Neutral citation [2023] CAT 71

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1339/7/7/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

14 November 2023

Before:

BRIDGET LUCAS K.C.
(Chair)

Sitting as a Tribunal in England and Wales

BETWEEN:

MARK McLAREN CLASS REPRESENTATIVE LIMITED

Applicant / Class Representative

- v -

(1) MOL (EUROPE AFRICA) LTD
(2) MITSUI O.S.K. LINES LIMITED
(3) NISSAN MOTOR CAR CARRIER CO. LTD
(4) KAWASAKI KISEN KAISHA LTD
(5) NIPPON YUSEN KABUSHIKI KAISHA
(6) WALLENIUS WILHELMSEN OCEAN AS
(7) EUKOR CAR CARRIERS INC
(8) WALLENIUS LOGISTICS AB
(9) WILHELMSEN SHIPS HOLDING MALTA LIMITED
(10) WALLENIUS LINES AB
(11) WALLENIUS WILHELMSEN ASA
(12) COMPANIA SUDAMERICANA DE VAPORES S.A.

Respondents / Defendants

Heard at Salisbury Square House on 31 October 2023

RULING (LFO CONTACT)

APPEARANCES

Nicholas Gibson (instructed by Scott+Scott UK LLP) appeared on behalf of the Class Representative.

Daniel Piccinin KC (instructed by Arnold & Porter Kaye Scholer (UK) LLP, Steptoe & Johnson UK LLP and Baker Botts (UK) LLP) appeared on behalf of the First to Third, Fifth and Sixth to Eleventh Defendants.

A. INTRODUCTION

(1) The Application

1. By a collective proceedings order dated 20 May 2022 ("the CPO") the Tribunal authorised Mark McLaren Class Representative Limited ("the CR") to act as class representative to continue collective proceedings against the twelve above-named Defendants. This Ruling relates to an application by the First to Third, Fifth and Sixth to Eleventh Defendants ("the Defendants")[1] for permission to write to certain large fleet owners ("LFOs") who are also class members, seeking disclosure from them, in the terms of a draft letter that was provided to the Tribunal on 23 September 2023 ("the LFO Letter"). The Defendants are required to seek permission pursuant to an Order dated 6 April 2023 ("the Directions Order") because it adverts to the possibility of an application for disclosure being made against the recipient class members.

2. The CR does not object to the LFO Letter being sent, but provided various proposed amendments as an enclosure to a letter to the Tribunal dated 25 September 2023. The CR also requested that it be copied in on any response to the LFO Letter, any subsequent correspondence relating to the request for disclosure, and be provided with any documents ultimately provided by the LFOs.

3. The Defendants accept that the effect of the Directions Order is that a copy of the LFO Letter needs to be provided to the CR but object to the CR being permitted to rewrite the letter or monitor their other communications with the LFOs.

4. The position is therefore that despite the CR having no objection to the LFO Letter being sent, in reality there are fundamental disagreements between the parties as to the terms in which the letter should be drafted, and whether or not the CR should be copied in on subsequent correspondence flowing from the

[1] There are two further Defendants, the Fourth and Twelfth Defendants, who have not participated in this application.

LFO Letter and receive any documents provided. In light of the differences between the parties, I requested that there be a short oral hearing. In particular, I raised three issues on which it would be helpful to hear submissions:

(1) Whether it is the Class Representative who ought to be communicating with the class members regarding the Defendants' request for data and voluntary disclosure;

(2) Whether the experts instructed by the parties have jointly considered the categories of data and disclosure required from class members. If not, why not; and

(3) Whether, in order to assist the LFOs, it is possible to be more specific as to the categories of data and/or documents required by the Defendants.

5. Having read the written submissions prior to the hearing, I also asked that the parties be prepared to address the issue of whether or not any response from a class member to the LFO Letter would be subject to litigation privilege. I am grateful for the very helpful written and oral submissions of the parties. The collective proceedings regime is relatively new. The Tribunal and parties alike are to an extent feeling their way and learning from experience. That is inevitable and unavoidable. I have been greatly assisted by Counsel's attendance before me so that matters can be properly ventilated and explored.

(2) The Background

6. The CR's claim arises out of a European Commission settlement decision dated 21 February 2018, relating to an infringement of Article 101 of the Treaty on the functioning of the European Union and Article 53 of the Agreement on the European Economic Area concerning the provision of deep-sea shipping services for new motor vehicles, known as "roll-on, roll-off" or "RoRo" services. The CR seeks to recover damages on behalf of consumers and businesses who purchased or financed new cars and light-medium weight commercial vehicles in the UK between 18 October 2006 and 6 September 2015 (subject to certain "excluded brands" which were not imported by deep-sea car

carriage). In very brief summary, the CR alleges that the original vehicle manufacturers paid too much for deep-sea shipping services; that those inflated shipping charges were passed on to national sales companies for the UK, and then on to retailers; and that ultimately they were passed on to class members when they purchased their vehicles.

7. The Defendants appealed against the granting of the CPO. The appeals all raised issues relating to the proof of loss in a pass on case. The Court of Appeal, in its judgment ([2022] EWCA Civ 1701), summarised the difference between the parties' positions at [11] as follows:

> "At risk of oversimplification, they concern arguments about two theories of pricing: "silo pricing" and "overall pricing". The Class Representative argues that consumers are charged separately for delivery which includes any unlawful overcharge. Charges for delivery occur in a "silo" and are unaffected by the pricing of the vehicle itself. [The Defendants argue] that there is no such thing as silo pricing; cars are purchased by the negotiation of a single "overall" price including all component costs and charges, which includes delivery."

