factual and expert evidence (as well as, no doubt, settlement).

2. This paper seeks to explore those new questions, reflecting particularly on how the Tribunal can address the practical and evidential difficulties inherent in collective proceedings – where those being represented are not present 'in the court room' – in a way that is both effective and adequately protective of the respective interests of the parties.

3. A key aspect of the discussion is how the Tribunal should seek effectively to case-manage and consistently resolve overlapping claims from an evidential perspective,[3] where the same competition law infringement forms the basis of multiple claims against the same defendants as brought by claimants at two or more different levels of the supply chain, in circumstances where it is unlikely that these claims will be neatly brought in a single set of proceedings. See, for example the ongoing Multilateral Interchange Fees ("***MIF**")* litigation[4] involving individual claims by retailers and opt-out claims by consumers.

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[1] Partner, Senior Associate and Associate respectively at Hausfeld & Co LLP.

[2] *Mastercard Incorporated and others v Walter Hugh Merricks CBE* [2020] UKSC 51; *1266/7/7/16 Walter Hugh Merricks CBE v Mastercard Incorporated and others*, [2021] CAT 28. The authors recognise however that some aspects of the certification standard continue to be explored, including as to the correct application of the *Microsoft* test, as detailed further below.

[3] And/or issues within such claims.

[4] One can also imagine a situation where an opt-in claim by direct purchasers/retailers and an opt-out claim by consumers coexist.

Overlapping claims

4. As the President of the Tribunal put it recently[5], competition law claims present a complex combination of commonality and difference – one of them being, for example, the application of the pass-on defence – which means that the traditional approaches for dealing with common issues in separate litigation (such as *res judicata* and the use of lead cases) will rarely be applicable.

UK regime

5. Under the UK competition regime, where both direct and indirect claimants are permitted to bring actions[6], the key concern arising from overlapping claims is one of over- or under-compensation of either set of claimants.[7] Unless the cases are brought at the same time and managed together before the courts, there is a risk of irreconcilable judgments – the court in the direct purchasers' case may, for example, find that no overcharge was passed on by the direct to the indirect purchasers, and the court in the indirect purchasers' case may simultaneously find that the entire overcharge was in fact passed on to the indirect claimants in that case[8].

6. Arguably, one theoretical solution may be for claimants at all levels in a supply chain to appear before the court in a single set of proceedings with the court apportioning a single fund of damages consistently amongst all interested parties.[9] Such an 'all-inclusive' approach might further the main objective stated in the European Commission's 2008 White Paper on Damages actions for breach of the EC antitrust rules[10] – that all persons injured as a result of anticompetitive conduct be able to recover their losses from the wrongdoer – and indeed the very aim of the Consumer Rights Act 2015 reforms of promoting fairness by enabling all persons who have suffered loss due to anticompetitive behaviour to obtain redress. The reality is that, for

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[5] See "A View from the CAT", speech by Mr Justice Marcus Smith to the UK Competition Law Conference 2023, accessible here: https://www.catribunal.org.uk/sites/cat/files/2023-03/2023-02-27_SPEECH%20TO%20UK%20COMPETITION%20LAW%20CONFERENCE%202023_A%20view%20from%20the%20CAT_C.pdf. See also Mr Justice Marcus Smith's keynote address at GCR Live: Competition Litigation Conference, 14 October 2022, summarised here: https://hsfnotes.com/crt/2022/10/14/highlights-from-the-gcr-live-competition-litigation-conference/#page=1

[6] Contrary for example to the position in the US (at the federal level).

[7] See the judgment on pass-on in The Merchant Interchange Fee Umbrella Proceedings [2022] CAT 31, at [12].

[8] Also, consider the impact of Part 2 of Schedule 8A Competition Act 1998 (for infringements starting after 17 March 2017). This section creates a presumption that overcharge is passed-on to downstream claimants but does that also suggest that the extent of the overcharge passed-through would be set by the findings of the court in the direct claim, or conversely would a finding in the direct claim of no overcharge rebut the presumption in the indirect claim?

[9] Supra note 4, "*A View from the CAT*", page 11.

[10] White Paper on damages actions for breach of the EC antitrust rules COM(2008) 165, 2.4.2008.

wide-ranging reasons – jurisdictional issues, parties' motivations, funding constraints, and coordinating representation – it may not always be possible (indeed, it may be impossible) to bring "all-inclusive" litigation, and courts as well as parties need to find alternative ways around the problem.

