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CASE LAW UPDATE “LIFE AFTER PACCAR”

Lucy Glyn · Tuesday, June 11th, 2024

The CAT has taken a robust, pro-funding approach

Following *PACCAR*, the Competition Appeal Tribunal (CAT) has taken a robust, pro-funding approach in response to a number of opportunistic challenges by defendants to the PCRs' amended funding arrangements.

Although the CAT granted permission to appeal on the funding issues, these challenges should fall away upon the entry into force of The Litigation Funding Agreements (Enforceability) Bill. However, the timing of this now looks uncertain following the surprise announcement of a general election on 4 July. Passage of the bill will now be a matter for a new government.

In March, the CAT delivered one of its most significant rulings on funding to-date in ***Gutmann v Apple***, in which it held:

- The CAT has the power to make an order that a **funder's fee be paid before distribution to Class Members**. There is nothing impermissible about a funding agreement which contemplates this.
- The CAT will be **slow to interfere in negotiated funding terms at the CPO stage** unless the provisions are “sufficiently extreme to warrant calling out”. This does not mean that the funder's fee will not be scrutinised at the end of proceedings.

A first time for everything

Le Patourel v BT

During the first three months of 2024, the CAT heard its **first substantive trial** in *Le Patourel v BT*. After a number of years of rapid growth, the market is eagerly anticipating the CAT's judgment, which will be an important milestone in the development of the regime and should go some way towards clarifying the CAT's approach.

McLaren Class Action

In another first for the regime, the CAT approved a settlement of £1.12m with a particular defendant in the McLaren class action as "just and reasonable". The long-awaited **first settlement approval** was swiftly followed by the second, this time of £25 million (out of a total of £39 million sought against the relevant defendant, Stagecoach) in the boundary fares action. Whilst the sums are relatively small in the context of the overall sums being sought by Class Representatives in the CAT, these are positive steps for the market.

Hunter v Amazon

In *Hunter v Amazon*, the CAT for the first time dealt with a **carriage dispute prior to the certification hearing**. Compared with the previous practice of dealing with carriage together with certification in one 'rolled-up' hearing, this new approach should help to drive cost efficiencies and provide certainty at an earlier stage where there are competing claims at an earlier stage.

Group Actions

Wirral v Indivior

At the end of last year, the High Court struck out a securities class action in Wirral v Indivior on the basis that "it would be unfair and unjust, and contrary to the overriding objective, to allow the Representative Proceedings to oust the jurisdiction of the Court to case manage the claims from the start". If pursued further, the claim would need to proceed via ordinary multi-party proceedings.

Commission Recovery Limitied v Marks & Clerk

In April, the Supreme Court refused permission to appeal in Commission Recovery Limited v Marks & Clerk LLP, upholding the Court of Appeal's unanimous judgment that class members satisfied the "same interest" test notwithstanding the

presence of issues requiring individual determination. This paves the way for a trial next January on the core common issue, with other issues needing to be dealt with subsequently on an opt-in basis. The challenge for funders with this bifurcated approach is that the representative element of proceedings will not result in a class-wide award of damages from which they could take a return.

Morris v Williams & Co

In April the Court of Appeal in *Morris v Williams & Co* endorsed a refusal to strike out a claim filed by some 134 claimants using the same claim form. Providing helpful clarity on the circumstances in which a **single claim form can be used to issue a claim for multiple claimants**, the court declined to add any additional limbs to the basic test of "convenience" pursuant to CPR 7.3. However, the court acknowledged the potential for defendants to group actions filed by a single claim form to face unfairness in the absence of active case management and suggested that the CPR Committee could usefully review the appropriateness of the test. The court also emphasised that the judgment should not be seen as discouraging the use of GLOs, which it described as "*a very useful and desirable procedure in many cases*".

Nox Emissions Group Litigation

There have been some interesting developments in the Nox Group Litigation.

First, several defendants sought funding information from the claimants in support of a potential application for security for costs against the funders under CPR 25.14(2)(b). The claimants' law firm said there was no agreement between their clients and any third-party funder. The law firm's own funding was provided through a secured loan from a funder which provided working capital used for all aspects of its work, and which must be repaid irrespective of the outcome of any litigation relevant to this application. Although it declined to order disclosure of the funding agreement between the claimants' law firm and their funders for now, the court confirmed there was no good reason to limit the court's power under CPR 25.14 to those in a direct contractual relationship with the claimants. Accordingly, the fact of funding being provided otherwise than via a direct contractual relationship with the claimant will not necessarily allow funders to avoid the risk of security for costs. The question was one of "*substance, and not form […] which can only be ascertained in substance by examining the arrangements in question.*" The court indicated that it would be appropriate to revisit the question of disclosure once it became clear whether the claimants had put in place sufficient ATE insurance so that the defendants would not be left exposed. In such an application, any funders against whom disclosure is sought would need to attend court in order to make submissions.

Secondly, in a February judgment the High Court confirmed that ATE insurance

being in place is not a condition precedent for making a GLO but rather is one of a broad range of factors in exercising the court's discretion. In any event, the claimants have substantial ATE in place and the court found the threshold requirements for making a GLO were clearly met in this case. The proper context to take any points in relation to the adequacy of their funding arrangements would be when in an application for security for costs when there is greater visibility as to future costs.

Other Developments

Topalsson V Rolls Royce

In Topalsson v Rolls Royce, the High Court granted an order for disclosure of funding information in support of the defendant's application for a non-party costs order against the claimant company's founder, managing director and majority shareholder, and, potentially, other funders. The claimant had argued that the application was "inherently unlikely to succeed" and that disclosure would involve the claimant breaching confidentiality agreements with investors, exposing it to criminal and civil sanctions in Germany. The court held that provided the applicant could show that the future non-party costs application was not inherently weak or fanciful, the court would be slow to undertake any further assessment of its merits.

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