Neutral Citation Number: [2022] EWCA Civ 593

Case No: CA-2021-000748 (formerly C3/2021/1632)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM COMPETITION APPEAL TRIBUNAL
MR JUSTICE WAKSMAN, EAMONN DORAN, DEREK RIDYARD
[2021] CAT 30

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/05/2022

Before :

SIR JULIAN FLAUX
Chancellor of the High Court
LORD JUSTICE GREEN
and
LORD JUSTICE PHILLIPS

- -

Between :

BT GROUP PLC **BRITISH TELECOMMUNICATIONS PLC**	**Appellants**
- and -	
JUSTIN LE PATOUREL	**Respondent**

- -
- -

Sarah Ford QC, Sarah Love & Allan Cerim (instructed by **Simmons & Simmons LLP**) for the **Appellants**
Ronit Kreisberger QC, Nikolaus Grubeck & Jack Williams (instructed by **Mishcon De Reya**) for the **Respondent**

Hearing date: Tuesday 15th March 2022

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Approved Judgment

Lord Justice Green delivering the single judgment of the Court:

A. Introduction

The Collective Proceedings Order

1. There is before the Court an appeal against the Collective Proceedings Order ("*CPO*") made by the Competition Appeal Tribunal ("*the Tribunal*" or "*the CAT*") which certified a claim for damages ("*the Claim*") against the Defendants, BT Group PLC and British Telecommunications PLC (together "*BT*"), as eligible for collective (class) proceedings. The reasons for the making of the CPO are set out in a judgment of the Tribunal dated 27th September 2021 ("*the Judgment*"). The CPO was made pursuant to the powers of the CAT under section 47C Competition Act 1998 ("*CA 1998*"). The Tribunal also ordered that the remedy, assuming the Claim succeeded, would be an award of "*aggregate damages*".

Opt-in or opt-out?

2. The Tribunal in addition ordered that the Claim proceed upon an opt-out basis. An opt-out claim is brought on behalf of all of the members of a defined class except those that choose to opt-out. The effect of the CPO is that a very large number of persons, estimated to be circa 2.3 million, will, should the Claim prevail, be entitled to recover compensation, without having to have incurred the effort, cost and risk of joining the proceedings as claimants from the outset, or even necessarily having been aware of the litigation at all.

3. BT argued before the CAT that if it were minded to certify the Claim then it should be upon an opt-in basis, i.e. any person wishing to benefit from the claim would be required, quite deliberately, to join the claim at the outset.

4. The Claim alleges that BT abused its dominant position in the market for voice only telephony by charging customers supra-competitive prices which it says are "*unfair*" and excessive contrary to section 18 CA 1998 which prohibits the abuse of a dominant position. The Claim refers by way of support to provisional findings made by Ofcom that BT had misused its market power in order to impose prices which were materially above the competitive level on voice only telephony customers. On 26th October 2017 Ofcom issued a statement entitled "*Review of the market for standalone landline telephone services*" ("*the Statement*") which concluded that BT possessed "significant market power" ("*SMP*") in the market for voice only telephony services and that it had charged customers materially above the competitive level. These findings were made pursuant to the Communications Act 2003 under its *ex ante* regime for regulation. This empowers the regulator to determine that an undertaking has SMP and then impose a forward-looking regulatory regime to forestall the possibility that in the future the undertaking misuses its SMP to the detriment of consumers. The fact that the regime is *ex ante* does not, of course, preclude the regulator intervening where there is evidence of existing, on-going, misuse of market power. It can intervene after the event to bring the harm to an end and then introduce regulation to prevent repetition. This sort of regime differs from the *ex post* regime under the CA 1998 which applies to proscribe and punish past conduct but where there is no significant power to introduce forward looking, prophylactic, regulation.

5. Nonetheless, there are, as the CAT found in its Judgment, significant similarities and overlaps between the two types of regime such that even a provisional report of Ofcom on misuse of SMP could amount to fertile territory for a claim based upon abuse of dominance under section 18 CA 1998. For example, the test for SMP, under section 78 Communications Act 2003, is the same as the test for dominance under section 18 CA 1998. We set out more detail about the Ofcom findings in Section B below.

6. This appeal does not concern the conclusion of the CAT that the Claim should be certified as eligible for a collective action; nor does it concern the conclusion, in response to the applications by BT to strike out the Claim and/or seek reverse summary judgment, that the Claim had a real prospect of success; and nor does it concern the ruling that there be an award of aggregate damages in the event that the Claim succeeded.

7. The appeal focuses upon the reasoning in the Judgment that the proceedings should be opt-out and not opt-in. The arguments advanced fall under three broad headings. First, the criteria that the CAT should apply in selecting as between opt-in or opt-out proceedings (Issue I). Secondly, the powers available to the CAT, once it has ordered that damages be paid, to direct that those damages are to be distributed by way of an account credit (Issue II). Thirdly, the role that an assessment of the merits plays in the choice of opt-in or opt-out proceeding (Issue III).

The scope of appeals: points of law only

8. The appeal is brought under section 49(1)(a) CA 1998 *"… on a point of law arising from a decision of the Tribunal in … collective proceedings … as to the award of damages or other sum …*". The jurisdiction enables this court to supervise all issues relating to damages which arise at whatever stage of the proceedings (including therefore at the certification stage) but it is limited to points of law only. We address the implications of this jurisdiction in greater detail at paragraphs [50] – [57] below.

Merricks and Lloyd

9. The nature and effect of the legislation has been considered in two judgments of the Supreme Court: *Mastercard v Merricks* [2020] UKSC 51 ("*Merricks*") and *Lloyd v Google Inc* [2021] UKSC 50 ("*Lloyd*"). Both were explored before us in written and oral submissions. *Merricks* concerned the process of certification, not the choice of opt-out or opt-in. Nonetheless, it provides guidance on the purpose of the legislation and the nature and scope of the discretion conferred upon the Tribunal to make decisions in relation to collective proceedings. We treat it as binding on issues where there is overlap and otherwise highly persuasive. *Lloyd* concerned the scope of the power under CPR.19.6 to approve representative actions. In the course of judgment, the Court expressed views about different types of collective proceedings, including the regime under the CA 1998. It sets out an analysis of the relative benefits of different types of opt-in and opt-out proceedings other than representative actions under CPR 19.6. It was submitted by the appellants that this analysis was *obiter*. It is at least arguable that the Court considered alternative forms of collective proceedings as part of its review of the legislative landscape and as a guide to construction of the CPR: see e.g. Judgment paragraphs [23], [33] and [68]. It is however ultimately unnecessary for us to decide this point. We treat the judgment as, at the least, strongly persuasive

because it was a unanimous judgment of the Court and, in any event, we agree with the analysis that it sets out.

B. The Ofcom findings

10. The Claim, as already explained, is brought in the light of Ofcom's finding that BT held SMP and had charged various categories of customer above the competitive level. The CAT sets out the history of the regulatory proceedings in its Judgment at paragraphs [10] – [17].

11. The background can be briefly summarised. In 2009 Ofcom removed all regulation on BT in the retail telephony market. Thereafter, many consumers moved to acquire bundled telephony and other services. Ofcom initiated a strategic review of the market in 2016. According to Ofcom, 88% of households had by 2017 acquired their communication services in a bundle of either dual-pay packages (landline and broadband) or triple-pay packages (landline, broadband and pay-tv). Ofcom concluded that competition for packages had steadily increased over time. Ofcom however expressed concern that, in contrast, standalone landline customers had experienced real time price increases and were not benefiting from competition.

12. In a consultation paper of 28th February 2017 Ofcom set out proposals to address its concerns. It identified two categories of consumer who purchased standalone telephone services: (i) voice only customers ("*VO customers*") who only acquired a telephone service and not broadband; and (ii) split purchase customers ("*SP customers*") who acquired a telephone service and a broadband service, but not as a bundle. Ofcom concluded that because telephone providers could not distinguish between VO and SP customers it was appropriate to include them in a single product market for the purpose of determining SMP. Ofcom provisionally concluded that BT had SMP in the provision of services to customers who purchased landline telephone services on a standalone basis.

13. By way of remedy Ofcom proposed to regulate BT's standalone telephony services through a retail price control, with an initial price cut of between £5 and £7 in monthly line rental, and a basket cap on prices of line rental and calls to limit future price increases to no more than the rate of inflation. Ofcom also proposed to require BT to work with it to trial the provision of consumer information to encourage standalone telephony customers to seek better value deals elsewhere in order to promote competition.

14. In the Executive Summary to the Statement Ofcom described the issue as follows:

> "1.1 Over the past decade, the landscape for fixed-line telecommunications in the UK has been transformed. Competition has brought new services, increased choice and delivered benefits to consumers.
>
> 1.2 While there remains a need to continue driving the industry to meet increasing demands for greater quality and reliability, on the whole customers who buy bundled services are getting more for their money than ever before. However, customers that do not take bundled services have not benefited from competition

> in the same way. In particular, customers purchasing voice-only services – often elderly people who have remained with the same provider for many years – are getting poor value for money. These consumers have less choice of suppliers and are not benefiting from strong price competition or promotional offers. Their loyalty to their provider is not being rewarded but is instead leading to ever higher prices.
>
> 1.3 …line rental prices have increased significantly since 2009. From December 2009 to June 2017, line rental prices rose by between 23% and 47% in real terms. At the same time, the wholesale cost of providing landline services fell by about 27% in real terms.
>
> 1.4 This fall in wholesale costs has allowed more competitive pricing in the bundled market but voice-only customers have faced price increases without receiving any significant corresponding benefits."

15. The Statement also recorded a development in the thinking of Ofcom about the relevant product market for SMP:

> "1.10 Since the February Consultation, we have been made aware that providers of standalone telephony services on Openreach's network are in fact able to identify which of their customers are voice-only and which are split purchasers. Therefore, while providers have not so far set different prices (or other terms and conditions) between these two customer groups, they could do so if they wished. Accordingly, we are no longer of the view that voice-only and split-purchase customers should be considered part of the same market.
>
> 1.11 While we have concerns about the current outcomes for both customer groups, our concerns are more acute for voice-only customers. Voice-only customers generally do not engage with the market: 77% of voice-only customers have never switched provider or considered doing so. They tend to be older and less likely to shop around for a better deal. Over 40% of voice-only customers are at least 75 years old, and 40% live in DE socioeconomic group households (for comparison, 55% of dual-play customers are 75 or over, and 20% are in DE group households). Moreover there are now relatively few providers of landline only services for these consumers to choose from.
>
> 1.12 Even if measures to promote engagement and competition for voice-only customers are successful, they are likely to take time to have an impact (and there are challenges to them being successful, which requires both that voice-only customers engage more actively and also that this stimulates a growth in the existing, limited competition). BT currently holds a dominant position in the market for voice-only customers and the lack of

> competition enables it to maintain prices above the competitive level.
>
> 1.13 We therefore consider that a significant price cut is important to alleviate the detriment suffered by voice-only customers. We are also in favour of providing information to consumers, because of the potential benefits in encouraging their engagement in the market and greater competition.
>
> 1.14 Like voice-only customers, split purchasers have suffered increases in line rental charges in recent years without significant offsetting benefits. However, split purchasers are typically younger and more technologically literate, and, by definition, have internet access which allows them to access alternative offers more easily. Unlike voice-only customers, split purchasers have a wide range of choices available to them, such as dual-play (telephone and broadband) bundles, which should allow them to seek better value for money from providers if they increase their levels of engagement.
>
> 1.15 To address the detriment faced by split purchasers we have decided that it is more appropriate to allow time for split purchasers to become more actively engaged and potentially switch to dual-play bundles where that is a better option for them, than to include them in a price control at this stage. Split purchasers may benefit from being informed that, in many cases, they are not obtaining good value for money and can find themselves a better deal."

