Exton Advisors

Litigation Funding Case Law Update – March 2025

Lucy Glyn · Friday, March 28th, 2025

Developments in the CAT

Since the turn of the year, there has been a flurry of significant and controversial decisions and developments in the fast-moving collective action regime in the CAT.

Liability

After much anticipation, the first ever substantive judgment in an opt-out collective action was handed down in *Le Patourel v BT*, an excessive pricing claim seeking more than £1bn in damages on behalf of millions of BT customers.

Despite the CAT's conclusion that BTs prices were excessive, the claim was unanimously

dismissed on the grounds that the prices were not unfair as they bore a reasonable relation to the economic value of the services provided. Interestingly, the CAT placed no material weight on the prior findings of the UK telecoms sector regulator, Ofcom. In addition, as to expert evidence, rather than favouring one over the other, the CAT took a "blended" approach as between the two contrasting methodologies employed. The CR was subsequently refused permission to appeal by the CAT and ordered to pay 85% of BT's costs (subject to detailed assessment on the standard basis), leading to an order to make a payment on account of £14m.

Attention now turns towards the Gutmann boundary fares case for the next significant decision on liability.

Certification

Following the unprecedented cross-examination of the PCR in *Riefa v Apple & Amazon* in relation to funding issues, the CAT refused to certify the claim on the basis that the PCR had not demonstrated sufficient independence or robustness to act fairly and adequately in the interests of the class.

Whilst the extent to which the approach taken by counsel for the Defendants (and the CAT) in Riefa becomes standard practice remains to be seen, the CAT was clear that its decision here was based on a cumulation of concerns that arose in this particular case. It is clearer now then ever before that PCRs carry a heavy burden and will require the assistance of appropriate (independent) legal and commercial advice in relation to funding issues, both at the brokerage/negotiation stage and during the course of the dispute.

The CAT refused to certify the various related collective actions brought by Professor Carolyn Roberts against six water and sewerage undertakers because the abuse of dominance claims are excluded by the applicable regulatory regime (namely s. 18(8) of the Water Industry Act 1991).

The CAT reasoned that this outcome reflected Parliament's intention in establishing the regime for privatised water and sewerage undertakers – enforcement rests primarily with Ofwat and private parties may only claim if there is a breach of a subsequent enforcement order. If not for this finding, the CAT said that it would have granted the CPOs sought. Independently of the Defendants, the CAT expressed some concern on behalf of class members regarding certain provisions of the LFA and the extent of funder control, particularly around termination.

In particular, the original definition of "Material Adverse Change" was seen as being vague and unbalanced in favour of the funder, as in the event of a dispute the independent KC appointed to resolve the matter would be asked to decide whether the funder's opinion was "reasonable" as opposed to whether the MAC had objectively occurred. As the funder agreed to amendments dealing with all of the CAT's concerns, no issue as to funding was relevant in the CAT's decision.

The CAT certified the opt-out collective proceedings brought against Royal Mail which follow on from an Ofcom decision regarding discriminatory pricing in the supply of bulk mail delivery services in the UK. The judgment contains some interesting and constructive passages in relation to funding and the PCR's approach to obtaining funding in a "post-Riefa" world.

Helpfully, the CAT acknowledged that the PCR "may be a person with little or no experience in dealing with litigation costs and fees. Measures may need to be put in place to ensure that the PCR gets specialist and independent advice on any litigation funding agreement as well as costs specialist advice on legal fees to provide assistance in approving any costs arrangements and fees." In response to issues raised by the Tribunal during the hearing, the PCR/funder agreed to:

- Amend the LFA such that, prior to any settlement, a legal opinion would need to be obtained addressing its rationale and terms, as well as the advantages and disadvantages (which was said to reflect good practice); and
- Consider appropriate changes to the LFA following the CAT's judgment in the Water CPO cases which flagged concerns around funder control and termination (see above).

Settlement

In the McLaren proceedings, the CAT delivered some helpful reasoning in support of its decision last year to approve two further settlements, this time with WW/EUKOR and "K" Line, which together with the earlier settlement with CSAV, took the total market share of the defendants who have now settled to 52.3%, leaving the remainder on the table in the liability hearing which concluded this month.

One of the key issues the CAT grappled with was the agreed split of the settlement sums between damages to be reserved for the class and damages which would be applied towards the CR's costs, fees and disbursements. Here, it was crucial in the CAT's decision that the relevant stakeholders provided an undertaking that they would not apply for payments to be made to them in respect of those portions of the settlements which were notionally apportioned to the class.

The CAT viewed as constructive the intervention of the funders and insurers during the settlement hearing. Issues of distribution and the reasonableness of the funder's return were deferred until the overall outcome is known.

Following a hearing in which funder Innsworth intervened, the CAT approved the £200m settlement reached between Walter Merricks CBE and Mastercard. The CAT's reasoning and decision as to important connected issues including the funder's return and distribution is anticipated shortly.

Carriage

The CAT found in favour Professor Andreas Stephan (instructed by Geradin Partners and funded by Innsworth) in its carriage dispute against BIRA Trading Limited (instructed by Willkie Farr & Gallagher and funded by LCM) in relation to prospective collective proceedings against Amazon. The CAT's judgment contains a helpful summary of the key factors the CAT will take into account in carriage disputes.

