Neutral Citation Number: [2023] EWCA Civ 1471

Case Number: CA-2023-002409

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
MR JUSTICE MARCUS SMITH P,
EAMONN DORAN and BRIDGET LUCAS KC
[2022] CAT 53

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 December 2023

Before:
LORD JUSTICE POPPLEWELL
and
MR JUSTICE BUTCHER

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Between:

(1) NIPPON YUSEN KABUSHIKI KAISHA **(2) MOL (EUROPE AFRICA) LTD** **(3) MITSUI O.S.K LINES LIMITED** **(4) NISSAN MOTOR CAR CARRIER CO. LTD**	**Appellants**
- and -	
MARK McLAREN CLASS REPRESENTATIVE LIMITED	**Respondent**
- and -	
(1) KAWASAKI KISEN KAISHA LTD **(2) WALLENIUS WILHELMSEN OCEAN AS** **(3) EUKOR CAR CARRIERS INC** **(4) WALLENIUS LOGISTICS AB** **(5) WILHELMSEN SHIPS HOLDING MALTA LIMITED** **(6) WALLENIUS LINES AB** **(7) WALLENIUS WILHELMSEN ASA** **(8) COMPANIA SUDAMERICANA DE VAPORES SA**	**Interested Parties**

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Marie Demetriou KC and Daniel Piccinin KC (instructed by **Steptoe & Johnson UK LLP and Arnold & Porter Kaye Scholer (UK) LLP**) for the **Appellants**

Sarah Ford KC and **Nicholas Gibson** (instructed by **Scott+Scott UK LLP**) for the **Respondent**

Hearing dates: 15 and 16 November 2023

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Approved Judgment

This judgment was handed down remotely at 10.00am on 8 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Popplewell :

Introduction

1. This is a challenge to an order of the Competition Appeal Tribunal (Mr Justice Marcus Smith P, Mr Eamonn Dorran, Ms Bridget Lucas KC) ('the Tribunal') dated 20 December 2022 ('the Order'), following its determination in a ruling dated 18 November 2022 ('the Ruling') that in collective proceedings before the Competition Appeal Tribunal ('the CAT') defendants may not communicate directly with members of the class, save with the permission of the CAT. The Tribunal reached that conclusion as a matter of interpretation of the Competition Appeal Tribunal Rules 2015, which were made by statutory instrument 2015 No 1468 on 7 September 2015 and laid before Parliament the following day ('the Rules'), pursuant to powers in the Enterprise Act 2002 and the Communications Act 2003.

2. It is unnecessary to give a general account of collective proceedings before the CAT as a specialist tribunal. The nature, purpose and detail of such proceedings has been considered extensively in a number of recent authorities, including *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC and Mastercard Inc* [2020] UKSC 24, [2020] Bus LR 1196; *Mastercard Inc* v *Merricks* [2020] UKSC 51, [2021] 3 All ER 285; *Lloyd v Google LLC* [2021] UKSC 50, [2022] AC 1217; *Le Patourel v BT Group PLC and another* [2022] EWCA Civ 593, [2023] 1 All ER (Comm) 667; *LSER and others v Gutmann* [2022] EWCA Civ 1077, [2022] ECC 26; *MOL (Europe Africa) Ltd and others v Mark McLaren Class Representative Ltd* [2022] EWCA Civ 1701, [2023] Bus LR 318 (an appeal in these proceedings); and *Evans v Barclays Bank Plc & Others* [2023] EWCA Civ 876.

3. The Order was made in collective proceedings brought by the Respondent ('MMCR') as class representative against the defendants to the proceedings, who are shipping companies. It was prompted by the solicitors for all the defendants other than the fourth defendant ('K-Line') sending a letter to each of 21 potential members of the class prior to the expiry of the opt-out period which had been set by a collective proceedings order made on 18 February 2022 ('the CPO'). K-Line was subject to the Order but has not participated in the present challenge. I will refer to the defendants in the collective proceedings as 'the Shipping Companies'.

4. The challenge to the Order was brought by way of a claim for judicial review brought by all the Shipping Companies except K-Line. It was actively pursued on behalf of four of them. It was listed to be heard by Butcher J and myself as a Divisional Court. In circumstances I will explain, it has been heard by us sitting also as a constitution of the Court of Appeal, so as to be able to determine it, if appropriate, as an appeal pursuant to s. 49(1A)(a) Competition Act 1998 ('the 1998 Act'). I have concluded that an appeal is the correct procedural route for the challenge, for the reasons given below. The title page of this judgment and nomenclature of the participants has been amended accordingly. Those claimants in the judicial review proceedings who have not actively pursued the challenge have been identified as interested parties, but for ease of exposition I have referred to all the Shipping Companies other than K-Line as the appellants in this judgment, without distinguishing between those four who have pursued the challenge and the remainder who have not actively done so but whose interests align with those who have.

The issues

5. The main point in issue is whether the Tribunal's conclusion in paragraphs 14 and 15 of the Ruling is correct:

> "14. We consider that the Rules preclude any communication between a defendant or that defendant's legal representative and a member (actual or contingent [footnote: in other words, communications are precluded where the period for opting in or opting out has yet to expire, which of course is the position here)] of a class identified or identifiable under a collective proceedings order made by the Tribunal where that communication concerns those collective proceedings, unless the Tribunal otherwise orders or (subject always to the Tribunal's supervisory jurisdiction) the parties agree.
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> 15. We consider that precisely the same restriction arises as between a proposed defendant (or that proposed defendant's legal representative) and a proposed member of the class (i.e., someone who could be a member if a collective proceedings order were made) from the time a collective proceedings application is made."

6. The Order was made in terms which did not exactly mirror the terms of paragraphs 14 and 15 of the Ruling. It provided:

> "1. The Defendants shall henceforth not communicate with members of the Class on matters concerning these collective proceedings, without the prior permission of the Tribunal.
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> 2. The prohibition in paragraph 1 does not operate to prevent the Defendants communicating with members of the Class in the ordinary course of their business operations."

7. Before us, the parties agreed that paragraph 2 was not intended, and has not been treated, as a qualification to paragraph 1, so as to permit communication in the ordinary course of business operations on matters concerning the collective proceedings. Rather, paragraph 2 was included for the avoidance of doubt to reflect the fact that communications in the ordinary course of business operations were not precluded provided that they were not on matters concerning the collective proceedings. This is consistent with the terms of the Ruling, which is unqualified in this respect. The prohibition which the Tribunal imposed, therefore, was on all communications concerning the collective proceedings even where they might be made in the ordinary course of the Shipping Companies' operations. I shall refer to the prohibition in the Order as 'the Restriction'.

8. There is a subsidiary issue as to whether the Tribunal made the Order on the alternative basis, if it were wrong on the issue of interpretation of the Rules, that it was exercising its case management powers under the Rules. When giving leave to bring judicial review proceedings, Linden J expressed the view that the Tribunal had not done so, based on an analysis of the terms of the Ruling. MMCR challenges that view; the appellants support it. If MMCR is correct on that subsidiary issue, the challenge must fail because the appellants do not suggest that the Order can be challenged if it was made in exercise of case management powers (which in the judicial review proceedings by which the challenge was made would involve asserting irrationality).

9. If, on the other hand, the appellants are correct that the Tribunal had not purported to make the order on the alternative basis that it was exercising case management powers, as was the view of Linden J, a further issue arises. MMRC submitted that it is highly likely that the Tribunal would have made the same order under its case management powers, with the result that the outcome for the appellants would not have been substantially different, so as to bar the grant of relief by reason of s. 31(2A) of the Senior Courts Act 1981. The appellants disputed that submission. The submission was framed in those terms by reason of the challenge being pursued by way of judicial review. However, if the correct procedural route is by way of appeal, the issue is different. In those circumstances, Ms Ford submitted that MMCR would have served a Respondent's Notice asking this court to uphold the Order on that case management basis, a basis not (on this hypothesis) relied on by the Tribunal. The appellants resisted that course.

10. Accordingly the issues may be framed as follows:

    (1) Issue 1: do the Rules impose the Restriction?

    (2) Issue 2: if not, did the Tribunal impose the Restriction in exercise of its case management powers?

    (3) Issue 3: if not, should the Order be upheld on the basis that it is highly likely that the Tribunal would have done so (JR) or that it should have done so (appeal)?

The claim and proceedings to date

11. The proceedings were commenced by the filing of the claim form by MMCR on 20 February 2020. MMCR is a company incorporated under the laws of England and Wales specifically for the purposes of bringing the proposed collective proceedings on behalf of the class. Its sole director and sole member is Mr Mark McLaren, who has experience of working in consumer-related roles. The proceedings are "follow on" proceedings after a decision of the European Commission in a prior infringement decision adopted on 21 February 2018 in Case AT.40009 – Maritime Car Carriers, following a settlement between the Commission and the Shipping Companies, which involved an admission of breach. Under section 47A of the 1998 Act, the Commission findings are dispositive of breach. In summary, the breach consisted of a cartel in relation to the shipping charges imposed for the deep sea carriage of new motor vehicles (cars, trucks and high and heavy vehicles) on various routes to and from the European Economic Area, which at the relevant time included the UK.

12. The class comprises, in broad summary, all persons who purchased new vehicles of numerous different brands in the UK in the period from 18 October 2006 to 6 September 2015. The number of vehicles involved has been estimated by MMCR as 17.8 million, of which 6.9 million were registered to private purchasers. The class therefore includes a wide variety of different kinds of member, ranging from the private individual who has no experience of litigation to very large organisations who purchased tens of thousands of qualifying vehicles as part of their business (e.g. car leasing) or as part of an institutional fleet for their business operations and/or staff. These include sophisticated members of the class with litigation experience and ready access to in-house legal advice and external legal teams. MMCR's estimate of the aggregate loss claimed (before interest) was between £57m and £115m with the range due to uncertainty as to the applicable overcharge figure. The claim increases to between £71m and £143m if simple interest is included.

13. The hearing for a CPO took place before the CAT presided over by Falk J, as she then was, in November/December 2021. It involved an intense scrutiny of the methodology of the quantification of the claim, with the Shipping Companies seeking a strike out/reverse summary judgment. The detail of the dispute is apparent from the judgment of the CAT on that occasion ([2022] CAT 10) and the decision of the Court of Appeal upholding the decision ([2022] EWCA Civ 1701; [2023] Bus LR 318). The Shipping Companies (save K-Line and CSAV) also sought, unsuccessfully, to have the proceedings certified on an opt-in basis for large business purchasers, defined as those purchasing 20,000 or more vehicles, of which there were estimated to be 45 in number. One of the grounds which was advanced for such opt-in was that the Shipping Companies would need to seek disclosure of documents and evidence from large purchasers of vehicles within the class. That was explained by reference to the class claims being based simply on the amount of the delivery charge made by the Shipping Companies, often not directly to the ultimate purchasers but via a retail chain; a major part of the defence would be that this did not involve any loss to the purchasers, who would have paid the same price irrespective of the size of the delivery charge further up the chain; and it would therefore be necessary to explore the pricing methodology and rationale at the retail level. In its CPO ruling the Tribunal adverted to the possibility of disclosure being ordered in the following terms:

> "168. Apart from increased scrutiny of the claim by Large Business Purchasers when deciding whether to opt in, the key benefit that the Respondents rely on as achievable through opt-in proceedings relates to disclosure. In our view this is not a good reason to accede to the Respondents' proposal, and any genuine issue that arises in relation to disclosure should be capable of being dealt with in another way.
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> 169. The Tribunal has power under rule 89(1)(c) to order disclosure by any represented person, defined in rule 73(2) to include class members who have not opted out of opt-out proceedings as well as those who have opted in to opt-in proceedings. No distinction is drawn between those who participate on an opt-in or opt-out basis. Rather, the Tribunal has a broad discretion. It may well be that disclosure would not ordinarily be ordered from members of an opt-out class, but nothing precludes it. If an order for disclosure against certain class members was determined to be reasonably necessary and proportionate (*Ryder Ltd v Man SE* [2020] CAT 3 at [35(7)]), then we would expect that a way could and would be found to achieve that so as to ensure that the proceedings can be disposed of fairly. Examples might include some form of costs protection so that the burden is not shouldered unfairly as between class members, or potentially giving the relevant class members the option of being excluded from the claim by removing them under rule 85(3) (if not rule 82(2)), if the opportunity to opt-out would otherwise have expired.
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> 170. We would also observe that disclosure from certain Large Business Purchasers may be of limited relevance. Whilst it could assist in relation to the levels of discount that they were able to negotiate (whether in relation to the overall price or any delivery charge element) and potentially in relation to pass-on by certain types of businesses to their customers, it would not obviously assist in determining the levels of discount obtained by other purchasers or, for example and if relevant, the approach to setting vehicle list prices."

