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(All views expressed are strictly personal to the author and should not be taken in any way to represent the views of the Tribunal)

1. It is a great honour to be invited to give this keynote address at this important conference on litigation finance. Although I have been invited as Chairman of the CAT, any views that I express today are my own and are of course not binding on the Tribunal. Today my focus is on the funding of collective proceedings brought on an opt-out basis, which is where the CAT has the greatest control over funding and in particular the allocation of sums paid whether pursuant to a judgment or a settlement approved by the Tribunal. The collective proceedings regime at the CAT has reached the stage that it has a considerable body of case law and experience at the CPO stage and now proceedings are coming through to the stage of judgment or settlement. On settlements the Tribunal has now approved settlements in *McLaren* (Roll-on Roll-off with 3 defendants), *Gutmann/SW Trains* (boundary fares) and *Merricks* (interchange fees), none can be described as entirely straightforward. I am sure people far more learned than I will be scrutinising various judgments in their presentations at this conference. It is a good time to stand back and reflect on where we are.

2. I don't need to tell you the impact of *PACCAR*[1], where the Supreme Court effectively took off the table litigation funding based upon funder entitlement to a percentage of damages (DBAs) at least until any legislative changes are made and brought into effect. This has led to funders entering into arrangements where they seek to make their return based on a multiple of outlay. Such arrangements may face scrutiny both at the certification stage[2] and settlement stage (approval of settlements and thereafter approval of payments of costs, fees and disbursements). It is fair to say the level of scrutiny of funding arrangements has intensified at the certification stage and the CAT may well use its experience at the settlement stage in considering funding and other stakeholder arrangements at the certification stage as the Tribunal recently did in *Bulk Mail Claim*[3].

Specific features of collective proceedings

3. In considering funding and other stakeholder arrangements it is important to bear in mind a multiplicity of factors and the balancing of the various interests involved. These are:

(1) Nature of collective proceedings: The collective proceedings regime is designed to cover those cases where it is not practical to expect individual claimants to bring their own proceedings or where the low level of financial loss for each individual and the cost of legal proceedings rule out that possibility. It allows claims to be on a class basis. Classes can be very large

[1] *R (on the application of PACCAR Inc) v. Competition Appeal Tribunal* [2023] UKSC 28; [2023] 1 W.L.R. 2594.
[2] *Riefa v. Apple Inc* [2025] CAT 5 (CPO refused where proposed CR found not suitable, who displayed lack of understanding of funding arrangements).
[3] *Bulk Mail Claim Ltd v. International Distribution Services Plc* [2025] CAT 19 at [21], [22], [36], [41].

and the amount of potential compensation for each class member is generally small or at best modest. The level of engagement by class members is usually not great and when it comes to distribution of any settlement the percentages of class members coming forward to make claims in most cases is likely to be in single digits.

(2) The importance of funders: Funders provide a central role in practice in enabling collective proceedings to be brought forward[4]. This has been recognised in various judgments both by the Tribunal and the Court of Appeal. Unless funders feel that they can make an adequate rate of return across their portfolio, they will withdraw from the market. Of course, funders are not the only stakeholders: legal teams and ATE insurers all need to be funded and paid.

(3) The role of the class representative ("CR"): The CR also has a key role and huge responsibility in the process. The CR is the champion of the class. The CR may or may not have a legal background. The CR will often be selected after the funders and legal team have been put together[5]. Thus in *Merricks* it was the solicitors who came up with the idea of bringing collective proceedings, they found the funders, and it was only once a project plan had been put together that Mr Merricks was invited to become the CR.[6] In such circumstances the CR should obtain independent advice on the terms of the retainer of the legal team and funding arrangements. This is unlike normal

[4] *Evans v. Barclays Bank* [2023] EWCA Civ 876 at [30].
[5] *Bulk Mail* at [22].
[6] *Merricks v. Mastercard Inc* [2025] CAT 28.

litigation where in general the client is the one who first approaches and selects the legal team. In *Bulk Mail*, the Tribunal proposed at the certification stage that the CR retain an independent costs specialist to assist him in reviewing and approving any bills.[7] That does not mean that the litigation funder does not also check the level of legal bills with an eye of keeping them at reasonable levels.

(4) The existence of conflicts of interest: Rather than ignoring the existence of conflicts of interest, it is better to recognise them and to take them into account. Such conflicts can manifest themselves at the stage of approval of collective settlements and distribution between compensating class members and providing for stakeholders. The CR will want to maximise the amounts to be available and paid out to the class members, whereas the stakeholders may want to maximise their own returns. At the end of the day, the Tribunal will want to avoid, so far as practicable, outcomes where the main beneficiaries of collective proceedings are the stakeholders. This I consider further below.

