

# UK collective proceedings in 2022 and beyond

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After a pivotal year for the collective proceedings regime in England and Wales in 2021, this article explores the further developments coming out of the judgment of the collective proceedings orders (CPO) application by Malcolm McLaren. It also looks ahead, from the time of writing in March 2022, at the key issues anticipated in the forthcoming year, in particular the management of collective proceedings beyond certification.

## Introduction

2021 was a pivotal year for the collective proceedings regime in England and Wales, with a record seven applications for collective proceedings orders (CPOs) registered and three collective proceedings applications certified: it was the year that the regime, finally, found momentum.

The seminal judgment of the Supreme Court in *Walter Merricks CBE v MasterCard Inc & Others (Merricks)* at the end of 2020<sup>1</sup> put the regime firmly back on track after six years of uncertainty. Not only did it kick-start the process of clearing the backlog of stalled CPO applications that had accumulated since 2016, but seemingly the relatively low threshold test established has galvanised practitioners and funders alike. The speed at which CPO applications are progressing from registration to judgment has also stepped up a gear, at least for the (relatively) straightforward

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<sup>1</sup> *MasterCard Incorporated & Others v Walter Hugh Merricks CBE* [2020] UKSC 51.

applications, which suggests that the Competition Appeal Tribunal (CAT) is keen to progress applications.

2022 promises to be an equally interesting year for the collective proceedings regime: at the time of writing in March 2022, there has already been one new CPO application registered and we have seen a further set of collective proceedings certified in *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd & Others* following the European Commission's 21 February 2018 decision (Case AT.40009 – *Maritime Car Carriers*) (*McLaren*).<sup>2</sup>

This article considers key issues in the collective proceedings regime in the forthcoming year as well as examining key points from the judgment in *McLaren*.

### The first CPO judgment of 2022

Just seven weeks into 2022, we saw judgment on a further CPO: an opt-out follow-on damages claim against participants in the maritime car carriers cartel. *McLaren* was the first CPO granted by the CAT on a conditional basis, with the Class Representative ordered to make adjustments to the proposed methodology for the calculation of aggregate damages to reflect findings made by the CAT at the certification stage (discussed further below), and to give further consideration to the potential need for sub-classes. This is consistent with the flexible approach the CAT has adopted in prior CPO judgments.

#### *Threshold for certification*

In its judgment, the CAT provided further guidance on what is now clearly a low threshold for applicants to overcome for certification.

- Under paragraph 6.37 of the CAT Guide, the class should be defined as narrowly as possible without arbitrarily excluding some people who are entitled to claim. It was acknowledged by the CAT that, prior to disclosure, it is to be expected that there may be some ambiguity in the identification of all class members who have suffered loss which, in turn, causes difficulty for the applicant in precisely defining the class. The CAT held that, on balance, a clear definition is preferable and that it is not fatal to the claim that some members of the class are ultimately found not to have suffered loss under the proposed methodology. Ultimately, if required, the CAT can exercise its power under CAT Rule 58 to vary the CPO at a later date.
- It is accepted that, at this early stage of the proceedings, the proposed expert methodology is necessarily provisional. It is reasonable to expect that it will be adapted during the course of the proceedings as further data is received.

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<sup>2</sup> *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd & Others* [2022] CAT 10.

- In response to the proposed defendants' contention that there was a better methodology for the experts to use than that proposed by the class representative, the CAT was clear that its assessment at this stage was not a relative one. The role of the CAT at the certification stage is to assess the proposed methodology put forward by the applicant (pursuant to the test established by the Canadian Supreme Court in *Pro-Sys Consultants Ltd v Microsoft Corp (Microsoft)*,<sup>3</sup> as endorsed by the Supreme Court in *Merricks*), not to determine what the best possible methodology would be.
- In going on to apply the *Microsoft* test, the CAT gave clear guidance that, while the threshold for certification is low following the decision of the Supreme Court in *Merricks*, what is required is more than symbolic scrutiny. The CAT should assess 'whether the proposed methodology offers a realistic prospect of assessing loss on a class-wide basis',<sup>4</sup> and the CAT is not required to satisfy itself that the methodology is bound to work – or even that it will work on the balance of probabilities.