16. To forestall more formal regulatory action BT proposed voluntary measures to address Ofcom's concerns. On 24th October 2017 BT advanced voluntary commitments ("*the Commitments*"). These spanned a three-year period in respect of its VO customers and included:

> "a) A line rental price reduction of £7 per month (inclusive of VAT) effective from April 2018; b) Raising prices of calls and line rental by no more than inflation (CPI) each year; c) Provision of reporting information to allow Ofcom to monitor its compliance with the voluntary undertaking; and d) A commitment to improve the information available to ensure voice-only customers are aware of possible savings available to them in this market."

17. Ofcom considered that BT's proposal addressed its concerns. It brought line rental prices down to 2009 levels in real terms and reversed the trend for ever higher prices. These remedies operated prospectively and did not seek to address past supra-competitive prices. Because Ofcom accepted the Commitments it did not proceed to a formal decision against BT and it follows it findings and conclusions must be treated as provisional.

18. In relation to VO customers Ofcom concluded that: (i) they were in a separate market to SP customers; (ii) that the relevant geographical market was the UK (excluding Hull); (iii) BT enjoyed a significant market share in excess of 70% which amounted to a dominant position; (iv) the market had become "*significantly more static*" with competitors facing significant barriers to expansion; (v) BT had been able to increase and sustain prices above the competitive level; and (vi), BT did not face any significant constraint upon its ability to act independently within that market.

19. In relation to SP customers Ofcom concluded that: (i) BT had SMP in the market; (ii) that it was UK wide (save for Hull); (iii) SP customers were paying materially more for standalone voice and standalone broadband services than they would pay for equivalent dual-pay services; (iv) services bought by SP customers were not in the same market as dual pay services; (v) BT had a very high market share of circa 97%; (vi) the declining and relatively small size of this market could make it difficult for competitors to target SP customers to encourage them to switch; and (vii) although these customers also suffered detriment from supra-competitive pricing, it was more appropriate to allow time for such customers - who as a group were more technologically literate than VO customers - to become more engaged and potentially to switch to dual-pay where that was a better option, rather than including them in price control at that stage.

20. Ofcom launched a consultation in 2020 reviewing the performance of the BT Commitments. A statement was published on 25th March 2021. Ofcom recorded that it had accepted a renewed BT 5-year Commitment with price increases for VO customers limited to inflation and in any event within a safeguard cap of 2.5% of the price of line rental. The Commitment in respect of SP customers continued as before.

C. The claim for damages

21. The Claim is for aggregate damages from BT for an alleged abuse of a dominant position in breach of section 18 CA 1998 in respect of (a) residential VO customers, for the period 1st October 2015 to 1st April 2018, and (b) SP customers, from 1st October 2015 until final determination of the Claim by the Tribunal. The 2015 date reflects the earliest point of time within which a tortious claim for damages is within limitation. The 2018 date is that upon which BT introduced Commitments Ofcom found to be acceptable. In respect of the VO customer claim period, there is an exception concerning business VO customers, for whom the claim continues until order of the Tribunal upon the basis that such customers were not covered by the BT price cut. According to data before the CAT this is a relatively small cohort of claimants.

22. The Claim is predicated upon losses said to have been sustained by 2.31 million customers comprising (i) 1.23 million VO customers and (ii) 1.08 million SP customers. Aggregated damage of £589m (as at October 2020) are claimed comprising £238 per VO customer and £351 per SP customer. Individual losses per class member are estimated to be between £148 and £333.

23. The Claim explains that whilst it is a standalone claim it nonetheless relies upon the findings of Ofcom in the Statement in particular that BT: (i) possessed SMP; (ii) was a price leader; and (iii) charged prices which were above the competitive levels so as to give rise to serious consumer detriment. The Claim was supported by expert economic analysis from Mr Parker of Frontier Economics which, as it were, explained the bridge

between the Ofcom findings under the *ex ante* Communications Act 2003 regime and abuse of dominance under the *ex post* CA 1998 regime.

D. The legal framework

24. We turn now to the legal framework which governs the exercise of the discretion of the CAT to order opt-out or opt-in proceedings and as to the power of the CAT to make awards of aggregate damages and as to their distribution. As recent case law emphasises an understanding of the regime must take into account its legislative purpose. We therefore start with legislative intent and then consider the details of the regime as it applies to the opt-out/opt-in choice.

The legislative intent and purpose

25. Legislation must be construed purposively, as the Supreme Court has recently emphasised in *Hurstwood Properties v Rossendale BC* [2021] UKSC 16 at paragraphs [9]-[10]. In *Merricks* the majority and minority were in agreement as to the purpose behind the legislation, as to the importance of construing the legislation with the purpose in mind, and as to the importance of arriving at an interpretation of the legislation which ensured that the certification process was not overly restrictive.

26. The majority emphasised that the collective action regime in the CA 1998: "… *enables whole classes of consumers to vindicate their right to compensation and the large cost of the necessary litigation to be funded before an expert tribunal*…"; the prospect that consumer rights can be vindicated in this manner "…*also serves as a disincentive to unlawful anti-competitive behaviour of the type likely to harm consumers generally*" (paragraph [2]). Later, in paragraph [37] it was stated that the statutory purpose was one "… *of providing effective access to justice for claimants for whom the pursuit of individual claims would be impracticable or disproportionate*…". At paragraph [53] the majority observed that anticompetitive conduct would not be "*effectively restrained*" if wrongdoers could not be "*brought to book*" by mass consumer claims. At paragraph [54] the Court endorsed the proposition that the "…*evident purpose of the statutory scheme was to facilitate rather than impede the vindication of those rights."*

27. Lord Briggs for the majority cited with approval (*ibid* paragraph [37]) the iteration of objects and benefits of class certification regimes set out by Chief Justice McLachlin in *Hollick v Toronto (City)* 2001 SCC 68; [2001] 3 SCR 158 at paragraph [15] in relation to the Ontario Class Proceedings Act 1992:

> "The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool … class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their

> behaviour to take full account of the harm they are causing, or might cause, to the public. In proposing that Ontario adopt class action legislation, the Ontario Law Reform Commission identified each of these advantages … In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters."

28. The minority (Lord Sales and Lord Leggatt) agreed with the majority as to the purpose of the legislation. At paragraph [92], in the context of a discussion of the benefits of opt-out relative to opt-in proceedings, they cast the analysis in terms of access to justice. The system was "*…designed to facilitate access to legal redress for those who lack awareness, capability or resolve required to take the positive step of opting in to legal proceedings*".

29. Pulling the threads together, the principal object of the collective action regime is to facilitate access to justice for those (in particular consumers) who would otherwise not be able to access legal redress. Embraced within this broad description is the proposition that the scheme exists to facilitate the vindication but not the impeding of rights. Also included is the proposition that a scheme which facilitates access to redress will increase *ex ante* incentives of those subject to the law to secure early compliance; prevention being better than cure. Finally, emphasis is laid on the benefits to judicial efficiency brought about by the ability to aggregate claims.

30. In articulating these objectives the Supreme Court took account of the legislative history of the collective action provisions (*via* the Consumer Rights Act 2015) which implemented recommendations made in a Department of Business Innovation & Skills paper entitled " *Private Actions in Competition Law: a Consultation on Options for Reform Government Response*" (January 2013). There the Government explained how and why opt-in mechanisms, in real and practical terms, had proven ineffective at improving consumer redress and access to justice and that, in consequence and following a consultation, the Government intended to introduce provisions to the CA 1998 creating opt-out as well as opt-in collective action mechanisms. The recourse in domestic case law to Canadian jurisprudence is justified by reference to a statement in the legislative history that Canadian law was the best model to follow in the UK for its own collective proceedings regime (see e.g. paragraph [194] of the Department's Final Impact Assessment published in January 2013, referred to by Lord Briggs in *Merricks* at paragraph [37]). At paragraph [43] in *Merricks*, Lord Briggs described the purpose behind the Canadian law as bearing a "*substantial similarity*" to that applying in the domestic context.

Competition Act 1998 (CA 1998)

31. The principal legislative measure governing certification of collective actions is section 47B CA 1998. The test for certification is set out in sub-section (6). It creates a test whereby the CAT will consider the nexus between the issues sought to be certified (whether they are the "*same, similar or related"*). This text of nexus has been given the shorthand "*the common issues*" test (see paragraph [37] below). In addition, the CAT must consider whether the issues are "*suitable*" to be pursued collectively. Sub-sections (10) and (11) define opt-in and opt-out proceedings and impose a duty on the

CAT, when it certifies a claim as suitable, to impose one or the other but they are silent as to the criteria the CAT should use to decide which, in a given case, to order:

> "47B Collective proceedings before the Tribunal
>
> …
>
> (6) Claims are eligible for inclusion in collective proceedings only if the Tribunal considers that they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings.
>
> …
>
> (10) "Opt-in collective proceedings" are collective proceedings which are brought on behalf of each class member who opts in by notifying the representative, in a manner and by a time specified, that the claim should be included in the collective proceedings.
>
> (11) "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."

32. The principal measure concerning damages is section 47C CA 1998. Section 47C(2) concerns what is termed "*aggregated damages*" and empowers the Tribunal to make an award of damages not based upon a principle of compensating individual members of the class:

> *"*(2) The Tribunal may make an award of damages in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person."

In *Merricks* this was described as having "*radically modified"* the established common law principle of damages awarded upon the "*compensatory*" basis i.e. reflecting the actual loss of a claimant (*ibid* paragraph [58]). Later Lord Briggs stated:

> "77. … A central purpose of the power to award aggregate damages in collective proceedings is to avoid the need for individual assessment of loss. While there may be many cases in which some approximation towards individual loss may be achieved by a proposed distribution method, there will be some where the mechanics will be likely to be so difficult and disproportionate, eg because of the modest amounts likely to be recovered by individuals in a large class, that some other method may be more reasonable, fair and therefore more just. For that purpose the statutory scheme provides scope for members within the class to be heard about the proposed distribution method. In many cases the selection of the fairest method will best be left until the size of the class and the amount of the aggregate damages are known."

In *Lloyd* (*ibid* paragraph [32]) Lord Leggatt, for the unanimous Court, explained that aggregate damages enabled the Tribunal to act with considerable flexibility to meet the justice of the case. It might be possible to devise a formula for distribution which divided up the aggregate to take account of individual losses but it might also be just to effect distribution in a different, more broad brush, manner for example by means of an equal division amongst all class members.