(5) The close supervision of collective proceedings by the Tribunal. As stated in *McLaren* which summarises the position:[8]

> "17. Collective proceeding are subject to the close supervision of the Tribunal, not just because of their complexity, but also because of the inherent potential conflicts of interests between the class members and those who work together to make such proceedings possible in a practical sense. The CR cannot realistically bring these proceedings without lawyers, funders and insurers. The lawyers all need to be paid and funders must have a good chance of recovering their outlay, plus interest and any funders fees for it to be worthwhile for them to put their

[7] *Bulk Mail* at [40]
[8] *McLaren v. MOL (Europe Africa) Ltd* [2024] CAT 47 at [17].

capital at stake. Funders work on a portfolio basis recognising that they may lose some actions, but in others they may do well such that as a minimum they make a reasonable rate of return. Lawyers and funders may agree terms with the CR, but at the end of the day the payment of costs and expenses is subject to the approval of the Tribunal, which must balance the interests of not just the class members and the stakeholders, but in doing so must bear in mind the importance of having a workable collective proceedings regime. As noted by Green LJ in *Le Patourel v BT Group plc* [2022] EWCA Civ 593 ("*Le Patourel*"), at [29]:

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

(6) The close supervision of the Tribunal manifests itself in a number of ways:

(a) At the CPO stage the Tribunal looks at how the litigation may pan out, not just in terms of having an arguable claim, but whether it really can be of benefit to class members. In the future there may be closer scrutiny on issues relating to distribution and take-up.

(b) The Tribunal will look at how it is intended to balance the various interests and conflicts, including:

(i) Lawyers retained by the CR: are their rates/incentives reasonable, how are they to be reviewed and approved?

(ii) The LFA: does it enable the CR to have the ultimate say, is the rate of return sought manifestly excessive, does it reflect the Tribunal's supervisory role?

(iii) Are the proceedings at the end of the day predominantly a vehicle for stakeholders to financially benefit with minimal actual benefit for class members?

(c) At the settlement stage, the Tribunal has no difficulty in rejecting a settlement which it does not consider to be in the best interests of class members. Even if actual take up may be low, a sum can be given to charity. The Tribunal will examine the distribution plan and is willing to put forward changes if needed to improve the level of take up. Distribution in some cases can be on the basis of refunds or price reductions which obviates the need for class members to make claims.

(d) At the settlement and distribution stages, no costs, fees or disbursements are to come out of settlements unless approved by the Tribunal. At this point all the interests and considerations can be taken into account.

4. Bearing in mind the various features listed above, I would like to touch upon a few specific topics:

(1) How does one define success and its significance?

(2) Rates of return.

(3) Cy-pres and payments to charity.

Success

5. Success is a relative concept but is important in a number of levels in collective proceedings. One may ask success for whom? The parties, the CR, the class members, the collective proceedings regime, the funders and other stakeholders?

6. As stated in *McLaren*:[9]

> "21. In assessing whether the terms of a proposed settlement are reasonable and ultimately what sums should be paid to stakeholders out of a settlement, success is a highly important factor. Success can be measured in a number of ways and success, for the purposes of a funding or conditional fee arrangement, is not necessarily a success for the class members as a whole. In determining success for the purpose of approving a settlement and distribution of costs, fees and disbursements, the Tribunal will also look to see whether the proceedings are a success overall, which includes the amounts of damages available for class members, the likely and actual take up by class members and what may happen with the amounts not taken up either in terms of reversion to defendants, or payment to charity or being made available to stakeholders (subject to the approval of actual payments out to stakeholders by the Tribunal). A successful outcome can include appropriate proxies to distribution to the individual claimants for any unclaimed damages, including charity as aforementioned but also, in appropriate cases, by way of a cy-près mechanism or to the Access to Justice Foundation. The Tribunal appreciates that not all claims brought by way of collective proceedings will have a successful outcome. The claims may fail at trial. The CR may be advised that it is unlikely to succeed at trial in the light of disclosure and expert evidence, such that it may end up either discontinuing the proceedings or seeking the approval of a settlement with either no or a relatively small amount of damages for class

[9] *McLaren v. MOL (Europe Africa) Ltd* [2025] CAT 4 at [21].

members. Such results are inherent in litigation where outcomes are often uncertain."

Rates of Return

7. There is no one approach in dealing with rates of return to be awarded to funders as to what sum that should go to funders is very much case specific. The Tribunal is of course aware of the importance of funders and the need for them to make a proper rate of return across their portfolios. As stated in *McLaren*:[10]

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

8. In terms of outcomes the range extends to the following outcomes:

(1) CR loses the proceedings whether at trial or by discontinuing without any recovery. In such circumstances the funder gets nothing as this is a risk which a funder takes on from the outset. Some cases are riskier than others and in general follow-on claims carry less risk as they are largely focussed on causation and quantum. On the other hand, standalone claims can be more expensive, and the outcome tends to have a greater degree of uncertainty.