#### *Large corporate class members*

One feature of the *McLaren* application with which the CAT needed to grapple was the inclusion of large businesses within the class, and the attempt by the respondents to split the proposed class in order to exclude them (with only consumers and smaller businesses remaining in the opt-out class – the excluded larger businesses would then need to pursue a separate claim if they wanted to proceed).

This is the first time that the issue of the inclusion of large businesses in collective actions has been decided by the CAT and is no doubt an indication of things to come in the outstanding CPO applications relating to trucks and spot foreign exchange (both discussed further below) and beyond.

The respondents' arguments in support of their attempt to exclude large corporates from the proposed class included the possibility of pass-on by businesses (which would not be an issue common to domestic consumers) and the possibility that if those business customers pursued a claim on an opt-in basis instead, information could be gathered up front to enable the parties to assess that issue more easily. Those arguments, to some degree, echoed those made by the respondent in *Justin Le Patourel v BT Group plc ('Le Patourel')*,<sup>5</sup> again without success.

As the respondents did not oppose the appropriateness of opt-out proceedings for the majority of the proposed class, the CAT questioned the efficiency of separating

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<sup>3</sup> *Pro-Sys Consultants Ltd v Microsoft Corpn* [2013] SCC 57.

<sup>4</sup> *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd & Others* [2022] CAT 10 at [107].

<sup>5</sup> *Justin Le Patourel v BT Group plc & Another* [2021] CAT 30.

the claims on the basis of what it found to be an arbitrary threshold for ‘large business purchasers’, which might then make the definition of the class unclear.

For its part, the applicant in *McLaren* challenged the jurisdiction of the CAT to accede to the respondents’ proposal to bifurcate the proceedings in any event, arguing that neither the Consumer Rights Act nor the CAT Rules contemplated such a mechanism, only a choice between opt-in or opt-out bases for the *entire* proceedings. The CAT indicated that it saw force in the submissions made on the applicant’s behalf but, ultimately, found that it did not need to determine that issue – leaving the door open (or at least ajar) for other respondents to attempt again in the future.

### Strike out/reverse summary judgment

In the wake of the Supreme Court decision in *Merricks*, in which it was held that the CAT was not required to assess the underlying merits of the claim at the certification stage *unless* the respondents had applied for strike out/reverse summary judgment, it seemed inevitable given the high stakes in these claims that respondents would take a chance on issuing those applications. The *McLaren* application is also now the third unsuccessful attempt to do so.

What is clear from *Le Patourel*, *Justin Gutmann v London & South Eastern Railway Limited* and *Justin Gutmann v First MTR South Western Trains Limited & Another* (together, ‘*Gutmann*’)<sup>6</sup> and now *McLaren* is that the bar for both certification and pleading of the claim is low.

In determining the strike out/reverse summary judgment application in *McLaren*, the CAT acknowledged that deficiencies identified in the proposed methodology of the economic expert may be capable of being resolved, or addressed by later adaptations, and are ultimately matters for trial. The CAT was dismissive of the criticisms of the proposed methodology raised by the respondents on the basis that they focused ‘*too narrowly on one element of the methodology, rather than standing back and considering it as a whole*’.<sup>7</sup> Similarly, issues raised with causation were dismissed as fact sensitive and therefore matters for trial.

#### *Strategy for respondents*

With that in mind, and thinking ahead to the fresh batch of CPO applications that are yet to work their way through the CAT, it may be time to ask the question:

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<sup>6</sup> *Justin Gutmann v First MTR South Western Trains Limited & Others* [2021] CAT 31.