33. We turn to the rules on opt-out and opt-in. Sections 47C(3) and (4) create two slightly different rules. In the case of opt-out proceedings, where the CAT makes an award of damages it is under a duty ("*must"*) to impose an order that the damages are paid either to the representative or to a third party authorised by the CAT. Where the CAT makes an opt-in order it has a power to make such a direction ("*may*") but not a duty:

> "47C Collective proceedings:
>
> …
>
> (3) Where the Tribunal makes an award of damages in opt-out collective proceedings, the Tribunal must make an order providing for the damages to be paid on behalf of the represented persons to—
>
> (a) the representative, or
>
> (b) such person other than a represented person as the Tribunal thinks fit.
>
> (4) Where the Tribunal makes an award of damages in opt-in collective proceedings, the Tribunal may make an order as described in subsection (3).

The Act however does not indicate how, once the money is in the hands of the representative or authorised third person, the damages are thereafter in practical terms to be distributed to the class. In *Merricks* all members of the Court emphasised that the later distribution stage was different from the earlier award of damages stage (see e.g. paragraphs [77] and [149]).

34. Section 47C(5) – (9) deals with the position that arises if, at the end of the day, following the process of distribution of an award in an opt-out case, there are unallocated funds. In such a case the residue is to be allocated to a nominated charity (at present The Access to Justice Foundation):

> (5) Subject to subsection (6), where the Tribunal makes an award of damages in opt-out collective proceedings, any damages not claimed by the represented persons within a specified period must be paid to the charity for the time being prescribed by order made by the Lord Chancellor under section 194(8) of the Legal Services Act 2007.
>
> (6) In a case within subsection (5) the Tribunal may order that all or part of any damages not claimed by the represented persons within a specified period is instead to be paid to the representative in respect of all or part of the costs or expenses incurred by the representative in connection with the proceedings.
>
> (7) The Secretary of State may by order amend subsection (5) so as to substitute a different charity for the one for the time being specified in that subsection.
>
> (8) A damages-based agreement is unenforceable if it relates to opt-out collective proceedings.
>
> (9) In this section—
>
> (a) "charity" means a body, or the trustees of a trust, established for charitable purposes only;
>
> (b) "damages" (except in the term "exemplary damages") includes any sum of money which may be awarded by the Tribunal in collective proceedings (other than costs or expenses);
>
> (c) "damages-based agreement" has the meaning given in section 58AA(3) of the Courts and Legal Services Act 1990."

The Rules

35. The Competition Appeal Tribunal Rules 2015 (SI 2015 No 1648) ("*the Rules*") flesh out the framework contained in the CA 1998. They address both the certifying of collective actions and the criteria to be applied in choosing as between opt-in and opt-out proceedings. The Rules are made by the Secretary of State after consultation in accordance with section 15(1) of the Enterprise Act 2002 and pursuant to section 15(1) to (3) of, and Part 2 of Schedule 4 to, the Enterprise Act 2002 and sections 192(3), (4) and 193(1), (2)(b) and (3) of the Communications Act 2003.

36. **Rule 4 General Principles**: Any order made under the Rules must take into account the "*General Principles*" set out in Rule 4. These apply to collective proceedings by virtue of Rule 3(a). The General Principles emphasise the importance of expedition,

proportionality, justice and fairness in the making of orders. They require the parties to cooperate with each other to achieve those results. A duty of mutual cooperation (in Rule 4(7) – note the word "*required*") is important because, especially once the CAT has made an award of damages, it is entitled to expect the parties, in fulfilment of this duty, to cooperate *inter se* and with the Tribunal to ensure smooth and effective distribution. They also make clear that the CAT has the power to switch from formal proceedings to informal proceedings in which the CAT will facilitate mediated solutions (cf. Rule 4(6)(a)):

> "(1) The Tribunal shall seek to ensure that each case is dealt with justly and at proportionate cost.
>
> (2) Dealing with a case justly and at proportionate cost includes, so far as is practicable—
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate— (i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party;
>
> (d) ensuring that it is dealt with expeditiously and fairly;
>
> (e) allotting to it an appropriate share of the Tribunal's resources, while taking into account the need to allot resources to other cases; and
>
> (f) enforcing compliance with these Rules, any practice direction issued under rule 115, and any order or direction of the Tribunal.
>
> (3) Each party's case shall be fully set out in writing as early as possible.
>
> (4) The Tribunal shall actively manage cases.
>
> (5) Active case management includes—
>
> (a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
>
> (b) identification of and concentration on the main issues as early as possible;
>
> (c) fixing a target date for the main hearing as early as possible together with a timetable for the proceedings up to the main hearing, taking into account the nature of the case;

> (d) adopting fact-finding procedures that are most effective and appropriate for the case;
>
> (e) planning the structure of the main hearing in advance with a view to avoiding unnecessary oral evidence and argument; and
>
> (f) ensuring that the main hearing is conducted within defined time-limits.
>
> (6) The Tribunal may— (a) encourage and facilitate the use of an alternative dispute resolution procedure if the Tribunal considers that appropriate; (b) dispense with the need for the parties to attend any hearing; and (c) use technology actively to manage cases.
>
> (7) The parties (together with their representatives and any experts) are required to co-operate with the Tribunal to give effect to the principles in this rule."

37. **Rule 79(1) and (2) - certification**: Rule 79(1) and (2) addresses the certification of claims as eligible for collective proceedings. As already explained, it condenses the "*same, similar or related*" test from section 47B(6) CA 1998 (see paragraph [31] above) into the expression "*the common issues*":

> "Certification of the claims as eligible for inclusion in collective proceedings
>
> (1) The Tribunal may certify claims as eligible for inclusion in collective proceedings where, having regard to all the circumstances, it is satisfied by the proposed class representative that the claims sought to be included in the collective proceedings— (a) are brought on behalf of an identifiable class of persons; (b) raise common issues; and (c) are suitable to be brought in collective proceedings.
>
> (2) In determining whether the claims are suitable to be brought in collective proceedings for the purposes of paragraph (1)(c), the Tribunal shall take into account all matters it thinks fit, including - (a) whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues; (b) the costs and the benefits of continuing the collective proceedings; (c) whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class; (d) the size and the nature of the class; (e) whether it is possible to determine in respect of any person whether that person is or is not a member of the class; (f) whether the claims are suitable for an aggregate award of damages; and (g) the availability of alternative dispute resolution and any other means of resolving the dispute, including the availability of redress through voluntary schemes whether

> approved by the CMA [Competition and Markets Authority] under section 49C of the 1998 Act(a) or otherwise."

38. In *Merricks*, at paragraph [61] in relation to the exercise of discretion under Rule 79(2) to certify a claim, the Supreme Court highlighted the open-ended nature of the discretion:

> "… the listing of a number of factors potentially relevant to the question whether the claims are suitable to be brought in collective proceedings in rule 79(2), within the general rubric "all matters it thinks fit" shows that the CAT is expected to conduct a value judgment about suitability in which the listed and other factors are weighed in the balance. The listed factors are not separate suitability hurdles, each of which the applicant for a CPO must surmount …"

39. The Court also emphasised the broad discretion conferred upon the CAT. The Tribunal was an expert body *"… to which Parliament has entrusted both the exclusive jurisdiction over collective proceedings and, in particular, the conduct of the task of certification, with wide discretionary power for that purpose.*" Certification under Rule 79(2) was *"… a single albeit multi-factorial balancing exercise in which too much compartmentalisation may obscure the true task*" (*ibid* paragraphs [63] and [64]).

40. **Rule 79(3) – choice of opt-out or opt-in**: Rule 79(3) addresses the nature of the discretion accorded to the CAT to make opt-in or opt-out orders. The test to be applied is different to that applied to the decision whether to certify or not. It can include an assessment (by virtue of the reference to the matters in paragraph Rule 79(2) also being capable of being considered) of suitability but is far broader:

> "(3) In determining whether collective proceedings should be opt-in or opt-out proceedings, the Tribunal may take into account all matters it thinks fit, including the following matters additional to those set out in paragraph (2) - (a) the strength of the claims; and (b) whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover."

We examine the scope of this discretion more fully at paragraphs [81] – [83] below.

41. **Rule 93 – distribution**: Rule 93 addresses distribution of an award of damages but does so only selectively. It caters for the start of the process and one eventuality that might arise at the end but otherwise is silent as to how an award is to be distributed, leaving it to the broad discretion of the CAT to regulate all matters in between.

42. Rule 93(1) and (2) addresses the start of the distribution process and replicates the effect of Section 47C(3) and (4) CA 1998, requiring an award of damages to be paid to the representatives or an authorised third person:

> "Distribution of award

> (1) Where the Tribunal makes an award of damages in opt-out collective proceedings, it shall make an order providing for the damages to be paid on behalf of the represented persons to - (a) the class representative; or (b) such person other than a represented person as the Tribunal thinks fit.
>
> (2) Where the Tribunal makes an award of damages in opt-in collective proceedings, it may make an order as described in paragraph (1)."

43. Rule 93(4) and (5) makes provision for the eventuality that might arise at the end of the distribution process where an award of damages is not fully distributed. It creates a default position whereby undistributed funds can be allocated to a nominated charity. The underlying policy is that since the defendant has acted unlawfully, it would be bad policy for undistributed sums to be remitted to the defendant. It is better that they are allocated to a public interest cause, such as a charity.

> "(4) Where the Tribunal is notified that there are undistributed damages in accordance with paragraph (3)(b), it may make an order directing that all or part of any undistributed damages is paid to the class representative in respect of all or part of any costs, fees or disbursements incurred by the class representative in connection with the collective proceedings.
>
> (5) In exercising its discretion under paragraph (4), the Tribunal may itself determine the amounts to be paid in respect of costs, fees or disbursements or may direct that any such amounts be determined by a costs judge of the High Court or a taxing officer of the Supreme Court of Northern Ireland or the Auditor of the Court of Session. (6) Subject to any order made under paragraph (4), the Tribunal shall order that all or part of any undistributed damages is paid to the charity designated in accordance with section 47C(5) of the 1998 Act(a) and a copy of that order shall be sent to that charity."

44. The Rules leave all other matters relating to distribution to the Tribunal to supervise by way of case management decisions. Rule 93(3) confers a broad power on the CAT to exercise control over the distribution process by ordering "*any … matters as the Tribunal thinks fit*". In *Merricks* (*ibid* paragraph [58]) Lord Briggs for the majority said that the only requirement was that the CAT must exercise its discretion by being "*just in the sense of being fair and reasonable*", a formula which is clearly reflected in the Rule 4 General Principles. This power might (but need not) include setting a date for the class members to come forward to make a claim for compensation and the date upon which the Tribunal is to be notified of undistributed funds:

> "(3) An order made in collective proceedings in accordance with paragraphs (1) and (2), may specify - (a) the date by which represented persons shall claim their entitlement to a share of that aggregate award; (b) the date by which the class representative or person specified in accordance with paragraph (1)(b) shall notify the Tribunal of any undistributed damages

> which have not been claimed; (c) any other matters as the Tribunal thinks fit."