8. The Court of Appeal dismissed the appeals, but remitted the case to the Tribunal for further case management, stating:

> "47. In the instant case, clear battle lines were drawn in relation to the methodology at the CPO stage. The Class Representative advanced a relatively inflexible case based upon its theory of silo pricing, and it seems almost inevitable that it will in due course have to modify or adapt its methodology to address the appellants' overall pricing case. The CAT said as much when it recorded that the methodology was provisional pending disclosure and evidence. The [Defendants], equally, advanced a relatively rigid theory about overall pricing. They have not set out what evidence they will adduce to prove the counterfactual or why and how it will establish that there would be no difference in outcome. The submission that there will be no difference between actual and counterfactual pricing might rest upon some hefty factual assumptions given what is presently known about the evidence.
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> …
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> 49. Neither the class, who are consumers, nor the appellants, who are carriers, will have much, if any, direct disclosure to give on the issue of how car prices are actually set by those in between. Attention will lie with alternative or proxy forms of evidence. None of the parties set out in any real detail how they proposed to address this evidential lacuna, or what the proxy forms of evidence would be. Nor did they address how they proposed that the CAT make appropriate findings of fact, or, once facts were found, what methodologies might, in an aggregate damages case, enable the CAT to arrive at conclusions on quantum. Nor have they considered what sorts of adjustments might need to be made should the appellants prevail on some issues for example relating

> to the extent to which there is pass through of the overcharge, or as to the existence of possible classes of no loss claimant, or as to the possibility of partial off-setting of overcharges by reductions elsewhere.
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> 50. In its Judgment, the CAT identified the battle lines, but said that the battle along those lines was for trial. In our judgment this was an error in approach. Once it had decided to grant certification, the CAT should have gone on to address the ramifications of the challenges to the Class Representative's methodology. At the CPO stage it was clear that this represented the pivotal dispute in the case." (emphasis added)

9. The underlined passages highlight the evidential difficulties facing the parties. Following remittal, a further case management conference ("CMC") took place on 23 February 2023. In its ruling of 6 April 2023 ([2023] CAT 25 – the "Directions to Trial Ruling") the Tribunal summarised the position as follows:

> "9. Although we have no doubt that the positions of both the Class Representative in and the Defendants to the McLaren Proceedings will change over the course of the proceedings, and that all will adjust the thrust and detail of their respective methodologies in light of disclosure and points taken by opposing parties, the parties are unlikely to be able to agree a common methodology for determining either the Overcharge Issue or the Pass-on Issue. Experience in the few cases that have actually come to trial shows that parties advance inconsistent yet plausible cases throughout, and that it is for the Court or Tribunal to determine which methodology works best after hearing all the evidence. It would certainly be unwise to assume methodological harmony will break out; and it would be in principle wrong for the Tribunal to seek to impose such harmony where none exists. Under our adversarial process, parties are entitled to advance the case they frame and formulate, subject always to the procedural control of the Tribunal.
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> 10. It follows from this that any attempt to create or force harmony through, e.g., requests for further information or yet more statements of case divorced from the evidence will accomplish nothing beyond delay and increased cost."

10. The Tribunal set out in the Directions Order a process that requires the parties to articulate their methodologies and cases in parallel (rather than sequentially), accompanied by all evidence relied upon, and then to respond to that propounded by the other as follows:

> "1. By 4pm on 15 December 2023, the Class Representative and the First to Eleventh Defendants to the McLaren Proceedings (if so advised) shall file and serve on the parties to the Volkswagen and McLaren Proceedings the signed witness statements of fact, signed expert reports and all documentary evidence that they intend to rely upon in support of their own positive case on all issues in the claim, together with a position statement that explains how, by reference to that evidence, they intend to establish their case (the "McLaren Positive Position Statement").

> 2. By 4pm on 15 May 2024, the Class Representative and the First to Eleventh Defendants to the McLaren Proceedings shall file and serve on the parties to the Volkswagen and McLaren Proceedings the signed witness statements of fact, signed expert reports and all documentary evidence that they intend to rely upon in response to the other party's Positive Position Statement, together with a position statement that explains their response, by reference to that evidence (the "McLaren Negative Position Statement")."

11. The Directions Order also provides for the parties to make disclosure requests of each other for the purposes of preparing their respective Positive and Negative Position Statements. However, that only takes matters so far given that neither the CR (representing consumers) nor the Defendants (being carriers) are likely to have much by way of documentary evidence to provide on either "silo-pricing", or "overall pricing".

B. THE COMMUNICATIONS RULING

12. The Defendants wish to communicate with the LFOs in order to obtain evidence relating to the way in which vehicle prices are negotiated. This is not the first time this issue has come before the Tribunal. In July 2022, shortly before potential class members were to decide whether to opt out of these proceedings, the Defendants sent letters to 21 LFOs, copied to the CR ("the July Letters"). The July Letters referred to the likelihood of the Defendants seeking disclosure of documents from those recipients who did not opt out; to the commitment of time, effort and cost this could involve; to the fact that the information that would need to be produced would include confidential information, and advising recipients who did not intend to opt out that they should take legal advice as to their duties to preserve relevant documents and exclude them from routine document destruction processes. On 3 August 2022, the CR made an application under Rules 53 and 88 of the Competition Appeal Tribunal Rules 2015 ("the Rules") for directions precluding the Defendants communicating directly with Class Members.