[10] *McLaren* [2024] CAT 47 at [21].

(2) CR wins the proceedings at trial which means that the defendants are liable for the full quantum of the damages suffered by the class. Here the stakeholders are likely to be covered in full (subject to reasonableness of actual costs and any assessments) and there should be in most cases a substantial amount not claimed by class members (depending upon the form of distribution). This should leave room for a significant rate of return for funders.

(3) CR settles the proceedings for a sum which is not in real terms a success, such as where the defendants pay a small percentage of the sums claimed. This was the situation in *Merricks*. Depending on the facts and sums involved, even in such cases a return may be made available to funders, even if it is lower than hoped for. In *Merricks* the settlement was £200 million (in contrast with the quantum estimated at the CPO stage of some £14 billion). Half was allocated for class members with the balance to be split between covering to a certain extent claims by class members over £100 million, the CR's legal team, the funders, and charity. This scenario where the settlement sum is relatively low is the most challenging one in terms of outcome and allocation.[11]

(4) CR settles the proceedings where the sum being paid is substantial and there is more than enough to meet class member claims and the costs, fees and disbursements of the CR. Even in such cases there may be issues on dividing up the recovery.

[11] The *Merricks* judgment is subject to a judicial review application by the funders.

9. Where funding and return is based on the initial outlay of a funder where the funder seeks a multiple of the sums advanced, there are risks which need to be taken into account by the Tribunal:

(1) That the system will perversely incentivise the incurring or funding of disproportionately high costs.

(2) That third party funders will have an incentive to sue and settle quickly, for sums materially less than the likely aggregate award.

(3) That there may be very low levels of take up by class members to make claims.

(4) That the system becomes or is regarded as one that primarily benefits and is for the benefit of stakeholders (both lawyers and funders) rather than class members or in default of take up, charity.

10. All these risks (as well as the risk of conflicts of interest)[12] can be managed within the system at various levels through the following:

(1) Appropriately worded LFAs which give ultimate control on settlement decisions to the CR (subject to approval by the Tribunal).

[12] *Gutmann v. Apple* [2025] EWCA Civ 459 at [100].

(2) The CR having appropriate independent legal advice in terms of the wording of LFAs, the retainer of any legal team and the vetting of any bills.

(3) The control and review of arrangements by the CAT at the certification stage. This may entail not just looking at the terms of the LFA, rates being charged, and the litigation budget. It may be helpful to have various scenarios based on costs and various sums which may be recovered from defendants whether by judgment or settlement as was provided at the Tribunal's request in *Bulk Mail*. In addition, the CAT considers the suitability of the proposed CRs to perform his or her role properly.

(4) Having sensible legal teams and funders who can take a realistic and practical approach, co-operating with each and the Tribunal, when it comes to settlements and distribution. Funders may contest applications to approve settlements, just as they may play an important and constructive role in putting together appropriate LFAs and suggesting how settlement sums ought to be distributed where they have an interest.[13]

(5) On applications for the Tribunal to approve settlements, distributions and payments out, there is incumbent on those before the Tribunal to bear in mind their duty of full and frank disclosure. As stated in *Gutmann*[14] (boundary fares):

> "53. Because of the conflicts we have identified, it is all the more important that we have full and frank disclosure of all the material before the Tribunal, so the Tribunal is in the best

[13] Many funders belong to the Association of Litigation Funders which has helped develop the wording of LFAs and represent the industry.
[14] *Gutmann v. First MTR South-Western Trains Ltd* [2024] CAT 32 at [53].

> possible position to ensure that any settlements and distribution plans are fair and reasonable for the class members. Not just fair and reasonable for the class representatives themselves and for the defendants, but we will not ignore the interests of others such as the lawyers, the experts and the funders, because we have an interest not just in this case but in future cases. If the lawyers and the funders are not going to get a return in this case, then they may be deterred from acting in further cases."

In my experience this duty is one that those who appear before the Tribunal do their best to fulfil.