45. The breadth of the discretion of the CAT to make case management orders and directions is important. In general (non-collective) litigation the CAT has a broad power under Rule 55 to make case management decisions:

> "(1) The Tribunal may at any time, on the request of a party or of its own initiative, at a case management conference, pre-hearing review or otherwise, give such directions as are provided for in paragraph (2) *or such other directions as it thinks fit to secure that the proceedings are dealt with justly and at proportionate cost*."
>
> (emphasis added)

In collective proceedings the power in relation to distribution conferred by Rule 93(3) is supplemented and buttressed by the more general power in Rule 88(1) which confers upon the CAT "*at any time"* the power to "*give any directions it thinks appropriate…*". This provides:

> "Case management of the collective proceedings
>
> 88 - (1) The Tribunal may, at any time, give any directions it thinks appropriate for the case management of the collective proceedings.

The combined effect of Rules 88 and 93 is that in relation to distribution the CAT is empowered (i) "*at any time*" (ii) to "*make any direction*" (iii) on "*any matter*".

The Guide

46. We turn now to the CAT's Guide to Proceedings 2015 ("*the Guide*"). This also addresses certification and the discretion of the CAT to order opt-in or opt-out. We address the legal status of the Guide below at paragraphs [64] – [67]. According to the Guide in deciding whether proceedings should be opt-in or opt-out, the CAT will consider "*all matters that it thinks fit*":

> "Whether proceedings should be opt-in or opt-out
>
> 6.38 As mentioned above, a judgment in opt-out proceedings binds all persons within the class, save for those who have opted out (or foreign class members who have not opted in), whereas a judgment in opt-in proceedings binds only those class members who have opted in to the proceedings. Where the class representative seeks approval to bring opt-out proceedings, it will need to make submissions as to why that form of proceedings is more appropriate than opt-in proceedings.
>
> 6.39 The Tribunal will consider all matters it thinks fit in determining whether proceedings should be opt-in or opt-out. Rule 79(3) lists two specific factors the Tribunal will consider: -

> Strength of the claims (Rule 79(3)(a)) Given the greater complexity, cost and risks of opt-out proceedings, the Tribunal will usually expect the strength of the claims to be more immediately perceptible in an opt-out than an opt-in case, since in the latter case, the class members have chosen to be part of the proceedings and may be presumed to have conducted their own assessment of the strength of their claim. However, the reference to the "strength of the claims" does not require the Tribunal to conduct a full merits assessment, and the Tribunal does not expect the parties to make detailed submissions as if that were the case. Rather, the Tribunal will form a high level view of the strength of the claims based on the collective proceedings claim form. For example, where the claims seek damages for the consequence of an infringement which is covered by a decision of a competition authority (follow-on claims), they will generally be of sufficient strength for the purpose of this criterion.
>
> Whether it is practicable for the proceedings to be brought as opt-in proceedings (Rule 79(3)(b)) The Tribunal will consider all the circumstances, including the estimated amount of damages that individual class members may recover in determining whether it is practicable for the proceedings to be certified as opt-in. There is a general preference for proceedings to be opt-in where practicable. Indicators that an opt-in approach could be both workable and in the interests of justice might include the fact that the class is small but the loss suffered by each class member is high, or the fact that it is straightforward to identify and contact the class members."

47. We draw attention to three points from this text relied upon by the appellants to support its argument that the system favours opt-in proceedings: (i) the last sentence of paragraph [6.38] which seeks to impose a burden on those seeking opt-out proceedings to make submissions as to why these are "*more appropriate*" than opt-in proceedings which, it is argued, indicates a presumption or default position in favour of opt-in procedures; (ii) the observation in paragraph [6.39] that in opt-out proceedings the merits should be "*more immediately perceptible*" which it is said reinforces the predisposition in favour of opt-in proceedings; and (iii) the express reference in the same paragraph to there being a "*general preference*" for opt-in proceedings. We deal with these arguments at paragraphs [60] – [68] below.

48. The Guide recognises that the CAT will need to undertake "*intensive*" case management of collective proceedings, especially where they are opt-out. This is justified by the need to protect the interests of the class. Paragraph [6.7] says: "*Collective proceedings, and in particular opt-out collective proceedings, require intensive case management by the Tribunal, so as to ensure that the interests of the class are adequately protected.*"

49. Issues relating to distribution are addressed at paragraphs [6.82ff] which largely follow the structure of the Rules. Though in paragraph [6.85] in relation to Rule 93(3)(a), it suggests that where an order is made that damages are paid to the representatives or

some authorised third party the CAT "*must*" specify a time within which individual represented persons may claim their entitlement. In fact under that rule there is only a power conferred and not a duty imposed; the CAT can, but need not, specify a time for claims to be made.

E. The scope of the appellate jurisdiction

50. This appeal raises a variety of arguments which are said to amount to points of law. We think it helpful to set out the approach we have taken to the grounds of appeal. The starting point is the classification made by the Supreme Court in *Merricks* as to what was a point of law.

51. In *Merricks* the Court identified what it classified as a series of errors of law in the restrictive approach taken by the CAT to certification. The CAT refused to certify a follow-on claim (on behalf of a class exceeding 46m individuals) as eligible for collective action. A defence of pass-on had been raised. The class applied for an order for aggregate damages and indicated an intention to distribute damages broadly equally on a per capita basis for each separate year that the breach applied to a class member. This was to overcome the obvious difficulties of seeking to compute loss by reference to the individual position of each of the 46.2m members of the class who might have suffered loss. The CAT heard expert economic evidence and held: (1) that the experts had not demonstrated a sufficient likelihood of there being available at trial sufficient data to enable the defence of pass-on properly to be determined and that therefore the claims were not suitable for an award of aggregate damages; and (2) that the claimant – wrongly - did not intend to distribute damages in a manner properly reflecting the compensatory principle reflecting individual losses.

52. The Court of Appeal allowed an appeal holding that the claim should have been certified. A majority of the Supreme Court dismissed the defendant's appeal. The Court treated the following as points of law: (i) whether the CAT correctly applied the "*common issue*" test (under section 47B(6) CA 1998 and Rule 79(2)(a)) as involving a series of hurdles to be overcome as opposed to merely a series of factors to be weighed in the balance; (ii) whether the test for "*suitability*" also under section 47B(6) CA 1998 was a relative one (where the decision to certify was to be taken with the counterfactual of individual proceedings as the relevant comparator) or an abstract one (where the decision whether the claim was suitable to be grouped together as a unit called for an assessment of whether there was or was likely to be a method available which could be used to assess loss suffered by the class with a reasonable degree of accuracy); (iii) the failure of the CAT to take account of the "*general principle*" that damages were to be quantified by the CAT doing "*what it can with the evidence*" with a "*broad axe*" or "*broad brush*" which thereby enabled the Tribunal to make allowances for a wide range of deficiencies and lacuna in the evidence; and (iv) the failure of the CAT to recognise that the compensatory principle of damages was not an essential element in the principles governing the distribution of aggregate damages. The Court decided that the following were <u>not</u> errors of law: (i) the decision by the CAT to conduct a "*trial within a trial*" at the certification stage involving the hearing of expert evidence; and (ii) having regard to the proposed method of distribution at the certification stage which had been argued to be premature. See generally paragraph [64(a) – (e)].

53. The majority treated as the most serious of the identified errors of law the failure of the CAT to find that "*the incompleteness of data and the difficulties of interpreting what*

survives" amounted to a real obstacle (*ibid* paragraph [74]). The clear message of the judgment was that it was the "*duty*" of the Tribunal to the class to do the best it could on the available evidence applying the famous "*broad axe*" and the "*broad brush*" and if needs be by using ADR to "*help*".

54. In relation to complaints which were held not to amount to errors of law, the objection to the "*trial within a trial*" procedure directed by the CAT at the certification stage was held by the Court to be appropriate on the facts though it expressed the view that such steps would normally be rare given the broad axe nature of the test to be applied (*ibid* paragraphs [78] and [79]). In relation to whether it was premature to consider distribution at the certification stage the Court was also of the view that it was appropriate on the facts (*ibid* paragraph [80]).

55. In the light of this guidance, we treat as issues of law any issue of construction of the CA 1998 or the Rules or any issue as to the construction or probative weight of the Guide (which has the status of a practice direction). The proper construction of a document (for example an agreement) might also amount to an issue of law. We also recognise upon the basis of *Merricks* that the overall, high level, approach that the CAT should take is treated as an issue of law. Examples from *Merricks* include the interpretation of section 47C(2) on aggregate damages as a departure from the compensatory principle, and the requirement for the CAT to take the "*broad brush*", "*broad axe*, "*do the best you can*", approach to issues of evidence and quantification.

56. Where the challenge is directed at a decision about facts *prima facie* this will not be a matter falling within the jurisdiction of the Court of Appeal because it will be the outcome of an exercise of judgment and not an error of law. Nonetheless, the exercise of judgment over facts can on occasion amount to an error of law, for example where the decision in dispute is outside the (generous) bounds of that which the decision maker (here the CAT) could properly and reasonably make. If for instance the CAT were wrongly to place the decimal point one place to the right in an equation relevant to the computation of aggregate damages (thereby magnifying the damages to be paid by 1000% - damages of £1m might become £10m), then the Court might, for example, treat this for instance as the CAT taking into account an irrelevant consideration and correct it. We consider that issues such as this will very much be the exception and not the rule.

57. On the other hand when it comes to the weighing up of the various factors relevant to the choice of opt-out or opt-in this is essentially an exercise of judgment over facts and evidence by an expert, specialist, body, that will over time accrue an increasing well of experience in how to handle these complex cases. The appellate courts recognise that the case management decisions of the CAT are exercises in pragmatism and that undue formalism and precision are not required: See the summary of the case law in *NTN v Stellantis NV and others* [2022] EWCA Civ 16 at paragraphs [24] – [29]. These considerations broaden the Tribunal's margin of discretion or judgment. This Court should not interfere simply because it might, for the sake of argument, have drawn a different conclusion from the weighing exercise. We would expect that most opt-out/opt-in decisions will involve a weighing exercise of this nature.

F. Issue I: The exercise of the discretion to order opt-out or opt-in proceedings

Appellants' submissions

58. We turn now to the first category of grounds of appeal which has a number of threads to it. The argument runs as follows. First, Rule 79(3) makes clear that in selecting between opt-in or opt-out proceedings the Tribunal should consider whether it is "*practicable*" for proceedings to be brought upon an opt-in basis. Secondly, the interpretation of practicability must be informed by the Guide – which is a practice direction - which explains that there is a "*general preference*" for opt-in proceedings "*where practicable*". Thirdly, the Guide indicates that opt-in proceedings are "*workable and in the interests of justice*" where it is "*straightforward to identify and contact the class members*". Fourthly, in the present case upon agreed and incontrovertible facts the class members are both identifiable and contactable (they were all BT customers whose identities and contact details are known to BT). Fifthly, applying the Guide, this should have led the Tribunal to conclude that opt-in proceedings were practicable, and this being so and given the preference for opt-in proceedings in the Guide, this should have been ordered. Sixthly, if this case is not suitable for opt-in proceedings "*it is difficult to see what case will ever be certified on an opt-in basis*".

59. With these considerations in mind the appellants then argues that the Tribunal erred because: (i) it failed to take into account the general preference for opt-in proceedings as articulated in the Guide; (ii) it accepted the submission that potential class members were less likely to opt-in at the outset than at the distribution stage (Judgment paragraphs [111] – [114]); (iii) it accepted the argument that the position and preference of third party funders was relevant and indeed dispositive (Judgment paragraph [115]); and (iv) it applied generally a mistaken understanding of the concept of practicability. We deal separately with these arguments.