13. The Tribunal, in its Ruling of 28 November 2022 ([2022] CAT 53) (the "Communications Ruling"), concluded at [14] that the Rules preclude any communication between a defendant or that defendant's legal representative and a class member in collective proceedings where that communication concerns those collective proceedings, unless the Tribunal otherwise orders or (subject

always to the Tribunal's supervisory jurisdiction) the parties agree. The Tribunal went on to consider the position should it be wrong in its construction of the Rules. It concluded that, in any event, the letters quite plainly ought never to have been written, finding at [29(1)] that:

> "the overwhelming tenor of the Letters, targeted as they were at some of the largest purchasers identified by the Defendants as potential class members, was that if they did not opt-out they would be likely to become involved in a time-consuming and expensive disclosure process: a process, we might add, that this Tribunal had not ordered. Furthermore, in advising these potential class members to take legal advice, the Defendants in effect envisaged that they would expend at least either time or money – or both – in doing so".

The Tribunal also found that the fact that the July Letters had been written at all amounted to improper conduct on the part of the Defendants' representatives.

14. By an Order dated 20 December 2022 ("the December Order") it was ordered that:

> "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."

15. In its Communications Ruling at [16] to [23], the Tribunal considered the Rules relating to collective proceedings, the nature of such proceedings and the effect on the status of the class representative and class members. In particular:

(1) At [19], the parties to collective proceedings are:

> "the proposed class representative and each and every proposed defendant.[2] The "parties" does not include any putative member of the class to be certified. Such persons may in due course become "represented persons",[3] and prior to that point in time might be referred to as "potential" or "putative represented persons. The one thing such persons are not is a party."

(2) At [20]:

> "the whole point of the collective proceedings regime is that the represented persons are represented by a class representative. Communications

[2] Identified pursuant to Rule 75(2)(d).
[3] See the definition of "represented persons" in Rule 73(2).

regarding the collective proceedings … should be between the parties to those proceedings, and this does not include represented persons or putative represented persons."

(3) At [21]:

"Collective proceedings are important because they enable the bringing of claims collectively in circumstances where it would not be efficient or cost effective to bring those claims individually. The point of the regime is to ensure that the class representative incurs one set of costs, rather than each individual class member incurring individual costs. That is why individual class members generally have no exposure to adverse costs orders. Communications regarding the 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."

(4) At [23]:

"The true nature of collective proceedings explains a number of other facets of the collective proceedings regime:

(1) Because the class representative acts in relation to claims of other people, the Rules require collective proceedings to receive the sanction of the Tribunal before they can be continued. … A proposed class representative must show that they are appropriate to be appointed as class representative (the so-called authorisation condition in Rule 78) and they must show that the claims being brought are eligible for inclusion in the collective proceedings (the so-called eligibility condition in Rule 79).

(2) Although represented persons are not parties to the collective proceedings, they do have a clear interest in the outcome. It is their claims that the class representative is progressing. That interest is reflected in the fact that there are various rules obliging the class representative to engage with represented persons in certain defined ways, often subject to oversight from the Tribunal. …

(iv) Rule 88(3) provides that, if the Tribunal directs that participation of any represented persons is necessary in order to determine individual issues, the class representative shall give notice of the further hearings to those persons."

(5) At [26] the Tribunal addressed an argument based on Article 10 (rights of freedom of expression) under the European Convention on Human Rights and found that:

"in general there is no restriction on a litigant contacting a third party who is not subject to the proceedings. However, statutory provision has been made for collective proceedings, for the important reasons we have noted above. The special position and role of the class representative in those proceedings has been specifically recognised in the Rules. We do not consider that a requirement that the professional representatives of defendants to collective proceedings communicate with the party having the

> conduct of those proceedings (namely, the class representative through its professional representatives – a person approved by this Tribunal), and preventing communication with persons not having the conduct of those proceedings (namely, the class members) can sensibly be attacked on Article 10 grounds. Were the position to be otherwise it would cut across the collective proceedings regime."

(6) At [28] the Tribunal made clear that:

> "to the extent that direct communication with class members is necessary or desirable to obtain evidence (for example, a questionnaire to determine the extent of pass on), that is a process that should be conducted under the overall supervision of the Tribunal and not as a litigation "free for all". As to that, we do not rule out the possibility of the parties themselves coming to an agreed position on the content of communications from defendants to class members, but that will depend on the particular facts of each case."

16. The issue of communication with class members then arose again in the course of the CMC which took place on 23 February 2023. Following a discussion as to the Defendants' need to contact class members in order to obtain evidence, the President indicated that the Tribunal would want the parties' assistance as to how an order should be framed so that "the spirit of [the Communications Ruling] is abided by, but so that the parties are not thwarted in their efforts legitimately to craft their cases."

17. Paragraph 5 of the Directions Order is the result. It states:

> "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."

18. The first sentence reflects the parties' proposed agreed wording. The second sentence was added by the Tribunal. It is because the Defendants' LFO Letter refers to the possibility of a formal application for disclosure being made that permission is now required. For reasons that will be apparent from section C below (and in particular [27(4)] and [29]), the first sentence does not completely reflect the principles articulated in the Communications Ruling.