14. The CPO was made on 20 May 2022 and provided that the opt-out deadline (and opt-in deadline for those domiciled outside the UK) was 12 August 2022. On 26 July 2022

solicitors for the appellants wrote letters in identical terms to 21 large business purchasers drawing attention to the opt-out date and indicating that they intended to seek disclosure, which if ordered might involve substantial work and expense for those large businesses ('the Letters'). The Letters quoted what the Tribunal had said in paragraphs 168-170 of its CPO judgment. Copies were sent to MMCR. They are appended to the Ruling (reported at [2022] CAT 53 and [2023] Bus LR 216).

15. Before us, the appellants contended that the Letters fairly set out what the CAT had said about disclosure, and said that there was a legitimate purpose in sending them at that stage, before the opt-out decision: it was necessary to alert the large businesses to the possibility of a disclosure application which might involve substantial work on their part because, if a disclosure application were subsequently made against a class member who was at that later stage permitted to opt-out, it would be seriously inconvenient to have gone to the trouble of a successful disclosure application, only for the target of the application to exit at the last moment, requiring a fresh application against another class member. MMCR disputed that such was the motive for sending the Letters or that it could form any justification for sending them. It contended that the Letters were intended to influence the recipients to opt out, or at least were likely to do so, and were in inappropriate terms. Although we were addressed by both sides about the propriety of the terms of the Letters (and the Tribunal found that they should not have been sent, as to which see below), it is not necessary to express any view about them in order to resolve the issues arising on the appeal.

16. An urgent application was made to the CAT by MMCR on 3 August 2022 for an order restraining further communications between the Shipping Companies and members of the class, and disclosure of all prior communications between members of the class and the appellants. Following correspondence between the parties and the CAT, the Shipping Companies provided various undertakings (without prejudice to the arguments they would make in due course), as a result of which the application was no longer urgent and did not need to be determined prior to the opt-out deadline. In the event, only one of the 21 large businesses to whom the Letters had been written opted out, with another indicating that it was not within the class because it had not purchased any of the included brands of vehicles during the relevant period.

17. The application was, however, pursued and heard by the Tribunal on 16 November 2022. At the hearing MMCR sought the Order on two alternative bases. The primary case, recorded at paragraph 9 of the Ruling, was that all communications directly between defendants and class members were prohibited by a rule which was to be implied into the Rules. The alternative submission, recorded in paragraph 11, was that even if there were no such prohibition in the Rules, the Shipping Companies' conduct in writing the Letters crossed the line of what was acceptable and the Tribunal should exercise its discretion to make the order sought pursuant to its case management powers. During argument, Mr Piccinin (now KC), acting for the Shipping Companies, opened his submissions with three observations, one of which was that although the question of statutory construction was quite different from the exercise of discretion under case management powers, the submissions of Ms Ford (then QC), acting for MMCR, "skates across them freely, as though there were no difference between those two tasks." He indicated that he would try to distinguish between them. At that point the President indicated that the Tribunal would be more assisted by argument on the exercise of statutory construction and said that Mr Piccinin could take it that it was construction which mattered. Mr Piccinin said he was

grateful for their indication and focussed his submissions thereafter on the interpretation of the Rules, although he sought to defend the terms of the Letters as "scrupulously fair". That has some significance for Issue 2.

18. Since the Order, there have been further steps in these proceedings. The first one of relevance was the bringing of the judicial review claim two days after the Order on 22 December 2022. Paragraph 3 of the Statement of Facts and Grounds explained why this form of procedure was adopted:

> "The Shipping Companies' challenge to those conclusions and that order can be brought only by way of judicial review. That is because s 49(1A) of the CA98 provides that an appeal from a decision of the Tribunal in collective proceedings lies to the Court of Appeal only where it is a decision "as to the award of damages or other sum (other than a decision on costs or expenses), or as to the grant of an injunction". The Court of Appeal in *Paccar v Road Haulage Association* [2021] 1 WLR 3648 decided that this meant that an appeal could lie only against decisions that "determined, or potentially determined, the entitlement of the claimants to such an award": §55 [21/565-606]. The Judgment did not determine, and could not have determined, the entitlement of class members to damages, and so an appeal is not available. As the Court of Appeal (sitting in parallel as a Divisional Court) said in *Paccar* at §60, in those circumstances, the substantive issue must be determined in judicial review proceedings."

19. That approach was not disputed by MMCR. Shortly before the hearing we asked the parties to address whether that remained the correct approach following the recent decision of the Court of Appeal in *Evans v Barclays.* In a helpfully prompt response on the eve of the hearing, the Shipping Companies explained their reasons for maintaining the view that an appeal was not available and that the appropriate procedure for challenge was by way of judicial review. MMCR agreed. At the beginning of the hearing we indicated that we were not sure whether that was correct and did not wish to express a conclusion before hearing the argument, which involved exploring the practical ramifications of the Ruling, including arguments on behalf of the Shipping Companies that it would have, and had had, an adverse impact on their evidence-gathering process. We suggested, and the parties agreed, that we should constitute ourselves also as a two person Court of Appeal so as to be able to decide the challenge as an appeal if that were the appropriate route, and we did so. I address below the issue of the appropriate route for challenge.

20. Meanwhile there was a case management conference on 15 March 2023 (dealing also with the case management of claims brought by Volkswagen AG and others in other proceedings) resulting in an order dated 6 April 2023. Paragraph 5 gave the Shipping Companies permission to communicate with class members for the purpose of evidence-gathering in the following terms:

> "5. The Defendants to the McLaren Proceedings shall have permission to communicate with Class Members for the purpose of seeking to obtain evidence or information in relation to the factual and/or expert issues in the McLaren Proceedings, without being required to obtain permission from the Tribunal or notify the Class Representative. Any communication adverting to the possibility of any formal application being made, or order sought against such Class Member shall require prior permission from the Tribunal."

21. The first sentence was in the terms sought by the Shipping Companies and not opposed in principle by MMCR. The second sentence was added by the tribunal without having been raised with the parties at the hearing or thereafter. The Shipping Companies wished, in their approach to class members, to be able to include a paragraph which adverted to the possibility of an order being sought, which triggered the requirement for the tribunal's permission in the second sentence of paragraph 5. The application for permission, disclosing the terms of the proposed communication, resulted in MMCR objecting to other parts of the proposed communication and led to further argument before Ms Lucas KC sitting as the CAT. In her ruling handed down on 14 November 2023 (the day before the commencement of the hearing before us) Ms Lucas gave detailed consideration to how evidence-gathering from class members should be approached. She refused to allow the approach to be made in the form sought by the Shipping Companies, which sought disclosure, determining that a first step should only involve identifying what disclosure the class members might be in a position to give. Without quoting from it at length, I would characterise the approach of the tribunal as being that because the Rules impose a ban on communications without permission (as found in the Ruling the subject matter of the present challenge), any departure from that presumed norm requires justification by the least invasive approach, and subject to careful scrutiny of the approach by the tribunal.

22. The appellants submit that this illustrates how the effect of the Ruling is to interfere with their rights under article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('article 10'); their litigation privilege; and their ability to gather evidence, so that the parties are not on an even footing. I will return to consider the merits of such arguments.

23. The Ruling has also been applied in a number of other cases before the CAT. The appellants rely on particular instances which they say illustrate the unacceptable consequences of the Ruling, to which I shall also return.

Judicial review or appeal?

24. The right of appeal is set out in s. 49(1A)(a) of the 1998 Act:

> "An appeal lies to the appropriate court on a point of law arising from a decision of the Tribunal in proceedings under section 47A or in collective proceedings—
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> (a) as to the award of damages or other sum (other than a decision on costs or expenses), or
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> (b) as to the grant of an injunction."

25. The two most important recent authorities dealing with this issue are *Paccar Inc & others v Road Haulage Association Ltd* [2021] EWCA Civ 299, [2021] 1 WLR 3648 and *Evans v Barclays.*

26. In *Paccar* two applications for a CPO were made and the CAT ordered them to be heard together. The defendants argued that the litigation funding agreements into which each proposed class representative intended to enter were unenforceable "damages based agreements". The CAT ordered that question to be tried as a preliminary issue and determined it in favour of the proposed class representatives. The defendants in one of the collective actions sought leave to appeal from the CAT, which refused it on the basis that the challenge did not fall within s. 49(1A) of the 1998 Act. The defendants sought

permission to appeal from the Court of Appeal, and issued a protective claim for judicial review. Patten LJ ordered that the application for permission to appeal and the application for leave to apply for judicial review be heard together in a rolled up hearing by the full court, which would also sit as a Divisional Court. The Judgment of the full court was given by Henderson LJ, with whom Singh and Carr LJJ agreed. The court held that the challenge could not be brought by way of appeal and determined it as a Divisional Court in judicial review proceedings. On the substantive issue the court upheld the decision of the CAT that the litigation funding arrangements were not unenforceable damages based agreements, a decision in due course reversed by the Supreme Court.

27. In his detailed reasoning addressing the procedural issue, Henderson LJ referred to two previous Court of Appeal decisions. The first was *Enron Coal Services Ltd v English Welsh & Scottish Railway Ltd* [2010] Bus LR 28, in which the issue was whether the court had jurisdiction to hear an appeal from the CAT's decision refusing to strike out a claim for damages brought by an individual claimant under s. 47A of the 1998 Act. Patten LJ gave the leading judgment holding that it did. That question arose under predecessor wording in s. 49(1) which was not in identical form to s. 49(1A), which came into effect with the introduction of collective proceedings in 2015, but whose relevant wording required "a decision of the tribunal as to an award of damages". Patten LJ's essential reasoning, as explained by Henderson LJ in *Paccar* at [41], was that the refusal to strike out was "as to damages" because an application to strike out was *potentially* dispositive of the damages claim so that an appeal should lie whichever way it was determined. The second case referred to by Henderson LJ was *Merricks v Mastercard Inc.* [2018] EWCA Civ 2527, [2019] Bus LR 1287 ('*Merricks (jurisdiction)'*). In that case the CAT had declined to grant a CPO in collective proceedings. It then refused permission to appeal to the Court of Appeal on the basis that it was not an appeal as to damages because the effect of such refusal was to leave in place the ability to pursue individual claims pursuant to s. 47A of the 1998 Act. Patten LJ, again giving the leading judgment in the Court of Appeal, rejected that reasoning on the grounds that a s.47A claim did not allow an award of aggregate damages under s. 47C(2) which is a remedy unique to collective proceedings. Coulson LJ gave a concurring judgment and Hamblen LJ agreed with both judgments.

28. In *Paccar*, Henderson LJ treated both decisions as establishing the principle that an appeal lay where the decision was whether to permit or preclude the pursuit of the claim for collective damages (see [45]). In relation to the CAT's decision to grant a CPO in the case before it, Henderson LJ rejected what he described as the wider argument by the defendant, that the "as to damages" requirement referred merely to a description of proceedings and was fulfilled if the proceedings themselves involved a claim to damages irrespective of the nature of the interlocutory decision under challenge. The narrower submission was that the grant of the CPO was as to damages because if the funding arrangements were damages based agreements and unenforceable, the CPO would not be granted; applying the logic of *Enron* and *Merricks (jurisdiction)*, the decision of the tribunal potentially affected an award of damages because if decided in favour of the defendants it precluded an award of aggregate damages. Henderson LJ rejected this argument at [59] after saying that he did not find it an easy question. He did so on the basis that the tribunal had found that if the litigation funding arrangements were unenforceable, that "would not have marked the end of the road for the potential claimants in collective proceedings and (by inference) that a solution would probably have been found which would have enabled them to continue with modified funding arrangements which the Tribunal would be able to approve". He said that that was a conclusion of the tribunal with which the Court of Appeal should be slow to

interfere. Henderson LJ did not refer to the Supreme Court decision in *Merricks* allowing the substantive appeal, although it had been delivered about a month before the Court of Appeal hearing in *Paccar*.

