Neutral citation [2023] CAT 75

Case No: 1339/7/7/20

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

6 December 2023

Before:

HODGE MALEK KC
(Chair)
WILLIAM BISHOP
EAMONN DORAN

Sitting as a Tribunal in England and Wales

BETWEEN:

MARK McLAREN CLASS REPRESENTATIVE LIMITED

Class Representative

- v -

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

Defendants

Heard at Salisbury Square House on 6 December 2023

JUDGMENT (CSAV COLLECTIVE SETTLEMENT)

APPEARANCES

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

Sarah Abram KC (instructed by Wilmer Cutler Pickering Hale and Dorr LLP) appeared on behalf of the Twelfth Defendant.

Mark Hoskins KC and Michael Quayle (instructed by Arnold & Porter Kaye Scholer (UK) LLP, Cleary Gottlieb Steen & Hamilton LLP, Steptoe & Johnson UK LLP and Baker Botts (UK) LLP) appeared on behalf of the First to Third, Fourth, Fifth and Sixth to Eleventh Defendants.

A. INTRODUCTION

1. This is a joint application by the Class Representative and the Twelfth Defendant ("CSAV") for a collective settlement approval order ("CSAO") made in the context of collective proceedings combining follow-on claims under section 47A of the Competition Act 1998 for damages for losses caused by the Defendants' breach of statutory duty in infringing Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the Agreement on the European Economic Area.

2. The Defendants' liability was determined by the European Commission in an infringement decision adopted on 21 February 2018 in Case AT.40009 – Maritime Car Carriers (the "Decision"). The Decision was addressed to all of the Defendants and found that the cartel operated between 18 October 2006 and 6 September 2012. However, CSAV was found not to have participated in certain aspects of the infringing conduct.

B. THE COLLECTIVE PROCEEDINGS

3. In its Re-Amended Claim Form the Class Representative alleges that vehicle shipping costs were unlawfully inflated as a result of the Defendants' anti-competitive conduct and that these inflated charges were passed on through the supply chain as part of the delivery charges which were ultimately paid by the first person to purchase or finance a vehicle.

4. On 20 February 2020 the Class Representative filed its application for a collective proceedings order ("CPO"). CSAV did not oppose certification but the other Defendants did.

5. On 20 May 2022 the Tribunal certified the claims as eligible for inclusion in opt-out collective proceedings and made a CPO accordingly. Pursuant to clauses 5 and 6 of the CPO, the notice period for persons domiciled within the United Kingdom wishing to opt out and persons domiciled outside of the UK wishing to opt in were set to expire on 12 August 2022. There was an appeal

against that certification decision but not by CSAV, and that appeal was dismissed by the Court of Appeal on 21 December 2022.

6. The funding arrangements of the Class Representative are subject to a challenge or subject to consideration by the Case Management and Trial Tribunal and that aspect is probably going to be resolved in January 2024, or soon thereafter, and that Tribunal will, of course, take into account the recent decision in *Alex Neill Class Representative Limited v Sony Interactive Entertainment Europe Limited and Others* [2023] CAT 73. However, if the funding arrangements are found to be unlawful there is a possibility that the CPO will be revoked.

C. THE CSAO APPLICATION

7. The claims to be settled by the proposed collective settlement between the Class Representative and CSAV relate to CSAV's shared liability in respect of the follow-on damages claims arising from the Decision, which are subject to the present collective proceedings, is a matter that is before this Settlement Tribunal today. The collective proceedings, irrespective of what happens today, will continue as against the First to Third, Fourth, Fifth and Sixth to Eleventh Defendants (the "Non-Settling Defendants").

8. The Class Representative has retained Mr Tom Robinson of BDO to advise on quantum of the claims. He has advised that there is an estimated quantum of some £147 million, and he estimates that the overall market share of CSAV relative to the rest of the market was only 1.7%.

9. In dealing with the CSAO application we have to bear in mind the provisions of section 49A of the Competition Act:

> "**49A Collective settlements: where a collective proceedings order has been made**
>
> (1) The Tribunal may, in accordance with this section and Tribunal rules, make an order approving the settlement of claims in collective proceedings (a "collective settlement") where—
>
> (a) a collective proceedings order has been made in respect of the claims, and

(b) the Tribunal has specified that the proceedings are opt-out collective proceedings.

(2) An application for approval of a proposed collective settlement must be made to the Tribunal by the representative and the defendant in the collective proceedings.

(3) The representative and the defendant must provide agreed details of the claims to be settled by the proposed collective settlement and the proposed terms of that settlement.

(4) Where there is more than one defendant in the collective proceedings, "defendant" in subsections (2) and (3) means such of the defendants as wish to be bound by the proposed collective settlement.

(5) The Tribunal may make an order approving a proposed collective settlement only if satisfied that its terms are just and reasonable.

(6) On the date on which the Tribunal approves a collective settlement—

(a) if the period within which persons may opt out of or (in the case of persons not domiciled in the United Kingdom) opt in to the collective proceedings has expired, subsections (8) and (10) apply so as to determine the persons bound by the settlement;

(b) if that period has not yet expired, subsections (9) and (10) apply so as to determine the persons bound by the settlement.

(7) If the period within which persons may opt out of the collective proceedings expires on a different date from the period within which persons not domiciled in the United Kingdom may opt in to the collective proceedings, the references in subsection (6) to the expiry of a period are to the expiry of whichever of those periods expires later.

(8) Where this subsection applies, a collective settlement approved by the Tribunal is binding on all persons falling within the class of persons described in the collective proceedings order who—

(a) were domiciled in the United Kingdom at the time specified for the purposes of determining domicile in relation to the collective proceedings (see section 47B(11)(b)(i)) and did not opt out of those proceedings, or

(b) opted in to the collective proceedings.

