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## **An analysis of the CAT case-law on private damages actions following the Supreme Court in Merricks<sup>α</sup>**

This is an exciting time to be involved in competition law litigation in the UK. There are numerous claims before the specialist competition court in the UK and, in particular, it is notable that we are witnessing a surge in applications under the new consumer collective opt-out redress provisions introduced by the Consumer Rights Act 2015.

This article surveys the case-law of the Competition Appeal Tribunal (CAT) in relation to private damages actions in the UK after the seminal ruling by the Supreme Court in December 2020 in the 'ongoing' Merricks litigation in relation to Mastercard and Visa. First the article will provide an outline of the background legislative context for damages actions before the CAT, and discuss the Supreme Court's judgment in Merricks. The main focus of the article will be to provide a comprehensive overview of the CAT's rulings and judgments in the period since the Merricks ruling, including any subsequent appeals from the CAT's rulings, up and until the end of August 2023. In particular, the article will discuss in greater detail those judgments in which the CAT has considered applications for Collective Proceedings Orders (CPOs) before making some concluding remarks on recurrent themes and issues in the case-law.

### **UK legislative and institutional context**

There has already been considerable academic literature on the background institutional context for the enforcement of competition law generally and the ways in which the UK has sought to facilitate and encourage private enforcement of competition law, in particular through the Competition Appeal Tribunal. Readers are encouraged to look at the extensive literature on these issues.<sup>1</sup> Nonetheless a brief precis is merited here to set the scene for understanding the more recent case-law which will be the main focus of this article. The Competition Act 1998 is the bedrock of the current UK competition law framework, and it established the two key competition law prohibitions:- the Chapter I and Chapter II prohibitions modelled on Articles 101/102 TFEU. The Competition Appeal Tribunal (predecessor CCAT) was first established following the Enterprise Act 2002<sup>2</sup> and it now undertakes a range of important judicial roles in relation to the overall UK competition law enforcement system, including appeals under the prohibitions and its judicial review function in relation to the market and merger investigation systems under the Enterprise Act 2002.<sup>3</sup> The most significant role of the CAT in the context of this article, and in terms of its overall workload in recent years, is in relation to private

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<sup>α</sup> Professor Barry Rodger, The Law School, University of Strathclyde, Glasgow. Thanks for Professor Paco Marcis, IR and Dr Sebastian Peyer, UEA, for their insightful comments.

<sup>1</sup> See A Andreangeli, 'The Changing Structure of Competition Enforcement in the UK: The Competition Appeal Tribunal between Present Challenges and an Uncertain Future' (2015) 3(1) JAE 1-30; A Robertson 'UK Competition Litigation: From Cinderella to Goldilocks?' (2010) *Competition Law Journal* 275. See B Rodger, 'The Consumer Rights Act 2015 and Collective Redress for Competition Law Infringements in the UK: A Class Act?' (2015) 3(2) JAE 258-286. M Furse 'Follow-On Actions in the UK; Litigating Section 47A of the Competition Act 1998' (2013) 9(1) *European Competition Journal* 79-103; B Rodger, 'Private Enforcement in the UK; Effective Redress for Consumers?' B Rodger, ch 12 in B Rodger, P Whelan and A MacCulloch (eds), *The UK Competition Regime: A Twenty Year Retrospective* (OUP 2021).

<sup>2</sup> See D Bailey, 'Early Case-Law of the Competition Appeal Tribunal', Chapter 2 in B Rodger (ed), *Ten Years of UK Competition Law Reform*, (Dundee University Press 2010).

<sup>3</sup> See A Andreangeli, 'The Changing Structure of Competition Enforcement in the UK: The Competition Appeal Tribunal between Present Challenges and an Uncertain Future' (2015) 3(1) JAE 1-30

litigation involving the competition law prohibitions. The CAT's role in relation to private enforcement was expanded considerably by the Consumer Rights Act 2015, not only in terms of its extension beyond only damages actions,<sup>4</sup> but crucially through the introduction of an opt-out collective redress scheme in s47B (revised) of the Competition Act 1998, based on a process of applications to the CAT for Collective Proceedings Orders (CPOs).<sup>5</sup> The idea was to facilitate effective consumer collective redress in the wake of the failings of the prior opt-in only scheme as exemplified by the Football Shirts litigation.<sup>6</sup> A basic outline of the CPO application process will be provided below.<sup>7</sup>

This article will focus on recent developments under s47B of the Act and in particular all the CAT rulings and judgments. The Merricks Supreme Court ruling was a watershed moment in the development of competition law collective redress in the UK and, following that ruling, the CAT has had to deal with a plethora of applications for certification and a Collective Proceedings Order (involving many new claims and some which had been registered and put on hold awaiting the outcome of the Supreme Court ruling). As shall be demonstrated, the recent case-law evidences a move away from a virtually complete focus on business claims<sup>8</sup> at the CAT to many more consumer-focused claims, many of which involving the digital economy.<sup>9</sup>

### **UK Collective Redress and Merricks**

The amended s47B of the Competition Act provides for the CAT to make a Collective Proceedings Order (CPO) in relation to a claim only on the basis that there is: an authorised representative; the claims raise the same, similar or related issues of fact or law; and are suitable for collective proceedings. It should be stressed that the revised system provides for the availability of applications for both opt-in and opt-out variants of the CPO.

Merricks sought to bring proceedings on behalf of a class defined as individuals who between 22 May 1992 and 21 June 2008 have purchased goods and/or services from businesses selling in the UK that had accepted Mastercard cards provided those individuals were a) resident in the UK at the time and b) aged 16 years or over. The claim was for an aggregate sum of circa £14 billion including interest and the class was considered to be around 46.2 million people in a claim based on Mastercard's setting of the multilateral interchange fee which applied as a fall-back between banks in the UK.<sup>10</sup> The application was not certified by the CAT. The case failed in the CAT on the suitability test on the basis that the applicant had failed to put forward: 1) a sustainable methodology to be applied in practice to

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<sup>4</sup> Ibid.

<sup>5</sup> See B Rodger, 'The Consumer Rights Act 2015 and Collective Redress for Competition Law Infringements in the UK: A Class Act?' (2015) 3(2) JAE 258-286. B Rodger, 'Private Enforcement in the UK; Effective Redress for Consumers?' B Rodger, ch 12 in B Rodger, P Whelan and A MacCulloch (eds), *The UK Competition Regime: A Twenty Year Retrospective* (OUP 2021).

<sup>6</sup> As *Replica Football Kit* had become known in the CAT follow-on Case 1079/7.9.07. See discussion by Rodger, Chapter 13, in B Rodger (ed) *Landmark Cases in Competition Law: Around The World in Fourteen Stories* (Kluwer Law International, 2012).

<sup>7</sup> See B Rodger, 'The Consumer Rights Act 2015 and Collective Redress for Competition Law Infringements in the UK: A Class Act?' (2015) 3(2) JAE 258-286.

<sup>8</sup> Though see eg *UK Trucks Claim Ltd/Road Haulage Association Ltd v Stellantis NV* discussed below.

<sup>9</sup> See for example *Coll v Alphabet* and *Consumer's Association v Qualcomm* both discussed below.

<sup>10</sup> This is not a genuine follow-on because the Commission decision affected EEA cross-border interchange fees whereas most of the Mastercard claim is on behalf of national consumers that were supposedly overcharged by the national fee (which was similar to the EEA fee).