29. Thus far the three Court of Appeal cases, *Enron*, *Merricks (jurisdiction)* and *Paccar* had been concerned with whether the decision under challenge had the potential to be an end of the road decision as to the award of damages. *Evans v Barclays* marked a substantial shift towards a wider interpretation of the "as to" damages test in s. 49(1A)(a). In that case there were two collective actions with rival proposed class representatives, and slightly different claim methodologies advanced by each. Although there was no application by the defendants to strike them out, the CAT considered of its own motion whether to dismiss the claims at the certification stage. The majority determined that a viable claim had not been formulated in the application by way of pleading. Recognising that their concerns had been described most fully, and in some respects for the first time, in their judgment, they deferred a decision on whether to strike out the claims until the prospective class representatives had been given an opportunity to address their criticisms of the pleading. They did, however, reflect their negative view of the merits in deciding that any proceedings should be opt-in, not opt-out. In doing so they recognised that in practice there would be no take up for opt-in collective proceedings, but were sanguine about that prospect because the proposed class comprised well-resourced and sophisticated entities who were well able to bring individual claims without any imperilment of access to justice. The CAT had also decided that one of the two rival claimants was (marginally) more suitable than the other to act as class representative.

30. The leading judgment was given by Green LJ, with whom Sir Julian Flaux C and Snowden LJ agreed. Green LJ said at [48] that "the Supreme Court decision in *Merricks* … provides the clearest guidance as to what constitutes '*a point of law….as to the award of damages…* "' The Supreme Court addressed seven grounds, all of which were accepted as being admissible and it "necessarily follows" that each amounted to a point of law and was '*as to* damages'. Green LJ then went on to identify the seven grounds at [49]-[50]. Having referred at [51] to *Merricks (jurisdiction)* and at [52] to *Enron,* he dealt with *Paccar* at [53]. He referred to the finding at [59] of *Paccar* that there was every reason to suppose that if the litigation funding arrangements were unlawful an acceptable way of dealing with the problem would have been found, so that the CAT decision was not an end of the road decision. "Given the omission from the judgment of any reference to the Supreme Court in *Merricks*, it [*Paccar*] should be seen as a decision on its own facts."

31. The paragraphs which follow in the judgment merit quotation in full:

> 54. Finally on this point, the approach currently adopted by the CAT to interlocutory decisions was recently set out in the decision on permission to appeal in *Merchant Interchange Fee Umbrella Proceedings* [2022] CAT 50 ("MIF") at paragraphs [4] - [22]. The question was whether Mastercard was entitled to appeal the substantive decision ([2022] CAT 31) on grounds concerning the extent of disclosure and witness evidence relevant to the issue of merchant pass-on. The CAT held that whilst there was jurisdiction to appeal (paragraph [22]) the appeal had no real prospect of success and permission should be declined. On the question of jurisdiction, the CAT asked "*essentially whether the decision affects the amount of damages to be awarded in some causal way*" (paragraph [14]). Further: *"… a case where no damages will arise at all because of an interlocutory decision will*

be a decision as to the award of damages" (paragraph [15]). In pragmatic terms the CAT observed (paragraph [18]):

> "Parties before the Tribunal can proceed on the basis that, assuming a point of law arises, contested interlocutory decisions, even of a contested case management nature, can be presumed, for the purposes of permission to appeal applications, to meet the requirement that they affect the final substantive outcome in terms of the level of damages awarded." (emphasis in original)

55. I see force in the CAT's analysis. The test: *"whether the decision affects the amount of damages to be awarded in some causal way*" highlights the need for there to be *"some"* (sufficient) causal link between the decision and damages. The guidance from *Merricks* is that the link or effect does not have to be very direct or close. The test is not one capable of being applied with mathematical exactitude. However case law indicates for example: that a decision which brings the possibility of a claim for damages to an end (such as a strike out) is "*as to*" damages; that a decision going to the amount of a possible claim (for instance a decision that part of a claim is unsustainable) is "*as to*" damages; that a decision that a claim should not be struck out is "*as to*" damages, not least because if the appeal prevails the effect is as if the CAT should have struck out the claim; and that decisions as to the procedure to be applied to determine damages claims are also "as to" damages because the procedure adopted could affect the ultimate quantum.

56. There will however be an outer limit. In argument, citing *Paccar*, it was suggested that the outer limit was whether the decision under challenge brought the claim or part of a claim to an end. But that analysis seems too narrow. It follows from *Merricks* that decisions which affect how claims are to be run or adjudicated upon are also "*as to*" damages even where the decision does not bring the claim to an end. So for instance the Supreme Court treated whether the CAT was right to hold a trial within a trial as a decision "*as to*" damages and it also held that a dispute about whether distribution should be taken into account at the certification stage was "*as to*" damages. Disputes as to how broad common law principles apply to the evaluation of evidence relating to damages and as to the judicial tools and techniques at the CAT's disposal (such as the broad axe) have also been held to be proper subject of the statutory appeal process and are therefore "*as to*" damages. They are reasonably described as principles of law and procedure which govern how a damages claim is to be determined and they all could ultimately affect quantum.

Relationship of statutory right of appeal to judicial review

57. I am loathe at this stage in the development of the case law to express a definitive view as to how bright the line is as between an appeal and judicial review. I am though clear that the statutory right of appeal should be construed broadly in order to minimise the scope of judicial review. One of the legislative purposes identified by the Supreme Court in *Merricks* as guiding the operation of the regime was judicial efficiency. Judged through this optic there is only judicial inefficiency flowing from forcing litigants seeking to challenge CAT decisions to go *via* judicial

review or (as in this case), even worse, proceed simultaneously *via* judicial review and a statutory appeal.

58. There is no logic in a conclusion that Parliament wished to give an appeal route a narrow scope leaving judicial review with a concomitantly broader scope. To the contrary there are good reasons why an appeal should take precedence over judicial review. First, in terms of judicial hierarchy it makes sense for challenges to CAT decisions to flow, to the greatest degree possible and consistent with the legislative purpose, to the Court of Appeal. Institutionally the CAT is presided over by a specialist High Court Judge and in individual cases High Court judges with suitable experience are routinely appointed to sit as the presiding judge. Judges who sit in the CAT acquire specialist skills and receive specialist training. A CAT panel routinely includes an economist. If judicial review were a normal route of challenge this would entail a challenge from a three person specialist CAT, to a non-specialist High Court judge sitting in the Administrative Court which could then lead to an appeal to the Court of Appeal. Judicial review inserts an unnecessary non-specialist step in the progress of a CAT decision to an appeal. Secondly, it is relevant that in practical terms there is not a great deal of difference (if any) between an appeal on a point of law and judicial review. There is no clear benefit in permitting judicial review to have a broad scope where there is no inherent forensic value to the exercise. Both proceed upon the basis of facts as found by the lower court or tribunal and in both an appropriate margin of discretion or appreciation is accorded to the first level trier of fact, especially if it is a specialist body. The traditional grounds of an appeal on a point of law are closely related to the traditional grounds of judicial review. The authors of De Smith's Judicial Review, 9th Edition (2023) observe at paragraphs [16-018] and [16-019] that the powers of an appellate court will encompass all the grounds of judicial review within the rubric "*points of law*" and might "*perhaps*" even be greater."

32. Green LJ then identified the three issues in the appeal and addressed whether they were points of law "as to" damages, before addressing them substantively. The first issue was whether the CAT applied the right test in law to the merits issue and to the deferral of the assessment of the merits before striking out. As to the latter aspect he said at [64] that it was properly pursued as an appeal because "it concerns … the nature, scope and effect of its case management powers to regulate how claims "as to" damages should be pleaded". The second substantive issue was the decision to order opt-in, which was "as to" damages because it was accepted that opt-in would in practice involve the collective proceedings coming to an end ([87]). The third substantive issue concerned the choice of proposed class representative, which was characterised as "the carriage issue". That was "as to" damages because there were some categories of transaction excluded from the claim proposed by the chosen class representative, such that the choice potentially affected the quantum of damages for some claimants; "adopting a purposive approach" the carriage issue was "as to" damages for those claimants; and judicial efficiency dictated that the procedural route for challenge of the carriage issue as a whole should not be split up (at [144]-[145]).

33. I find the analysis in *Evans v Barclays* puzzling in one important respect. Green LJ's analysis proceeded on the basis set out in [43] where he said of s. 49(1A)(a) of the 1998 Act:

"This contains two cumulative limits. First an appeal is limited to a "*point of law*"; and secondly that point of law must be "*as to the award of damages or other sum*"".

34. I would express it differently. It is not the point of law which must be "as to the award of damages". It is the decision, out of which the point of law arises. Appeals are against decisions (orders), not reasons. A number of different grounds may be formulated for challenging a single decision, some of which involve a point of law and some of which do not. It is only challenges on points of law which are permitted by s. 49(1A)(a) of the 1998 Act. However it is the decision, not the point of law, which must be "as to an award of damages".

35. I would not myself, therefore, attach significance to the different grounds considered by the Supreme Court in *Merricks*, all of which arose out of a single decision. The tribunal decision in that case was a refusal to grant a CPO. That was an end of the road decision which precluded the ability to pursue a collective proceedings claim for aggregate damages. The grounds relied on to challenge the decision had all to be points of law; but they did not individually fall to be analysed as points of law "as to" damages.

36. For similar reasons I do not agree that "The guidance from *Merricks* is that the [causative] link or effect does not have to be very direct or close" (at [55]); or that "[i]t follows from *Merricks* that decisions which affect how claims are to be run or adjudicated upon are also "*as to*" damages even where the decision does not bring the claim to an end" (at [56]).

37. Nevertheless, I would accept that these principles should be applicable, notwithstanding that they are not mandated by *Merricks*, given the desirability of a wide interpretation of the section for the reasons articulated at [57]-[58] of *Evans v Barclays*. It is also desirable that there is as much clarity as possible as to the appropriate route of challenge. It is administratively inefficient, and conducive to wasted cost and delay, for parties to have to adopt both forms of procedure in the alternative as a result of uncertainty.

38. With that caveat, I derive the following principles from *Evans v Barclays*.

    (1) The expression "as to" damages should be given as wide a construction as possible because of the desirability of challenges coming directly to the Court of Appeal by way of appeal from the experienced specialist CAT, rather than by an application to the Administrative Court, involving first an application for leave to bring a claim for judicial review ([57]-[58]).

    (2) The appeal route is not confined to end of the road and potential end of the road decisions ([143]).

    (3) It encompasses decisions on any issue capable of having "some causal effect" on the award of damages. The casual effect need not be very direct or close ([55]).

    (4) The decision need not be one which determines whether or not damages are awarded: s. 49(1A)(a) is engaged if the decision might (sufficiently) have causative effect on the quantum of damages ([55]). The test is whether it "could ultimately affect quantum" ([56)], in the sense that there is a real and material risk of it having such an effect.

    (5) Interlocutory case management decisions will often fulfil the "as to" damages requirement because they involve a sufficient risk of affecting how the case can be conducted, so as potentially to affect the amount of damages. Accordingly, as the CAT observed at [18] of *Merchant Interchange Fee Umbrella Proceedings* [2022] CAT 50, approved by Green LJ at [54], in pragmatic terms, interlocutory case management

decisions can be presumed to meet the requirement that they may affect the final substantive outcome in terms of the level of damages awarded and so are subject to the appeal route ([54]). This will not be true of all interlocutory decisions. Those concerned merely with timing are unlikely to do so. But those which concern the extent of disclosure of documents, or of admissible evidence, for example, are likely to do so.

(6) There are outer limits where the causative link will be too remote or non- existent. *Paccar* is an example of the latter. It is to be explained as a case on its own particular facts because the CAT's finding about alternative sources of funding meant that the substantive decision would have no causative effect at all on the recovery of damages ([53]).

39. Applying those principles, the issues in this case are, in my view, each "a point of law… arising from a decision of the Tribunal as to the award of damages". It is not disputed that they are points of law. They each arise out of a decision that the Shipping Companies are prohibited from communicating with members of the class and represented persons, without prior permission by the tribunal scrutinising proposed communications, which is a decision which may well affect the quantum of damages; it has already interfered with the Shipping Companies' conduct of their case, invading their litigation privilege, and has the potential to do so in other ways, such as gathering expert evidence, as I go on to consider in more detail below. If a case management decision has a real and material potential effect on how a party is able to pursue and conduct its defence of a claim for damages, that will involve a decision "as to" damages so as to engage s. 49(1A) as the proper route for a challenge, by way of appeal, because it potentially affects the awarding of damages or the quantum of damages awarded. The decision under challenge in this case falls within that territory.