C. DISCLOSURE IN COLLECTIVE PROCEEDINGS

19. Rule 4 (Governing principles) requires the Tribunal to ensure that each case is dealt with justly and at proportionate cost,[4] and that a case is dealt with expeditiously and fairly.[5] Rule 4(4) provides that the Tribunal shall actively manage cases. That includes "encouraging the parties to co-operate with each other in the conduct of the proceedings",[6] and "adopting fact-finding procedures that are most effective and appropriate for the case".[7]

20. The Tribunal has wide-ranging case management powers pursuant to Rule 53 to give such directions as it thinks fit to secure that the proceedings are dealt with justly and at proportionate cost. Such powers apply equally to collective proceedings.[8] Rule 53(3) provides that the Tribunal may of its own initiative "ask parties or third parties for information or particulars",[9] and "ask for documents or any papers relating to the case to be produced".[10]

21. Rule 88 deals specifically with case management of collective proceedings and provides that the Tribunal may give any directions it thinks appropriate. Rule 88(3) provides that the class representative shall give notice of further hearings if the Tribunal directs that the participation of any represented person is necessary. The assumption underpinning this rule is that class members are not generally expected to participate in the collective proceedings.

22. That class members are not parties to proceedings is further underlined by Rule 89 which specifically refers to disclosure, and provides that:

> "89.—(1) In addition to the Tribunal's general powers under these Rules to order disclosure, the Tribunal may order, on any terms it thinks fit, disclosure to be given—
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> (a) by any party to the collective proceedings to any other party;

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[4] Rule 4(1).
[5] Rule 4(2)(d).
[6] Rule 4(5)(a).
[7] Rule 4(5)(d).
[8] Rule 74.
[9] Rule 53(3)(c).
[10] Rule 53(3)(d).

(b) by the class representative to any or all represented persons; and

(c) by any represented person to any other represented person (including a person within a different sub-class), the class representative or the defendant."

23. The Tribunal's general powers to order disclosure are contained in Rules 60 to 65. Rule 60(1)(a) provides that as regards disclosure between the parties, "a party discloses a document by stating that the document exists or has existed". Rule 60(1)(b) defines a "disclosure report" as being:

> "… a report verified by a statement of truth, which—
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> (i) describes briefly what documents exist or may exist that are or may be relevant to the matters in issue in the case;
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> (ii) describes where and with whom those documents are or may be located;
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> (iii) in the case of electronic documents, describes how those documents are stored;
>
> (iv) estimates the broad range of costs that could be involved in giving disclosure in the case, including the costs of searching for and disclosing any electronically stored documents; and
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> (v) states which directions are to be sought regarding disclosure."

24. Rule 60(2)(a) provides that the Tribunal will generally decide at the first CMC whether and when a disclosure report should be filed. Rule 60(2)(b) provides that the Tribunal will then consider "having regard to the governing principles and the need to limit disclosure to that which is necessary to deal with the case justly, what orders to make in relation to disclosure". Rule 60(3) provides the Tribunal with a broad discretion to give directions as to how disclosure is to be given including as to the searches to be undertaken, whether lists of documents are required, the format in which documents should be disclosed, and whether disclosure should take place in stages.

25. The Competition Appeal Tribunal Guide to Proceedings 2015 (the "Tribunal Guide") refers to disclosure in claims brought pursuant to section 47A of the Competition Act 1998 at paragraph 5.87, which provides that:

> "This is an area in which the Tribunal will expect the parties to pay close attention to the requirement of co-operation in Rule 4(7) and to the need to devise a sensible and practical approach to the conduct of the proceedings. The purpose of disclosure is to obtain documentary material that assists in

> determination of the issues raised by the pleadings and it is not to be used as a weapon in a war of attrition."

26. Disclosure against non-parties is dealt with at Rule 63. Rule 63(3) makes clear that the Tribunal may only make an order against a non-party where the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and disclosure is necessary to dispose of the claim fairly or save costs. Further, any order made must specify the documents or the classes of documents which the respondent must disclose. The Tribunal Guide states (at paragraph 5.90) that, in the event that such a non-party disclosure application is made:

> "the Tribunal is only likely to order disclosure of clearly defined documents or a very limited category of documents, and it will have regard to the fact that the person from whom disclosure is sought is not involved in the proceedings. Any such application must be served on the person from whom disclosure is sought, as well as on the other parties. If the Tribunal makes such an order, it may include provision for the payment of the costs incurred by the non-party in making disclosure."

27. As regards disclosure from class members in collective proceedings, therefore, the position appears to me to be as follows:

(1) The claims that are brought together in collective proceedings are those of the class members. The class representative represents the class members in bringing those claims, even if the class member is unaware of the claim or of the class representative's existence, as may well be the case in an opt-out case.

(2) The underlying purpose of the collective proceedings regime is to enable claims to be brought against defendants in relation to unlawful conduct that would not otherwise necessarily be pursued by individual class members.

(3) Class members are not parties and are not subject to the ordinary burdens that fall on parties to litigation. Those burdens, including in relation to disclosure, primarily fall on the class representative and their legal representatives.

(4) Class members are not parties, but nor are they "non-parties" in the technical sense that that term is used in relation to, for example, disclosure. If the class representative is successful in the pursuit of the class members' claim, the class members stand to benefit, ordinarily financially. The class members therefore occupy an area of middle ground where they ordinarily ought not to be subject to the burdens of litigation but where, given that they are the ones intended ultimately to benefit from the collective proceedings, it may be necessary for them to participate, whether that be to produce documents or information, for example. However, that is intended to be the exception rather than the norm and will be subject to careful scrutiny by the Tribunal, which will be astute to ensure that the burdens on class members do not become such that the entire purpose behind the collective proceedings regime is undermined. That is a point of difference as between class members and non-parties: whilst third party disclosure will undoubtedly place burdens on the third party (and ordinarily the applicant for disclosure can be expected to provide recompense), the making of the request does not run the risk of undermining the policy reasons behind collective proceedings. A request made of class members runs the risk of doing so, in particular in "opt out proceedings", if the alternative course is for the class member simply to opt out so as to avoid the hassle.