7. To limit the risk of conflicting judgments, the Court of Appeal has taken the view that the CAT is the appropriate forum with the right specialist expertise to deal with competition damages claims.[11] Recent times have accordingly seen the transfer of several High Court cases across to the CAT – meaning the Tribunal has had to grapple with an ever increasing volume of claimants and claims[12] and devise new case management tools to navigate this challenge.

8. The CAT's recent Practice Direction on Umbrella Proceedings ("**UPPD**")[13] is one such tool. This aims to assist in extracting out 'ubiquitous issues' (i.e., same or similar issues that may be raised in separate proceedings but in the context of differing facts or circumstances) and resolving them in a single umbrella proceeding, so as to reduce the risk of conflicting judgments by different tribunals. Effectively, the UPPD supplements and particularises the Tribunal's existing general power under Rule 17 of the CAT 2015 Rules to order the consolidation of proceedings, or of any particular issue or matter raised in proceedings. Whilst it is on the face of it a straightforward solution to the problem, it remains to be seen: (a) how easy it will be to ensure the ubiquitous issues are accurately defined; and (b) how their resolution in umbrella proceedings will feed into the resolution of what are otherwise separate, complex proceedings between multiple parties with differing interests and incentives and which may also be running on very different timetables and/or budgets.

9. The UPPD has so far only been used in the context of the *MIF* litigation, with a judgment handed down by the CAT last year on the ubiquitous issue of pass-on.[14] Other issues could of course be eligible to be resolved under the remit of the UPPD, especially as the text of the UPPD specifies that ubiquitous issues "*may be substantive or procedural in nature or both*", leaving significant freedom to the CAT to umbrella proceedings orders ("**UPOs**") to regulate the interaction of claims at multiple stages. Further, in addition to the power of the President to make an umbrella proceedings

[11] See [2018] EWCA 1536 (Civ), at [361-363]
[12] Over 200 claims currently on foot, according to Sir Gerald Barling in his remarks to CORLA on 23 March 2023 - https://corla.org.uk/sir-gerald-barling/
[13] CAT Practice Direction 2/2022.
[14] Supra note 7.

order of his/her own volition or upon request from the Chair of an existing Tribunal, parties themselves can also apply for such an order. We are therefore likely to see some strategic use being made of the UPPD by parties on both sides going forward. For example, defendants to an earlier, more advanced claim may seek to stall its progress by applying for UPOs to be made in respect of ubiquitous issues arising in a later, less advanced claim.

10. Although one can see how consolidation of particular issues may become unwieldy and add to the costs and risk of litigation for both parties when the two (or more) proceedings in which the issues arise are far apart in time, the UPO in the *MIF* litigation demonstrates that the Tribunal will not balk at the proactive case-management of cases at very different stages in order to avoid potentially inconsistent judgments in the future (as was the case in the original *MIF* litigation where the High Court and CAT issued three conflicting judgments following the first instance trial).[15]

11. In *McLaren*,[16] there is an example of active case management in circumstances where two trials - the McLaren Proceedings and the Volkswagen Proceedings - are closely connected in that they concern claims arising from marine carriage of vehicles where the approach to overcharge overlaps to a certain extent between the two cases. In its 6 April 2023 ruling, the Tribunal did not see a UPO as a complete solution to managing these two sets of proceedings (although it is quite likely there will be a role for a UPO at a later stage once Ubiquitous Matters have been identified within overcharge and pass-on issues). Accordingly, the Tribunal ordered that "McLaren Issues", "Volkswagen Issues" and "Possible Ubiquitous Issues" be identified and grouped with sequential trials set down to dispose of all McLaren Issues, then all Ubiquitous Issues, followed by any remaining Volkswagen Issues. There will be mutual disclosure and mutual exchange of all other documents between the two sets of proceedings and for all practical purposes the cases will be managed together.