40. I am conscious that the parties agreed in their written submissions before trial that the appropriate course for challenge was by way of judicial review, and I naturally hesitate to depart from the agreed position of legal teams with great experience in this area. Their common position might perhaps have been influenced by the fact that they did not know at that stage that we could constitute ourselves a Court of Appeal and hear the challenge without further delay if it proceeded as an appeal. However that may be, I have not found the reasons they advanced persuasive. The written reasons (which were not developed orally) sought to rely principally on the fact that *Paccar* was treated in *Evans* as correctly decided. Wherever the boundary was set, it was said, if a decision on litigation funding was beyond the limits of s. 49(1A), then so too must be a decision on communications by defendants. This, however, ignores the way *Paccar* was decided (at [59]) and why it was treated in *Evans* as turning on its own particular facts. It was decided as it was because the tribunal's particular findings of fact in that case precluded *any* potential causative link between the decision and an award of damages.

Issue 1: interpretation of the Rules

41. I find it convenient to address the issue under the following headings:

(1) principles of statutory construction;

(2) the Rules;

(3) the Ruling;

(4) the rival arguments in outline;

(5) how collective proceedings before the CAT differ from other forms of civil litigation;

(6) the express terms of the Rules relied upon;

(7) the role of the class representative;

(8) case management;

(9) practical consequences;

(10) the Canadian experience and jurisprudence;

(11) article 10;

(12) conclusions.

Principles of statutory construction

42. In his restatement of the approach to statutory interpretation in *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255, Lord Hodge DPSC (with whom Lord Briggs, Lord Stephens and Lady Rose JJSC agreed) clarified at [29]-[31] that statutory interpretation is concerned to identify the meaning of the words used by Parliament as an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words being considered; and that, in ascertaining that meaning, the context and purpose of the provision are important. See also to similar effect *R v Luckhurst* [2022] UKSC 23, [2022] 1 WLR 3831. The context and purpose can be derived from the words of the instrument themselves, not just individually but taken as a whole, but that is not the only source. Context and purpose may be gleaned from external aids to interpretation such as Explanatory Notes, prepared under the authority of Parliament, and Law Commission Reports, but these play a secondary role. The words of the statute are the primary source by which meaning is ascertained. This applies as much to statutory instruments laid before Parliament as to primary legislation.

43. Where a meaning is not set out expressly in the wording of the instrument, that meaning may nevertheless sometimes be implied. However, where the instrument is silent, the implication must be a necessary one, not merely reasonable or desirable. This is well established by high authority including: *Salomon v A. Salomon & Co Ltd* [1897] AC 22 per Lord Watson at p. 38; *R (Morgan Grenfell) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563 per Lord Hobhouse at [44]; *R (Black) v Secretary of State for Justice* [2017] UKSC 81, [2018] AC 215 per Baroness Hale at [36], [49]. *Okedina v Chikale* [2019] EWCA Civ 1393, [2019] ICR 1635 per Underhill LJ at [20], [46]; and *Privacy International v Secretary of State for Foreign and Commonwealth Affairs* [2021] EWCA Civ 330, [2021] QB 1087 at [69]-[71]. The test is one of necessity, and what this means is that the implication must be "compellingly clear": *B (A Minor) v Director of Public Prosecutions* [2000] 2 AC 428 per Lord Nicholls at p. 463-464; *Pwr v Director of Public Prosecutions* [2022] UKSC 2 [2022] 1 WLR 789 per Lords Hamblen and Burrows JJSC and Lady Arden at [34].

44. One reason for such an approach is that it is a relevant factor against making the implication if it would have been easy enough for the instrument to have said it expressly but did not do so: *Black* at [43], [48]. This is not a sufficient test in itself, but it means that, as Underhill LJ put it in *Okedina v Chikale* at [45]: "It is a healthy principle that courts should be slow to give a statute an effect that is not expressly stated. Parliament should say what it means."

45. Ms Ford KC relied upon a passage in *Bennion, Bailey and Norbury on Statutory Interpretation* 8th edn. at p. 404 in support of a submission that the test is whether the implication is "proper" and that it need not be necessary:

> "It is suggested that the question whether an implication should be found within the express words of an enactment depends upon whether it is proper, having regard to the accepted guides to legislative intention, to find the implication; and not whether the implication is 'necessary' or 'obvious'."

46. The suggestion that an implication may be made if it is proper, rather than necessary, is erroneous and apt to mislead. The authors appear to base it on a passing remark of Willes J in *Chorlton v Lings* (1868) LR 4 CP 374 at p. 387; and a number of Commonwealth authorities which have adopted that formulation as expressed in earlier editions. The distinction between what is "proper" and what is "necessary" which the authors appear to be drawing is that what may qualify as "proper" is something which is not "logically necessary": see p.404. The distinction between what is necessary and what is logically necessary is a narrow one. For my part I would accept that necessary does not mean "logically necessary", because context and purpose have their part to play as well as logic. But the test is still one of necessity as the statements of principle from the House of Lords, Supreme Court and this court, cited above, make clear. Adopting a test of what is "proper" is unhelpful because the concept is elusive: it offers no guide as to what standard is to be applied; and is apt to mislead if interpreted to mean something different from necessity, as Ms Ford submitted it is to be interpreted.

47. In the Supplement to the 8th edition, in a passage to which our attention was not drawn, the authors recognise that the case law establishes that the test is one of necessity in an amending paragraph, referring now also to *Privacy International v Foreign Secretary, B v DPP* and *Pwr v DPP*. It is clear from that passage that the authors' suggestion is directed to what they suggest the law ought to be, not what it is. I would reject the suggestion, but in any event am bound in this court by the law as established at high level.

The Rules

48. Section 47B of the 1998 Act enables a class representative to bring two or more claims on behalf of the class for breaches of competition law (as defined in s. 47A). They are heard by the CAT which comprises a panel which is specially trained and expert in competition law and presided over by a High Cout Judge. Proceedings are initiated by someone seeking to be the class representative applying for permission to commence proceedings by issuing a claim form (Rule 75). The claim form is required to contain, amongst other things, specified details of the class and of the claims (Rule 75(3)) in what is in practice a detailed pleading; and a statement of belief that the claims have a real prospect of success (Rule 75(2)(h)). It must also contain a statement of the basis on which the proposed class representative is suitable to act in that role by reference to the statutory criteria set out in Rule 78 (Rule 75(3)(d)).

49. The claim form is in the first instance filed at the CAT, whereupon the Registrar acknowledges receipt (Rule 76(1)) and checks it for compliance in form with the Rules (Practice Guide paragraph 6.15). The Registrar gives directions as to service, which are governed by Rule 76. The proposed class representative will be directed by the Registrar to serve it on the defendants save where permission to serve out of the jurisdiction is required (Rule 76(1)). In service out cases, permission will be addressed by the CAT which will give directions (Rule 76(9),(10)(a)). When served, defendants must file an acknowledgment of service (Rule 76(4) and (5)), with the Registrar notifying the proposed class representative when acknowledgments are filed (Rule 76(7)).

50. As soon as practical the CAT must hold a case management conference to give directions in relation to the application for a CPO (Rule 76(9)). The making of a CPO is a very important stage in the proceedings which involves scrutiny of both the class representative and the claims (see below), and accordingly the first case management conference is itself an important procedural step. Where a CPO is opposed, the hearing of the application for a CPO may itself be lengthy and require detailed directions, themselves stretching over some time. There may be more than one CMC for the purposes of orderly preparation for the CPO application. In this case the CPO application took three days of court time with the hearing taking place some 21 months after the commencement of proceedings; and the CPO itself was not finalised until 6 months thereafter. Rule 76 identifies, non-exclusively, a number of directions which may be made. Directions will address, amongst other things, how opposition to a CPO is to be handled as a matter of form, content and timing (Rule 76(10)), which does not generally require a defence to be filed (Rule 76(11)) but will require the defences to be sufficiently identified for the purposes of addressing issues as to whether and in what form a CPO should or should not be made. It may involve service of evidence and in some cases disclosure (Practice Guide para 6.28).

51. The next important stage is the making of a CPO after hearing the parties (Rules 77-80), which is often referred to as certification. Consideration of whether to make a CPO, and if so in what terms, involves the CAT authorising an applicant to act as the class representative in accordance with the provisions of Rule 78. It may only do so if "it is just and reasonable" for the proposed class representative to act in that capacity (Rule 78(1)(b)). In addressing that question, it must consider: whether the applicant "would fairly and adequately act in the interests of class members" (Rule 78(2)(a)); that the applicant does not have a conflict of interest with class members (Rule 78(2)(b)); and that the applicant would be in a position to meet adverse costs orders or satisfy a cross undertaking for damages where interim injunctive relief is sought (Rule 78(2)(c),(d)).

52. In considering whether the applicant would act fairly and adequately in the interests of the class members, the CAT must take into account all the circumstances including a non-exclusive list of factors set out in Rule 78(3), which include at (c) whether the proposed class representative has prepared a plan for the collective proceedings that satisfactorily includes (i) a method for bringing the proceedings on behalf of represented persons and for notifying represented persons of the progress of the proceedings; and (ii) a procedure for governance and consultation which takes into account the size and nature of the class; and (iii) any estimate and details of and arrangements as to costs, fees and disbursements which the tribunal orders that the proposed class representative shall provide.

53. Where there is a sub-class whose common issues are not shared by all the class members, a class representative for the sub class can be appointed, applying the same criteria.

54. Considering whether to make a CPO also involves the CAT being satisfied of the eligibility of the claims to be included as raising common issues and being suitable to be heard together (Rule 79).

55. The CPO will specify whether the proceedings are to be opt-in collective proceedings or opt-out collective proceedings, each of which are defined terms in the 1998 Act and the Rules. Opt-in proceedings are those whereby the members of the class are given the opportunity to opt in to the class in a manner and at a time to be specified, in order to become persons whose claims are pursued by the class representative on their behalf. Opt-out proceedings are defined in s. 47B(11) of the Act and Rule 73 as follows:

> "Opt-out collective proceedings" are collective proceedings which are brought on behalf of each class member except—
>
> (a) any class member who opts out by notifying the representative, in a manner and by a time specified, that the claim should not be included in the collective proceedings, and
>
> (b) any class member who—
>
> (i) is not domiciled in the United Kingdom at a time specified, and
>
> (ii) does not, in a manner and by a time specified, opt in by notifying the representative that the claim should be included in the collective proceedings."

56. Opt-out proceedings, as defined, are therefore what in lay terms might be described as hybrid opt-in and opt-out proceedings if and insofar as they involve class members domiciled outside the UK.

57. The CPO application will often involve a close scrutiny of the merits and methodology of the claim, both for the purposes of determining whether it meets the Rule 79 eligibility criteria for certification and, if so, for the purposes of intensive case management of how the claim is framed and how it is to be progressed (see *McLaren* at [44]-[53]). This is sometimes referred to as part of the CAT's gatekeeper role, which is a proactive one which continues after its decision to make a CPO (ibid. [45]-[47]). The CAT has particularly extensive case-management powers in Rules 53-56 and 88 which it can impose of its own initiative at any stage.

58. Once a CPO is made, Rule 81(1) provides that the class representative shall give notice of the CPO to class members in a form and manner approved by the tribunal.

59. Rule 85 provides that the tribunal may at any time, of its own initiative, or on the application of the class representative, a defendant or a represented person, make an order revoking or varying the CPO or staying the proceedings. In doing so it may take into account, amongst other things, whether the class representative still satisfies the suitability criteria for authorisation under Rule 78.

60. Rule 87 deals with applications by the class representative to withdraw after a CPO has been made. It may only do so with the permission of the CAT, which will only be given if, amongst other things, the CAT is satisfied that the class representative has given notice of the application to the represented persons in a form and manner approved by the tribunal (87(2)(a)).

61. Rule 88 deals with case management of collective proceedings. Rule 88(1) provides that the CAT may "at any time, give any directions it thinks appropriate for the case management of the collective proceedings". Rule 88(2) has a non-exclusive list of directions, which includes at (d) that "the class representative give notice in such manner as the Tribunal directs to represented persons of any step taken by the class representative." Rule 88(3) provides that if the Tribunal directs that the participation of any represented person is necessary in order to determine individual issues, the class representative is to give notice of the further hearings to those represented persons in a form and manner approved by the tribunal.

62. Rule 89(1)(c) provides that disclosure may be ordered from represented members of the class, separately from third party disclosure which is provided for in Rule 63.

63. Rule 91(2) provides that where the CAT makes a judgment or order, notice of it is to be given by the class representative to all represented persons in a form and manner approved by the tribunal.

64. Rule 92 deals with the position where the tribunal has made an aggregate award of damages and provides for directions to be given for the assessment of the amount to be received by individual represented members of the class out of that award. Rule 92(3) provides that the class representative shall give notice to represented persons, in such a manner as the tribunal directs, of any hearing to determine what directions should be given for such assessment.