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calculate a sum which reflected the aggregate of the individual claims; and 2) a reasonable and practicable means for establishing the individual loss to be used a basis for distribution.<sup>11</sup>

On appeal, the Court of Appeal rejected the CAT's reasoning and adopted a more purposive approach to certification proceedings, recalibrating the process in the balance of potential collective redress applicants. In considering the nature of the aggregated damages, the CA noted the Canadian approach<sup>12</sup> at the certification stage did not involve a detailed analysis of expert opinion, and the threshold for certification is not an onerous one. The CA considered that the applicants had provided a methodology for calculation of the aggregate damages and there was data likely to be available to operate it, and at this stage they need only show prospect of success before completion of disclosure and filing of evidence, not that the claims were certain to succeed. The CAT had set too high a hurdle for certification and there was 'no requirement ... to approach the assessment of an aggregate award through the medium of a calculation of individual loss'.<sup>13</sup> The second main issue concerned the proposed mechanism for distribution of the aggregate damages award. The CA stressed that s47B did not require aggregate awards to be distributed on a compensatory basis as envisaged by the CAT.<sup>14</sup> The CAT Rules 92 and 93 provided that distribution on the basis of individual loss where readily calculable is the most obvious and suitable method, but the Court emphasised that the power to make an aggregate award would be largely negated if 'calculation of individual loss was a pre-requisite for any authorised method of distribution and therefore for certification'.<sup>15</sup> The opt-out CPO mechanism was 'obviously intended to facilitate means of redress which could attract and be facilitated by litigation funding and had parliament considered it necessary to limit this new type of procedure by what would be required for the assessment of damages in an individual claim then it would have said so.'<sup>16</sup> The ruling emphasises the need for the practical effectiveness of the collective redress scheme itself, and that the mechanisms created for CPO applications should be workable and not create insurmountable barriers to collective redress by consumers.

The Supreme Court delivered its ruling in the subsequent appeal in December 2020, and a majority judgment upheld the Court of Appeal and returned the case to the CAT to reconsider the CPO application in light of its findings.<sup>17</sup> Lord Briggs emphasised the context and purpose of CPOs: 'Collective proceedings are a special form of civil procedure for the vindication of private rights, designed to provide access to justice for that purpose where the ordinary forms of individual civil claim have proved inadequate for the purpose'.<sup>18</sup> The most serious of the errors of law by the CAT identified by Lord Briggs concerned the methodology and evidence to calculate damages at trial, whereby he stressed that a broad brush approach was appropriate in estimating damages to be awarded, particularly where evidence was limited or incomplete. The minority judgment (by Lords Sales and Leggatt), concurred with Lord Briggs (and the earlier Court of Appeal ruling) on the issue of distribution of aggregate damages.<sup>19</sup> Again the CAT had erred in law in deeming the compensatory principle to be essential for determining the outcome of that process. As Lord Briggs notes, 'section 47C of the Act radically alters the established common law compensatory principle by removing the requirement to assess individual loss in an aggregate damages case, and that nothing in the Act or the Rules puts it back again, for the purposes of distribution.'<sup>20</sup>

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<sup>11</sup> <https://competitionpolicy.wordpress.com/2017/08/10/has-the-cats-mastercard-decision-killed-off-opt-out-class-actions-by-indirect-purchasers/#more-1175>.

<sup>12</sup> Para 40.

<sup>13</sup> Para 46.

<sup>14</sup> At paras 56-62.

<sup>15</sup> At para 57.

<sup>16</sup> Para. 60.

<sup>17</sup> [2020] UKSC 51, see Lord Briggs at para 82.

<sup>18</sup> Ibid. at para. 45.

<sup>19</sup> Ibid, Lords Sales and Leggatt at paras 148-150.

<sup>20</sup> Ibid. at para 76.

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The CAT subsequently certified the application, subject to exclusion of deceased persons and a claim for compound interest, and authorised Merricks as class representative.<sup>21</sup> In the wake of the Supreme Court Merricks ruling, there are a number of ongoing CPO applications, notably numerous follow-on claims against Mastercard/Visa and also in relation to the trucks cartel, as well as a range of other cases including various involving aspects of the digital economy. The remainder of this article will now look at the rulings and judgments by the CAT (and appeal courts) following the Supreme Court's judgment.

### **Number of rulings and judgments**

We will provide a brief quantitative and qualitative analysis of the rulings and judgments<sup>22</sup> issued by the CAT, and subsequent appeal courts, in its private enforcement function, from the *Merricks* Supreme Court ruling to the end of August 2023. In total there have been 84 rulings by the CAT (including its key judgments on CPO applications), 7 by the Court of Appeal and one by the Supreme Court. We have made the following categorisations of case-law to provide a clearer and structured breakdown of the case-law. We will first provide an overview of all the case-law in the Merricks case itself following the Supreme Court ruling, which was far from the end-point in that extended and extensive litigation. We will then briefly outline all the rulings on procedural or preliminary issues, followed by rulings on costs issues. The following section will examine in a little more depth all the judgments on CPO applications which have taken place in the wake of the Supreme Court ruling, and which are particularly significant in terms of developing the appropriate approach to the new collective redress certification scheme in light of that ruling, in particular Lord Brigg's judgment. The subsequent 2 sections will consider appeals, firstly the CAT's approach to applications for permission to appeal and secondly the Court of Appeal and Supreme Court's decisions on appeals. Finally, we will reflect on recurring themes and issues which we can discern from the considerable number of judgments in this short period of less than 3 years.

### **Post-Supreme Court Merricks case-law**

There have been 16 subsequent rulings in relation to the Merricks dispute alone in this period,<sup>23</sup> covering a range of issues. In the first ruling, albeit Mastercard did not oppose certification, the CAT was required to rule on 2 issues.<sup>24</sup> The first concerned the scope of the class of persons in the collective claim, notably the 'deceased persons' issue, resolving that the claim did not extend to any persons deceased as at the date of claim. The second concerned the issue of compound interest holding that it could not be resolved in these collective proceedings in the absence of a plausible method to calculate on an aggregate basis. The next two rulings concerned the date of domicile of potential claimants within the class, and the CAT held that it was necessary for the CPO to specify the domicile date within the UK as being as at the date of the claim form on 6 September 2016.<sup>25</sup> The CAT subsequently refused permission to appeal on this issue on the basis that it was not an appeal on a

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<sup>21</sup> [2021] CAT 28

<sup>22</sup> See Tribunal Guidance- 7.117 As a matter of practice, decisions of the Tribunal are referred to as "judgments" where the decision deals with the substantive issues in the case; where predominantly procedural or ancillary issues such as disclosure, costs, or permission to appeal are involved, the Tribunal's decisions may also be referred to as "rulings", "decisions" or "reasoned orders".

<sup>23</sup> 15 by the CAT 1 by the Court of Appeal.

<sup>24</sup> [2021] CAT 28.

<sup>25</sup> [2022] CAT 13.

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point of law and even if it were, the appeal grounds were incorrect.<sup>26</sup> The following ruling involved a close scrutiny of costs by the CAT.<sup>27</sup> The next ruling by the CAT involved the Umbrella Interchange Fee claimants proceedings (multiple business claims against Mastercard and Visa joined together), and concerned common issues in both sets of proceedings, namely in relation to pass-on and proof thereof. The CAT refused permission for Mastercard to rely on specific fact evidence to make good its defence, but did not preclude the UIFC from adducing evidence to support their claim that the overcharge was not passed on.<sup>28</sup> The next ruling by the CAT gave permission to the claimants to amend the claim in relation to run-off overcharges.<sup>29</sup> In its subsequent Merricks ruling,<sup>30</sup> the CAT refused permission to appeal (also in relation to the MIFU proceedings). The CAT next awarded no costs either way<sup>31</sup> in relation to the dispute on run-off overcharges.<sup>32</sup> The Court of Appeal then dismissed an appeal by Merricks in relation to the domicile issue determined by the CAT.<sup>33</sup> In the next judgment, Merricks' application to amend his Re-Amended Reply in respect of (i) deliberate concealment, pursuant to s.32 of the Limitation Act 1980 (and under Scots law, s.6(4) of the Prescription and Limitation (Scotland) Act 1973) was granted,<sup>34</sup> and the CAT ruled that both parties had to bear their own costs,<sup>35</sup> in the next judgment the CAT had to resolve various preliminary issues in relation to limitation/prescription and the applicable law to certain claims,<sup>36</sup> for which the CAT subsequently dismissed an application for permission to appeal,<sup>37</sup> and later made a costs ruling.<sup>38</sup> The CAT then ruled to grant permission for Merricks to adduce certain evidence<sup>39</sup> and finally the CAT delivered an important judgment<sup>40</sup> in which it considered, in relation to arguments on limitation, the earlier CJEU ruling in *Volvo*.<sup>41</sup>

### **CAT procedural/preliminary issues**

Including the Merricks dispute, several rulings have concerned procedural or preliminary issues in relation to all private enforcement claims before the CAT,<sup>42</sup> and will generally be dealt with relatively briefly. The more interesting rulings which generally concerned international private law, limitation or funding-related issues will be given a fuller outline where appropriate.