12. However, where a claim at one level of the supply chain has been issued, but another claim by claimants at a different level of the supply chain is waiting in the wings or could *theoretically* be brought successfully (i.e., has not actually been issued), the UPPD is unlikely to be applicable. Therefore, does the Tribunal need to determine the proceedings before it with the interests of the claimants in the other unfiled/potential

[15] The UPO in the *MIF* litigation concerns, for example, both the *Merricks* claim (certified in 2020) and the CICC claims which were commenced in 2022. A hearing in respect to evidential issues on pass-on took place between 23-25 May 2023, with judgment reserved at the time of writing.
[16] Case Nos: 1339/7/7/20 and 1528/5/7/22 (T), ruling of 6 April 2023 ([2023] CAT 25).

proceedings in mind? As Mr Ridyard alluded to in his dissenting opinion in the recent *Trucks* judgment[17] in the specific context of pass-on, in circumstances where it appears that much of the loss lies at a different level of the supply chain, one solution to avoid the dilemma between over-compensating the claimants before the tribunal and the need to uphold the principle of effectiveness might be to make full payment to those claimants but explore the possibility that a share is set aside or retained in some way, with a view to making payments to the other set of claimants if they can make a case for passed on damages.[18] This does pose some difficulties as a matter of principle, as it effectively requires the Tribunal in one action to adjudicate on what claimants might receive in the other action without the benefit of the evidence in that action.

13. These are difficult questions which stray into the realm of public policy arguments – whether over-compensation can be tolerated so long as the defendant does not pay damages more than once for the same harm, which is related to the (policy) question of whether there needs to be an identifiable class of claimants at the next level of the supply chain - which will only be more prominent going forward as the Tribunal strives to do "*all that it can*" to ensure that cases can be decided consistently.[19]

14. The Tribunal notes that it is likely that this case management solution may well form a template for use in later separate proceedings with similar procedural complexities. Though the process of review of the 2015 Rules which is currently ongoing[20], the CAT has a very timely opportunity to revise its rulebook to reflect the practical experience acquired over the past seven years.

Canadian experience

15. Similar questions have previously been explored in Canadian jurisprudence which, as Lord Briggs noted in *Merricks*, is persuasive in the UK "*not only because of the greater experience of their courts in the conduct of class actions but also because of the substantial similarity of purpose underlying both their legislation and ours*".[21] As such, it is worth considering the views of the Canadian courts as to how manage overlapping claims and over-/under-compensation concerns. It should be noted however that, as

[17] [2023] CAT 6.
[18] Ibid, at [734(1)].
[19] Supra note 7, at [18].
[20] CAT User Group minutes, accessible at: https://www.catribunal.org.uk/sites/cat/files/2023-03/20230314-CAT%20User%20Group%20%288%20Feb%2023%29-Minutes%20%28Final%29.pdf
[21] [2020] UKSC 51, at [42].

at the time of writing, no antitrust class action has ever completed a common issues trial in Canada. Consequently, most judicial commentary on this issue has been made either in the context of certification or settlement[22], and it remains to be seen how the principles might be applied to damages assessment in a trial of common issues.

16. In 2013, the Supreme Court of Canada heard *Pro-Sys* alongside two other cases[23] in which it addressed, among other things, the ability of indirect purchasers to claim for antitrust damages. The court found that indirect purchasers are able to claim because, whilst the pass-on *defence* cannot be invoked by defendants to reduce claims by direct purchasers in Canada[24], indirect purchasers can still use pass-on as a 'sword' against defendants.[25] On that basis, the court articulated the following rules for cartel damages actions where claims are asserted by both direct and indirect purchasers, in summary:

    a. both direct and indirect purchasers have causes of action against suppliers for damage they suffered as a result of a conspiracy by suppliers to raise prices;
    b. a defendant cannot avoid or reduce a claim by a claimant on the basis that that the claimant passed on some or all of an overcharge to an indirect purchaser further down the supply chain. As such, each purchaser in the supply chain can *claim* (though not necessarily recover) the full value of the overcharge that that purchaser had to pay (including any overcharges that were in fact passed on); and
    c. direct and indirect purchasers cannot collectively recover more than the total of the overcharge.[26]

17. The Supreme Court did not provide specific guidance as to how courts should allocate damages in order to avoid overcompensation to claimants and overpayments by defendants but concluded that any risk of double or multiple recovery could be managed by the courts. It posited two scenarios in this regard. Where actions by direct and indirect purchasers are pending at the same time, the defendant can bring evidence of the risk of multiple recovery and ask the court to modify any damages award; similarly, if the defendant raises evidence of parallel suits pending in multiple

[22] David Vaillancourt and Michael I. Binetti, *The Private Competition Enforcement Review: Canada*, The Law Reviews, 6 March 2023.
[23] *Pro-Sys Consultants Ltd v. Microsoft Corporation*, 2013 SCC 57; *Sun-Rype Products Limited v. Archer Daniels Midland Company, 2013 SCC 58*; *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59.
[24] Pursuant to *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3
[25] *Pro-Sys*, at [60].
[26] See Paul-Erik Veel and David Quayat, Price-Fixing Actions After Pro-Sys V Microsoft: Worrying Implications Of The Supreme Court's Decision, Canadian Competition Law Review, Vol.27, No.2, 2014.

jurisdictions, it can ask the court to modify the damage award accordingly to prevent multiple recovery.