65. Rules 94 to 96 regulate settlements. Rule 94 provides that for opt-out proceedings, once a CPO has been made settlement can only be made by a collective settlement approved by the tribunal in accordance with that Rule. Rule 94(2) provides that any offer to settle by a defendant in the collective proceedings shall be made to the class representative. The application to the tribunal for settlement approval is then to be made jointly by the defendant(s) and the class representative, which must include, amongst other things, details of the form and manner in which the class representative is to give notice of the application to the represented persons (or to the class members if it is before the opt-out date): 92(4)(f). The tribunal may direct that notice is to be given in that manner or any other manner: Rule 94(6). Rule 94(13) provides that if the tribunal approves the collective settlement offer, the class representative shall give notice of the terms of the settlement and its approval in a form and manner approved by the tribunal to the represented persons (or to the class members if it is before the opt-out date).

66. Finally I should mention Rule 4, which sets out governing principles applicable to all CAT proceedings including collective proceedings. It requires the CAT to seek to ensure that each case is dealt with justly and at proportionate cost, which includes so far as practical the objectives set out in Rule 4(2). Those mirror the terms of the Overriding Objective in Part 1 of the Civil Procedure Rules, such as ensuring that the parties are on an equal footing, saving expense, and dealing with the case proportionately, expeditiously and fairly. Rule 4(4) provides that the CAT shall actively manage cases, with Rule 4(5) giving a non-exhaustive list of steps which active case management involves. Rule 4(7) requires the parties to cooperate to give effect to the principles set out in the Rule.

The Ruling

67. The Tribunal gave its reasons for construing the Rules as imposing the Restriction at paragraphs 16 to 24 of its Ruling.

68. At paragraph 18 of the Ruling, the Tribunal said that the making of the application to commence the proceedings by the filing of the claim form itself accorded the proposed class representative "a certain status" before any CPO was made, relying on the definition of a CPO in Rule 73(2) as "an order authorising *the continuance* of collective proceedings" (its emphasis), suggesting that the collective proceedings have been commenced prior to that date. The Tribunal did not identify what it meant by "a certain status" beyond saying that it was reflected in the parts of Rule 76(1) which required the acknowledgment of receipt of the claim form by the Registrar to be given to the proposed class representative; and for the Registrar to *direct* (its emphasis) the service of the claim form on the defendant(s).

69. The Tribunal also relied in this connection on the provision at Rule 77 that the CAT may make a CPO "after hearing the parties"; and said that it was clear that proposed members of the class were not "parties". It referred to the definition of "represented person" in Rule 73(2) as someone who had opted in or opted out in accordance with a CPO once made, and suggested that prior to the making of a CPO, potential or proposed class members were potential or putative represented parties (its own term, not a defined term). This was said to support the conclusion that communications in relation to collective proceedings even prior to the making of a CPO should only be between parties and this does not include putative represented persons.

70. At paragraph 20 the Tribunal said that the whole point of the collective proceedings regime is that the represented persons are represented by the class representative, treating this as support for the conclusion there expressed that communications regarding the collective proceedings should be between the parties, who do not include represented persons or putative represented persons. At paragraph 21 it said that not only was this the clear effect of the language of the Rules but that it accorded with the purpose of collective proceedings, which enabled the bringing of claims collectively in circumstances where it would not be efficient or cost effective to bring them individually. The point of the regime was to enable the class representative to incur one set of costs, which was why individual class members generally have no exposure to adverse costs orders. Communications regarding collective proceedings, if directed to class members, are liable to result in costs being incurred not merely to no purpose but to the disbenefit of the regime as a whole. "That is why we consider the rule against communication by defendants to the class regarding the collective proceedings to be as absolute as it is."

71. At paragraph 22 the Tribunal said that it had not been assisted by the materials which it had been shown as to the position in other jurisdictions, notably Canada, because the question turns very much on the precise wording of the Rules, which it considered to be unequivocal. At paragraph 23 the Tribunal said that "the true nature of collective proceedings explains a number of other facets of the collective proceedings regime". The two facets identified were (1) the sanctioning of collective proceedings by the CAT in making a CPO applying the criteria in Rules 78 and 79; and (2) particular parts of the Rules requiring the class representative to engage with the represented persons in certain defined ways, often with oversight from the CAT. It referred specifically to Rules 81(2), 87(2)(a), 88(2)(d), 88(3), 91(2), 94(2), 94(4)(f) and 94(13).

The rival arguments in outline

72. Ms Demetriou criticised the approach of the Tribunal and MMCR as failing to treat the wording of the Rules as the primary source by which meaning is ascertained. There is nothing in the wording of the Rules which justifies the implication as a necessary one. Moreover such implication is counter-indicated by Rule 94 which is inconsistent with it; by the practical consequences of the Restriction; by the Canadian jurisprudence and experience; and by article 10.

73. Ms Ford sought to support the decision of the Tribunal for the reasons it gave and by reference to: the particular role allocated to the class representative; the express provisions in the Rules referred to in the Ruling (and Rule 92(3)); and the important case management role of the CAT.

How collective proceedings before the CAT differ from other forms of civil litigation.

74. There is no general rule in civil litigation which prevents a defendant or its legal representative from communicating directly with a claimant about the case. Nor is there any rule of professional conduct for solicitors which imposes a blanket ban on communications from a defendant's solicitor to a claimant directly where the claimant is legally represented. No doubt the court would be able to impose such a restriction if the circumstances of an individual case required it, although I am unaware of any particular instance of it having done so. However, the default position is that there is no prohibition on direct communication between the person whose claim is being advanced and the person against whom it is being advanced, notwithstanding that one or both of them may have solicitors on the record conducting the litigation. Absent fact-specific reasons for an order being made in a particular case, the general rule and widespread position in practice is that such communications are permitted. That is not regarded as contrary to the Overriding Objective.

75. This is equally true in each of the three ways in which civil claims can be advanced by or on behalf of a group of claimants with a community of interest. The first way is by representative proceedings. Under CPR Rule 19.8, where more than one person has the same interest in a claim, the claim may be begun by a single person representing the class of those sharing the interest. This is a form of proceeding which has existed for several hundred years, having its origins in the procedure of the Court of Chancery before the Judicature Act 1873: see *Lloyd v Google* at [33]ff. It is not a necessary part of the jurisdiction to bring such a claim that all members of the class of represented persons have authorised it. A represented person may be bound by the result without taking any positive step and without even being aware of the existence of the claim: see *Lloyd v Google* at [77]. In this respect it shares the "opt-out" characteristics of opt-out collective proceedings before the CAT. The community of interest between the representative and those represented which is required by CPR Rule 19.8 is to ensure that the representative does not have any conflict of interest with those who are represented: ibid [71]. This mirrors Rule 78(2)(b) of the Rules in collective proceedings. The Court has some supervisory power over who acts as a representative by reason of CPR Rule 19.8(2) under which it may direct that a person may not act as a representative.

76. The second way in which group claims may be advanced is through a group litigation order ('GLO claims'), which is governed by CPR Rules 19.21 to 19.26. GLO claims typically involve a large number of small claims, sometimes many thousands, which enable

economies of scale to render the pursuit of the claims cost effective: see for a recent example *Municipio de Mariana v BHP Group (UK) Ltd* [2022] EWCA Civ 951 [2022] 1 WLR 4691. A register of claims included within the group is maintained by the group's lead solicitor, and unless the court otherwise orders, a judgment made in the litigation is binding on all the claimants included in the group. Such proceedings are "opt-in" because each individual claimant must authorise his inclusion in the group. Such cases are actively and intensively case managed: see *Mariana* at [135]-[139].

77. The third way in which a group of claims may be pursued is by claims brought individually but which are case managed together, with all the case management tools available to the court, including preliminary issues and test cases. These have been used to manage litigation of considerable complexity involving very large numbers of parties and issues, as, for example, in the litigation arising out of the losses at Lloyd's in the late 1980s and 1990s: see *Deeny v Gooda Walker Ltd* [1994] CLC 1224 and the many related cases.

78. What then are the essential features of collective proceedings in competition cases before the CAT which distinguish them from these other forms of group claims? The two key features identified in *Lloyd v Google* at [29] to [32] as marking them out from GLO claim actions pursuant to CPR Rules 19.21 to 19.26 are the availability of opt-out proceedings, and the availability of aggregate damages. As to the first, opt-out proceedings enable members of the class to have their claims advanced without their knowledge. This contributes to the cost effectiveness of such claims to a greater extent than opt-in forms of group action for several reasons: it ensures the inclusion of claims by those unaware of the collective proceedings; it takes advantage of the inertia of those who are aware of the proceedings; and it avoids the administrative costs of individual claimants having to authorise GLO group claims: *Lloyd v Google* at [25]-[27], *Merricks* at [92]. As to aggregate damages, this enables the CAT to award damages without the need for proof of loss by individual claimants, thereby again improving the cost efficiency of the bringing of claims: see *Lloyd v Google* at [28].

79. Neither of these distinguishing features has any bearing on whether there should be a general prohibition on communications between a defendant and represented persons in collective proceedings. The availability of aggregate damages is immaterial. The availability of opt-out proceedings is not, in fact, a feature distinguishing collective proceedings from representative proceedings, in which represented parties may be unaware of the existence of proceedings being pursued for their benefit: no doubt many non-working names at Lloyd's are commonly unaware of their syndicates' litigation in which they are represented parties. But even if it were, it is not a material distinction for present purposes. It is not suggested by MMCR, or by the Tribunal in its Ruling, that the prohibition on communications is to be implied into the Rules for opt-out proceedings only, and I can see no principled basis for doing so. Indeed opt-out proceedings, as defined, are hybrid in that they have an opt-in element for those domiciled outside the UK.

80. I find this comparison between collective competition proceedings in the CAT, and other procedural forms for collective pursuit of civil claims, instructive. If it is not necessary for other civil claims, pursued individually or collectively, to be subject to the Restriction, and there is nothing in the context and purpose of the collective proceedings in the CAT which makes them distinguishable in any way which is material to this issue, it is difficult to see how the context or purpose of collective competition proceedings can justify implication of the Restriction as a necessary one. The comparison suggests, at least, that the express words of the individual Rules are not merely the primary source, but the only source, from

which the implication could be justified. There is nothing in the scheme of the regime which gives rise to the implication as a matter of necessity.

81. Moreover, the Rules were drafted against the background of the absence of any such restriction in collective pursuit of civil claims generally. I have already referred (at [44] above) to the authorities which indicate that it is a factor against an implication, although not a conclusive one, that the instrument could easily have stated expressly what is said to be implied. That is a factor against the implication contended for in the present case. That factor becomes all the stronger when the prohibition does not exist in other forms of collective civil litigation from which collective proceedings are not materially distinguishable. If it were intended to introduce a rule for collective proceedings which departed from the position in other materially indistinguishable forms of civil litigation, there is all the more reason to expect such intention to have been made manifest in express terms.

The express terms of the Rules relied on

82. There is nothing in the individual references in the Rules to communications with the class representative, individually or collectively, which can bear the weight of giving rise to the implication as a necessary one.

83. The specific references to matters which are to be communicated by the class representative to the members of the class fall into the following categories:

    (1) Rules which provide for communication of tribunal judgments orders and directions, in a form and manner to be approved by the tribunal: Rules 81(1), 88(3), 91(2), 92(3), 92(4)(f) coupled with 94(6), and 94(13). In these cases the class representative is essentially the conduit for communications from the tribunal in a form to be determined by the tribunal. They do not involve reposing any trust and confidence in the class representative as to the terms of the communication, which are determined by the tribunal itself, and are only concerned with tribunal directions and orders. They do not lend any support to a necessary implication about what is to happen in relation to the myriad of communications between litigants which form the common coinage of complex litigation.

    (2) A Rule providing for a situation in which the class representative wants to act contrary to the interests of the represented class members by withdrawing: Rule 87(2). That is a particular instance in which it is obviously appropriate to require the class representative itself to give notice. Again it lends no support for a necessary implication of the Restriction.

    (3) A Rule which is permissive, such that the tribunal may, but need not, require such a method of communication: Rule 88(2) which provides that the tribunal may order a class representative to notify represented persons of any step taken by the class representative. This does not proscribe communications by other means about steps taken by a class representative. Such a provision cannot therefore support a proscription in other circumstances.