(6) Any settlement of opt-out proceedings requires the approval of the Tribunal. At that stage the Tribunal can do its best to ensure that the best interests of the class are considered as well as a fair outcome is reached in the round. It is at that stage the Tribunal can consider the appropriateness of the funders fee or return.[15]

11. Where opt-out proceedings have led to an award of damages by the Tribunal or even by way of settlement,[16] the Tribunal clearly has the power to order the payment of a funders fee out of damages, even before distribution to class members. As stated in the recent Court of Appeal judgment in *Apple*:[17]

> "78. Ingenious though the arguments on jurisdiction advanced by Lord Wolfson KC were, I am unable to accept them. Payment of the funder's return and lawyers' fees from the award of damages in priority to payment to the class is clearly permitted under section 47C(3)(a) and (b) CA 1998. Sub-section (3)(a) contemplates that the CAT will make an order for the damages to be paid on behalf of the represented persons (i.e. the class) to the CR. It does not prescribe what the CR does with the damages once received and accordingly it would be open to him to pay the funder and the lawyers, subject always to the control of the CAT under its supervisory jurisdiction. Sub-section (3)(b) contemplates that the CAT will make an order for a proportion of the

[15] *Gutmann v. Apple Inc* [2025] EWCA Civ 459.
[16] *Gutmann v. Apple* [2025] EWCA Civ 459 at [86].
[17] [2025] EWCA Civ 459 at [78].

damages to be paid on behalf of the class to such third party as the CAT thinks fit. These are wide unrestricted powers given to the CAT which can clearly include payment to the funder or the lawyers of a proportion of the damages in priority to the class. There is no basis for limiting the scope of "such person other than the represented person" to a claims administrator or similar as Lord Wolfson KC suggested. Whilst what this Court said in Le Patourel at [99] was obiter, it was clearly correct in concluding that: "the CAT has a wide discretion to make any case management order it sees fit and it is within its power to ensure that funders and representatives are paid".

81. There is nothing surprising or unusual about the CAT ordering payment to funders or lawyers from the award in priority to the class. Subsection (3) is predicated on the CAT having entered judgment in favour of the class so that there has been a successful outcome to the proceedings, which have only been possible because the funder was prepared to fund them on the terms of the LFA, which entitles the funder to its return in the event of a successful outcome, subject always to the amount that it recovers by way of return being approved by the CAT. Lord Wolfson KC's submission that enabling the funder to obtain its return in priority to the class was contrary to the purpose of the collective proceedings regime (as set out in the Government response to the consultation before the legislation was passed) of enabling class members "to get back money which is rightfully theirs" is misconceived. The Government response was not contemplating that funders and lawyers would not be entitled to make an appropriate recovery of costs, fees and disbursements incurred in collective proceedings from a damages award where the commercial reality is that those proceedings could not have been pursued and brought to a successful conclusion without the benefit of litigation funding. The supervisory jurisdiction of the CAT will ensure that what is recovered is not excessive."

12. In deciding on what level of return and the distribution of recoveries, the Tribunal aims to act fairly to all concerned, including funders. In *McLaren* this was emphasised by the Tribunal (see para 7 above).

13. As illustrated by *Merricks* a number of factors may come into play in deciding what rate of return (if any) should be awarded the funders at the distribution stage. As funders operate on a portfolio basis, it would be helpful to know the actual rates of

return across the relevant portfolio.[18] The Tribunal will seek to avoid an excessive rate of return and look to determine what is the reasonable rate of return in all the circumstances. This may entail looking at the degree of success in the proceedings; the amount of any settlement or judgment; the stage at which the action reached; the amount that would be available to and taken by up by class members; any sum which may be allocated to charity or cyprès to take up sums not claimed by class members; the degree of risk taken on by the funder; and, the need for funding not just in the case before it, but for other cases. This is not intended to be a binding or exhaustive list, as the facts vary so much from case to case.

Cyprès or charity

14. It has to be recognised that in most cases the majority (if not vast majority) of class members are unlikely to make claims when it comes to the distribution stage. Sometimes it may be possible to increase the level of take up by making payment automatic (e.g. by a reduction in future bills or credit or repayment where there is an ongoing relationship). However, such alternatives may not be available. In such circumstances the parties, stakeholders and the Tribunal may consider payments to charity. Again, this is a very much fact specific situation. In *Merricks* the Tribunal was prepared to direct that a proportion of the settlement sum not claimed and payable to class members should go to the Access to Justice Foundation.[19]

[18] *Merricks* [2025] CAT 28 at [185].
[19] *Merricks* [2025] CAT 28 at [71], [200]-[204].

Conclusions

15. Collective proceedings, which are perceived to be or become predominantly about getting profits for stakeholders rather than compensating class members, are not an outcome that is likely to find favour with the Tribunal or society more widely. In contrast, to have a regime which is unable to have funders is similarly self-defeating. Neither outcome is desirable, nor inevitable. I believe CRs, Stakeholders and the Tribunal should be able to work together for the benefit of society and consumers to have a practical system with outcomes which are fair to all. My experience at hearings has been in general a positive one where funders and other stakeholders are doing their best to be flexible, constructive and to learn lessons with a view to improvements.