18. In the former scenario, it is indeed likely that a judge could award each party damages equal to the actual economic harm that they suffered. In Canada, most cartel damages actions have been commenced and certified as a single proceeding on behalf of both direct and indirect purchasers and have ended with settlements where the settlement proceeds are distributed to direct and indirect purchasers based on an estimate of the extent to which the alleged overcharge has been passed through the distribution chain. The claimants in those cases submitted expert evidence to the effect that pass-through can be measured using a regression analysis.[27] In *Option Consommateurs*, the Quebec Court of Appeal accepted the process of determining the aggregate damages in an amount equal to the unlawful overcharge and then apportioning the damages as between direct and indirect purchasers. In *Vitapharm Canada Ltd. v F. Hoffmann-La Roche Ltd*, the court endorsed a system whereby all levels of purchasers could claim for their losses in a single proceeding, holding that "*upon a determination of the common issues, including the global damages with respect to a product, the plaintiffs would seek directions as to the appropriate manner and means of distribution amongst the class members*."[28] For the purposes of determination of the common issues, including the assessment of global damages for each product, there is no divergence of interests among class members and through the "*common pursuit of the common issues, all class members are more likely to maximize the quantification of their overall, global damages and achieve their ultimate, shared goal of a fair and just resolution of the claims of all class members.*"[29]

19. In the latter hypothetical scenario however, where there are parallel actions in multiple jurisdictions, the position is likely to be less straightforward, as there are bound to be additional considerations such as, for example, disclosure of evidence from the parallel proceedings (which we address later on in this paper) to ensure whatever discount is made to the award in the proceedings in question is fair and just.

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[27] See for example, *Irving Paper Ltd. v Atofina Chemicals Inc.*, [2009] OJ no 4021 (SCJ); *Pro-Sys Consultants Ltd v Infineon Technologies AG,* [2009] BCJ no 2239 (CA); *Fanshawe College of Applied Arts and Technology v LG Philips LCD Co*, 2011 ONSC 2484, [2011] OJ no 2337.
[28] *Vitapharm Canada Ltd. v F Hoffmann-La Roche Ltd.*, [2005] OJ no 1118 (SCJ), at [41].
[29] Ibid at [42].

Sub-classes

20. The use of sub-classes may be one way of limiting parallel claims and reducing the risk of conflicting judgments. The CAT Rules 2015 acknowledge the possibility of having sub-classes at every step of collective proceedings.[30] Paragraph 6.35 of the CAT Guide to Proceedings also specifically refers to "*different categories of purchasers*" with "*conflicting interests*" as a situation which may justify the use of sub-classes:

> *"Where the claim covers a sub-class of persons, the Tribunal may authorise a separate class representative for that sub-class pursuant to Rule 78(4). 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."*

21. Paragraph 6.79 further provides that "*If it is not appropriate to make an aggregate award of damages for the entire class, it may be possible to proceed to determine the entitlement of sub-classes on a group basis, amending the CPO as appropriate to authorise the appointment of class representatives for those sub-classes. If that is not possible, the Tribunal may direct that the quantification of damages proceed as individual issues*".

22. The Tribunal's judgment on the Road Haulage Association (RHA)'s CPO application in relation to the Trucks cartel handed down in June 2022[31] was the first (and remains the only one thus far) to address the issue of one class representative seeking authorisation to represent class members at two different levels of the value chain (in that case, purchasers of both new and used trucks). All potential claimants in the opt-in action held a common interest in establishing that there was an overcharge on the sale of new trucks at as high a level as possible; however, there was a potential conflict of interest between claimants for new and used trucks, as the determination of the level of pass-on of any overcharge in a transaction for a used truck affects the interests of claimants for new and used trucks in opposite ways. The RHA's claim was on that basis seeking individual awards of damages based on a common method of quantification but conducted separately for purchasers who acquired new trucks and for those who acquired used trucks. In the circumstances, the Tribunal was satisfied

[30] See, for example, Rules 80, 88, 91 and 98.
[31] [2022] CAT 25.

that separate representation for the two sets of claimants was not required, as an adequate solution to the specific possibility of a conflict of interest would be for the RHA to explain to prospective class members that by agreeing to opt-in, they also agreed to accept the determination of the RHA - based on expert advice - as to the appropriate level of new-used pass-on.