The first was in *Epic Games v Apple Inc*,<sup>43</sup> an abuse case and the issue was an international private law question regarding service outside the jurisdiction (on defendants based outside the UK), which was

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<sup>26</sup> [2022] CAT 19.

<sup>27</sup> [2022] CAT 27.

<sup>28</sup> [2022] CAT 31.

<sup>29</sup> [2022] CAT 43.

<sup>30</sup> [2022] CAT 50 re [2022] CAT 31.

<sup>31</sup> [2022] CAT 52.

<sup>32</sup> [2022] CAT 43.

<sup>33</sup> [2022] EWCA Civ 1568.

<sup>34</sup> [2023] CAT 5.

<sup>35</sup> [2023] CAT 8.

<sup>36</sup> [2023] CAT 15.

<sup>37</sup> [2023] CAT 33.

<sup>38</sup> [2023] CAT 53.

<sup>39</sup> [2023] CAT 39.

<sup>40</sup> [2023] CAT 49.

<sup>41</sup> 22 June 2022 in *C-267/20 Volvo AB and DAF Trucks NV v RM* (the "Volvo Decision", EU:C:2022:494).

<sup>42</sup> This category covers a range of situations in which judgments are given in a competition law dispute during the procedural phases of the litigation, and some judgments in this category are closely related to the judgments category (which includes full strike out or summary judgment rulings), for instance where a party seeks to amend to include a competition law defence or claim.

<sup>43</sup> [2021] CAT 4.

partially successful here. *Westover v Mastercard*<sup>44</sup> also concerned the application of international private law rules and in particular those of the Rome II Regulation to determine the applicable law.<sup>45</sup> The following judgment in *Stellantis v NTN*<sup>46</sup> was a relatively routine ruling striking out an amended defence, followed by a ruling in *Asda v Mastercard*,<sup>47</sup> in relation to a plea regarding defences on the issue of quantum. *Sainsbury's v Mastercard*,<sup>48</sup> concerned an important issue in terms of efficiency of justice with the CAT stressing that raising identical arguments in similar suits constitutes an abuse of process. *Dune Group Ltd v Mastercard (the Umbrella Interchange Fee Claimant proceedings)*, involved a mixed outcome where the claimants sought summary judgment (on the standard test that the defence has no real prospect of success), unsuccessfully, and the defendants were given permission to amend their defences.<sup>49</sup> The next ruling, again in *Dune Group Ltd v Mastercard*, emphasises the hands-on role in case management to enhance the efficient conduct of the proceedings which has been adopted by the CAT.<sup>50</sup> This concerned the 'merchants' claim against Mastercard and Visa, involving a large number of claimants, already at this stage 959, which accordingly required close case management regarding the most appropriate way forward.<sup>51</sup> Accordingly the CAT recognised the need to reduce the time and costs involved in multiple litigation and therefore consideration was needed as to how to bind as many claimants as possible on common issues and to assess if a series of trials on grouped issues would be preferable to trials involving lead claimant cases or the extreme possibility of a single trial on all issues. The underlying concern was that the risk of re-litigating similar or identical issues in non-lead claims was unacceptably high, and therefore the CAT issued an Order setting out a timetable for identification of the issue, which would give 'an opportunity to manage these proceedings in a way that recognises their particular characteristics and brings efficient and proportionate outcomes across a wide range of complex claims'.<sup>52</sup> Moreover the CAT in its ruling encouraged other claimants proceeding in the High Court to expedite their claim transfer to the CAT in order to take part in this process. In *Euronet 360 Finance Ltd v Mastercard*<sup>53</sup> the application for a split trial was rejected, as the CAT identified real difficulties in defining an appropriate or convenient split of the relevant issues. The next ruling concerned the appointment of the tribunal in *Le Patourel v BT Group Plc*.<sup>54</sup> An application for transfer to the fast-track process was rejected by the CAT in *Belle lingerie Ltd v Wacoal Emea Ltd*<sup>55</sup>, as although an element of public interest may be relevant to the issue of urgency, the CAT undertook the balancing exercise in deciding this was not a suitable case for the fast-track procedure. The CAT allowed a pre-certification meeting to assess new evidence and a new claim in *Boyle and Vermeer v Govia Thameslink Railway Ltd*.<sup>56</sup> Permission to amend was granted in relation to a specific draft amendment in *Gutmann v First MTR South Western Trains Ltd*.<sup>57</sup> Next, the CAT granted disclosure in relation to an earlier French DGCRF decision in *Gutmann v Apple Inc*,<sup>58</sup> whereas it then dismissed application for limitation defence to be treated as a preliminary issue in

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<sup>44</sup> [2021] CAT 12.

<sup>45</sup> Regulation (EC) 864/2007.

<sup>46</sup> ([2021] CAT 14.

<sup>47</sup> [2021] CAT 16.

<sup>48</sup> [2021] CAT 17].

<sup>49</sup> [2021] CAT 35.

<sup>50</sup> [2022] CAT 14.

<sup>51</sup> The CAT did note that the quantum issues are complex and queried if they gave rise to common issues.

<sup>52</sup> Para 37.

<sup>53</sup> [2022] CAT 15.

<sup>54</sup> [2022] CAT 21.

<sup>55</sup> [2022] CAT 22.

<sup>56</sup> [2022] CAT 30.

<sup>57</sup> [2022] CAT 49.

<sup>58</sup> [2022] CAT 55

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*Allianz Global Investors GmbH v Deutsche Bank AG*.<sup>59</sup> It also refused Apple's application to hear preliminary issues regarding market definition and dominance in *Kent v Apple Inc*,<sup>60</sup> on the basis that a clean split between two trials on these two distinct issues was not possible, and accordingly there should be a unitary trial. *McLaren v MOL*<sup>61</sup> concerned a complicated and controversial issue regarding communication with the class members by the defendants, where invoked art 10 freedom of expression was involved, although the CAT noted that freedom was qualified in determining that the letters undermined the potential benefits of collective proceedings and shouldn't have been written.

There have been a further 17 preliminary issue rulings between February 2023 and end August 2023. Virtually all of these have been fairly routine, relating to such issues as the fast-track procedure;<sup>62</sup> disclosure;<sup>63</sup> expert evidence;<sup>64</sup> adjournment/case management;<sup>65</sup> directions to/format of trial.<sup>66</sup> There were 2 rulings in relation to Collective proceedings, certified as discussed below, in *Consumers' Association v Qualcomm*, the first<sup>67</sup> a successful partial strike out by the defendants in relation to a reply by the claimants to the defendants defences; the second a successful plea again by the defendants that certain amendments to the Re-amended claim form constituted a new claim.<sup>68</sup> The CAT also rejected strike out applications in *PSA Automobiles SA c Autoliv AB*.<sup>69</sup>

Aside from all these rulings, there were 2 particularly interesting rulings in the post-Merricks period in relation to funding and in particular disclosure regarding funding arrangements.