(5) For that reason, whilst the parties to litigation are generally to be permitted to prepare and frame their cases as they see fit, the Tribunal will exercise its supervisory jurisdiction to ensure that the interests of class members are adequately protected.

28. In the Communications Ruling (at [28]), the Tribunal addressed the suggestion that an inability on the part of the Defendants to communicate with class members inhibited the proper exercise of their rights of defence. The Tribunal pointed out that if there was a concern that class members might destroy important documentation that was a matter that should have been raised in terms with the Tribunal on the certification application so that a means of dealing with it could be addressed by the CR in its litigation plan. Alternatively, if the concern arose later in the proceedings, it could be raised with the Tribunal and

directions sought. The Tribunal further noted that to the extent that direct communication with class members was necessary to obtain evidence, that was a process that should be conducted under the overall supervision of the Tribunal and should not be a litigation "free for all".

29. It seems to me that, generally, if it is likely that there may be a need to contact class members to seek data, documentation or information that could also be raised at the certification stage, or at a CMC (whether the first post-certification, or a CMC specifically convened to deal with issues arising on disclosure), and directions sought. The directions that may be appropriate are likely to depend on the particular facts in dispute, but in general:

(1) one of the issues that the Tribunal is likely to wish to consider is who it is who should have the conduct of such communications as may be necessary: the class representative (which is in most situations likely to be the case) or the defendant.

(2) If a defendant wishes to correspond with the class members in order to understand the extent and nature of the data and documentation that class members may hold then the first step is to raise the issue with the class representative to seek to reach agreement. If it is not possible to reach agreement the defendants may approach the Tribunal for directions. Either way, the Tribunal must be informed as to what is proposed. Any direction that the Tribunal might give is likely to require the request to be communicated in simple and straightforward terms, so that a class member readily understands what it is that they are required to do, and can do so at minimal inconvenience and cost. It may be that this is best achieved by adopting a tailored "disclosure report" approach.

(3) The Tribunal has recently made clear that it is the expert economist who is likely to be best placed to explain how it is envisaged the evidence will be developed to trial, and that the Tribunal is likely to have particular regard to what the expert says they need, and what is the most efficient and proportionate way to proceed to trial: *Boyle v Govia*

Thameslink Railway Limited [2023] CAT 63 at [9(7)]. That applies equally to any request for disclosure from class members.

30. The balance that has been struck on the facts of this particular case is that (1) the Defendants are not prevented from contacting class members in the ordinary course of their business operations[11] and, subject to one important point of clarification, (2) the Defendants have general permission to communicate with the class members for the purpose of seeking to obtain evidence or information in relation to factual or expert issues in the proceedings without having to seek prior permission from the Tribunal or notify the Class Representative, but must seek specific permission from the Tribunal if reference is to be made to the possibility of a formal application against the class member.[12]

31. The important point of clarification is this: the Communications Ruling and Directions Order both proceeded on the basis that the Defendants only contemplated contacting a limited group of class members, namely the LFOs. It ought to be obvious from what I have said that it is difficult to foresee a case where communication by the Defendants with *all* class members would be permissible. To be fair, the Defendants do not seek to suggest otherwise but, having had cause to scrutinise paragraph 5 of the Directions Order in relation to this application, it seems to me that there is a risk of its extent and effect being misunderstood. Given the fact that this is a new regime and all Rulings and Orders are inevitably scrutinised by those involved in other collective proceedings, I should clarify that paragraph 5 is intended to be limited in effect to the LFOs and, if necessary, the Directions Order will be amended to reflect that fact.

32. In this particular case, the LFOs are limited in number and likely to be large businesses. The Defendants have identified less than twenty they wish to contact. I am told by the Defendants that if a fleet size of over 20,000 vehicles is taken then those twenty LFOs are likely to account for approximately 40% of the estimated claim value. Further, it is clear in this case that there is an

[11] Paragraph 2 of the December Order.
[12] Paragraph 5 of the Directions Order.

evidential lacunae which needs to be addressed, and the Defendants consider it is necessary to consider whether or not the LFOs have data and documentation that will enable them to address it.

33. Paragraph 5, understood in this context, seeks to strike a balance between the Defendants' ability to prepare their defence, and ensuring that the principles underpinning collective proceedings, as set out in the Communications Ruling, are not undermined. It is intended to represent a limited carve out from the general principle that communications with class members ought, in the ordinary course, to be directed through the class representative, and reflects the exercise of the Tribunal's supervisory jurisdiction.

D. THE LFO LETTER

34. In summary, the LFO Letter is broken down under headings into the following sections:

(1) Paragraphs 1 to 5 refer the recipient to the information relating to these proceedings available on the Tribunal's website, identify the parties and class members, and summarise the nature of the claim. The LFO Letter explains that the recipient has been identified as the owner of a large fleet of vehicles, and that it is likely to be a class member. It also refers back to the July Letters in the following terms: "We previously wrote to you on [26/27] July 2022 informing you that we might seek third-party disclosure in relation to the Claim. The purpose of this letter is to seek such disclosure."

(2) Paragraph 6 identifies the Defendants and explains that their interests are likely to be adverse to those of the recipient LFO.

(3) Paragraphs 7 to 10 summarise the parties' respective cases on "silo pricing" and "overall pricing", by way of explanation of the importance to the case of the prices actually paid, and the importance to the Defendants of the way in which prices of vehicles were negotiated, in particular as regards delivery charges (given the CR's case).

(4) Paragraph 11 explains the Defendants' position as carriers, and lack of experience regarding the supply chain for vehicles.