23. That solution is, of course, not directly transposable in opt-out proceedings (where class members only come forward at the distribution phase). Nonetheless, it is clear that the Tribunal has wide discretion regarding the use of sub-classes (even where they are not proposed by the PCR prior to certification) and, where aggregate damages are sought, it won't prevent it ruling simply based on speculation as to potential conflicts that might occur in the future; rather, the Tribunal expects the class representative to be able to resolve such matters on a sensible and proportionate basis should they arise.[32] It seems that, if necessary, provision of separate representation for each of the sub-classes can also be made at a later stage after the aggregate liability phase. These principles should be equally applicable to opt-out proceedings before the Tribunal, in line with the Canadian opt-out class actions jurisprudence on this point.[33]

24. The recent case law on representative actions under CPR 19.6, albeit a different procedure, also provides some indication of the relevant considerations when acting on behalf of groups of claimants with divergent and/or conflicting interests. The judgment in *Lloyd v Google* finds the following (having previously considered, notably, *Emerald Supplies*): "*Even if it were considered inconsistent with the "same interest" requirement, or otherwise inappropriate, for a single person to represent two groups of people in relation to whom different issues arise although there is no conflict of interest between them, any procedural objection could be overcome by bringing two (or more) representative claims, each with a separate representative claimant or defendant, and combining them in the same action*."[34]

25. It is likely that the feasibility and suitability of sub-classes will depend on the specifics of the case, and on an assessment of whether the conflict in question effectively destroys the required commonality of interest required under the regime. In the

[32] Ibid at [249].
[33] See for example *Option Consommateur*s, where the Canadian Supreme Court held that, rather than barring a class representative who was from one level of the value chain from acting for both direct and indirect purchasers, those issues could be dealt with at subsequent stages of the proceedings, once any aggregate loss had been established.
[34] [2021] UKSC 50, at [174].

meantime, the suggestion that the question of conflict and the potential appointment of further (sub-)class representatives can be left until after the aggregate liability phase is certainly helpful from a funding perspective, where funding and insurance for that phase would otherwise need to be agreed upfront. Depending on the nature of the sub-classes, there may however be a risk that classes at different levels of the value chain get certified on a different basis, with the direct/business purchaser class being certified as opt-in[35] and the indirect/consumer class as opt-out, leading to added funding and practical complexities.

Evidence

26. All class action regimes seek to balance two seemingly contradictory interests—the interest in providing effective redress for parties whose claims might be too small to proceed individually (i.e. the compensatory/restitutionary interest), and the responsibility of protecting the legitimate interests, due process and otherwise, of defendants. Different jurisdictions balance these competing interests differently. The spirit of the UK Consumer Rights Act 2015 reforms as the Tribunal has interpreted it so far is that, if given the choice between denying any recovery to claimants with potentially small value claims because of possible imprecision in the calculation of their individual damages – or because some of the claimants in the class may have suffered no loss – and allowing such claims to proceed beyond the certification stage, the better approach is to accept a degree of imprecision and allow the action to proceed, rather than to refuse to certify the action and therefore rule out recovery altogether.

27. As the Supreme Court and subsequently the Tribunal clarified in *Merricks,* for the purpose of establishing causation, a tenable claim for aggregate damages dispenses with the requirement to undertake an individual assessment of the amount of damages recoverable by each class member for all purposes antecedent to an award of damages, including proof of liability as well as quantification of loss.[36] As far as expert evidence is concerned, this only requires the proposed class representative to put forward a sufficiently credible or plausible methodology for the commonality requirement that is grounded in the facts of the case, with some evidence of the availability of the data that such methodology is to use in due course post-certification. If a claim is certified then the methodology offered by the Representative at least provides and initial 'blueprint' for the parties and a potential route to trial, but this will

[35] Following the Tribunal's approach in *Evans/O'Higgins*, which is currently subject to appeal. The appeal hearing took place on 25-28 April 2023 and judgment is awaited at the time of writing.
[36] See [2020] UKSC 51, at [97]; [2021] CAT 31, at [107-108].

require active ongoing case management. The Tribunal will act throughout as a gatekeeper.