<sup>7</sup> *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd & Others* [2022] CAT 10 at [131].

is there still strategic value for respondents in outright opposition of certification and making these summary challenges at the CPO stage?

Respondents have had some success in attacking particular aspects of the claim (for example, the claims for compound interest in *Merricks*)<sup>8</sup> which can make a material impact on the shape and value of the claim which the respondents will go on to substantively defend.

In the *McLaren* judgment, the CAT worked through the detail of the various points taken by the respondents in relation to causation and the proposed methodology, providing interim views on a number of those issues despite not going on to make binding findings at this stage. The result is the provision of a clear roadmap to the applicant as to what areas will be the focus of the respondents' case, and how the CAT might view those issues, which will be valuable insight for successful applicants when preparing for the later stages of their certified claims.

There is, of course, a balance to be struck for respondents in doing all they can to extricate themselves from lengthy and expensive proceedings at an early stage – but respondents in recent CPOs have faced substantial adverse cost orders as a result of the unsuccessful attempts to oppose certification outright.

#### *Other key issues*

Other noteworthy points from the *McLaren* judgment include:

- In light of the decision in *Merricks* that compound interest was not suitable for inclusion in that claim as certified, the applicant in *McLaren* narrowed the claim for compound interest only to proposed class members who had acquired affected vehicles using debt finance. The CAT dismissed arguments raised by the respondents that compound interest would therefore not be a common issue suitable for inclusion – the CAT Rules make provision for sub-classes and the issue was common to a sub-class capable of being defined.
- When assessing suitability of the claim for certification the CAT was invited to consider the cost-benefit analysis of the proposed claim, as the CAT had done previously in *Gutmann*. The respondents argued that, in view of the modest amount of the loss per class member, uptake to claim funds at the distribution stage is expected to be low. In those circumstances, it was said that the main beneficiaries of the claim would be the lawyers and the funder. The CAT was not persuaded that this was the case and, in any event, recognised that compensating those who had suffered loss as a result of the cartel was not the only benefit to be achieved – the deterrence of future infringements is also a factor to be considered.

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<sup>8</sup> *Walter Hugh Merricks CBE v MasterCard Incorporated & Others* [2021] CAT 28.

## Upcoming issues

### *Competing claims*

CPO applications in *Michael O'Higgins FX Class Representative Limited v Barclays Bank PLC & Others* ('O'Higgins') and *Phillip Evans v Barclays Bank PLC & Others* ('Evans') (together *FX*) were heard together over five days in July 2021.

Both *O'Higgins* and *Evans* seek certification of opt-out follow-on proceedings relating to the spot foreign exchange cartels. While there are some differences in the definitions of the proposed classes in each action (with the *Evans* claim, for example, separating classes for those who suffered direct and umbrella effects), there is a considerable overlap between the two which puts them in direct competition.

This is the first time that this scenario, known as a 'carriage dispute', has come before the CAT for determination. It has always been clear that, in this scenario, it will not be possible for both claims to be certified. What was not clear is how, and when, the CAT should decide which proposed class representative (if any) should have carriage of the claims.

While the United Kingdom's collective regime is still very much in its infancy, the CAT often refers to authorities from other jurisdictions with more established collective regimes (particularly Canada and the United States) for guidance on deciding novel issues.

The CAT considered the timing for determination of the carriage dispute in February 2020.<sup>9</sup> Both applicants argued that the question of carriage should be determined as a preliminary issue, with the successful applicant then going on to a certification hearing, in line with the general approach taken in Canada, with the respondents either in agreement or neutral on the issue. Notwithstanding that accord, the CAT decided that the question of carriage should be considered at the same time as certification.

The rationale for that decision was that the CAT would have more information available to it in the context of certification, which would also be useful to determine the issue of carriage, and that it would be more cost-effective overall to have one hearing instead of two. It is important to note that the CAT was clear that this decision does not necessarily mean that all future carriage disputes will be handled in the same way – the CAT will consider the best approach on a case-by-case basis.