The existence of a general preference or presumption in favour of opt-in proceedings?

60. We start with the argument that there is, in law, a "*general preference*" or presumption in favour of opt-in proceedings. This is a point of law which concerns the construction and weight to be attached to legislation and to the Guide.

61. Both parties have argued before us that there is a predisposition built into the legislation. Both rely upon the legislative history from which the appellants argues that the predisposition lies in favour of opt-in proceedings and the respondent argues that it is in favour of opt-out proceedings. In our judgment, as we explain more fully below, neither section 47B CA 1998 nor the Rules provide for any sort of a policy or legal preference or predisposition either towards or against opt-in or opt-out. The legislative starting point is one of neutrality. Further, read fairly, we do not consider that the Guide seeks to create any clear predisposition. Indeed, on first principles, it would not be open to a President in a Guide to create a legal preference or presumption which was inconsistent with a legislative scheme which proceeded upon the basis of neutrality.

62. Section 47B CA 1998 recognises that collective proceedings can be opt-in or opt-out but does not indicate any preference for either solution. Rule 79 makes clear that the exercise of the discretion is open textured. The duty upon the CAT is to take into

account all the circumstances. In relation to opt-out or opt-in the Tribunal *"…may take into account all matters it thinks fit, including…*". What then follows is a non-exhaustive list of considerations that the CAT is empowered ("*may*" – not "*must"*) to address. The list is not exclusive or exhaustive and no weighting is ascribed to any particular matter; and there might be other considerations of lesser, equal or greater weight that the CAT considers relevant in a given case.

63. The legislature could, had it wished, have introduced a presumption. It could, for instance, have said that collective proceedings will be opt-in (or opt-out) save insofar as the CAT considers that there is good reason to order otherwise; or it could have specified that certain considerations were to carry enhanced weight; or it could have said that there was a rebuttable presumption in favour of opt-in (or opt-out) proceedings. There are numerous drafting techniques that could have been used had the legislature intended to create such a presumption or preference; but it did not use any such technique. In our judgment the legislature intended to leave the choice of opt-in or opt-out to the CAT based upon the facts of each individual case and it did not intend to create any starting presumption or preference either way.

64. We turn to the Guide. Under Rule 115(1) entitled "*General power of the Tribunal*" the Tribunal is entitled "*to determine its own procedure*". Under Regulation 115(3) "*The President may issue practice directions in relation to the procedures provided for by these Rules*". The Guide was issued in 2015 under this latter power. The Guide is an important and valuable indication of the approach that the CAT will take upon a wide range of procedural matters. The issue in this appeal concerns only the provisions which relate to collective actions and the view expressed (in paragraphs [6.38] and [6.39]) that there is a "*general preference for proceedings to be opt-in where practicable"* (see paragraphs [46] and [47] above).

65. First, when read fairly, the Guide does not purport to impose predetermined limits upon the exercise of discretion. The Registrar, in the Preface to the Guide, made clear that the collective action jurisdiction was "*novel*", that there was no prior experience to draw upon, that the Tribunal might "*develop its approach on a case by case basis*" and that the Guide might, in the light of experience, require future revision:

> "As regards collective proceedings and collective settlements, the jurisdiction of the Tribunal is novel. In prescribing directions and providing guidance for such proceedings and settlements, the Tribunal therefore has no prior practice from any part of the United Kingdom on which to draw. While the Guide seeks to provide as much assistance as possible, it is expected that the Tribunal will further develop its approach on a case-by-case basis, and the Guide is likely to need revision accordingly in the light of experience."

66. Paragraphs [6.38] and [6.39] of the Guide upon which the appellants rely as indicating a predisposition for opt-in proceedings must be viewed in the above light. This text was not drafted in terms intended to impose limits upon the exercise of discretion. It was a tentative view as to how, in 2015, before the CAT had acquired hands-on experience, the President, quite reasonably, considered that the exercise of discretion might pan out. It focused in paragraph [6.39] upon the twin considerations of identifiability and contactability but did not address the relevance to the opt-out/opt-in

decision of the ability to convert those persons into litigants. Subsequently, the Supreme Court has made clear that convertibility is an issue of substantial importance. In *Merricks* a key purpose of the legislation was said to be to give consumers claiming modest sums a mechanism whereby they could vindicate their claims in circumstances whereby absent that mechanism the claim would not be brought. The same logic must apply to convertibility and the opt-out/opt-in decision. There would be little point in the CAT certifying a claim upon the basis that it facilitated a large scale consumer claim which otherwise would not occur but then ordering that it be opt-in with the consequence that few took up the option and the claim withered away to nothing. The judgment in *Lloyd*, referred to below at paragraph [71], focused upon the ability to avoid the problems of having to convert a class of identifiable and contactable persons into litigants as an important advantage of opt-out over opt-in collective proceedings. This illustrates how, as contemplated in the Guide, subsequent judicial analysis has identified factors of relevance not covered by the Guide and this will necessarily affect the weight the CAT will attach to the Guide on the issue in question. It also illustrates why the Registrar was correct to be tentative in his evaluation of the effect of the Guide in this new and evolving procedural field.

67. Secondly, upon the basis of first principles, it would not in any event be open to a President in the exercise of a legislative power to issue practice directions departing from the legislative intent. The power conferred is to supplement and implement the intent, not deviate from it. If the legislator has concluded therefore that a discretion is to be exercised in an open textured way without prior disposition then a presumption in favour of opt-in proceedings cannot lawfully, by a practice direction, be injected into the equation to reduce or curtail that otherwise unfettered discretion. To argue that the Guide binds the Tribunal as a matter of law or sets out matters which must in law be taken into account as attracting enhanced weight is for the tail to wag the dog.

68. In summary, the power to order opt-in or opt-out proceedings is one for the Tribunal to make upon the basis of all the circumstances of the case. There is no prior legislative predisposition one way or another. Whether, over time and in the light of experience, the Tribunal and the courts identify considerations which will typically attract greater or lesser weight in the scales is quite a different matter. The CAT did not therefore err in failing to take as its starting point, or otherwise factor into its thinking, that there was a legal or policy presumption or preference in favour of opt-in proceedings.

69. We turn now to the appellants' specific objections about the manner in which the Tribunal exercised its discretion.

The likelihood of class members opting-in at the outset

70. As already described, the appellant argues that the only issues relevant to practicality are the identifiability and contactability of potential claimants. It is also argued that it is wrong in principle to draw a distinction between a class member's willingness to opt-in at the outset, on the one hand, and the willingness to opt-in *after* a favourable ruling on liability and the making of an award as part of the distribution process, on the other hand. The Tribunal disagreed and held that the analysis had to consider the willingness of claimants (assumed to be identifiable and contactable) to sign up to litigation which itself had to take into account the before and after positions. The Tribunal held as follows:

"111. BT's overarching point is that in this case, because all the potential claimants are or have been in the recent past, customers of BT, they are easily identifiable and indeed contactable (subject to changes of address etc). …. Therefore, it will be relatively straightforward for such customers (a) to be informed of this action and (b) then to decide whether or not to join it. BT points to the fact that the PCR now relies upon this feature of the claim to explain how simple it would be to distribute any damages or equivalent remedy, since the class to be compensated can be identified.

112. The PCR's core response is that there is a real difference between the option to join a legal action at the outset and claiming a damages entitlement later on once the case has been won. Especially with the demographic of at least most of the potential claimants here, there may well be a reluctance to sign up to a legal action where the risks and complexities will have to be explained to them, and that this scenario differs from that in which they are simply asked to collect a defined amount at the end. Indeed, and as canvassed with counsel during the hearing, the distribution of damages could be achieved without any active participation of the relevant customers at all because their BT accounts could simply be credited with the relevant amount - a method noted albeit in passing by the President during argument in the recent CPO hearing in Gutmann v MTR South West Trains Gutmann v First MTR South West Trains and others:

> "Similarly, if a telecoms operator overcharged subscribers, well they will know who the subscribers are, they can credit them on their phone bills or their account, even if it's only £4.50. One couldn't say, "No you shouldn't bring a collective action because it's only £4.50 and that's trivial", if the mechanism is straightforward."

113. We say more about this feature of the claim below.

114. In more detail, the PCR contends that there is little prospect that the 2.3m customers who would be within the scope of the action would be sufficiently proactive to opt-in given the demographic of most of them. The claim is a technical one. It is also correct that paragraph 6.39 of the Guide does pre-suppose that individual customers will have conducted their own assessment of the strength of the case before opting in. That seems unlikely here. Of course, legal advice is not mandatory and the proposed Litigation Plan here does set out the nature of the action. Nonetheless, in our judgment, the position at this stage is not at all the same as at the distribution stage, for the reasons already given."

71. In *Lloyd* the Supreme Court highlighted the important advantage of opt-out proceedings in overcoming the low-participation rates associated with opt-in proceedings. We set out the relevant paragraphs in full:

> "[25] … the group action procedure suffers from the drawback that it is an "opt-in" regime: in other words, claimants must take active steps to join the group. This has an administrative cost, as a solicitor conducting the litigation has to obtain sufficient information from a potential claimant to determine whether he or she is eligible to be added to the group register, give appropriate advice and enter into a retainer with the client. For claims which individually are only worth a few hundred pounds, this process is not economic as the initial costs alone may easily exceed the potential value of the claim.
>
> [26] Another limitation of opt-in proceedings is that experience has shown that only a relatively small proportion of those eligible to join the group are likely to do so, particularly if the number of people affected is large and the value of each individual claim relatively small. For example, a group action was recently brought against the Morrisons supermarket chain for compensation for breach of the DPA 1998 arising from the disclosure on the internet by a Morrisons' employee of personal data relating to other employees. Of around 100,000 affected employees, fewer than 10,000 opted to join the group action: see Various Claimants v Wm Morrisons Supermarkets plc [2017] EWHC 3113 (QB); [2019] QB 772 (reversed on the issue of vicarious liability by the Supreme Court: [2020] UKSC 12; [2020] AC 989). During the period of more than 12 years in which collective proceedings under the Competition Act 1998 (discussed below) could be brought only on an opt-in basis just one action was commenced, based on a finding of price fixing in the sale of replica football shirts. Although around 1.2 - 1.5m people were affected, despite widespread publicity only 130 people opted into the proceedings: see The Consumers' Association v JJB Sports Plc [2009] CAT 2, para 5; Civil Justice Council Report "Improving Access to Justice through Collective Actions" (2008), Part 6, para 22; and Grave D, McIntosh M and Rowan G (eds), Class Actions in England and Wales, 1st ed (2018), para 1-068.
>
> [27] Likely explanations for the low participation rates typically experienced in opt-in regimes include lack of awareness of the opportunity to join the litigation and the natural human tendency to do nothing when faced with a choice which requires positive action - particularly if there is no immediate benefit to be gained and the consequences are uncertain and not easy to understand: see eg Thaler R and Sunstein C, Nudge: The Final Edition (2021), pp 36-38; Samuelson W and Zeckhauser R, "Status Quo Bias in Decision Making" (1988) 1 Journal of Risk and

> Uncertainty 7-59. As the New Zealand Court of Appeal has recently said of opt-in class actions:
>
> > "Whichever approach is adopted, many class members are likely to fail to take any positive action for a range of reasons that have nothing at all to do with an assessment of whether or not it is in their interests to participate in the proceedings. Some class members will not receive the relevant notice. Others will not understand the notice, or will have difficulty understanding what action they are required to take and completing any relevant form, or will be unsure or hesitant about what to do and will do nothing. Even where a class member considers that it is in their interests to participate in the proceedings, the significance of inertia in human affairs should not be underestimated."
>
> Ross v Southern Response Earthquake Services Ltd [2019] NZCA 431, para 98; approved by the New Zealand Supreme Court at [2020] NZSC 126, para 40."