28. The McLaren Proceedings[37] illustrate the Tribunal's "gatekeeper function" in ensuring a proper "blueprint to trial" is established as early as the CPO stage. While the McLaren Proceedings were certified, a subsequent appeal to the Court of Appeal found that the Tribunal had failed properly to exercise its role as the "gatekeeper" in collective proceedings, specifically with regard to how the Court should case manage to trial complex challenges arising from the parties' opposing pricing theories. The Court of Appeal found that a "*class representative might not have to overcome a very high hurdle to obtain a CPO by the CAT should nonetheless ensure that from certification stage the case proceeds efficiently to trial. This role might well entail the CAT imposing substantial burdens on the parties at an early stage*"[38]. The Court of Appeal therefore remitted the claim to the CAT to reconsider case management of the dispute on the approach to pricing, noting (at [52]) that "*further consideration by the CAT at this juncture will provide substantial clarity to the parties going forward. It will sharpen the focus on disclosure and evidence preparation and in due course should improve the management of the trial and assist in making the proceedings more efficient and less costly. Secondly, the CAT lost an opportunity to lay down early guidance for other cases as to how consumer pass on disputes should be prepared and case managed. The issues arising in this case are likely to reflect issues arising in other similar cases. A more detailed assessment by the CAT now could be valuable in guiding how putative Class Representatives construct their methodologies and as to the way in which defendants seek to counter them. In coming to this conclusion, we are not seeking to prejudice in any way how the CAT goes about addressing the remittal or as to the conclusions it might arrive at, and nothing we have said affects the threshold to be met for the grant of a CPO".*

29. The subsequent CPO judgment in *Gormsen v Meta*[39] offers further guidance as to the application of the certification standard, with the Tribunal emphasising the need for the proposed class representative to outline a "*blueprint*"[40] leading to an effective trial of

[37]Case 1339/7/7/20 *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others.*
[38] *MOL (Europe Africa) Ltd and Ors v Mark McLaren Class Representative Ltd*, 21 December 2022, [2022] EWCA Civ 1701, at [45].
[39] Judgment of 20 February 2023 ([2023] CAT 10) in Case 1433/7/7/22 *Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and Others.*
[40] Where a blueprint exists but the class representative is not satisfactorily adhering to it, is there a risk of de-certification? Whilst this has not yet arisen in practice, an indication as to the CAT's potential attitude can be found in *David Courtney Boyle v Govia Thameslink Railway Limited & Others* [2023] CAT 19 where the withdrawal of the

the proceedings. The logical reading is that the Tribunal is keen to ensure the proposed expert methodology is sound in that (a) it establishes the required link between the competition law infringement alleged and the harm allegedly caused to the class[41]; and (b) to the extent that such methodology is dependent upon disclosure from the proposed defendants (and potentially non-parties to the litigation), the expert articulates the disclosure that will be required, so as to effectively demonstrate to the Tribunal how a particular allegation will be made good at trial. This is especially the case where the Tribunal is being asked to assess potentially novel claims (other such claims may include, for example, the bitcoin collective proceedings, which are yet to be heard)[42].

30. This relatively permissive approach to certification relative to, for example, the United States, has however meant that some of the discussion around disclosure and factual evidence has been postponed until after certification. As the Tribunal previously noted, it would be unrealistic for the class representative to outline a detailed, complete and budgeted plan to gather evidence at CPO stage.[43] The key question that the Tribunal will have to grapple with going forward is what exactly is (or should be) expected of the certified class representative/class members post-certification following exchange of disclosure and expert evidence and ahead of trial. There are likely to be information asymmetries in collective proceedings which will feed into considerations around disclosure. In fact, the very nature of collective proceedings lends themselves to such asymmetries being more frequent, given the class representative's role and the fact of claims not being brought directly by those actually affected. On the one hand, many of the cases brought as collective proceedings so far are standalone and brought on behalf of classes of consumers/indirect purchasers, such that there is not always an immediately obvious source of documents relevant to establishing the alleged infringement within the CAT's jurisdiction (as would be the case, for example, if the proceedings were following on from a CMA decision). On the other hand, defendants are unlikely to obtain disclosure or witness evidence of fact from the class representative/class members. For example, none of the recent post-certification

class representative's economic expert from the proceedings was seen as a potential reason for certification to be revoked.

[41] In other words, it articulates the counterfactual situation of what would have been the case had the alleged infringement not been committed, and then quantifies the loss to the class by reference to that counterfactual.