At the time of writing, judgment is still awaited, but it promises to be another landmark decision in the development and shaping of the UK collective regime. Points of interest to note from the CPO applications hearing in July 2021 included:

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<sup>9</sup> *Michael O'Higgins FX Class Representative Limited v Barclays Bank PLC & Others and Phillip Evans v Barclays Bank PLC & Others* [2020] CAT 9.

- The CAT heard from both Mr O’Higgins and Mr Evans personally during the course of the hearings, which has not happened in any of the CPO hearings which have gone before. It is perhaps unsurprising that, in circumstances where the appropriateness of the proposed class representative will be a decisive factor in the resolution of the carriage dispute, it will assist the CAT to hear directly from the applicants on their relevant experience and motivations.
- The existence of the carriage dispute itself provided some assistance to the respondents, with the competing applicants each taking aim at the proposals put forward by the other (including, for example, class definitions, funding and expert methodologies) – at the risk of bolstering the positions taken by the respondents.
- On the issue of class definition, arguments were made at the hearing around the scope of each of the proposed classes, with submissions made on behalf of *O’Higgins* that the class definition put forward in that claim is wider and would therefore result in a greater number of injured parties receiving compensation. Following the consideration by the CAT in *McLaren* of the need for the class to be defined as narrowly as possible without arbitrarily excluding some people who are entitled to claim, it will be interesting to see how the CAT approaches class definition in determining this carriage dispute.

The judgment on the carriage dispute could have significant ramifications for the future of the regime: the CAT may well wish to avoid creating a race to its door for future actions as, no doubt, will future respondents given the low threshold test.

Aside from the ‘pure’ carriage disputes in *FX*, judgment is also anticipated on the certification of competing opt-in and opt-out claims. At a combined hearing over five days in April 2021, the CAT considered CPO applications in *UK Trucks Claim Limited v Stellantis NV & Others* (*UKTC*) and *Road Haulage Association Limited v MAN SE and Others* (*RHA*) (together, *Trucks*). Those applications posed a different challenge for the CAT: the actions are not a direct carriage dispute, in the sense that the *RHA* claim is brought solely on an opt-in basis whereas *UKTC* is brought on an opt-out or, alternatively, opt-in basis.

The proposed class in the *RHA* claim is wider than that in *UKTC* (covering also leased trucks, pre-owned trucks and trucks registered in a European Economic Area state). By the date of the CPO application hearing in April 2021, more than 15,000 proposed class members had already signed-up to participate in the *RHA* claim (with two-thirds of those said to be covered by the scope of the *UKTC* opt-out claim). They had provided data at the outset (recognised as a key benefit of the opt-in regime in both the *Le Patourel* and *McLaren*), which can be used to better shape the economic model at an early stage.

Interesting features of the hearing in April 2021 included:

- The CAT heard evidence from, and questioned, the economic experts of both applicants on their proposed methodologies (as was also the case in *FX*). While it remained a possibility that the CAT may seek to do that during the certification hearing, following the Supreme Court judgment in *Merricks*, that is not the default position (it did not happen, for example, in the relatively more straightforward cases of *Le Patourel* or *McLaren*). Clearly, where the proposed methodology of the respective experts is likely to be a factor in the selection of one of the competing claims, it is to be expected that the CAT is more likely to want to hear from the experts.
- The significance of one of the applicants being a special purpose vehicle ('SPV') was a more prominent feature in the *Trucks* hearings than was the case in *FX*. Counsel for *UKTC* argued that the fact that it was an SPV was itself a factor which weighed in its favour – suggesting that *UKTC* did not have any other function that may cause distraction and had no conflict of interest with the members of the proposed class (which it was argued would be the case for the *RHA*, of which certain of the respondents were themselves members, a point which was not accepted by the *RHA*).
- With the issue of deceased persons having played a central role in the hearing of some of the now certified claims (specifically, *Merricks* and *McLaren*), it was defunct companies in the spotlight in *Trucks*. To participate, a defunct company would need to be restored to the company register. The respondents forcefully resisted their inclusion in the opt-out class in *UKTC* where there was a question as to whether those companies could be restored at all at that stage (noting the six-year time limit to do so) and, if so, whether that would happen in practice.