84. Rule 94(2) requires particular consideration because it is, in my view, inconsistent with the implication contended for. I will assume that it is to be read as prohibiting an offer to settle being made directly to represented persons in the circumstances to which it applies

(although on its face it only requires service on the class representative as opposed to prohibiting other forms of service in addition). Even so, it is inconsistent with the implication contended for two separate reasons.

85. First, if there were implied a ban on all communications between defendants and represented persons it would be surplusage. The offer to settle would have to be made to the class representative by reason of the Restriction. The fact that such a restriction is imposed specifically for this particular circumstance suggests that it does not apply more generally, and that the reason for it lies in the particular context of collective settlement offers, which by their nature have to be accepted collectively, rather than more generally.

86. Secondly, Rule 94(2) only applies to some aspects of settlement of collective proceedings. It is of no application to opt-in proceedings. The Rules must therefore envisage that a defendant is free to negotiate and conclude an individual settlement directly with an individual claimant in opt-in proceedings. This is consistent with the definition of collective settlements in s. 49A(1) of the 1998 Act which confines them to opt-out proceedings. Moreover, Rule 94 is expressed to apply only to the position after a CPO has been made, suggesting that prior to certification a defendant may negotiate settlements directly with members of the class even where the certification is sought on an opt-out basis. Both those aspects are inconsistent with the Restriction as formulated and supported by MMCR as applicable to all collective proceedings, whether opt-in or opt-out, and from the moment of filing of the claim form.

The role of the class representative

87. Once a CPO has been made, the class representative has a status as someone approved by the court as both authorised and suitable to represent the interests of the class members as a whole. The claims being advanced are those of the represented parties, not the class representative (save if and to the extent it is a member of the class). The represented parties may have no knowledge of the representative and may not even know that they have claims which are being advanced on their behalf. The class representative is thus in a trusted position and owes fiduciary duties towards those it represents (*UK Tucks Claim Ltd v Stellantis NV* [2023] EWCA Civ 875 at [91]), just as a solicitor does to its client in other forms of civil litigation. The tribunal vets the class representative for suitability to perform that role in accordance with Rule 78 before the CPO is made. Thereafter the tribunal does not, save in the specific instances identified above, supervise communications between the class representative and those whom it represents. There will be a wide range of matters which arise in the course of the sort of complex litigation which collective proceedings usually comprise, where the class representative is left to form its own judgement, in accordance with its fiduciary duty, as to the extent, content and timing of communications with the represented class members.

88. Ms Ford laid particular emphasis on this trusted role of the class representative as someone vetted for suitability by the tribunal and entrusted with the task of exercising its judgment as to communication with the represented class. She submitted that absent the Restriction there was a real risk of subversion of this role by inappropriate communications from defendants.

89. There are two reasons why this does not support the implication contended for as a necessary one. First, the same is equally true of a solicitor conducting litigation on behalf of any claimant in civil proceedings. The solicitor may be acting for a large number of

claimants. Although the solicitor is not vetted as suitable by the court, an equivalent vetting process arises by the regulatory framework of the solicitors' profession, with its training, rule-making and disciplinary functions. The solicitor owes a fiduciary duty to all the persons represented, just as does a class representative in collective proceedings, and in that role is trusted to exercise its professional judgment as a fiduciary in communicating with those represented. Moreover the trusted role of a class representative in collective proceedings in the CAT applies equally to a lay claimant who is acting in a representative capacity in representative proceedings. They too are subject to supervisory oversight by the court by reason of CPR Rule 19.8(2). In neither such case is the solicitor or the representative claimant respectively required to be the conduit for communications: defendants and their solicitors are free to communicate directly with claimants. If a restriction is not made necessary by the role of the solicitor or representative claimant in civil claims, there is nothing in the similar role of a class representative in collective proceedings which makes it necessary.

90. Secondly Ms Ford's submission focussed on the position after a CPO is made, but the position is different unless and until that occurs. Until a CPO is made, the proposed class representative has no such representative status. The issuing of the claim form does not clothe it with authority to pursue claims which belong to others, and confers no badge of suitability. It may be entirely unsuitable to fulfil that role. A proposed class representative is no more than a self-appointed would-be class representative. MMCR's submissions were underpinned by the argument that permitting direct communication between the defendants and members of the class was justified by the members being able to rely upon the class representative to look after their interests as the conduit in communications with the defendants, because it had been vetted as suitable for this purpose. That is not so prior to the making of a CPO.

91. In its Ruling the Tribunal referred to the proposed class representative having a "certain status" from the moment of commencement of proceedings by the filing of the claim form. The Tribunal did not identify what it meant by "a certain status" beyond saying that it was reflected in the parts of Rule 76(1) which required the acknowledgment of receipt of the claim form to be given to the proposed class representative and for the Registrar to direct the service of the claim form on the defendant(s).

92. The question of when collective proceedings have been "commenced" prior to the making of a CPO is not straightforward. The filing of the claim form is said in Rule 75(1) to be an *application to commence* proceedings (my emphasis). However, the Rules do not provide expressly for the granting of permission to commence proceedings, although both the checking of the claim form by the Registrar and the scrutiny by the CAT at the first CMC may involve the proceedings being permitted to go no further (for example through a defect in form or refusal of permission to serve out of the jurisdiction); and perhaps directions by the Registrar for service (or the CAT in service out cases), or directions by the CAT in relation to the CPO application at the first CMC, are to be treated as the granting of the application to commence proceedings which the filing of the claim form comprises.

93. It is not necessary to determine when collective proceedings are "commenced" for the purposes of the present challenge. It is, however, important to recognise that there may be a very considerable amount of adversarial interlocutory activity prior to the determination of the CPO application, at a time when the proposed class representative may be someone whom the CAT subsequently determines is not someone who can properly be trusted to look after the interests of the class members it wishes to represent. It would be surprising,

to say the least, if it were a matter of necessary implication of the Rules that at that stage the defendants were bound to communicate through the medium of a potentially unsuitable self-appointing proposed class representative. Nothing in Rule 76 providing that the Registrar will acknowledge the filing of the claim form to the person who has filed it, and that service on the defendants is to be undertaken by the person who has filed the claim form, would justify that conclusion.

94. The Tribunal also relied in this connection on the provision at Rule 77 that the CAT may make a CPO "after hearing the parties"; and said that it was clear that proposed members of the class were not "parties". This was said to support the conclusion that communications in relation to collective proceedings even prior to the making of a CPO should only be between parties and this does not include putative represented persons.

95. I am unable to accept that the wording of the Rules dictates such a conclusion, which again I find a surprising one. Defining class members as such rather than parties says nothing about communications from the defendants towards them, or even whether they may participate in the CPO application. There is nothing in the requirement to hear "the parties" which precludes hearing from others. One would have thought that a class member who wishes their claim to be pursued in collective proceedings, but regards the proposed class representative as unsuitable, should be allowed to participate in the CPO hearing to make representations to that effect; and, in an appropriate case, to support them with evidence of unsuitability. I can see no good reason why such a member should be precluded from writing directly to the defendants laying out their objections and seeking the defendants' support. Nor can I see any good reason in the converse situation where it is one of the defendants who has particular evidence of the unsuitability of the self-appointed proposed class representative and wants to draw that to the attention of class members. In such circumstances, the interests of the would-be class representative are in not passing the communications on to the class members; and the less suitable it is, the less likely it is to do so.

96. It might be thought that these last points about the position prior to making a CPO have no bearing on whether the Restriction might properly be implied in a modified form so as to apply once a CPO has been made, but that is not so. Rule 85 provides that an application may be made by, amongst others, a defendant or a represented person to vary or revoke the CPO so as to remove or substitute the appointed class representative on the grounds that they no longer fulfil the suitability requirements in Rule 78. This recognises that there may come a time after a CPO has been made when the class representative may not be someone who can be trusted fairly and adequately to look after the interests of all the members of the class. If so, the position is the same as pertained prior to the making of the CPO.

Case management

97. Ms Ford relied on the particularly extensive case management powers in Rules 53-56 and 88 which the CAT can impose of its own initiative at any stage. She referred to [48] of *Le Patourel* where Green LJ noted that the CAT Guide recognised that opt-out collective proceedings require intensive case management by the CAT and that this is justified by the need to protect the class.

98. This is not a distinguishing feature from other forms of civil litigation in which claims are pursued collectively, including GLO claims, or multiple individual claims case managed together, such as those arising in the Lloyd's litigation referred to above. It is a factor

which in my view militates against the implication contended for rather than in its favour. The intensive case management is designed to be case- specific and provide for the overriding objectives identified in Rule 4 to be achieved in the context of each individual set of collective proceedings. It must be borne in mind that both the nature of collective proceedings, and the size and make-up of the represented class, may vary enormously from case to case. The issues may be more or less complex. There may only be a few members of the class or they may be numbered in millions (we were told that in the *Merricks* litigation the estimate of represented class members was some 46 million). The class may comprise or include individual consumers who are unsophisticated and inexperienced from a litigation point of view. It may include businesses of varying size and sophistication up to and including those with well-resourced in-house legal departments, ready access to external legal advice and plentiful litigation experience and expertise. It may include businesses with whom a defendant has an ongoing business relationship which will inevitably touch on the subject matter of the collective proceedings. If a default rule against communication between defendants is to arise by necessary implication from the Rules, it must be necessary to imply it in every case to which the Rules might apply, including, at the extreme, proceedings between two large and commercially sophisticated businesses as class members and one large and commercially sophisticated defendant, who are continuing to do business with each other in the commercial area which is the subject matter of the proceedings. It is difficult to see how in such a case the implication contended for would be necessary. This may be an improbably extreme example, but the same point would apply to communications between such businesses if the large business class member were merely part of a much wider class of represented persons comprising in addition many individual consumers. If, on the other hand, it is a matter of case management to impose restrictions, they can be tailored to the requirements of each case, including the position of individual consumers who might require greater protection than others. It may be appropriate to impose some restrictions at the initial CMC or when making the CPO, but that should be a matter which depends on the particular nature of the claim and the make-up of the class and the parties. I will return to this possibility below.

Practical consequences

99. At first sight the difference between the parties might be thought to be a relatively narrow one. The Ruling of the Tribunal, and MMCR's case, recognises that communication might be justified in some circumstances and permitted by the CAT. The CAT has recognised that such communication is in principle appropriate in this case for the purposes of disclosure of documents by its order of 6 April 2023. Conversely, the appellants recognise that if there is no a priori restriction, the CAT can nevertheless impose a restriction by way of its case management powers in appropriate circumstances in individual cases. The dispute would therefore appear to be about what the default rule should be, rather than about whether a particular communication should be permitted in a particular case.

100. However the difference is of practical importance for two reasons. First the default rule affects what happens as a matter of timing, which may cause damage which cannot readily be undone by an order from the Tribunal which applies prospectively. This applies in both directions. If a defendant were to undertake a multi media campaign on the morning of the last day for opt-out, misleadingly telling class members that they had best opt out because the claim was hopeless and they would suffer disastrous costs consequences if they didn't, it is not easy to see that the damage could be fully remedied by any subsequent order: merely extending the opt-out date and ordering the defendants to publish corrective

material would not do so. Conversely, if the class representative gives an interview about the claim which is prominently published in the media, which sometimes happens, the defendants should be entitled to respond. Business reputation may be at stake. It would unfairly prejudice the defendants if they had first to come to the CAT and have the terms of any response scrutinised, which might be a lengthy process, and subject its proposed response to objections from its opponent, the class representative. Damage to reputation is most readily mitigated by a swift response and the news cycle moves on quickly. The damage may have been irremediably done. Moreover in such circumstances the journalistic aspect of article 10 rights would be engaged as well as those of the defendants.

101. Secondly, the decision of the CAT on the disclosure application illustrates that the Ruling has been interpreted as requiring intensive scrutiny of any permission to make a direct communication because it involves an exception to a general rule, and this is encouraged by what was said by the Tribunal at paragraph 29 of the Ruling that it is a "process which should be conducted under the overall supervision of the Tribunal". MMCR maintains that this is the correct approach. The Ruling therefore affects not only whether permission is granted but how applications for permission are to be approached. That has ramifications for a number of arguments advanced by Ms Demetriou for the appellants as to the practical consequences of the Ruling.

102. At the forefront of her argument that the Restriction brings unacceptable and unfair consequences was the submission that it interfered with litigation privilege. In this case, the Shipping Companies had to disclose the detail of their approach to class members in seeking disclosure of relevant evidence, notwithstanding that such an approach had been sanctioned as appropriate in principle by the CAT's April 2023 order.