[42] Case 1523/7/7/22 *BSV Claims Limited v Bittylicious Limited & Others.*

[43] See, for example, [2022] CAT 20 at [75,93,100].

rulings and orders issued so far concerning disclosure (in *Kent v Apple*[44] and *Coll v Google*[45]) envisage data or documents being provided by the claimants.

31. Certain asymmetries may be overcome if collective proceedings are case-managed together with overlapping individual claims, or where UPOs are made in respect of certain ubiquitous issues arising, as evidence in the latter proceedings will effectively stand as evidence in the collective proceedings (either generally or in respect of those ubiquitous issues). For proceedings where neither of these solutions are possible, however, parties will be reliant on the Tribunal to allow some more ad-hoc, creative approaches to obtaining relevant evidence so as to strike the right balance between the respective interests of the parties.

32. As regards the information asymmetry affecting the claimants, the Tribunal has so far been receptive to class representatives' applications for disclosure of decisions and investigation files of foreign competition authorities as well as of documents produced in parallel private proceedings overseas, where they concern the same or similar allegations against the defendants. The Tribunal has considered this both at post-certification and pre-certification stages. Post-certification, we have seen such orders for disclosure in Dr Kent's claim against Apple, where Apple was ordered to produce documents from parallel proceedings in the US and Australia[46], and in the *Which? v Qualcomm* claim, where Qualcomm was ordered to provide preliminary disclosure of certain parts of the European Commission's investigation file in *Case T-235/18 Qualcomm v Commission* on the basis that (inter alia), even if Decision issued by the Commission following its investigation was annulled by the General Court, that did not taint the relevance of the entirety of the documents in the Commission's file for the purposes of the collective proceedings (and also where those proceedings do not 'follow-on' from the Decision in question).[47]

33. The test for pre-certification disclosure was clarified in the context of Mr Gutmann's proposed opt-out proceedings against Apple in relation to iPhone batteries.[48] Mr Gutmann sought disclosure of a decision issued by the French General Directorate for Competition Policy, Consumer Affairs and Fraud Control which he considered concerned materially the same conduct relevant to his proposed claim. Apple objected

[44] Case 1403/7/7/21 *Dr. Rachael Kent v Apple Inc. and Apple Distribution International Ltd.*
[45] Case 1408/7/7/21 *Elizabeth Helen Coll v Alphabet Inc. and Others.*
[46] [2023] CAT 20.
[47] [2023] CAT 4, at [11].
[48] [2022] CAT 55. Mr Gutmann was subsequently granted permission to seek pre-certification disclosure on 25 May 2023.

to this request, arguing that, pursuant to the Tribunal's Guide to Proceedings, Mr Gutmann could only obtain disclosure of the decision if the disclosure was 'necessary in order to obtain certification'. The Tribunal noted that the question of necessity was a difficult one to ascertain at the first case management hearing, as it takes place well before the issues for certification are likely to have crystallised. Nevertheless, the Tribunal considered that it was unattractive and inefficient for the parties and for the Tribunal to reconvene once the issues had in fact crystallised in order to determine Mr Gutmann's application. On this basis and taking into account the fact that disclosure would assist his claim, the Tribunal ruled in favour of Mr Gutmann; it was also noted by the Tribunal that Apple had not argued that providing the decision would give rise to practical or legal difficulties or be particularly burdensome.[49]

34. The flexible approach adopted by the Tribunal in allowing disclosure of this kind is likely to be conducive to consistent judgments and findings across jurisdictions, and for that reason it is to be welcomed by claimants and defendants alike. By contrast, the Tribunal has not yet been asked to consider third party disclosure applications (by either class representatives or defendants). The issue has however been raised as a potential future issue in some of the collective proceedings filed so far[50], and so we are likely to see developments in the near future in this area. Rule 63 of the 2015 CAT Rules provides that any application for third party disclosure must be supported by evidence, and the Tribunal may grant the application only where (a) the documents in question are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and (b) the disclosure is necessary in order to dispose fairly of the claim or to save costs. Similar conditions in relation to third party disclosure exist in Canada, having regard in particular to the costs risk involved. From the perspective of the class representative, one of the key challenges will be obtaining the necessary funding cover for such applications to the extent not already provisioned for in any CPO application, in circumstances where the class representative, as set out above, is not required to produce a detailed and complete plan for the gathering of evidence at certification stage.