72. In *Merricks* Lord Sales and Lord Leggatt, in an observation consistent with the judgment of the majority, stated (*ibid* paragraph [92]), that opt-out proceedings existed to facilitate those who otherwise lacked the "*awareness, capability or resolve*" to take the "*positive*" step of opting-in. The factors identified are all relevant to the likelihood of convertibility.

73. In our judgment, and in line with the observations expressed in *Lloyd* and in *Merricks*, the CAT was entitled to conclude that if an opt-in was ordered the take-up could be very limited. Indeed, this seems to us to be a more or less obvious conclusion to arrive at on the facts. Both judgments demonstrate that the practicalities of collectively organised litigation might favour an opt-out solution where there are large numbers of potentially affected parties and relatively small sums at stake which might otherwise deter the take up of opt-in proceedings.

74. The ability of a claimant to convert identifiable contacts into litigants is hence an important factor which goes well beyond issues of identifiability and contactability. The Tribunal examined relevant factors such as size of class, the scale of a possible award and the impact of these on funding as important considerations. These might be sufficient, by themselves, to justify an opt-out decision. The CAT also considered the more subjective characteristics of the class including age profile, social class and technical ability. These are case specific factors which can serve to reinforce an opt-out decision. The CAT came to specialist conclusions which lay squarely within its broad margin of judgement. There is in our judgment no basis in law upon which this court can properly interfere.

Whether the position and preference of third-party funders is relevant?

75. The next issue is whether the preference of a funder is a relevant consideration, and, if so, as to the weight to be attached to such views. The Tribunal held:

> "115. Next, the PCR contends that if (as he predicts) too few customers opt in, the required third-party funding will not be attracted and in reality the claim would never get off the ground. It is hard to see an answer to this point, save the one which we have rejected which is that in reality a large number of the relevant customers would opt in. It might well be obvious that the ability of a claimant to fund a claim will be a matter of central importance and it is probably a truism that it is easier to fund a claim on an opt-out basis than it is upon an opt-in basis."

76. The appellants argue that the Tribunal erred in treating the third-party funder's preference for opt-out proceedings rather than opt-in proceedings as "*all but determinative*". The Tribunal certified on an opt-out basis because of the expressed preference of the litigation funder. Nothing in the Rules or the Guide permits this. If the CAT is correct then proceedings would never be certified on an opt-in basis because a funder could (and no doubt would) always express a preference for opt-out proceedings, and the Proposed Class Representative could (and no doubt would) always maintain that no claim would be brought on an opt-in basis thereby precluding access to justice. In other words, the representatives and the funders would game the system. If this were the position the Tribunal's assessment of practicability under in Rule 79(3)(b) would become "*emasculated*".

77. We do not agree. The financial position of the parties, which includes their ability to attract third party funding, is identified as a matter which the Tribunal should consider when making orders, pursuant to the Guiding Principles (Rule 4(2)(c)(iv)). Those principles also highlight the importance of the Tribunal taking steps to facilitate equality of arms as between litigants, which also bears upon issues of funding and representation (Rule 4(2)(a)). It is also an obvious consideration that would need to be considered under Rule 73. If, in a given case, a claim is only viable if third party funding is secured then this is relevant to access to justice and is a factor the CAT should necessarily take into account. It is self-evident that in many large-scale consumer based collective actions the availability or non-availability of third party funding might be dispositive of whether the claim ever gets off the ground.

78. In the present case the CAT did not simply accept the position of the funder without more but took its decision based upon its own assessment of the facts and its own view of what was judicial common sense. Its conclusion took into account its own view of: the number of potential claimants that might sign up to opt-in proceedings; the impact of this upon the willingness of potential funders to invest; and, in consequence, the probability of the litigation ever becoming viable absent an opt-out order. Even assuming identifiability and contactability, the CAT accepted that: (i) very few claimants would sign up to an opt-in process; (ii) a third party funder would therefore find the litigation unattractive; and (iii) this being the case the Claim might never be commenced if the Claim proceeded upon an opt-in basis. If the proceedings did not go ahead, because of lack of funding, then access to justice, which is a seminal principle lying at the epicentre of the jurisdiction, might be thwarted. As to the risk of gaming by funders undermining the system, the importance of the CAT forming an independent view is supported by judicial comment in *Merricks* in both the Court of Appeal [2019] EWCA Civ 674 at paragraph [60] and per Lord Sales and Lord Leggatt in the Supreme Court at paragraph [98]. Commercial funders seek to profit from litigation and the

Tribunal will no doubt be alert to curb the risk that the leverage that opt-out proceedings provide is being deployed oppressively and unfairly and/or that the costs spiral out of control relative to likely awards. Rule 4(1) emphasises that the CAT will "*ensure*" that cases are dealt with "*at proportionate cost*".

79. The appellants do not take issue with the findings of fact made by the Tribunal. They do not, for instance, argue that particular findings were outside the range of possible findings that a reasonable Tribunal could make and that therefore they amounted to errors of law. Criticism is though made that the CAT did not refer in its Judgment to actual evidence to support its conclusions and that the Judgment appears, as a matter of drafting, propositional. But, again, it is not said that there was no actual evidence which was before the CAT (albeit not referred to in the Judgment) that was capable of supporting the CAT's findings. Further, judgments such as that of the Supreme Court in *Lloyd* (see above at paragraph [71]) indicate that conclusions about convertibility may be of a type and nature such that the Tribunal is able to form a conclusion by applying a healthy dollop of judicial common sense. In the present case the Tribunal was entitled to conclude that it was "*probably a truism*" that it was easier to fund opt-out than opt-in proceedings.

80. In our judgment the CAT's conclusion about the financial viability of the Claim absent an opt-out order are findings the Tribunal was entitled to make as an exercise of judgement. We can identify no error of law.

Whether the Tribunal erred generally in its understanding of the concept of practicability?

81. The appellants in written submissions argued that in its reasoning in the ruling refusing permission to appeal ([2021] CAT 32) the Tribunal explained that it had merely engaged in a "*reasoned multifactorial assessment*" as contemplated by the Supreme Court in *Merricks*. When the Supreme Court stated that the Tribunal's task was to engage in a "*reasoned multifactorial assessment*" this was however in relation to the concept of "*suitability"* under Rule 79(2), not the test of "*practicability*" under Rule 79(3). It is also pointed out that in its main Judgment the Tribunal also applied a test of appropriateness and suitability and not practicability (see e.g. Judgment paragraph [125]).

82. As to this, at the very worst, the Tribunal might have used slightly loose language but to criticise it elevates form over substance. The CAT recited the correct test in the substantive Judgment (see paragraphs [22] and [24]). In paragraph [110] it seeks to summarise those tests as ones of "*appropriateness*" and it then goes on to refer to factors relevant to the statutory test which incorporates practicability as one out of a number of other potentially relevant considerations. Focusing upon substance we detect no errors in the handling by the CAT of the test. The CAT identified the factors it considered most relevant and it identified a few that it did not attach weight to and there are yet other factors identified in the Guide that it did not refer to at all. It is reasonable to infer from the Judgment that the most compelling or weightiest factors were: the large scale of the class; the modesty of the individual awards that would be made if the Claim prevailed; the difficulties that would be confronted in seeking to convert the class into actual opt-in litigants; and the impact of the availability of funding on the viability of any claim were it to be upon an opt-in basis. In our judgment this combination of factors was compelling in favour of opt-out proceedings. Some (seemingly modest and

by no means determinative) weight was also attached to the fact that if the CAT ordered an account credit this would enable a remedy to be made without the involvement of the class. It was not influenced by inferences that might be drawn from any brand loyalty that customers might owe to BT (which could deter an opt-in) or the substantive merits of the Claim. Equally, the CAT did not consider that the complexity of the claim was a factor either way, nor did it seek to attach significance to the fact that the class would not have conducted any independent assessment of the merits of the case. This was a proper balancing of considerations.

83. In any event it can equally be said that in determining whether to make an opt-out order under Rule 79(3) the test is "*multifactorial*", just as it is under Rule 79(2). This flows from the expressly open-ended nature of the discretion the CAT must exercise under Rule 79(3). The additional matters referred to in Rule 79(3) are all matters the CAT "*may*" (not "*must*") take into account. These are (i) all matters set out in Rules 79(2) on suitability; (ii) practicability; and (iii) the strength of the merits. The concept of "*practicability*" is not defined in the CA 1998 or the Rules and it is not "*the*" test but simply "*a*" matter the Tribunal is entitled to take into account. Practicability, in any case, will be highly fact and context sensitive and will include, as one facet of this broad analysis, the Tribunal using its expert judgement to envisage how the costs and benefits of litigation will play out upon an opt-out or opt-in basis. The view the Tribunal takes will be a conclusion reached by an expert body with a growing depth of experience in the conduct of collective proceedings. Ms Ford QC for BT did not demur from this analysis of legislative language. She did argue that practicability meant "*doabilty*"; if it can be done then it is practicable and if it is therefore practicable then it pointed powerfully in favour of an opt-in process. With respect we do not agree. Practicability includes being "*doable"* but goes further; it requires the court to ask whether it is not only "*doable*" but also reasonable, proportionate, expedient, sensible, cost effective, efficient etc, to do it. There are many things that might be doable but where to do them would amount to a poor exercise of judgment.

84. In conclusion, the balancing exercise was well within the CAT's margin of discretion. There was no error of law. We dismiss this ground of appeal.

G. Issue II: The power of the Tribunal to order an account credit

The Judgment

85. This ground – which is an issue of law – arises because in the Judgment the CAT (at paragraph [112]) treated as a fact relevant to the benefits of opt-out over opt-in that in opt-out proceedings distribution could be achieved by means of an account credit without active involvement of relevant customers:

> "… the distribution of damages could be achieved without any active participation of the relevant customers at all because their BT accounts could simply be credited with the relevant amount - a method noted albeit in passing by the President during argument in the recent CPO hearing in Gutmann v MTR South West Trains Gutmann v First MTR South West Trains and others:

> "Similarly, if a telecoms operator overcharged subscribers, well they will know who the subscribers are, they can credit them on their phone bills or their account, even if it's only £4.50. One couldn't say, "No you shouldn't bring a collective action because it's only £4.50 and that's trivial", if the mechanism is straightforward."