103. There is considerable force in this argument. Tribunal scrutiny of such an approach is an invasion of litigation privilege because it forces the defendants to disclose to their opponents details of their pursuit of evidence for the purposes of defending the claim. That is a class of communications which attracts litigation privilege because the communications are for the dominant purpose of the litigation. The vice in litigation privilege being invaded in respect of the conduct of a party's case in preparations for trial is that it may involve a party having to reveal to its opponent aspects of its litigation strategy, or its unused material. But the right to maintain privilege does not depend on whether it does so in a particular case. The privilege attaches to a class of communications. Moreover, where legal professional privilege exists, it is inviolate: there is no balancing exercise to be undertaken between the interest in maintaining privilege and competing public interests in disclosure of the communications; privilege is a right, which cannot be overridden as a matter of case management or discretion: *R v Derby Magistrates Court Ex p B* [1996] AC 487; *Three Rivers DC v Bank of England (No 6)* [2005] 1 AC 610 at [25]. The Ruling has resulted in that principle being breached in this case, and would potentially do so in many other collective proceedings before the CAT. That poses an unfair dilemma for defendants between foregoing their privilege or foregoing their legitimate pursuit of evidence.

104. Ms Ford suggested that no litigation privilege existed in such a situation either because the communication was with "an opponent", or by reference to the doctrine of common interest privilege. This was mistaken. The common interest she invoked was that between the class representative and members of the class. The litigation privilege in issue, however, is that of a defendant in its communications with a member of the class; whilst that privilege does not exist vis a vis that particular class member in the communication

between them because it lacks the quality of confidentiality, it remains vis a vis all the other members of the class, with whom the defendant has no common interest.

105. A consideration of the effect of the Restriction on privilege does not stop with what has happened or may happen in this particular case; what matters for the purposes of testing the argument is whether privilege may be invaded in all cases to which the Restriction applies, i.e. all collective proceedings. There is an obvious risk of that occurring in relation to most applications for disclosure from represented class members, which are specifically contemplated by Rule 89(1)(c). One can readily foresee that it may do so in other ways, apart from disclosure. One obvious opportunity for it do so is in relation to expert evidence. Defendants in collective proceedings will very often need to advance expert evidence. Taking steps to secure expert evidence for the trial will require them first to identify an appropriate expert, from what may in some cases be a limited field given the expertise required. Those it wants to approach might be members of the class, for example relevant vehicle purchasers in the present case, or payment card holders in the *Merricks* proceedings. Whilst an expert, once instructed, would fall outside the class because of the specific definition of Excluded Persons in the CPO, that would not apply to the previous stage at which initial inquiries are made of potential appointees. It is common for there to be such a stage in which potential expert witnesses are assessed for their suitability, both in terms of expertise/experience and their provisional views. It is not uncommon in complex litigation for a number of potential experts to be approached. They may also need to be approached, and discussions take place, before a party is in a position to ask the CAT to make an order for expert evidence in appropriately framed terms. A class representative is free to approach any number of potential experts until it finds one whose views are regarded as most favourable for the conduct of its case. The less favourable or perhaps unfavourable views of others would remain clothed in litigation privilege. Not so for defendants under the Ruling, who would be bound to disclose such approaches if the potential expert happened to be a member of the class. This would be contrary to the overriding objective in Rule 4 of putting the parties on an equal footing or dealing with the case fairly. It would unfairly interfere with defendants' pursuit of evidence and the fair conduct of their defence. One could multiply examples. Nor is this necessarily limited to litigation privilege. It might also apply to legal advice privilege. Lawyers are excluded from the class but again, only once instructed. That does not cater for so called "beauty parades" which commonly occur in larger cases, whereby solicitors and their clients consult a number of members of the bar before deciding who to instruct to conduct a case.

106. The Restriction also interferes with the ability of defendants to act in the normal course of business, which is not carved out as an exception where it overlaps with the subject matter of the proceedings, including compromising a legitimate entitlement to commercial confidentiality. If, say, a Shipping Company were refinancing its fleet, it might well have to disclose its views on the merits and anticipated outcome of the collective proceedings to members of the class (by reason of the financing institution being an institutional purchaser of qualifying vehicles, or the relevant officers, agents or employees being such purchasers). The Ruling would require it to disclose details of such intended refinancing discussions to the whole of the class, through the class representative, who might include the CEO of a rival shipping company to whom the information would have significant commercial value to the detriment of the defendant. This would unfairly compromise the Shipping Company's confidentiality in its commercial strategy and/or impede its business development. One can envisage many circumstances in which a similar unfairness might arise in which a defendant to collective proceedings may wish to, or be obliged to, disclose

its views as to the merits of claim in the collective proceedings in the normal course of its business operations, including, for example, regulatory requirements in corporate restructuring/capital raising; and in which such disclosure falls to be made to people or entities who fall within the class (e.g. payment card holders).

107. An example of such interference with legitimate business interests and commercial confidentiality which has already occurred as a result of the Ruling is *CICC v Visa & Mastercard* [2023] CAT 1. That ruling was given in collective proceedings brought on behalf of businesses which accept payment cards, claiming damages for allegedly unlawful interchange fees. A feature of that case, which has not yet been certified, is that thousands of individual claims had already been lodged or threatened against Visa and Mastercard, claiming damages for alleged losses for similar competition law breaches which overlapped with the subject matter of the collective proceedings. The communications were generally made on a without prejudice basis. The tribunal agreed that the Ruling caught all such communications in proceedings or threatened proceedings with overlap, and that permission was required. It imposed limitations on how communications could take place for each of the two categories, namely where proceedings had been commenced prior to the collective proceedings and where they had been threatened but not commenced. In relation to the latter the tribunal imposed a blanket ban on communications with defendants; in relation to the former, it imposed limitations on communications with defendants, including, for example, a ban where merchants were not legally represented. Where the ban remained, Visa/Mastercard could not respond without specific permission from the CAT on a case by case basis, which would "inevitably involve a degree of disclosure (to the Tribunal and the relevant Proposed Class Representative) of the identity of the merchant and the nature of the discussion". The effect of the Ruling was that Visa and Mastercard have to air in public aspects of their settlement strategy in ongoing litigation and potential litigation involving thousands of claimants; and that restrictions were imposed on those claimants, as well as Visa and Mastercard, in how they could go about settling claims which had been initiated or threatened prior to the commencement of the collective proceedings. This is a striking interference with the normal course of business not only of defendants, but also of members of the class.

108. My conclusion so far as practical consequences are concerned is that whilst there are potentially unsatisfactory consequences on both sides' case, there are three aspects which militate against the implication contended for, which, it is worth re-emphasising, must be a necessary one. The first is that it is likely to inhibit a defendant's ability to conduct its defence, and thereby operates unfairly, an unfairness which is not remedied by the ability to seek permission from the CAT which involves having to forego legal privilege. The second is that it may unfairly interfere with a defendant's legitimate interests in the normal conduct of its business, and the normal course of business of class members. It might be said that each of these could be avoided by a careful case management approach by the CAT towards the applications for permission, so as not to require disclosure to the class representative in anything more than a generic form, and/or the use where appropriate of confidentiality clubs with which the CAT has plentiful experience. But that has not been the experience of the application of the Ruling in this case, which has treated the implication in the Rules of a prima facie restriction on all communications as requiring detailed scrutiny by the tribunal itself (and therefore disclosure to the class representative of the scrutinised material) if any departure from the restriction is to be allowed. Further, if the application for permission were framed in such generic terms as to avoid the problem (e.g. we wish to seek some disclosure of documents from some class members) it would not enable the CAT

to determine whether a departure from an existing prohibition implied in the Rules is justified. I am not persuaded that the adverse practical consequences of the Restriction can be avoided in this way.

109. The third aspect of the practical consequences of the Restriction, which points away from it being a necessary implication, is the experience in Canada. Although one can posit hypothetical examples of unwelcome practical consequences with the position adopted by both sides, the experience in Canada, where no such general prohibition applies, suggests that a general prohibition is not necessary to achieve the purpose of the regime. I now turn to that Canadian experience and jurisprudence.

The Canadian experience and jurisprudence

110. Many Canadian provinces and territories developed a statutory structure for collective proceedings, there called class proceedings, including Ontario in 1992 and British Columbia in 1996. They were the model on which collective proceedings were introduced here in 2015 by amendment of the 1998 Act. They have substantially the same purpose. The Canadian jurisprudence is of some persuasive value as to statutory construction of the domestic legislation because the latter is based on the former, and the Canadian Courts have greater experience of the operation in practice of what is a system serving substantially the same purpose. By contrast the regime here is in its relative infancy: few collective actions have progressed meaningfully beyond the certification stage and none has yet reached the point of returning damages to class members. See *Merricks* per Lord Briggs JSC at [37]-[42] and *Le Patourel* per Green LJ at [30], subject to the caveats articulated in *LSER v Guttman* at [40]-[41].

111. We were referred to two cases of relevance from Ontario. In *ALS Society of Essex County v Corp of the City of Windsor* [2016] ONSC 676, Patterson J sitting in the Superior Court of Justice of Ontario was concerned with two class actions, which he had certified as opt-out proceedings, brought against the City of Windsor and the Town of Tecumseh, alleging that they had charged illegal bingo licence fees. The City and the Town had instituted a multi-media campaign seeking to persuade members of the class to opt out, drawing attention, amongst other things, to the fact that if they were found liable, it would result in higher taxes and/or lower expenditure on other public services. The class representatives sought relief which included a direction that the defendants be restricted in communicating with potential class members. Patterson J observed at [8] that there was nothing in the Ontario legislation (the Class Proceedings Act 1992), which prevented defendants from communicating with class members; and they had a constitutional right to do so as long as they did not engage in conduct or communication which is inaccurate, intimidating or coercive or made for some other improper purpose aimed at undermining the process of the court. He cited the statement of principles by Hoy J in *Smith v National Money Mart Co* (2007) 157 ACWS (3d) 1001, [2007] OJ No 1507, where the latter had emphasised that there was no absolute prohibition on such communications, and that an order limiting communication was an extra-ordinary one which had to be justified as necessary to avoid a real and substantial risk to the fair determination of the class proceeding. On the facts Patterson J determined that the multi-media campaign "went over the line" so as to exert "undue influence" on members of the class, and made an order that there be no further information promulgated by the defendants about the opt-out beyond what had already occurred.

112. The significance of the case for present purposes is twofold. It confirms the position in Ontario that the substantially similar form of class proceeding in that jurisdiction does not expressly or impliedly contain a blanket prohibition on communications between defendants and members of the class, and that any restriction on such communication has to be justified on a fact-sensitive basis. Secondly it suggests not only that such a regime is regarded in Ontario as one which satisfactorily balances the interests of the parties and class members, but also that it is regarded as workable in practice.

113. This latter point is also illustrated by the decision of Perell J, also in the Superior Court of Justice of Ontario, in *Del Giudice v Thompson* [2021] ONSC 2206. In that case the class proceedings, which had not yet been certified, were brought against various affiliated companies of the Capital One banking group and a Mr Paige, who was alleged to have hacked its data base, leading to the compromise of the personal information of some 90 million customers. Capital One gave notice that it was intending to send a letter to some 51,000 of its customers, who comprised class members, and the proposed class representative sought injunctive relief to restrain it from doing so. Perell J rejected the application on the grounds that the proposed communication did not risk affecting the integrity of the class proceedings. He added a "Postface" at the end of his judgment in the following terms:

> "[52] Not as a matter of judicial decree and more as a matter of recommendation, I add this postface to comment how, in my opinion, communications with class members might be handled in the future to avoid what happened in the immediate case.
>
> [53] In this regard, I suggest that once a class action has commenced:
>
> a. If the defendant wishes to communicate with class members and the communication is: (a) out of the normal course of the defendant's business or affairs; and (b) on a topic that is substantively significant to the class action, then - not as a matter of courtesy - but as a means to avoid problems and objections, the defendant's lawyer should ask Class Counsel if there are any problems or objections to the notice.
>
> b. Class Counsel should respond with its objections, if any. Class Counsel should appreciate that for unofficial notices from the defendant, the court has a high threshold for exercising its jurisdiction to supervise the communication.
>
> c. If Class Counsel has comments, the defendant's lawyer should consider Class Counsel's comments and objections seriously. For example, Class Counsel may have advice as to how not to alarm the class members by the details of the notice. In a given case, it is even conceivable that Class Counsel may not wish to discourage the Class Members from obtaining such benefits as the defendant may be offering.
>
> d. If after considering Class Counsel's comments, there remains a dispute between the parties about the notice, then the defendant's counsel should consider inviting Class Counsel to schedule a case management conference to determine whether a motion is actually warranted to address the propriety of the notice.