35. As regards the potential information asymmetry affecting defendants, it is reasonable to assume that the Tribunal will be slow to order the class representative and/or class

[49] Ibid, at [11-16].
[50] See, for example, *Qualcomm*, [2022] CAT 20 at [75-76]. This was also touched upon in the certification judgment in *Dorothy Gibson v Pride Mobility Products Limited Pride* (not ultimately certified), where the CAT suggested that the proposed class representative apply for limited third party disclosure in any renewed CPO application.

members to produce documents or witness evidence, in line with the spirit of the collective actions regime; however, as Mrs Justice Falk noted in the certification judgment in *McLaren*, the Tribunal retains broad discretion in this regard. The Tribunal has power under rule 89(1)(c) to order disclosure by any represented person, which is defined in rule 73(2) to include class members who have not opted out of opt-out proceedings as well as those who have opted into opt-in proceedings, so no distinction is drawn between the two in principle. It may well be that disclosure would not ordinarily be ordered from members of an opt-out class, but nothing precludes it. Mrs Justice Falk further observed that if an order for disclosure against certain class members was determined to be reasonably necessary and proportionate, then a way could and would be found to achieve that so as to ensure that the proceedings can be disposed of fairly.[51]

36. Nonetheless, the Tribunal's other ruling in the McLaren Proceedings on the related issue of defendants' direct communications with class members suggests the Tribunal will not look favourably at attempts by the defendants to cause class members to incur costs, or threaten them with the prospect that they are likely to incur costs, such as disclosure costs. The Tribunal made very clear that the regime is designed to ensure that '*represented persons are represented by the class representative*'[52].

37. It remains to be seen whether, for example, the Tribunal will be open to applications for specific disclosure against the class representative in their role as members of the class (where they are in fact part of the class). Depending on the circumstances of the case, a sampling approach may be appropriate, particularly in the context of opt-in proceedings where there are readily identifiable and often sophisticated class members. See, for example the Court of Appeal in *Gutman* (Trains): "*The class representative is not prohibited from looking to the class representative, for instance to answer a survey. But the CAT is unlikely to be moved by a generic complaint that the class representative is not calling individual members*"[53].

38. These points have been tested in the context of the Canadian regime (although not in the specific context of competition claims, as set out above), which also places limits on and conditions to the ability of a defendant to conduct discovery of individual class members regarding the common issues. As a general rule, defendants must first seek

[51] [2022] CAT 10, at [169].
[52] [2022] CAT 53, at [20].
[53] [2022] EWCA Civ 1077, at [62].

to exhaust their rights of discovery of the class representative and must then seek permission from the court. In considering whether to allow the discovery of individual class members, the court considers factors such as the stage of the proceeding, the need for discovery in view of the claims and defences that have been advanced, whether discovery would represent an undue burden for class members and, indeed, the existence of sub-classes. Oral discovery usually follows the production of documents. In some instances, members of the class beyond just the class representative can be subjected to oral discovery. This includes cases where different groups of class members are in a different situation from the class representative, and the defendants require access to such evidence to properly present a defence.[54]

39. Approaches to disclosure and witness evidence inevitably have an impact on the scope and function of expert evidence in collective proceedings. Conversely, the experts' analysis (on both economic and technical issues) can fill the gaps where evidence from the parties is not available and will accordingly be key in the context of collective proceedings as well as for the efficient case management of overlapping claims. In its recent judgment the umbrella proceedings in the *MIF* litigation, for example, the Tribunal provisionally considered that pass-on would be better approached using econometric evidence and existing studies of pass-on rates, rather than taking claimant-specific factual evidence from a sample of claimants.[55]

40. If one looks at civil jurisdictions, such as the Netherlands, similar collective actions regimes have been introduced and operate successfully there without the benefit of a disclosure regime, with expert evidence thus heavily relying on econometrics and publicly available studies. Either way, the lack of claimant-specific factual evidence may be the subject of challenges by defendants in this jurisdiction and even expose expert analyses to *Britned*-style arguments.

Conclusion

41. As we cast our eyes ahead to the next 20 years of the CAT's existence and beyond, in the short to medium term we are likely to see characteristically innovative solutions to some of the issues highlighted above, certainly as the first collective action proceeds to trial. This is likely to draw upon experiences from the US, Canada and Australia at the very least and there is certainly the scope for home-grown solutions. What goes

[54] *Coburn and Watson's Metropolitan Home (cob Metropolitan Home) v. Bank of Montreal* [2018] B.C.J. No. 3665
[55] See further footnote 15.

first in the CAT will act as a template for the pursuit of collective actions elsewhere in Europe, especially now that representative actions seem set to be well founded throughout the EU.