86. Later in paragraphs [117] and [118] the Tribunal addressed an objection by BT that there was no power for the CAT to enable damages to be paid out *via* a credit to their account or anything equivalent. The CAT said:

> "117. In the course of argument, a point was taken by BT as to whether, if the PCR won, the Tribunal would actually have jurisdiction to enable the damages to be paid out to each customer via a credit to their account or something similar. It is pointed out that Rule 93 (1) … stipulates that damages can only be paid to the class representative or such other person other than a represented person as the Tribunal thinks fit. Thus this direct method of compensation is simply not available. For our part, we do not accept that the position is as clear as that. The "other person" could be a claims administrator instructed by the PCR who would then, with the assistance of BT's records and technology, be able to effect the relevant credit or something similar. Indeed, on the face of it, the "other person" could be BT itself on a specific direction of the Tribunal.
>
> 118. In a case of this kind, it would be extremely odd if Rule 93(2), interpreted in a common-sense way, would prevent this obvious way of compensating the customers who have won. We appreciate that Rule 93(3) states that the relevant CPO may specify the date by which represented persons shall claim their entitlement to a share of that aggregate award …. However, that is a discretionary power and we do not accept that this power must entail that in a case like this a customer must positively claim the remedy as opposed to simply collecting it."

The appellants' arguments

87. The appellants repeat these submissions about lack of jurisdiction. It is said that the CAT erred in law in taking into account the benefits of an account credit. We observe that the objection is not one based upon the facts or upon practicalities; it is premised solely upon law. The CAT has no lawful power to order an account credit or make any order other than a traditional award of damages by way of a defined or definable fixed sum of money. Ms Ford QC for BT argued that the crux of the meaning of "*damages*" in the legislation was fungibility: "*An account credit does not equate to a claim for a sum of money since it is not fungible in the manner of a monetary payment and can only be applied against charges for future telephony services.*"

Analysis

88. We do not agree. BT's argument elides an award of damages with the CAT's case management powers as to how an award that has been made should then be distributed. It is common ground that in opt-out proceedings the CAT will, if it upholds the claim, make an award of damages and an order as to whom, for the purposes of distribution, the damages are first to be paid to. As set out at paragraphs [41]-[45] above there is (with limited exceptions) thereafter almost nothing in the CA 1998 or the Rules which addresses the actual process or *modus operandi* of distribution, a lacuna filled by the exercise of the CAT's broad case management powers. In particular there is nothing which prevents the CAT issuing orders and directions which result in the award of damages then being distributed in a form which maximises recovery and compensation for the class. The Tribunal in this case contemplated the possibility that the CAT might order payment to a claims administrator instructed by the legal representatives who would then, with the assistance of BT's records and technology, effect the relevant credit or something similar. The Tribunal also contemplated that the "*other"* person under CAT Rule 93(1) could be BT on a specific direction of the Tribunal. We agree that these are possibilities.

89. The collective action regime is in many respects a departure from established tenets of civil liability. The aggregate damages provisions have been described as a radical departure from traditional common law principles of compensation. It would be a retrograde step to construe the concept of "*distribution*" as inextricably hidebound to a formal concept of "*damages*" when nothing in the legislation or its purpose compels such a construction and when the philosophy behind the legislation is to create a new and innovative regime unshackled from this mainstream tradition. No one in this appeal addressed whether purposively construed "*damages*" included an account credit. In *Merricks* the Supreme Court applied a strongly purposive construction to the aggregate damages provision in section 47C(2) CA 1998 concluding that it was implicit that it departed markedly from traditional concepts of the common law. We think it arguable that an equally strong purposive interpretation of "*damages*" might lead to a conclusion that fungibility was not the sole defining touchstone of "*damages*". We, however, leave this for another occasion when the issue can be fully argued.

90. BT's argument is, at its core, narrow and technical. It assumes that because "*damages*" must, in an opt-out case, following an award, be paid over to the representatives or authorised third parties, that there is no flexibility in terms of *subsequent* distribution to ensure that the award benefits the widest group of customers. It is important to be clear as to the implications of this argument. The counterfactual - preferred by BT - is that the class representative or a third party approved by the CAT must devote substantial time and cost in identifying over 2 million customers. The representative must then persuade the class member that when an unknown agent phones or emails and says: "*I have £200 for you please can I have access to your bank account*" that this is not a prelude to egregious fraud. The representative must then collect over 2m bank details and then effect an individualised transfer of funds to each account. Even in a case where it is relatively easy to identify the account holders the cost and effort would still be substantial, and wholly unnecessary if an account credit can be ordered.

91. Further, because BT's argument is based upon the proposition that it would be *ultra vires* the powers of the CAT to permit anything other than the distributing of a fixed, fungible, monetary sum the CAT could not make an order for distribution *via* an

account credit even if (say) 2 million customers wrote to the CAT to say that this was exactly how they wished to be compensated. If BT is correct in a case with a large class, distribution could take years and entail the incurring of costs which would have to be deducted from the damages to be paid to the customer and would have the effect of reducing the ultimate aggregate sum to be distributed. In the present case the class comprises about 2.3 million customers; the damages claimed approach £600m. The average claim will be between £148 and £333. If customers prove hard to contact and/or then engage in correspondence about the claim including seeking proof that it is genuine and/or further correspondence about the method of payment, the administrative costs could rapidly eat significantly into the sum to be paid.

92. There is, moreover, no sensible policy to support BT's submission. On the contrary, the aim of the legislation is to redress consumer wrongs and increase access to justice. In an appropriate case an account credit does that expeditiously, cost effectively and serves to maximise the benefit to the wronged consumer. A rule which eases the administrative costs and burdens of collective litigation and thereby makes it easier will also increase the incentive on companies holding customer accounts to comply with the law.

93. It is also relevant to place the argument in a wider litigation context. An account credit bears a strong resemblance to a set-off in contractual and tortious claims. It is not in any real sense a departure from ordinary common law principles. The following illustration highlights the point. A group of customers refuse to pay BT's line rental charges upon the basis that they include sums which amount to an abuse of BT's dominance. BT sues the customers for debt. The customers then raise by way of counterclaim that because the rental contains an unlawful overcharge the sums claimed by BT are abusive which gives them a right to damages under section 18 CA 1998. That counterclaim is pleaded as a defence of set-off. If the counterclaim prevails – and BT's debt claim overtops the counterclaim (as it probably would) – the court will set-off the claim and the counterclaim and in effect order an account credit so that the customer is ordered to pay the balance by way of judgment debt. Just this scenario was intensely litigated in the 1990's and early 2000's in the long running battle over beer ties between brewers and pub owners, on the one hand, and pub tenants and licensees on the other. Landlords sued for rent and the price of beer supplied but unpaid for and tenants and licensees counterclaimed for breach of the competition rules upon the basis that the rent and beer prices were tainted by illegality and raised their competition law claim as a defence of set-off. This industry wide litigation raged for over a decade and culminated in the seminal judgment of the CJEU on damages for breach of competition law even as between co-contractors in *Courage v Crehan* [2001] ECR I-6297. There is hence a relationship between damages claims, awards of damages and the use of an account credit as a well-established means of ensuring vindication of the right to damages for breach of competition law. For the CAT to order an account credit by way of distribution is a far less extreme departure from the common law than the "*radical*" modification wrought by the aggregate damages provisions in section 47C(2) CA 1998.

94. In our judgment the CAT did not err. The structure of the legislation is that the CAT makes an award of damages if a claim prevails. The CAT then orders that the damages are paid to the representatives or to an authorised third party. At this point the process of distribution starts. The concept of "*distribution*" is not defined, and the law has very little to say about its mechanics. There is no prohibition (express or implied) on the

party performing distribution using innovative methods to maximise the benefit to the consumer. Absent a clear prohibition that we are compelled to give effect to, this Court should not construe "*distribution*" so as to thwart the clear purpose of the legislation. A construction in favour of conferring power upon the CAT to order an account credit is consistent with the legislative purpose. A construction which precludes that option is inconsistent with the statutory purpose.

95. It follows that in our judgment the CAT can, at the appropriate point in time in the future, assuming the Claim prevails, make an order, in the exercise of its case management powers, to permit an account credit. It has the power to require that all the parties, in this case therefore including BT, cooperate in this endeavour.

96. We deal next, briefly, with some additional points made by the appellants. First it is said that an inference supporting their argument flows from the fact that the CAT must in an opt-out case order damages to be paid to the representatives or to an authorised third party. We disagree. This concerns the stage prior to distribution and does not indicate what happens during that process. Further, in many cases monetary sums *will* be paid out by way of distribution. The possibility of an account credit arises in a limited sub-section of cases where the defendant holds an account with the class member. The fact that the law caters for the payment of fixed sums is therefore neither surprising nor indicative that this is the only way of distributing an award of damages in each and every case.

97. Next it is said, no doubt correctly, that an account credit is of no utility to class members who no longer have a BT account or to a deceased person. The fact that some members of the class might not benefit from an account credit, or even might not wish to be compensated in this manner, is nothing to the point. The CAT has the power to make a variegated order requiring an account credit for some and a payment of a monetary sum to others, as the case and the circumstances might be.

98. Next, it is said that because section 47C(5) CA 1998 and Rule 93(4) and (6) provide that any damages not claimed by the class within a specified period be paid to a prescribed charity this is inconsistent with distribution of the aggregate damages award by means of an account credit which would mean that there were no unclaimed sums. We reject this submission. It is not the policy of the law that damages should be paid to charity. The policy is that as many victims as possible should be compensated but if an award cannot be fully distributed it should not be remitted to the wrongdoer defendant but should then be allocated to some public interest good cause, such as a charity. These provisions represent a default arising only if the principal purpose of compensating victims is incapable of being fulfilled. Much the same points are made in the Guide at paragraphs [6.87] – [6.90].

99. Finally, we address for the sake of completeness an issue that arose briefly during the hearing concerning whether an order for an account credit provides opportunity for the class representatives and funders to be paid. The concern has arisen because the *only* occasion where costs are expressly dealt with in the context of the opt-out/opt-in regime is in relation to the allocation of undistributed damages to charity. Here the law empowers the CAT to make provision for costs in favour of the representatives out of the sum otherwise to be paid to charity: see section 47C(6) CA 1998 and Rule 93(5). We detect no difficulty here. It would defeat the purpose of opt-out proceedings, which might routinely require third party funding, if costs orders could not be made in any

case where an account credit was the chosen means of achieving distribution. As to this the CAT has a wide discretion to make any case management order it sees fit and it is within its power to ensure that funders and representatives are paid. It also has a broad discretion to make orders as to costs under Rule 98 which applies to the collective action regime. The Tribunal could for instance make a sequential order that: (i) there be an award of damages; (ii) costs be defrayed from the award (before or after the damages are paid to the representative or authorised third party); and (iii) the residue is then to be distributed according to whatever method is considered by the CAT to be most appropriate be that a fixed sum, an account credit or by some other sensible means. We record that Ms Ford QC for BT did not seek to argue that if an account credit was, in the event, made by the CAT that this gave rise to any difficulty as to costs.

Conclusion

100. In conclusion we reject this ground of appeal. In our view the CAT was correct to conclude that it had the power to order an account credit. There are two additional observations that we would briefly make. First, this point played a minor part in the Tribunal's balancing exercise; the decision would have been the same even had the CAT concluded that there was no power to order an account credit. Secondly, we have pointed out that Rule 4 permits the CAT to facilitate mediated solutions, a power of potential utility in relation to distribution (see paragraph [36] above). Lord Briggs in *Merricks* also noted that ADR could play a part in the resolution of parts of collective proceedings (see paragraph [53] above). It would always be open to the Tribunal, following an award, to seek proposals from the parties, which would include from the class members, as to how best to achieve an informal, mediated, method of distributing the award which could include any creative solution. Under Rules 94-96 the Court could then embody any agreement that it approved of in a Collective Settlement Order.