> e. If after considering Class Counsel's comments, there remains a dispute between the parties and the defendant's counsel decides not to suggest a case management conference, then the defendant should issue its communication. The defendant, however, should understand that proceeding in this way runs the risk that the plaintiff will move for an order that a corrective notice be issued likely at the expense and possible embarrassment of the defendant.
>
> f. In any event, neither side should use the occasion of the notice opportunistically or tactically.
>
> g. If there is a motion, in deciding that motion, the court's role is purely adjudicative. The court will not be deciding the merits of the case and will be making a decision in the context of the adversary system. It is not the court's role to prejudge the merits of either side's case."

114. The decision, and these comments, again suggest that it is not regarded as necessary in practice in Canada to have some a priori prohibition on communications between defendants and class members; and that restrictions on communication can be addressed on a case by case basis with the cooperation of the parties. Such cooperation is required under the Rules by Rule 4(7).

115. I have set out the postface in full because it might be regarded as helpful for the CAT to issue a practice direction, or to make orders at the first CMC or when making a CPO, to guide the parties as to communications from defendants in an appropriate case, and the postface in *Del Giudice* might form a helpful starting point. I do not express any views on whether the topic might better be addressed in practice guidance or in orders made in individual cases, and if the latter the terms or frequency of such orders. That will be for the CAT to determine drawing on its particular experience and expertise.

116. The Tribunal in this case treated the Canadian jurisprudence as of no assistance because "the question turns very much on the precise wording of the Rules". The Tribunal did not, however, identify any material distinction in the wording of the respective statutory provisions. All the key features of the domestic regime provided for by the Rules and relied on by MMCR are replicated in substance by provisions in the Ontario Class Proceedings Act 1992. Ms Ford suggested that a relevant distinction arose from what was said at [24]-[26] of *Del Giudice*, namely that in Ontario the court was not the protector of the class in the sense of owing it a fiduciary or quasi-fiduciary duty, and it was for the class representative to protect the interests of the class members, whereas the court's role was to act impartially when disputes were brought before it. This, Ms Ford submitted, is materially different from the position in collective proceedings in this jurisdiction where the CAT's case management role has been described in [48] of *Le Patourel* as one justified by the need to protect the class. This is not, however, a point of distinction in substance: what Perell J said in *Del Guidice* at [24]-[26] applies equally to proceedings before the CAT. Even were it a point of substantive distinction, it would not eliminate the force of the point that the Canadian experience points away from the existence of the Restriction. The important point is that in a system which is seeking to achieve substantially the same objectives, it has not been found necessary in practice to have the prohibition contended for. That weighs against such a prohibition being implied as a matter of necessity, especially when the implication is sought to be made into Rules which were themselves based on the Canadian experience.

Article 10

117. Ms Demetriou submitted that having to seek permission in every case was an unjustified interference with the defendants' article 10 rights, although she did not put this in the forefront of her argument.

118. Section 3 of the Human Rights Act 1998 requires primary and secondary legislation to be interpreted and given effect in a way which is compatible with ECHR rights.

119. Article 10 provides:

> **Freedom of expression**
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

120. Article 10 is given effect in domestic law by section 12 of the 1998 Act which provides at s. 12(4) that particular regard is to be had to the importance of the Convention right to freedom of expression.

121. The appropriate structure for analysing the application of article 10 rights is the series of questions identified by the Divisional Court (Singh LJ, Farbey J) in *DPP v Ziegler* [2020] QB 253 at [63] and approved and applied by the Supreme Court in that case [2022] AC 408 at [16] and [58], and in *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32, at [24], [110 ff]:

> (1) Is what the defendant did in exercise of one of the rights in Article 10?
> (2) If so, is there an interference by a public authority with that right?
> (3) If there is an interference, is it 'prescribed by law'?
> (4) If so, is the interference in pursuit of a legitimate aim as set out in paragraph 2 of article 10?
> (5) if so, is the interference 'necessary in a democratic society' to achieve that legitimate aim? This question will in turn require consideration of the well-known set of sub-questions which arise in order to assess whether an interference is proportionate:
>
> (a) Is the aim sufficiently important to justify inference with a fundamental right?
> (b) Is there a rational connection between the means chosen and the aim in view?
> (c) Are there less restrictive alternative means available to achieve that aim?

> (d) Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?"

122. In this case the real article 10 question arises at question 5. The Order interferes with the defendants' freedom of expression. Ms Demetriou specifically confirmed that she was not submitting that an implied prohibition in the Rules was not sufficiently foreseeable to be "prescribed by law". The interference is in pursuit of the legitimate aim of providing the right to a fair trial in accordance with article 6 which is necessary in a democratic society. It is accepted by the defendants that some restriction on freedom to communicate with class members can be justified in seeking to achieve that objective, but submitted that it can be achieved on a case by case basis by the exercise of case management powers. The question is whether a blanket prohibition, subject to permission from the tribunal, is necessary to achieve the aim of a fair resolution of collective proceedings; or whether that aim can be achieved by the alternative means, namely restriction by an order from the CAT based on individual cases.

123. It is important to keep in mind that the proportionality issues raised by question 5 do not always fall to be determined on a fact-sensitive, case-specific basis: see *In re Abortion Services* per Lord Reed at [29]-[55], and R (*DPP) v Manchester City Magistrates Court* [2023] EWHC 2938 (Admin) at [32]. The unspoken premise of Ms Demetriou's submission is that a priori freedom to communicate, subject to the CAT imposing a prohibition, is a less restrictive alternative means of achieving the legitimate objective than an a priori prohibition, subject to CAT permission. That is not self-evidently so. At paragraph 100 above I have posited an example where an a priori prohibition subject to CAT permission may work unfairly for defendants, and one, conversely, where an a priori freedom subject to CAT prohibition may work unfairly for class members. Others could arise, in both directions. This point was not explored in argument, and since the article 10 point was not put in the forefront of the case advanced by the appellants, and I have reached a clear conclusion that the Ruling was erroneous for the other reasons I have discussed, I would prefer to express no concluded view on it.

Conclusions on Issue 1

124. For all these reasons I have concluded that the Rules do not contain the Restriction determined by the Ruling. In summary those reasons are the following.

(1) There is no express wording containing the prohibition, and if it had been intended, it would have been easy enough to say so.

(2) That is reinforced by the absence of such a prohibition in other forms of collective civil litigation which existed in 2015, when the collective proceedings regime was introduced, which do not differ in respects which are material to this issue.

(3) This also illustrates that there is nothing in the context and purpose of the collective proceedings regime which makes it necessary to imply such a prohibition, and that the implication would have to be found in specific express terms.

(4) There is nothing in the express words of any of the Rules which gives rise to a necessary implication. On the contrary Rule 94 is inconsistent with any such implication.

(5) The practical consequences point against the implication, in particular in relation to the position before a CPO has been made; the invasion of legal privilege in the conduct of defence of proceedings; the interference with legitimate interests of defendants and others in their normal course of business; and the Canadian experience and jurisprudence.

(6) So too does the flexibility of the CAT's active case management powers.

Issue 2: did the Tribunal make the Order in exercise of its case management powers?

125. This involves an interpretation of paragraphs 27 to 29 of the Ruling, which appear under the heading "CONCLUSION". Prior to that point the Ruling had only considered what I have described as Issue 1 and had expressed the Tribunal's reasoning for concluding that the Rules contained the Restriction as a matter of interpretation. Paragraph 27 commences with "The application therefore in substance succeeds."

126. It then went on to say that the Letters should not have been written; that that was not proper conduct on behalf of the appellants' representatives; and that although assurances had been received that there would be no repetition of the conduct, MMCR should have the benefit of an order "as an indication of our views on the conduct of the [appellants]."

127. Paragraph 28 said: "By way of postscript and in order to be absolutely clear, we should deal with the canard that this non-communication obligation in some way inhibits defendants to collective proceedings from properly exercising their rights of defence." The paragraph went on to make the point, amongst others, that to the extent necessary for gathering evidence the process should be conducted under the supervision of the Tribunal.

128. Paragraph 29 opened with "In light of our decision on the proper construction of the Rules, our views on the substance of the Letters are not strictly relevant. However for completeness:…" This introduced two sub-paragraphs. The first sub-paragraph rejected the appellants' suggestion that the Letters were couched in terms which were "conspicuously fair". The second sub-paragraph said:

> "The content of the Letters therefore cut across and undermined the potential benefits of collective proceedings, at least for these particular class members and potentially for all class members if and in so far as it influenced the potential make-up of the class. Even if we were wrong in our construction of the Rules, therefore, in our view the terms of the Letters were such that they plainly should not have been written."

129. In support of its submission that the Tribunal was making the Order, in the alternative, in exercise of its case management powers, MMRC relies in particular on the final words of that paragraph, and the terms of paragraph 27 which involve exercising a discretion as to whether to make the Order. In my view neither passage will bear that weight.

130. Paragraph 27 is addressing whether there should be an order as a result of the decision on the interpretation of the Rules. The finding that the Rules contained the Restriction did not automatically mean that the Shipping Companies should necessarily be subjected to an

Order. It required the exercise of a discretion in that regard. That is consistent with the interpretation of the Rules being the only basis for making the Order.

131. Paragraph 29 appears after what is described in paragraph 28 as a "postscript" and is expressed to be "not strictly relevant". This is not the language of an alternative basis of decision, especially from a Tribunal with extensive legal experience, presided over by a High Court Judge. Had the Tribunal intended to say that it would have granted the Order in exercise of its case management powers in any event, that is the kind of language it would have used. The final sentence of paragraph 29 does not say any more than that the Letters should not have been written. It does not say that that was itself a sufficient reason for making the Order.

132. Two further considerations point strongly against MMRC's position on this issue. First, had a case management order been treated as an alternative basis for the decision, one would have expected some detailed reasoning as to why it was appropriate, and why the sending of the Letters was sufficient reason for making the Order. The justification for such an order is not self-evident. The vice of the Letters identified by MMRC was that they were intended or likely to influence the recipients in the opt-out decision. Before the opt-out period the appellants had undertaken not to communicate further on that subject and by the time the Order was made the opt-out period had long since passed. If the Letters were to justify a prospective order aimed at different risks there would need to have been findings as to what risks as to future conduct were involved, and why those risks merited a blanket ban on communications rather than one tailored to the risks. The Letters had not been sent on behalf of K-Line, so that it is difficult to see how the Order could have been made against it on a case management basis. There is no obvious correlation between the terms of the Letters and the scope of Restriction, and the absence of any reasoning for treating the former as justifying the latter is a powerful indication that the Tribunal was not purporting to exercise case management powers.

133. The second consideration is that the Tribunal effectively closed down argument from Mr Piccinin on the alternative basis for the application, based on the exercise of case management powers. It would have been unfair to decide the application on that basis without permitting further argument and the Tribunal, with all its experience, will have been fully aware of that.

Issue 3: should the Order be upheld on the basis that the Tribunal should have made it in exercise of its case management powers?

134. This would be a point to be advanced in a Respondent's Notice, in the light of my decision that the proper route of challenge is by way of appeal. Because the challenge was pursued by way of judicial review, that has not occurred. I would be content to treat MMRC as if it had served a Respondent's Notice if the Court could be put in the same position as if it had, but that is not the case. The Tribunal did not consider it appropriate to make an order in exercise of its case management powers, in the alternative, despite being invited to do so, and did not express any reasoning on that issue, which did not arise in the light of its conclusion on the interpretation of the Rules. As I have observed, it is not self-evident that an order should be made on that basis against the appellants (and difficult to see any basis for an order against K-Line who had not made any communication with class members). We were not addressed in any detail on the relevant discretionary factors and did not have all the material which it would be necessary to consider for that purpose. It remains open to MMRC to invite the CAT to make an order on a case management basis

in the light of our decision on the interpretation of the Rules. The CAT, with its detailed understanding of the claims and the evidential and procedural position, is far better placed to consider whether to make such an order than we are, with the benefit of tailored submissions and evidence directed to that issue. It should be left to determine any such application, if pursued. I do not feel able to say, on the material put before this court, that the Ruling should be upheld on the basis that the Tribunal should have made it under its case management powers.

Conclusion

135. I would therefore treat the challenge as properly brought by way of appeal, grant permission to appeal, and allow the appeal.

Mr Justice Butcher:

136. I agree.