Here, the key determining factors in favour of Prof. Stephan were the wider scope of his claims and the preferred quantum methodology of his expert. Various issues had been raised (on both sides) regarding the PCRs' respective funding arrangements which were either dealt with by way of amendment or considered by the CAT not to be a material concern.

Interestingly, although the return to Prof. Stephan's funder was "remarkably high" and potentially substantially higher than BIRA's, the LFA had been amended so that such return would be payable out of undistributed damages (unless otherwise agreed and approved by the CAT), which the CAT considered adequately protected class members. The CAT in fact considered BIRA to be the more suitable of the two class representatives, but this was "clearly outweighed by the factors which favour Prof Stephan".

Appeals

The Court of Appeal has delivered four robust rejections of appeals against CAT decisions in the following cases, which taken together may help to bolster market certainty around CAT decision-making, particularly with respect to issues of case management.

- In *Ad Tech Collective Action v Google*, the appeal against the CAT's certification decision was rejected on the basis that the matter fell within the CAT's broad case management decision, with the Court of Appeal emphasising that whilst it will intervene where the CAT "has exceeded the limits of its reasonable discretion or otherwise made an error of law, this will be rare".

- In Trucks, the Court of Appeal refused the attempt by DAF to challenge the arrangements approved by the CAT for the separate funding of two sub-groups of potential class members (purchasers of new vs used trucks). No arguable point of law was identified and, instead, the CAT's conclusion regarding the adequacy of the arrangements to address any potential conflict in respect of funding was a case management factual assessment by the CAT which was well within its discretion. DAF was seeking "to concoct a point of law out of that factual assessment".

- In *Ennis v Apple*, the Court of Appeal again refused an appeal against the CAT's certification decision on essentially the same basis as in the Google case above – the relevant assessments made by the CAT fell well within its discretion.

- In the Amazon carriage dispute referred to above, the Court of Appeal rejected the unsuccessful PCR's application. Most interesting for funding purposes was the treatment of Ground 3, whereby it was alleged that the CAT erred in law when it treated funding as a neutral factor as between the two PCRs. The issue here was that Prof. Stephan had originally entered into an LFA

which the CAT regarded as unsatisfactory as it gave disproportionate control to the funder. Prof. Stephan and his funder subsequently agreed an amended funding package which removed the offending provision and therefore dealt with the CAT's concern. The CAT held: "[…] it is hardly conducive to promoting the interests of the class members to deny a class representative the chance to improve the funding terms when faced with competition from a rival. The suggestion by the applicant that the unsatisfactory nature of the original LFA […] meant that Professor Stephan was unsuitable to act as a class representative is unwarranted and the comparison with Riefa is not appropriate."

Group actions

In a decision which will be a boost to claimants and claimant-side lawyers in the group consumer litigation space, the High Court in *Angel v Black Horse* upheld the use of omnibus claim forms for some 5,800 claims relating to discretionary commission arrangements in car finance. This is generally advantageous for claimants as it avoids the need to issue separate claim forms (and pay court fees) for each individual claim.

This comes against a wider background of claims in the motor finance space, with the Supreme Court currently considering an appeal against *Johnson v FirstRand Bank* and the FCA considering whether to implement a consumer redress scheme. The outcome of these decisions is likely to have significant implications for car finance claims and, potentially, the mass claims space generally.

In what may prove to be the final nail in the coffin for CPR 19.8 representative actions as a mechanism for securities actions, the Court of Appeal upheld the lower court's judgment in *Wirral v Indivior & Reckitt Benckiser* holding that certain securities claims could not proceed as a representative action. Instead of the "one-sided" bifurcated representative procedure sought by the Claimants (whereby Defendant issues would be frontloaded), the claims could be pursued by way of the (ongoing) multi-party proceedings, which were both feasible and consistent with the overriding objective.

Interestingly, one of the arguments raised by the Claimants was that the litigation funders would not fund the claims of certain (retail) investors unless a representative action was allowed. The court was not persuaded by the evidence on this issue, or the lack thereof, and evidently suspected funders of "gaming the system".

In a securities fraud action against Standard Chartered, the High Court refused to strike out price reliance and dishonest delay claims pursuant to section 90A FSMA 2000, in a decision that seemed to contrast with the summary judgment delivered last year in *Allianz v Barclays*.

Other

In *Tactus Holdings v Jordan & Ors*, the High Court dismissed an application under CPR 19.2(4) by a third party who purported to be the assignee of the claimants rights under the relevant contract to be substituted as claimant. The assignment was ineffective as a consequence of a contractual

prohibition and, in any event, would have been rendered void for champerty.

Whilst the relevance of the ancient doctrines of maintenance and champerty has reduced considerably following the rise of litigation funding as an accepted feature of modern litigation, this judgment serves as a reminder that a third party will not be permitted to pursue a claim under assignment unless it has a legitimate interest in the claim independent of the assignment.

In *Reeves v Frain and McKinnon*, the High Court held that DBAs used by a law firm in a probate dispute concerning a valuable estate were unenforceable for failure to comply with the much-maligned Damages-Based Agreements Regulations 2013. The key issues were that the DBAs did not provide for "payment out of sums recovered" (as the claim had in fact been for a declaration) and did not include counsel's fees (which were charged as expenses).

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