In *Kent v Apple*<sup>70</sup> the CAT noted,<sup>71</sup> that even if not privileged, disclosure of the premium reflecting the insurer's assessment of merits may give rise to an unfair tactical advantage, and that there is discretion for the CAT to refuse disclosure.<sup>72</sup> Moreover, in principle, disclosure of the excess would effectively reveal legal advice on the merits and accordingly may be privileged. The CAT exercised its discretion to decline the application and the information would remain redacted.

Subsequently, the CAT considered the issue again in *Coll v Alphabet inc*,<sup>73</sup> in a claim involving a proposed class of approx. 19.5 mill consumers, and allegedly abusive conduct by various Google entities relating to the distribution and payment services on various Android Devices provided via their 'Play Store'. The CAT was required to rule on 1) a proposed redaction of information regarding deposit premium payable under an ATE and 2)-whether it was obliged to disclose the % of success fees payable to solicitors and counsel in the claim. In relation to the first issue, the CAT held that there would be a

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<sup>59</sup> [2022] CAT 44.

<sup>60</sup> [2022] CAT 45.

<sup>61</sup> [2022] CAT 53.

<sup>62</sup> *Instaplanta (Yorkshire) Limited v Leeds City Council* [2023] CAT 11.

<sup>63</sup> *Road Haulage Association Limited v Man SE and Others* [2023] CAT 16; *PSA Automobiles SA & Others v Autoliv AB & Others* [2023] CAT 26; *Kent v Apple* [2023] CAT 20; *Volkswagen AG v MOL and others* [2023] CAT 44; *Coll v Alphabet* [2023] CAT 47.

<sup>64</sup> *Kent v Apple* [2023] CAT 22; *Coll v Alphabet* [2023] CAT 47 and see also re admissibility of evidence in *Merricks* [2023] CAT 39.

<sup>65</sup> *Boyle v Govia Thameslink Railway Ltd* [2023] CAT 19; *Gutmann v First MTR South Western Trains Ltd* [2023] CAT 23 (intervention); *Pollack v Alphabet* [2023] CAT 34 (case management: handling of carriage disputes); *Gutmann v Apple* [2023] CAT 35 (re adjournment).

<sup>66</sup> *Maclaren v MOL* [2023] CAT 25; *JJH Enterprises v Microsoft* [2023] CAT 36.

<sup>67</sup> [2023] CAT 9.

<sup>68</sup> [2023] CAT 51.

<sup>69</sup> [2023] CAT 27

<sup>70</sup> [2021] CAT 37

<sup>71</sup> Para 3.

<sup>72</sup> *Ibid*,

<sup>73</sup> [2022] CAT 6.

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risk of an unfair tactical advantage to the defendants if they required disclosure, and accordingly the Tribunal exercised its discretion against making such an order, noting ‘the importance of transparency in relation to the PCR’s funding arrangements in Collective Proceedings’.<sup>74</sup> In relation to the success fees issue, the defendants had not made out a case for these not to remain redacted.

### **Costs issues**

The next sub-category for the purposes of this analysis are rulings related to costs issues arising from the disputes, albeit these often overlap with rulings on appeals issues, discussed below as the two issues are often dealt with in the same rulings.<sup>75</sup> The Tribunal rules provide for recovery of costs in the CAT litigation process:-Rule 104(2), which covers all proceedings before the Tribunal, provides that the Tribunal has discretion, at any stage of the proceedings, to make any order it thinks fit in relation to the payment of costs by one party to another in respect of the whole or part of the proceedings. Rule 104(4) sets out the factors that the Tribunal may take into account in making a costs order, including: the conduct of all the parties; any schedule of incurred or estimated costs filed by the parties; whether a party has succeeded in part of its case, even if that party was not wholly successful; whether costs were proportionately and reasonably incurred; and whether costs are proportionate and reasonable in amount.<sup>76</sup> Cost recovery is clearly a significant issue in practice, partly in incentivising claims to be brought in the first place.

In *Le Patourel v BT Group*, following a hearing on consequential issues including costs, the claimants were awarded 70% of a reduced starting point in costs recovery.<sup>77</sup> In *Gutmann v First MTR South Western Trains Ltd* it was held that there were no permissible grounds of appeal, and the applicant was allowed to recover the great majority of the costs of the successful CPO application.<sup>78</sup> On the other hand, the CAT were very critical of the proposed costs in the following two rulings on this issue.

First in *Kent v Apple Inc*,<sup>79</sup> the CAT expressed sympathy for the defendants’ critique that the level of costs, approaching £1 million, is “plainly too high”. They awarded an Interim payment of 65% of the costs in relation to the summary judgment/strike out applications.

Subsequently in *Dune Group Ltd v Mastercard*,<sup>80</sup> where Mastercard was seeking interim payment for its costs, the CAT was again highly critical of the proposed costs of nearly 300k – which it considered to be a very high sum for a matter heard over 3 days.<sup>81</sup> *McLaren v MOL*<sup>82</sup> involved a costs award and payment to account. In *Belle lingerie Ltd v Wacoal Emea Ltd*,<sup>83</sup> the CAT had dismissed BL’s earlier application for a Capping Costs Order (CCO) and approved the costs budgets as scheduled.

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<sup>74</sup> Para 41.

<sup>75</sup> See 2022] CAT 6

<sup>76</sup> See eg *Sainsburys v Visa*, [2021] CAT 22 where an appeal was refused and costs were awarded to Sainsburys,

<sup>77</sup> [2021] CAT 32.

<sup>78</sup> [2021] CAT 36.

<sup>79</sup> [2021] CAT 38.

<sup>80</sup> [2022] CAT 5.

<sup>81</sup> In particular it held that that expert report fee of £92k was unreasonable, and that 70% of the legal costs of £200k (i.e. £140 k should be awarded).

<sup>82</sup> [2022] CAT 18

<sup>83</sup> [2022] CAT 22.

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In *Merricks*<sup>84</sup> again the CAT reviewed and awarded a reduced level of costs than claimed. *Churchill Gowns Ltd v E & R Ltd*<sup>85</sup> involved a successful costs award to E & R who had been successful in defending the damages action, as discussed below. *UK Trucks Claim Ltd/Road Haulage Association Ltd v Stellantis NV*,<sup>86</sup> involved a partial payment to account related to costs, on the basis that UKTC has not submitted a proper and itemised schedule of incurred costs.<sup>87</sup> In another 2022 *Merricks* costs ruling,<sup>88</sup> the CAT was again critical of Mastercard's high level of costs but ordered each party to bear their own costs. A similar outcome arose in the next *Merricks* cost ruling in 2023<sup>89</sup> and in the final *Merricks* costs ruling in the period,<sup>90</sup> given the mixed outcome of the earlier judgment on limitation/prescription,<sup>91</sup> costs awards were set off leaving a costs award by Mastercard to the CR. Costs were also awarded in *Royal Mail Group Limited v DAF Trucks Limited and Others*<sup>92</sup> but were reduced to 70 and 75% respectively of the applicants' claimed costs. Two cases involved security for costs.<sup>93</sup> Overall, it is evident that the CAT exercises clear and scrutiny of costs, with examples of critique of excessive costs, and reduced costs being awarded where appropriate.

### **Final Judgments (general)**

The following section will focus on judgments in relation to applications for CPOs. Of course, the CAT's remit and scope for competition law is wider than simply collective proceedings, although the case-law in relation to collective redress has expanded considerably. Since the Consumer Rights Act 2015, the CAT is no longer restricted to follow-on actions for monetary awards and can also deal with stand-alone actions and applications for injunctions. This category will deal with the substantive judgments by the CAT where it is not dealing with an application for a Collective Proceedings Order (CPO).