(5) Paragraph 12 states: "We believe that your company has possession or control over documents which show (1) prices actually paid for a substantial number of vehicles in the UK, and (2) how purchase prices for vehicles in the UK were negotiated."

(6) Paragraphs 13 to 18 are headed "Request for voluntary disclosure of documents and information" and are as follows:

> "13. The Relevant Defendants request that you voluntarily provide the parties to the Claim with disclosure of (1) transaction data showing the prices which were actually paid by your company for vehicles in the UK, and (2) documents showing how those prices, and any delivery charge, were negotiated with the relevant suppliers.
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> 14. Ideally such data and documents would relate to the entire Cartel Period (as defined above). However, if data and documents are not available for the entirety of that period (for example due to routine document destruction processes), data and documents for part of that period, or even more recent material, would still be of assistance.
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> 15. Various confidentiality protections would apply to data and documents disclosed in the Claim, and we would be content to provide further information on this.
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> 16. We envisage that there may be ways to minimise any burden of producing the data and documents requested, for example by producing a representative sample, and we would like to discuss those with you once you have had a chance to consider this request.
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> 17. In addition, the Relevant Defendants would, in principle, be willing to pay any expenses reasonably incurred in complying with this request. To that end, it would be helpful to have an indication as to what costs you envisage would need to be incurred to provide the requested data and documents.
>
> 18. If you do not agree to provide the requested voluntary disclosure, the Relevant Defendants envisage seeking an Order from the CAT that such disclosure be provided. For the avoidance of doubt, no such application has yet been made, and the CAT has not given any indication that it is likely to grant the application if it is made. Further, if such an application is made, the CR and your company would have an opportunity to be heard in relation to whether it should be granted. The Relevant Defendants would be required to pay costs reasonably incurred by your company in relation to such application and Order."

(7) Paragraph 19 seeks a response within 14 days.

(8) Paragraphs 20 and 21 state:

> "20. If you have any questions about this request, you may if you wish contact any of the Relevant Defendants' solicitors using the contact details provided. Please note, however, that neither we nor those other solicitors can provide you or your company with legal advice: we and they represent the Relevant Defendants, and this letter and its subject matter do not create any client relationship with your company, and nothing in this letter constitutes legal advice to your company. You are, of course, free in addition or instead to contact the CR, who is conducting this litigation on Class Members' behalf, or to seek your own advice elsewhere.
>
> 21. We are copying this letter to the solicitors for the CR, and the solicitors for the Defendants other than the Relevant Defendants, for their information."

35. On 25 September 2023, the CR's solicitors wrote to the Tribunal expressing disappointment that they had not been provided with the LFO Letter or put on notice of the Defendants' intention to seek permission to send the letter prior to it being filed with the Tribunal, but stating that the CR had no objection to the LFO Letter being sent. The CR proposed various amendments in a marked up copy which was enclosed. The CR also recorded its belief that:

> "(i) it should be copied to all correspondence regarding the disclosure requests made in the Draft Letter; (ii) the Relevant Defendants should ensure that any correspondence from the recipients of the Draft Letters which does not copy the Class Representative, be provided to the Class Representative in short order; and (iii) should the Relevant Defendants receive documents as a result of these disclosure requests, these would be disclosable to the Class Representative in the normal way".

The CR's proposed amendments included an additional sentence to paragraph 21 of the LFO Letter stating: "We request that you keep the CR's solicitors copied in any response to this letter".

36. On 26 September 2023, the Defendants' solicitors wrote to the Tribunal objecting to the CR's proposed amendments stating that:

> "The LFO Letter is a communication prepared by the Relevant Defendants for the purpose of obtaining evidence for proceedings. In the ordinary course, communications of this kind would be privileged and the Class Representative ("CR") would not see them at all. While the Tribunal has made Orders the effect of which is to prevent the Relevant Defendants from sending the LFO Letter without providing the letter to the CR, it would be highly inappropriate and unfair for the CR's solicitors to be permitted to rewrite the letter or to monitor the Relevant Defendants' other communications."

37. In the event that the Tribunal rejected the Defendants' submissions, a schedule was included identifying some of the amendments proposed by the CR that the Defendants considered were inappropriate, giving reasons. In particular, the Defendants objected to the CR's proposal that other communications between the Defendants and the LFO should be shared with the CR's solicitors. As to this the Defendants' position is that:

> "It is highly inappropriate and unfair for the Relevant Defendants to be required to ask the recipients to copy their responses to the CR. While the Relevant Defendants can do so if they so choose, there is no good reason why they should automatically lose the litigation privilege that would otherwise attach to communications for the purposes of gathering evidence. Moreover, the CR has no such burden."

E. ANALYSIS OF THE LFO LETTER

38. The critical part of the letter for present purposes is the "Request for voluntary disclosure of documents and information" at paragraphs 13 to 18. The Defendants seek "disclosure of (1) transaction data showing the prices which were actually paid for vehicles in the UK; and (2) documents showing how those prices, and any delivery charge, were negotiated with the relevant suppliers"[13] ideally over the entire Cartel Period i.e. the period from 2006 to 2015.[14] The voluntary disclosure sought is therefore potentially very broad.

39. I note that the Defendants in their written submissions stated that "the point of the LFO Requests is to find out what is available, and how practicable it would be to obtain it, with a view to obtaining the data, documents or information which can be obtained most efficiently and proportionately and so to spare the LFOs any unnecessary burden." That, if I might say so, is a perfectly sensible course, but I do not see the LFO Letter as properly, or clearly, encapsulating that exercise. Nor, if that was the purpose of the intended exercise, was it necessary to make the threat of a possible application for an order from the Tribunal that "such disclosure be provided". Such a threat is, put simply, premature.