### Managing collective proceedings

Certification is of course only the first hurdle in the progression of these large and complex claims to final resolution. After lengthy delays in establishing what is required to overcome that preliminary stage, there are sure to be many further challenges to come as the CAT feels its way through stages ahead. With *Merricks* having already proceeded to the first CMC following certification earlier in 2022, the momentum continues.

#### *Applications to vary, stay or revoke CPOs*

CAT Rule 85 provides that the CAT may at any time, either of its own volition or following an application, make an order for the variation, revocation or stay of collective proceedings.



In several judgments, the CAT has referred to this provision, in particular the ability to revoke CPOs later in proceedings if material developments mean that that becomes necessary. In deciding whether to vary or revoke a CPO under Rule 85, the CAT should take account of ‘all the relevant circumstances’, but in particular whether the statutory criteria for certification/authorisation are still met: the provision gives seemingly limited scope for challenge by respondents in the early stages following certification, but it remains to be seen whether it will be the focus of respondents in some of the front-running collective proceedings at a later date, perhaps following disclosure and the advancement of the econometric analysis.

It will also be interesting to see how the CAT approaches applications by defendants to stay collective proceedings pending appeals. Having waited on the progression of *Merricks* up to the Supreme Court and effectively halted the regime for a number of years, it could be considered unfortunate if the CAT were to permit the same to happen again following appeals on other key issues such as carriage disputes.

#### *Multiplicity of claims*

Now certified, the *Merricks* collective proceedings join a whole host of damages actions relating to multilateral interchange fees which have now been progressing through the courts and the CAT for several years (and in a number of which settlements have already been agreed).

The concurrent adjudication of issues concerning the extent of loss and the level of pass-on/pass-through across the multiple claims is something the CAT is already grappling with in interchange cases, having recently signalled a move from a sampling approach to ‘common issues’ in the non-collective claims. What is not clear is how the CAT will approach adjudication of the non-collective, direct claims and the *indirect* collective action brought in *Merricks*.

#### *Settlement*

It would be highly optimistic to suppose that the first distribution of damages will take place this year, but what may be more likely is exploration of collective settlement.

Some might argue that the low threshold for certification does not create a strong incentive for settlement at an early stage, with respondents more inclined to test the claims in earnest. However, there is no denying that the time and cost associated with defending collective claims will be a heavy burden and so commercial settlements may well be offered.

It will be interesting to see both how the CAT approaches the *process* for determining applications for collective settlements and the approach to determining the *substance* of those applications. In particular, recent judgments

from the CAT have sought to emphasise the high premium of open justice and an understandable reluctance to sit in private: for more straightforward cases, this may not prove problematic, but how that is squared with a situation in which, for example, only one of multiple defendants wishes to be bound by a collective settlement will no doubt prove to be a further battleground.

## **Conclusion**

After a stuttering start, the collective action regime is now gathering pace. With huge sums at stake, the well-resourced and well-funded defendant legal teams can be expected to keep raising novel and challenging issues with which the CAT will need to grapple and which are likely to be prime candidates for appeals in what is now a fast-developing area of law. Many areas of the collective proceedings regime remain untested; however, it is clear that 2022 and beyond promises to be an exciting time for all those interested in or involved in the UK collective action regime.

## **Author biographies**

**Jake Minards-Tonge**, **Samantha Haigh** and **Paul Chaplin** are members of the Competition Disputes team at Addleshaw Goddard and have extensive experience advising claimants and defendants on competition damages claims, including collective proceedings, group actions and individual claims before the Competition Appeal Tribunal, High Court and Court of Appeal.