The first case in this category during the period was *Forrest Fresh Foods Ltd v Coca Cola*<sup>94</sup> where the CAT struck out the full claim based on abuse of a dominant position under the Chapter II prohibition of the Competition Act 1998 on the basis that there was no reasonable prospect of success for the claimant. Subsequently, the CAT awarded damages of £3874077 in *Achilles v Network Rail*,<sup>95</sup> following an earlier ruling that the defendants had infringed the Chapters I and II prohibitions in relation to the operation of a Railway Industry Supplier Qualification Scheme.<sup>96</sup>

The CAT, sitting in Edinburgh, had to deal with a slightly bizarre claim in *Blue Planet Holdings Ltd v Orkney Islands Council*,<sup>97</sup> in which a plea by the defendants to have the action struck out was

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<sup>84</sup> [2022] CAT 27.

<sup>85</sup> [2022] CAT 47.

<sup>86</sup> [2022] CAT 51,

<sup>87</sup> [2022] CAT 52.

<sup>88</sup> [2022] CAT 54 re [2022] CAT 43.

<sup>89</sup> [2023] CAT 8 re [2023] CAT 5.

<sup>90</sup> [2023] CAT 53.

<sup>91</sup> [2023] CAT 15.

<sup>92</sup> [2023] CAT 31.

<sup>93</sup> *Commercial Buyers Group Limited v Associated Lead Mills Limited and Others* [2023] CAT 17 and *Instaplanta (Yorkshire) Limited v Leeds City Council* [2023] CAT 37.

<sup>94</sup> [2021] CAT 29.

<sup>95</sup> [2022] CAT 9-

<sup>96</sup> See [2019] CAT 20; approved on appeal [2020] EWCA Civ 323.

<sup>97</sup> [2022] CAT 40.

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successful. Alternatively, the defendants' application for strike out/summary judgment in *PSA Automobiles SA & Others v Autoliv AB & Others* was dismissed.<sup>98</sup>

Probably the most important judgment in this category was delivered in *Royal Mail Group Ltd v DAF Trucks Ltd*,<sup>99</sup> where the CAT basically held that the infringement caused a loss in the form of an overcharge, and the level of the overcharge would be presumed to be 5%. Various mitigation defences, for example in relation to the issue of pass-on failed, and the CAT also determined that simple interest should be applied at the base rate plus 2%.<sup>100</sup>

### **Final judgments- CPO Applications**

The amended s47B of the Competition Act provides for the CAT to make a CPO<sup>101</sup> in relation to a claim only on the basis that there is: an authorised representative;<sup>102</sup> the claims raise the same, similar or related issues of fact or law; and, are suitable for collective proceedings.<sup>103</sup>

A Collective Proceedings Order must include:<sup>104</sup> (a) authorisation of the person who brought the proceedings to act as the representative in those proceedings; (b) description of a class of persons whose claims are eligible for inclusion in the proceedings; and, (c) specification of the proceedings as opt-in collective proceedings<sup>105</sup> or opt-out collective proceedings.<sup>106</sup>

It should be noted that in such proceedings, any non-UK domiciled class member<sup>107</sup> must opt-in by notifying the class representative.<sup>108</sup> Section 47B(8) provides for authorisation of the class representative in collective proceedings whether or not that representative is a 'class member'.<sup>109</sup> Another crucial provision is s47B(8)(b), which specifies that authorisation will only be granted 'if the Tribunal considers that it is just and reasonable for that person to act as a representative in those proceedings.' The legislative provision is sparse on the central issues regarding opt-out collective proceedings: eligibility as a collective proceeding; whether it should be on an opt-in or opt-out basis; and the appointment of a suitable class representative. Each of these issues is dealt with in fuller detail in part V of the Competition Appeal Tribunal Rules 2015. The relevant certification process provision is set out in Rules 77-79. Rule 78 deals with the Authorisation condition and Rule 79 with the Eligibility condition.<sup>110</sup> In this context, the CAT has adopted and relied on the test developed by the Canadian Supreme Court in *Pro-Sys Consultants v Microsoft*.<sup>111</sup> The *Pro-Sys test* ensures that the claimants have established a clear blueprint to trial, notably in relation to their methodology, and reflects the important case management gatekeeper role exercised by the CAT, to ensure efficiency and efficacy in the collective proceedings regime.

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<sup>98</sup> [2023] CAT 7.

<sup>99</sup> [2023] CAT 6.

<sup>100</sup> See F Marcos, "Cutting the Baby in Half – The First Decision of the UK Competition Appeals Tribunal on Damages in the Trucks Cartel" Kluwer Competition Blog 31/3/23 (available <https://competitionlawblog.kluwercompetitionlaw.com/2023/03/31/cutting-the-baby-in-half-the-first-decision-of-the-uk-competition-appeals-tribunal-on-damages-in-the-trucks-cartel/>).

<sup>101</sup> As required under s 47B(4) of the 1998 Act. See s 47B(5)(a) and (6) in particular.

<sup>102</sup> In s 47B(5)(a) of the 1998 Act.

<sup>103</sup> s 47B(6).

<sup>104</sup> s47B(7).

<sup>105</sup> s 47B(10).

<sup>106</sup> s 47B(11).

<sup>107</sup> s 59(1B).

<sup>108</sup> s 47B(11)(b).

<sup>109</sup> s47B(8)(a).

<sup>110</sup> See *O'Higgins* [2020] CAT 8 discussed below.

<sup>111</sup> [2013] SCC 57.

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### **1 [2021] CAT 30 *Le Patourel v BT Group Plc***

This case involves an alleged abuse in relation to 2.3 million BT customers using landline telephone services to residential addresses, otherwise known as Standalone Fixed Voice Services ('SFVs') The ruling here concerned the CPO application, resisted by BT which had also made an application for strike out/summary judgment on the merits. The CAT stressed that all substantive issues could be debated at trial, and that it was not persuaded that this constituted a very weak claim, and therefore the application for a CPO was successful<sup>112</sup> (and the cross-application to strike out and/or summarily dismiss the claim was dismissed).<sup>113</sup>

### **2 [2021] CAT 31 *Gutmann v First MTR South Western Trains Ltd (Part 1)***

This case concerns two applications for a CPO by consumers in relation to the train services on the SW and SE franchises respectively. The claims were based on alleged abusive behaviour by the failure by the train provider to make boundary charges sufficiently available to consumers. The CAT held this claim to be reasonably arguable at trial. A key issue concerned the question of commonality, involving discussion of the Canadian collective action regime (and its differences). The CAT noted that the UK statutory framework for aggregate damages is predicated on a very different basis. It noted that collective action systems could potentially provide collective redress on alternative bases- 1) aggregated damages provision in a class action for the purpose of proving the class wide loss (liability approach) or 2) by assessing the measure of the class-wide loss (quantum approach). The CAT confirmed that the UK had adopted the former broader approach – and that accordingly the CAT noted it could derive very little from the US authorities on the issue of commonality. Moreover, there was a plausible and credible method to calculate aggregated damages here and that type of award was appropriate in this dispute. The CAT proceeded to undertake the cost/benefit assessment under s79(2)(b) and noted<sup>114</sup> it would be concerned if it appeared that the Collective Proceedings would be likely to benefit principally the lawyers and funder as opposed to class members. The CAT noted it was generally acknowledged<sup>115</sup> that Third party funding of the type utilised to finance this claim is a necessary feature of many CPs. Nonetheless the CAT considered the cost/benefit balancing exercise overall to be slightly against the grant of a CPO but the circumstances were clearly in favour of a finding of suitability. In relation to whether the proceedings should be on an Opt-Out basis, the CAT was in 'no doubt that it is not practicable for opt-in proceedings to be brought here' primarily on the basis of 'The small amount of estimated individual recovery...'<sup>116</sup> The CAT authorised the CPO on an opt-in basis as there were sufficient common issues, and did not consider the class to be too broad subject to a minor qualification.<sup>117</sup>

### **3- [2022] CAT 16 *O'Higgins/Evans v Barclays Bank plc (part 1)***

This case involved two CPO applications, both as follow-on actions from two Commission infringement decisions known as 'Three Way Banana Split' and 'Essex Express' respectively.<sup>118</sup> The judgment here

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<sup>112</sup> See Appeals below.