[13] LFO Letter: paragraph 13.
[14] LFO Letter: paragraph 13.

40. On its face, the LFO Letter is a request for the recipient to provide disclosure of all data and documents falling within the very general descriptions adopted by the Defendants, and for the LFO to start that process straightaway. It is right to say that the possibility of "minimising any burden of producing the data and documents requested" is raised, but that is not the same as minimising the burden of disclosing them. The LFO Letter also refers to the Defendants being "in principle" willing to pay expenses, but what is sought is an indication of the costs of providing the data and documents which, again, is not the same as taking steps to limit the scope of disclosure in the first place.

41. The exploratory process ought logically to precede the consideration of what (if any) disclosure is necessary and proportionate in any particular case, and might therefore be ordered. This is important because paragraph 18 of the LFO Letter states that if the recipient does not agree to provide the disclosure on a voluntary basis then "the Relevant Defendants envisage seeking an Order from the CAT that such disclosure be provided". If the Defendants have not yet even considered what is available, practicable or proportionate, or the costs that might be incurred in providing it (including whether the Defendants are prepared to meet them) it is difficult to see what order for disclosure would ultimately be sought, let alone made by the Tribunal, but it is unlikely to be in the general form currently adopted by the Defendants.

42. It is no answer to say that the recipients are sophisticated large businesses, or that the LFO Letters are to be addressed to the CEOs, or to their "Head of Legal" and that they might be expected to engage with the Defendants on the scope of the request before providing the requested disclosure. It is for the Defendants to make clear what exactly the LFOs are to be expected to do at this stage.

43. It is useful to compare the Defendants' approach to the position where disclosure is sought from the parties to the proceedings, or from non-parties.

    (1) In the normal course of events, if disclosure was sought from a class representative it is likely that a disclosure report would be required, or at least there would be an opportunity for information of the sort specified in Rule 60(1)(b) to be considered and provided. It goes without

saying that if there were no collective proceedings and a claim was brought by an individual claimant, that would be the likely first step. There would then be a discussion between the class representative and the defendants as to what ought to be disclosed, taking into account factors such as likely relevance, proportionality, and cost prior to any application potentially being made.

(2) If disclosure were to be sought against a non-party, an order would only be made for disclosure of clearly defined documents or a very limited category of documents. That presupposes that before any such application could be made (or threatened) requests would need to be carefully and precisely formulated. Again, it can reasonably be expected that a focused and targeted request would have been honed and made to the non-party prior to an application actually being threatened, let alone made.

44. In those circumstances, I do not see why the LFOs ought, in effect, to be in a worse position than both a party to proceedings and a non-party by being requested to provide disclosure in the most general of terms, under threat of an order being sought requiring them to provide *"such"* disclosure if they fail to do so. That is particularly so in circumstances where, in the CPO Judgment [2022] CAT 10 (at [170]) the Tribunal also observed 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."

45. On any analysis, more specificity would be required before any application to this Tribunal for disclosure could possibly be made. I do not consider it is either strictly accurate or appropriate to refer to the Defendants' envisaging an application requiring disclosure of all (1) transaction data showing the prices which were actually paid by LFOs for vehicles in the UK; and (2) documents showing how those prices, and any delivery charge, were negotiated (which the Defendants foreshadow in the LFO Letter).

46. The Defendants' approach is to put the cart before the horse. It seems to me that the first step is for the Defendants to seek from the LFOs the equivalent information to that which is sought from a party by way of a disclosure report. In other words:

(1) A brief description of what documents exist or may exist that are or may be relevant to the two issues identified by the Defendants over the Cartel Period. I would add that this would extend to confirmation as to whether data and documents are available for the entirety of that period, or only part;

(2) A brief description of where and with whom those documents are or may be located;

(3) A description of how electronic documents are stored;

(4) An estimate of the broad range of costs that could be involved in giving disclosure on the issues identified by the Defendants, including the costs of searching for and disclosing any physical or electronically stored documents.

47. It ought then to be possible for the Defendants to consider what is available; how practicable it would be to obtain it; what data or documentation is most likely to be relevant to the issues in the case; and what is proportionate, in particular, given the need to ensure that any unnecessary burden on the LFO is minimised. The Defendants would be able to consider such matters with the LFOs. If the LFOs are unable or unwilling to assist in this exercise, it is at that stage that the Defendants might consider seeking assistance from the Tribunal.

48. Mr Piccinin KC, Counsel for the Defendants, submitted that, but for paragraph 18 which adverts to the possibility of an application being made, the Defendants would not have had to refer the LFO Letter to the Tribunal at all. It was suggested that it would be open to the Defendants to consider removing paragraph 18 and sending the LFO Letter in its current form anyway. For the reasons I have explained (namely the breadth and the premature nature of the

request in the LFO Letter), that would be wholly inappropriate, and would be contrary to the principles set out in the Communications Ruling.

49. That is all the more so given that, had the LFO Letter been sent in the current form but without paragraph 18, it would have referred expressly to the July Letters. The July Letters are the self-same letters that the Tribunal has already determined (whether or not it was right in its construction of the Rules) ought never to have been sent. In effect, it is an invitation for the recipient of the LFO Letter to look back at those letters. That is plainly inappropriate, and the fact that the Defendants considered it appropriate to do so is a matter of concern.