H. Issue III: The relevance of the merits to the choice between opt-in and opt-out

The issue

101. The third and final issue concerns the role that the merits play in the assessment. We treat this as a matter of law since it concerns both the interpretation of the CAT's Judgment, and, the correct test to be applied when considering the strength of a claim. The strength of a claim plays no formal part at the initial certification stage and is mentioned in the Rules only as part of the subsequent and consequential decision on opt-out or opt-in. Though, experience is showing that merits will frequently play a role in certification because of the exercise of the right of putative defendants to seek summary dismissal of a claim. Here, BT sought summary dismissal of the Claim, as it was entitled to do, thereby putting the merits squarely into play and, of course, had BT succeeded the CAT would not have certified the action at all; it would simply have failed *in limine*. As already explained that application failed.

102. This ground of appeal concerns the implications of paragraph [124] of the Judgment:

> "124. At this stage, the strength of the claim features again. But that could only assist BT here, in our view, if it could persuade us that this is a very weak claim even if it could surmount the summary judgment/strike-out threshold. For all the reasons given, however, we are not so persuaded."

This was said in the context of the Tribunal's discussion of the pros and cons of opt-out and opt-in. It was an observation made *following* the analysis conducted by the Tribunal of the merits for the purpose of the summary procedure, hence the reference to the strength of the Claim featuring "*again*". It is the *only* reference to the strength or merits of the Claim in the context of the opt-out/opt-in assessment.

Appellants' arguments

103. The appellants argue, on the basis of this brief observation, that the CAT misdirected itself in law in concluding that the strength of the proposed Claim was only of relevance against an order for opt-out proceedings if BT could show that it was "*very weak*". BT says that if this is correct it creates a systemic slant against opt-in proceedings because a defendant will always have to establish that a claim is "*very weak*" before opt-in becomes appropriate. This is wrong because, as the Guide points out (paragraph [6.39]), given the greater complexity, costs and risks of opt-out proceedings, the Tribunal will usually expect the strength of the claims to be "*more"* immediately perceptible in an opt-out rather than an opt-in case. BT draws support also from the legislative history of the regime (under the Consumer Protection Act 2015) which emphasised the need for strong safeguards to be in place before opt-out proceedings are ordered. In BT's submission the Tribunal should have adopted a quite different approach and required the Class Representative to demonstrate "*strong*" merits to displace the general preference under the legislative regime for proceedings to be certified as opt-in.

The role played by the merits

104. We start by setting out some observations on how the strength of a claim might be relevant. We then consider paragraph [124] of the Judgment. There are 4 points we would make.

105. First, in many cases the CAT might be hard pressed at the certification stage to form a sufficiently clear view of the merits to enable it, with confidence, then to take merits any further in the overall balancing exercise. This might be because of the complexity of the legal and economic issues arising and the absence at the certification stage of expert evidence and disclosure. There is no dispute as to the test to be applied at the summary stage (Judgment paragraph [25]). The claim must demonstrate a "*real prospect of success*", be more than "*merely arguable"*, and not be "*fanciful*". The assessment is relatively high level. The CAT does not conduct a "*mini trial*" but equally it does not have to take every assertion made by the claimant at face value. It can take account of evidence not presently available, but which could be expected to be produced at trial by way of disclosure from the defendant. In the present case the CAT was evidently of the view that the threshold was met given the findings of Ofcom and the two expert reports submitted by Mr Parker, an economist from Frontier Economics, which explained how Ofcom's findings translated to abuse of dominance under section 18 CA 1998. BT for its part had not challenged the Ofcom findings, it had instead proposed Commitments to resolve the concerns, and it had not advanced any expert analysis of its own to counter that tendered to support the Claim. The CAT was clearly correct in its conclusion that the Claim had a real prospect of success. The CAT addressed six arguments advanced by BT (Judgment paragraphs [48] – [109]) which we summarise briefly. First, the Ofcom investigation was carried out pursuant to the *ex ante* regulatory regime under the Communications Act 2003 which was very

different to the *ex post* regime applicable under the CA 1998. There was no simple "*read across*" from the former to the latter. Secondly, Ofcom did not, in any event, reach any final determinations about BT's pricing. Thirdly, the expert evidence adduced to support the Claim failed adequately or at all to deal with the wider competitive dynamics which did or may have influenced BT's pricing. Fourthly, the expert evidence was wholly inadequate. Fifthly, Ofcom's conclusions did not, in any event, support a case of abuse in respect of SP customers. Finally, BT's customers were guilty of a failure to mitigate their loss. The CAT rejected these arguments, holding that the Claim had a realistic prospect of success and its ruling on the merits is not the subject of any appeal. There is no further analysis in the Judgment by the Tribunal of the strength of the Claim. Paragraph [124], which we consider below, contains a reference to the test but did not include any incremental appraisal of the strengths of the Claim nor seek to draw any relevance from the merits for the opt-out/opt-in decision.

106. Secondly, there might however be cases where the Tribunal, following a contested summary procedure in which it finds that a claim has a realistic prospect of success, concludes that it can go further. Where the claim seeks damages for the consequence of an infringement covered by a binding prior decision of a competition authority (i.e. a follow-on claim), then the CAT will be concerned only with quantum and distribution. The existence of the binding decision might amount to a factor in favour of opt-out proceedings which would attract weight in the scales over and above that flowing out of the threshold finding in the summary proceedings. We would add that in the present case Ofcom has, in analogous regulatory proceedings, and after a prolonged investigation, set out non-binding findings on SMP and supra-competitive pricing of direct relevance to the Claim. It would, in our view, have been surprising if the CAT had not found that these findings were amply sufficient to meet the threshold test for defeating the summary challenge. We accept of course that Ofcom's provisional conclusions do not bind the CAT (or the parties) and the findings the CAT might reach at trial might differ from those provisional conclusions. Nonetheless, Ofcom's findings on the merits might, in the scales, attract some incremental weight in support of a decision to make the proceedings opt-out.

107. Thirdly, there is the issue of the relevance of conclusions as to the complexity of proceedings. Paragraph [6.39] of the Guide (see paragraph [46] above) suggests that opt-out proceedings are generally more complex and difficult than opt-in proceedings and that for this reason the Tribunal would expect the merits to be "*more immediately perceptible*". The Guide suggests that the reason for this is that in an opt-in case the class members can be presumed to have "*…conducted their own assessment of the strength of their claim*". We are not convinced that these statements can be treated as accurate generalisations. It is not inevitably the case that an opt-out case is more complex than an opt-in case. If an opt-out case attracts third party funding it might be conducted on a better resourced and more efficient basis than an opt-in case where the representatives scrabble around to raise adequate funds to run the litigation efficiently. Where an order for aggregate damages is made in an opt-out case that will reduce the complexity of the litigation because it will significantly simplify the quantification, award and distribution stages. Equally, if an account credit is available and ordered in an opt-out case that also will simplify the distribution stage. As to the nature of the alleged breach and the extent to which it is factually and economically complex this will be a constant whether the proceedings are opt-out or opt-in. And even the

substantive merits might be simplified in an opt-out if the case is a follow-on where no issue of liability arises or where, as here, there are prior regulatory proceedings which might assist at least to highlight in advance the key legal and evidential issues – battle lines will have already been drawn. In relation to the ability and relevance of a class being able to perform an independent assessment of merits we, again, are not convinced that this bears any especial significance. It might be true that in a class action involving (say) 50 corporations each might seek to be satisfied of the strengths of the claim and have undertaken an independent assessment. There can however be no realistic suggestion that the fact that about 2.3m customers in this case (or 46m cardholding customers in *Merricks*) have not performed an independent evaluation of merits is a factor against an opt-out. On the contrary an opt-out in mass consumer cases might be optimal for the very reason that the customers are not only incapable of conducting a merits assessment but may be unaware of the existence of the proceedings. An important objective of the statutory regime is to facilitate the vindication of rights and to create *ex ante* incentives on undertakings to comply with the law. An opt-out claim vindicating the rights of millions of consumers who would not individually bring actions meets these objectives. The fact that they have performed no assessment of the merits is irrelevant. If a merits filter is needed, then this is performed by the CAT in addressing any application by a defendant to have the claim summarily dismissed and in ensuring that the case is intensively case managed to maximise efficiency. There is no policy deficit arising by virtue of class members not having conducted an independent assessment of merits in a large-scale consumer action. Indeed, in *Lloyd* (*ibid* paragraph [27]) the Court treated as an *advantage* of an opt-out claim that it could proceed without the class even being aware of its existence which by definition means that the class will not have performed any evaluation of merits.

108. Fourthly, the argument about there needing to be a specific safeguard before ordering opt-out proceedings is misplaced. The safeguard contemplated by Parliament is the imposition upon the Tribunal of a general duty to act as the gatekeeper in deciding upon all aspects of certification, including opt-out and opt-in; there is no free-standing right for claimants to launch collective actions without judicial approval and close oversight. The legislation does not however create additional hurdles relating to the merits which have to be satisfied before an opt-out can be ordered, as part of that safeguard.

Analysis of paragraph [124]

109. With these observations in mind we turn to paragraph [124] of the Judgment. We have some difficulty in construing this paragraph. Given that the Tribunal, at this point in its analysis, had fully addressed the merits and the test to be applied, we do not think that it can have intended to invent an entirely new test. We suspect that the words - "*even if it could surmount the summary judgment/strike-out threshold"* - are superfluous and that all the CAT was seeking to explain was that since BT had failed to establish, in the course of its summary proceedings, that the Claim was "*fanciful"* and that the CAT had held that the Claim had a "*realistic*" prospect of success, the merits had no further part to play in the assessment. We agree with Ms Ford QC for BT that *if* the CAT had sought to create a new test this would have been an error of law since a finding that a claim has a realistic prospect of success and is not fanciful and is more than arguable, logically precludes a conclusion that it is simultaneously "*very weak*". The respondent also agreed with Ms Ford QC on this, if, which was not accepted, this was what the CAT had intended. Standing back, and notwithstanding the

ambiguities in paragraph [124], on the facts of this case the merits were examined and served to prevent the Tribunal dismissing the Claim and, it would have followed, refusing certification. Beyond this it is not apparent to us that the merits played any further role in the opt-out/opt-in decision. The approach of determining the summary proceedings but then concluding that the merits added nothing additional to the decision on opt-out/opt-in, was a course of action open to the Tribunal.

Conclusion

110. We therefore set aside paragraph [124] as irrelevant to the analysis. The Tribunal's decision on opt-out was motivated by different conclusions which, as we have found, were all matters that were within its power to arrive at. We dismiss the appeal on this ground.

Disposition of the appeal

111. For all the above reasons we dismiss the appeal.

112. As a postscript, and reflecting the observation of the Registrar in the Preface to the Guide, we would respectfully suggest that there are a number of points made about collective proceedings which might, when the Tribunal considers that it has sufficient experience, warrant reconsideration in the light of that experience.