<sup>113</sup> See also [2022] EWCA Civ 593 below.

<sup>114</sup> Para 171.

<sup>115</sup> Para 176.

<sup>116</sup> Para 183.

<sup>117</sup> Para 188- 'it should exclude point-to-point fares purchased for use in conjunction with a Travelcard'. see the unsuccessful appeal, [2022] EWCA Civ 1077.

<sup>118</sup> Case AT.40135 FOREX (Three Way Banana Split) and Case AT.40135 FOREX (Essex Express).

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considered three key issues:- certification; carriage<sup>119</sup> and whether it should proceed as an opt-out or opt-in proceedings. The CAT held that the Eligibility condition had clearly been met by both parties. However the CAT held that it could not certify either application on an opt-out basis,<sup>120</sup> on the basis of a number of factors:- there was no pre-existing body to act as the representative here; there were concerns over the level of funding and the the existence of related litigation. Moreover, under Rule 79(3)The CAT considered the strength of claim and practicality factors weighed against an opt-out basis for collective proceedings. Given the determination that the proceedings should proceed on an opt-in basis, the majority CAT ruling noted that consequently the carriage issue did not arise for determination.

### **(part 2) – the dissenting judgment**

Paul Lomas delivered an important dissenting judgment in this dispute. In his view the CPO should be granted on an opt-out basis, stressing<sup>121</sup> that this was the first time that there has been an exercise of discretion by the Tribunal on a contested opt-in/opt-out question. He indicated<sup>122</sup> various factors in favour of opt-out proceedings- including the nature of the class eligibility criteria, and in terms of practicability. He noted that an opt-in outcome effectively means in practice that the collective claim doesn't proceed and consequently the respondents would not have to respond to the substance of claims which he stressed were in relation to anti-competitive behaviour which had already been fined by competition authorities worldwide. In relation to any purported concern regarding the ultimate legal costs if the respondents were successful in defending the claim. Lomas was strongly critical of the perceived impact of any shortfall on 'amongst the world's largest and best capitalised financial institutions with large and robust balance sheets'!

## **4 [2022] CAT 20 Consumers' Association v Qualcomm Inc**

This case was based on abusive conduct in relation to royalties charged by Qualcomm to smartphone manufacturers for licensing of patents for chipsets. This was a follow-on action raised on behalf of UK consumers for the passed-on overcharges resulting from the abusive conduct which the Commission had found to infringe art 102 TFEU. The central issue for determination here was the proposed pass-on quantification methodology by the claimants, which the CAT considered to be 'robust'. The CAT noted that it was relevant to consider per Gutmann if the grant of the CPO would principally benefit lawyers and funder- which would be a factor opposed to the grant of the CPO.<sup>123</sup> It considered that satisfaction of this factor didn't 'come close'<sup>124</sup> here. In the current economic climate and given the cost-of-living challenges faced by many consumers, the CAT did not consider an average claim of £16-£17 per consumer to be such a small sum that take-up is inherently likely to be limited. The CAT observed that the costs of proceedings are, unsurprisingly, substantial, but that they constituted only 5% of the total estimated claim of £482.5 mill, and therefore the CAT was not minded refusing to certify the action on the basis of the cost benefit analysis.<sup>125</sup> There was a second issue in relation to

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<sup>119</sup> This is where there is more than one claim, each with a Proposed Class Representative, in relation to essentially the same set of issues and potential class, and the CAT is asked to determine which claim, and PCR, is most suitable.

<sup>120</sup> Para 383.

<sup>121</sup> Para 416.

<sup>122</sup> Para 455.

<sup>123</sup> Para 105.

<sup>124</sup> Para 105.

<sup>125</sup> Paras 105-111.

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the proposed funding and costs entailed in the action. The CAT accepted the defence arguments that Qualcomm could not recover directly from the post-CPO After the Event Insurance policy but, nonetheless, the CAT considered there to be no risk that the class representative would not make a claim to meet an adverse costs order in the event of failure of the claim post-CPO. Finally, the CAT clarified, as is now standard practice, that the CPO would be granted on an opt-out basis for all members of the class domiciled in the UK and on an opt-in basis for claimants domiciled outside the UK.<sup>126</sup>

#### **5 [2022] CAT 25 UK Trucks Claim Ltd/Road Haulage Association Ltd v Stellantis NV**

Again, this dispute involved two alternative CPO applications, and ultimately the CAT granted the former, by UK Trucks Claim Ltd, on a narrower class definition and on an opt-in basis. The ruling focused on a central theme in the developing CAT jurisprudence on CPOs under the CRA 2015, namely the grant of damages on an Aggregate v individual basis. The UKTC claim was developed on the former basis and it was accepted that while the aggregate damages award offers the benefits of single, final quantification, it was nonetheless more difficult/challenging to quantify.<sup>127</sup>The CAT noted that the most fundamental difference between the two claims was that the UKTC claim had a clear preference for opt-out proceedings.<sup>128</sup> However, the CAT here considered that for the present dispute, opt-in proceedings had the notable advantage of giving expert economists access to a significant source of data from the claimants to facilitate quantification.<sup>129</sup> Furthermore, the CAT considered<sup>130</sup> that in relation to the proposed opt-out UKTC claim, arrangements with the 3<sup>rd</sup> party funder and ATE insurer would mean that the remuneration and premium would fall to be paid from any sum ordered as damages by the CAT. Nonetheless, the CAT accepted,<sup>131</sup> that collective proceedings would in effect be impossible without 3<sup>rd</sup> party funding, and accordingly the tribunal should be slow to reject opt-in where the funder's remuneration does not appear unreasonable.<sup>132</sup>

#### **6 [2022] CAT 27, Boyle and Vermeer v Govia Thameslink Railway Ltd**

This case, one of a number of similar claims before the CAT in recent years, related to the claim that there had been discrimination by the defendants between single-brand and multiple-brand rail tickets and that this constituted an abuse of dominance. Here the CAT noted that the scheme under the ACT allowed for the possibility of joint representatives in a claim and for there to be (different) joint sub-class representatives. Nonetheless, in this dispute the CAT refused to exercise that power, expressing its doubts as to the added value of the proposed second class representative, and appointed Boyle as sole representative, granted the application, and certified the claim as collective proceedings.

#### **7 [2022] CAT 28, Kent v Apple Inc**

This judgment concerned simultaneously a CPO application and an application for strike out/ summary judgment by the defendants, in a dispute involving exclusionary and discriminatory abuses in the market for apps and the associated payment processing market. The Litigation funding agreement in

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<sup>126</sup> As required under section 47B(11)(b)(i).

<sup>127</sup> Para 215.

<sup>128</sup> Para 217.

<sup>129</sup> Para 223.

<sup>130</sup> Para. 225.

<sup>131</sup> Para 230.

<sup>132</sup> Note the unsuccessful appeal, [2023] EWCA Civ 875.

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relation to this claim was considered to provide appropriately for Apple's recoverable costs if the PCR was ordered to pay costs by the CAT and the key issue for determination here was whether the tribunal was satisfied regarding the requirements for the grant of a CPO or alternatively, in relation to the defendant's motion, to strike out the claim at this stage. Significantly, the CAT stressed that the complex debate on the law of unfair pricing and how it would or should apply in the factual context involved here, should be resolved at trial, and accordingly the strike out application was dismissed, and the application for a CPO granted.