50. I will, therefore, dismiss the Defendants' application for permission to write the LFO Letter. The logical first step is for the Defendants to write to the LFOs seeking information that will enable them to establish the relevant data and documentation population. With that in mind, I will also order that any reply from the LFOs, and correspondence between the Defendants and LFOs relating to this exploratory stage is copied to the CR. Notwithstanding the first sentence of paragraph 5 of the Directions Order, I can see no reason for excluding the CR from correspondence that simply elicits the relevant data and documentation population the LFOs have. They are class members and the CR represents them. In this regard, I also note that, despite the Defendants' opposition to being required to copy in the CR, paragraph 13 of the LFO Letter expressly envisaged that the disclosure sought would be provided "to the parties to the Claim".

51. As I have indicated, when it comes to formulating the precise, proportionate disclosure requests to be made of the LFOs, I anticipate that process will be expert-led and will be undertaken under the supervisory jurisdiction of the Tribunal. Before the LFOs are required to provide any disclosure, the Tribunal will need to be satisfied that it is appropriate and proportionate for them to do so. That is consistent with the approach taken to disclosure to be provided by parties and non-parties. Again, it seems to me that it is likely to be appropriate for the CR to be involved in any application for directions, and that its participation will be of assistance to the Tribunal, although it is open to the Defendants to argue the contrary.

52. It has been suggested that issues of privilege may arise. However, although this was adverted to as a possibility by the Defendants, neither the Defendants nor the CR was in a position to argue the point fully before me. If the Defendants consider that issues of privilege do arise then the matter can be revisited and properly argued, and if necessary, directions given as to the extent to which it is necessary to copy the CR into correspondence. But it does not seem to me that such concerns as there might be impact the first stage with which we are presently concerned which, as I have said, is simply establishing the relevant population of data and documentation the LFOs who are class members might have, and that might be relevant to vehicle pricing and the negotiation of delivery charges.

F. THE THREE ISSUES

53. For completeness, I should briefly touch on the three specific issues that I had raised with the parties when convening this hearing.

(1) Whether the Defendants' request for disclosure ought to be communicated to the Class Members by the Class Representative.

54. As is apparent from the Communications Ruling, and consistent with the Rules referred to above (which enable the Tribunal to consider whether, and if so the extent to which, class members should participate at any stage of the collective proceedings), if class members are to be contacted to obtain evidence, that is a process that should be conducted under the overall supervision of the Tribunal.

55. It is common ground between the Defendants and the CR that in this case, it is the Defendants who should make disclosure requests rather than the CR. Given that the CR represents the class members in relation to their claims and acts in the interests of class members, in the ordinary course it might be expected that the CR and the Defendants, acting in accordance with Rule 4(7), would discuss and agree the data and documentation required from class members (if any), and that it would be the CR who would communicate requests for data and documentation to class members. It is for that reason that the parties were asked to consider why it is that the CR is not the channel for the Defendants' request.

56. Having heard submissions, I accept that we are now where we are. In the particular circumstances of this case, it is the Defendants who seek this evidence in relation to the preparation of their Positive Case (as defined in the "Directions to Trial Ruling"). It is not evidence that the CR seeks for the purposes of its own Positive Case. I accept, therefore, that it is not necessary to require the CR to be the conduit in this instance, although as with all aspects of case management, it would be open to the Tribunal in the exercise of its supervisory jurisdiction to revisit this.

57. Relatedly, I should add that, had I been minded to grant permission, I would also have found that it is open to the CR to make submissions on the wording of the LFO Letter. It would be for the Tribunal to decide whether or not to approve any letter and if so, on what terms.

(2) Whether the experts instructed by the parties have jointly considered the categories of data and disclosure required from class members. If not, why not.

58. The experts have not jointly considered the categories of data and disclosure required from class members. Mr Piccinin explained that this is the combined effect of (a) the stark differences between the parties' case on the relevant issues; and (b) the particular approach to case management adopted by the Tribunal in this case. That is a reference to the Directions Order and the requirement for each party to put forward their own positive cases, accompanied by the evidence relied upon. I see the force in that. As I have indicated, once the Defendants understand what the LFOs may be able to provide, I would expect the Defendants' expert(s) to be involved in determining what is required, and in formulating a proportionate approach.

(3) Whether it is possible to be more specific as to the categories of data and/ or documents.

59. As the Defendants made clear in their submissions, any requests made at this stage are:

> "inherently exploratory in nature, and it would not be appropriate to be more prescriptive or specific at this stage. The … Defendants (whose businesses are completely different in nature from those of the LFOs) do not have any insight into the extent to which, or the form in which, the LFOs are likely to have retained information on what they paid for their vehicles or how their transactions were negotiated. Indeed, the… Defendants know very little (if anything) about how LFOs go about procuring their vehicles. It may be that some have easily accessible databases in one form or another, or it may be that some information or documents are widely dispersed and difficult to pull together for disclosure. The … Defendants also would not wish to rule out any other approach which an LFO might suggest, for example the provision of a narrative statement explaining its purchasing practices. The point of the LFO Requests is to find out what is available, and how practicable it would be to obtain it, with a view to obtaining the data, documents or information which can be obtained most efficiently and proportionately and so to spare the LFOs any unnecessary burden".

As I have indicated, it is for that very reason that it is inappropriate and premature to threaten any application for an order requiring disclosure in correspondence with the LFOs at this stage, and why permission to write the LFO Letter in its current form is refused.

G. CONCLUSION

60. I therefore dismiss the application for permission.

Bridget Lucas K.C.
Chair

Charles Dhanowa O.B.E., K.C. (*Hon*)
Registrar

Date: 14 November 2023