#### **8 [2022] CAT 39 Coll v Alphabet Inc**

This judgment concerned the CPO Application by the PCR on behalf of affected consumers in relation to the abusive behaviour consisting of the imposition of a myriad of contractual and technical restrictions to remove all meaningful competition on Google's Play Store enabling it to collect an excessive and unfair commission. The CAT considered the funding arrangements, but was satisfied that the PCR had demonstrated an ability to pay a substantial level of recoverable costs, and the ATE policy was deemed to be sufficient for at least a significant part of the proceedings. Overall, the CAT was satisfied that the consumer claims here were better suited to an aggregate award rather than a large number of individual awards of compensation. Accordingly, the CAT certified the claim as opt-out proceedings for UK domiciled claimants and opt-in proceedings for non-UK domiciled claimants.

#### **9- [2023] CAT 10 Gormsen v Meta Platforms Inc**

This was an application for a CPO by Dr Liza Lovdahl Gormsen, as proposed class representative in a stand-alone claim for abusive behaviour in breach of the Chapter II prohibition by the defendants which own and operate Facebook. The claim was based on the complex business terms imposed on users of Facebook essentially giving Facebook permission to collect, share and process personal data. The claim was based on an 'unfair data requirement' and imposition of an 'unfair price' and 'unfair trading conditions', constituting three distinct abuses. The CAT found problems with both the legal basis and methodology proposed. The CAT held that the claim failed to meet the test in *Pro-Sys Consultants v. Microsoft* ("the Pro-Sys test") due to inadequacies identified in the pleading of the abuses and the methodology to quantify loss and accordingly could not lead to an efficient and effective trial of the issues raised. The CAT stayed the CPO Application for a period of six months to enable additional evidence to be provided to set out a better blueprint for the effective trial of the proceedings, absent which, the application would be dismissed.

#### **10- [2023] CAT 18 Gutmann v Govia**

In this case, given the close similarity of the proceedings with the earlier *Gutmann* proceedings discussed above, the Respondents did not oppose the grant of a CPO (albeit stressing they would contest the substantive proceedings). In any event, as required, under s47B(5) of the Competition Act, the CAT was satisfied that the "authorisation" and "eligibility" conditions were met.

#### **11- 2023 CAT 38 Commercial and Interregional Card Claims I Limited ("CICC I") v Mastercard Incorporated & Others**

This was another case in relation to the commercial and interregional multilateral interchange fees ("MIFs") set by Defendants' respective card schemes. The different claimants sought opt-in and opt-

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out CPOs respectively, the former in relation to merchants with an annual turnover of £100 million or more between 2016-2019 and the latter on an opt-out basis in relation to merchants with an annual turnover of less than £100 million in that period. The Tribunal did not grant the applications as they failed to meet the necessary certification requirements. First, the opt-out CPO applications were defective in relation to class identification and lacking appropriate methodologies in relation to both assessment and pass-on issues, and second, the opt-in applications were problematic in terms of class definition and adequate methodology in relation to infringement and its counterfactual. The proceedings were stayed for 8 weeks to allow the PCRs to notify any intention to return with revised proposals.

### **The CAT and permission to appeal**

There is the possibility of an appeal from the CAT to the Court of Appeal (or the Court of Session In Scotland /Court of Appeal in Northern Ireland)) and thereafter on to the Supreme Court under s49 of the Act, which provides :

- on a point of law arising from a decision under section 47A of the 1998 Act or in collective proceedings (a) as to the award of damages or other sum (other than costs or expenses, or (b) as to the grant of an injunction; - from a decision under section 47A of the 1998 Act or in collective proceedings as the amount of an award of damages or other sum (other than costs or expenses);
- from a decision under section 47A of the 1998 Act or in collective proceedings as the amount of an award of damages or other sum (other than costs or expenses).

However, the process is slightly more convoluted as the CAT rules require permission to appeal from the CAT or the appropriate court.

In the vast majority of cases the CAT refuses permission to appeal, as in the following cases :- *Asda v Mastercard*,<sup>133</sup> *Sainsburys v Visa*,<sup>134</sup> *Merricks*,<sup>135</sup> *Blue Planet Holdings Ltd v Orkney Islands council*,<sup>136</sup> *Royal Mail Group Ltd*,<sup>137</sup> *Merricks*,<sup>138</sup> and only brief comment will be made here regarding some selected rulings. In *Dune Group Ltd v Mastercard*<sup>139</sup> and *McLaren v MOL*<sup>140</sup> and *UK Trucks Claim Ltd/Road Haulage Association Ltd v Stellantis NV*,<sup>141</sup> applications for permission to appeal were rejected as there was no real chance of success, or prospect of success in the final two appeals, respectively.

In *Le Patourel v BT Group*,<sup>142</sup> again the CAT held there no real prospect of success, noting that there was no error of law in relation to the TPF issue, whereas in *Gutmann v First MTR South Western Trains Ltd*<sup>143</sup> the CAT stated that there were no permissible grounds of appeal. One judgment in this category

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<sup>133</sup> ([2021] CAT 21.

<sup>134</sup> [2021] CAT 22.

<sup>135</sup> [2022] CAT 50.

<sup>136</sup> ;[2023] CAT 2.

<sup>137</sup> [2023] CAT 31.

<sup>138</sup> [2023] CAT 33.

<sup>139</sup> [2022] CAT 3.

<sup>140</sup> [2022] CAT 18

<sup>141</sup> [2022] CAT 48.

<sup>142</sup> [2021] CAT 32

<sup>143</sup> 2021] CAT 36.

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is particularly interesting in terms of the CAT's approach generally to the question of permission to appeal.

In *Merchant Interchange Fee Umbrella Proceedings*,<sup>144</sup> the CAT reflected on s49 of the Competition Act and considered that Parliament had intended to circumscribe or limit the scope of appeal,<sup>145</sup> noting - ' [the]restrictions contained in section 49 have in recent months- generated something of an industry before this Tribunal'.<sup>146</sup> Nonetheless, the CAT clarified that section 49 was not confined to appeals in relation to final decisions on the award of damages. For example, it would clearly extend to allow an appeal in relation to the outcome of an application to strike out, but would not provide for appeals in relation to a complaint concerning a case management decision.

## Appeals

There have been eight appeal judgments delivered during the relevant period, most of which were unsuccessful.

In *NTN Corp v Stellantis NV*<sup>147</sup> for instance, an appeal in relation to the pleadings on the causation issue were rejected. Similarly, the appeal in *LSE Railway Ltd v Gutmann*<sup>148</sup> was rejected following a successful CPO application, and also dismissed in *Merricks*<sup>149</sup> on the issue of domicile.

In *BT Group PLC v Le Patourel*,<sup>150</sup> the Court of Appeal considered a range of issues relevant to how it would determine the outcome of an appeal and the CAT's role. It stressed that determination of whether proceedings should go ahead on an opt-in/out was for the CAT to make in the circumstances of the application and, accordingly, dismissed the appeal on the basis that the CAT had not erred in failing to take as starting point the legal/policy preference favouring opt-in proceedings. The Court of Appeal also noted that the financial position of parties, including their ability to attract TPF, is a relevant matter to consider. The Court noted that the CAT had determined that few claimants would sign up for opt-in, and that third party funders might therefore find litigation unattractive.<sup>151</sup> The CAT had held that given the claim may never be commenced as opt-in proceedings where there was an absence of funding, and access to justice might be thwarted if the proceedings were not certified on an opt-out basis. It was accurate in its determination that it was easier to fund opt-out actions, and it was entitled to make its own assessment of the financial viability of the claim absent the opt-out nature of the proceedings. Finally, the Court considered the issue of the merits, accepting,<sup>152</sup> that in many cases it would be practically difficult for the CAT at the stage of determining whether to grant a CPO to have a sufficiently clear view on the substantive merits of the claim.

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<sup>144</sup> [2022] CAT 50.

<sup>145</sup> Para 5.

<sup>146</sup> Para 9.

<sup>147</sup> [2022] EWCA Civ 16.

<sup>148</sup> [2022] EWCA Civ 1077.

<sup>149</sup> [2022] EWCA Civ 1568, [2022] CAT 19.

<sup>150</sup> [2022] EWCA Civ 593.

<sup>151</sup> At para 78.

<sup>152</sup> Para 105.

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In *Dune Group Ltd v Visa and others*<sup>153</sup> the appeals were partially successful in relation to the scope of the earlier CAT ruling on the CPO,<sup>154</sup> whereas in *UK Truck Claims Ltd v Stellantis NV and others*,<sup>155</sup> all grounds of appeal in relation to the earlier CPO<sup>156</sup> were dismissed.

Potentially the most significant appeal judgments arose in *Paccar Inc/DAF Trucks and others V RHA /UKTC*, where there was an appeal judgment by the Court of Appeal<sup>157</sup> subsequently overruled by the Supreme Court<sup>158</sup> in relation to the issue of the legality of third-party litigation funding arrangements. The Court of Appeal was asked to consider whether funding agreements between claimants and third parties where remuneration is based on a share of damages recovered, are prohibited as 'damages-based agreements'.<sup>159</sup> The Court held that it did not have jurisdiction to hear this as an appeal under the statutory provisions, but proceeded on the basis of a judicial review and upheld the ruling of the CAT on the merits. Although not an appeal *strictu sensu*, it is important to note that the majority judgment (delivered by Lord Hales, Lady Rose dissenting) allowed the appeal on the basis that the relevant LFA constituted a damages-based agreement. This ruling has a potentially significant impact and has required all class representative claim lawyers to review their litigation funding arrangements.

### **Concluding remarks- Recurring themes and issues**

There are several recurring themes and issues arising from the case-law on private damages litigation during this short, selected period following the Supreme Court's seminal ruling in Merricks in December 2020.

It is clear that the CAT engages in very active case management of all disputes to seek to ensure efficient and relatively speedy resolution of any issues, and to enhance transparency during the process of the case. In particular, it appears that in the exercise of its powers, as discussed above, the CAT has demonstrated a reluctance to grant permission for appeals to the Court of Appeal and it has also exercised considerable scrutiny over the costs suggested by parties to cover legal representation and other costs such as expert reports. There has been continued<sup>160</sup> consideration of the application of both rules of private international law<sup>161</sup> and the rules on limitation of actions and their application in a competition law context. The issue of litigation funding has been important and relevant to a number of rulings:- firstly in relation to preliminary pleas where parties have sought disclosure of funding arrangements; secondly as part of the CPO certification assessment of the balancing of cost/benefits, where the CAT has demonstrated real engagement with the issues and also a clear appreciation of the practicalities involved in initiating mass claims and the need for third party funding. This was echoed by the Court of Appeal, but the system has potentially been jeopardised by the more recent ruling by the Supreme Court, which has at least ensured that litigation funders are reflecting on their funding mechanisms to seek to ensure they are not compromised by that ruling. There has

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<sup>153</sup> [2022] EWCA Civ 1278.

<sup>154</sup> [2021] CAT 35.

<sup>155</sup> [2023] EWCA Civ 875.

<sup>156</sup> [2022] CAT 25.

<sup>157</sup> [2021] EWCA Civ 299.

<sup>158</sup> [2023] UKSC 28 On appeal from: [2021] EWCA Civ 299.

<sup>159</sup> See S47C(8) of the Competition Act 1998.

<sup>160</sup> Albeit slightly less frequent than in the early years of the CAT- see eg B Rodger, 'Competition Law Litigation in the UK Courts: A study of all cases 2009-2012' [2013] 6(2) GCLR 55-67.

<sup>161</sup> See eg B Rodger 'Competition Litigation and EU Private International Law Rules' Ch 6 in *Research Handbook on Private Enforcement of Competition Law in the EU*, (Edward Elgar) Rodger, Marcos and Sousa Ferro and Marcos (eds) 2022.

An analysis of the CAT case-law on private damages actions following the Supreme Court in Merricks

been a clear reluctance by the CAT to engage with the merits of any claim at the CPO/ strike-out (summary judgment) stage. The case-law has also highlighted the CAT's general acceptance of the significance of both opt-out and aggregated damages mechanisms. Nonetheless it is notable that in two cases, the CAT certified the action on an opt-in rather than an opt-out basis<sup>162</sup> and when certifying on an opt-out basis, the CAT has distinguished between UK and non-UK domiciled claimants, with that part of the claim related to the latter being certified only on an opt-in basis.<sup>163</sup>

What is evident from both this snapshot and a broader look at the CAT case-law is the increasing number of both abuse-based claims and stand-alone collective opt-out claims, with a considerable degree of overlap and synergy between these two sub-categories of private damages claims before the CAT. This is interesting and significant given the prevalence of business claims over the initial 10-15 years of the CAT's existence, primarily in follow-on actions in relation to prior European Commission art 101 TFEU infringement decisions involving price-fixing cartels. It was also anticipated that section 47B collective proceedings would predominantly involve follow-on price fixing cartel consumer claims.

The more recent period evidences a real change, following the Consumer Rights Act 2015, to more large-scale consumer redress claims, utilising the opt-out model advantages allied with the availability of third-party litigation funding. This has apparently encouraged and facilitated multiple mass stand alone collective claims, in relation to abuse of dominance, and again this has featured significantly in relation to very big business players in various tech and digital markets, for instance Alphabet and Apple. It is noticeable that there has been a very limited number of appeals under the relevant statutory provisions before the Court of Appeal, partly reflecting the CAT's strict gatekeeper role in considering whether to exercise its power to grant permission to appeal. Although there were only a limited number of rulings by the Court of Appeal, they included some important dicta to the effect that opt-in is not the preferred starting point, and that certification does/should not involve a merits stage assessment. Furthermore, it has provided support for innovative funding arrangements, in particular third-party funding. Nonetheless the Supreme Court ruling in PACCAR has potentially challenged the legality of many funding arrangements in the competition litigation context. It is important to be aware that the CAT's caseload is increasing not merely as a result of new claims being registered, but also due to the transfer of numerous claims,<sup>164</sup> primarily in relation to MasterCard/Visa and Trucks, as exemplified by the relatively recent transfer of numerous claims by Scottish local authorities from the Court of Session to the CAT.<sup>165</sup>

Finally, despite a range of concerns regarding the post-Brexit implications for competition litigation before the CAT and, for example, whether EU-wide claims would still be litigated here,<sup>166</sup> it appears that the benefits notably in relation to expertise and experience, and the availability (to date) of third Party Funding and After the Event Insurance, have prevailed and we have not witnessed any downturn in claims being raised before the CAT and the competition litigation market is buoyant.

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<sup>162</sup> With an important dissenting judgment in [2022] CAT 16.

<sup>163</sup> As required under section 47B(1)(b)(i)..

<sup>164</sup> See the s 16 Enterprise Act Regulations 2015/1643.

<sup>165</sup> See for example Case 1558/5/7/22 (T) *Scottish Borders Council v VFS Financial Services Limited & Others*.

<sup>166</sup> Note the greater difficulty to enforce awards outside the Brussels 1a regulation regime; Commission decisions will no longer be binding in follow-on actions, and there remains uncertainty regarding the future of the Antitrust Damages Directive provisions in the UK.