(9) Where this subsection applies, a collective settlement approved by the Tribunal is binding on all persons falling within the class of persons described in the collective proceedings order.

(10) But a collective settlement is not binding on a person who—

(a) opts out by notifying the representative, in a manner and by a time specified, that the claim should not be included in the collective settlement, or

(b) is not domiciled in the United Kingdom at a time specified, and 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 settlement.

(11) This section does not affect a person's right to offer to settle opt-in collective proceedings.

(12) In this section and in section 49B, "specified" means specified in a direction made by the Tribunal."

10. The Competition Appeal Tribunal Rules 2015 deal with this aspect in more detail, particularly in Rule 94(1) to (10):

"**Collective settlement where a collective proceedings order has been made: opt-out collective proceedings**

94.—(1) Where a collective proceedings order has been made and the Tribunal has specified that the proceedings are opt-out collective proceedings, the claims which are the subject of the collective proceedings, may not be settled other than by a collective settlement approval order issued in accordance with this rule.

(2) Any offer to settle by a defendant in the collective proceedings shall be made to the class representative.

(3) An application for a collective settlement approval order shall be made to the Tribunal by—

(a) the class representative; and

(b) the defendant in the collective proceedings, or if there is more than one defendant, such of them as wish to be bound by the proposed collective settlement.

(4) The application referred to in paragraph (3) shall—

(a) provide details of the claims to be settled by the proposed collective settlement;

(b) set out the terms of the proposed collective settlement, including any related provisions as to the payment of costs, fees and disbursements;

(c) contain a statement that the applicants believe that the terms of the proposed settlement are just and reasonable, supported by evidence which may include any report by an independent expert or any opinion of the applicants' legal representatives as to the merits of the collective settlement;

(d) specify how any sums received under the collective settlement are to be paid and distributed;

(e) have annexed to it a draft collective settlement approval order; and

(f) set out the form and manner by which the class representative proposes to give notice of the application to—

(i) represented persons, in a case where it is expected that paragraph (11) will apply; or

(ii) class members, in a case where it is expected that paragraph (12) will apply.

(5) Unless the Tribunal otherwise directs, the signed original of the application for a collective settlement approval order shall be accompanied by five copies of the application and its annexes certified by the class representative or its legal representative as conforming to the original.

(6) On receiving an application for a collective settlement approval order, the Tribunal may give any directions it thinks fit, including—

(a) for the confidential treatment of any part of an application for a collective settlement approval order;

(b) for the giving of or dispensing with the notice referred to in paragraph (4)(f);

(c) for further evidence to be filed on the merits of the proposed collective settlement;

(d) for the hearing of the application.

(7) Any represented person or, in a case where paragraph (12) applies, any class member may apply to make submissions either in writing or orally at the hearing of the application for a collective settlement approval order.

(8) At the hearing of the application, the Tribunal may make a collective settlement approval order where it is satisfied that the terms of the collective settlement are just and reasonable.

(9) In determining whether the terms are just and reasonable, the Tribunal shall take account of all relevant circumstances, including—

(a) the amount and terms of the settlement, including any related provisions as to the payment of costs, fees and disbursements;

(b) the number or estimated number of persons likely to be entitled to a share of the settlement;

(c) the likelihood of judgment being obtained in the collective proceedings for an amount significantly in excess of the amount of the settlement;

(d) the likely duration and cost of the collective proceedings if they proceeded to trial;

(e) any opinion by an independent expert and any legal representative of the applicants;

(f) the views of any represented person in a case to which paragraph (11) applies, or of any class member in a case to which paragraph (12) applies; and

(g) the provisions regarding the disposition of any unclaimed balance of the settlement, but a provision that any unclaimed balance of the settlement amount reverts to the defendants shall not of itself be considered unreasonable.

(10) A collective settlement approval order may specify the time and manner by which—

(a) a represented person or class member, as the case may be, who is domiciled in the United Kingdom on the domicile date may opt out of the collective settlement; and

(b) a represented person or class member, as the case may be, who is not domiciled in the United Kingdom on the domicile date may opt in to the collective settlement.

…"

11. The Competition Appeal Tribunal Guide to Proceedings 2015 (the "Guide") provides even further detail, and at paragraph 6.125 sets out the factors to be taken into account in considering whether a collective settlement is just and reasonable:

"In considering whether a collective settlement is just and reasonable, the Tribunal will take into account all relevant circumstances, including the specific factors listed in Rules 94(9) and 97(7). While Rule 94(9) applies to settlements of collective proceedings and Rule 97(7) applies to direct collective settlements, the factors are broadly the same in both scenarios. These factors are as follows:

- *The amount and terms of the settlement*

  The Tribunal's consideration of the amount and terms of the settlement will include the monetary and non-monetary benefits offered by the settling defendant, as well as any related provisions as to the payment of costs, fees and disbursements. In particular, the Tribunal may consider the amount allocated to costs, fees and disbursements as a proportion of the overall settlement. Where legal costs make up a significant proportion of the settlement funds, the Tribunal will scrutinise whether this allocation is appropriate and will be alert to any potential conflict of interest between the class (or settlement) representative and its lawyers on the one hand and the class members on the other hand.

  The Tribunal will also consider carefully the terms of any waiver or release contained in the proposed settlement agreement.

- *The number or estimated number of persons likely to be entitled to a share of the settlement*

  The number of persons who may be able to claim a share of the settlement will influence the Tribunal's overall assessment of the settlement amount and terms. A settlement may incorporate a provision whereby either party has a right to cancel the settlement in the event that a specified opt-out threshold is exceeded.

  The Tribunal may also consider how class members will be required to claim their entitlement in order to ensure that the applicable conditions or

procedures are not overly onerous or complicated so as to discourage or hinder legitimate claims.

- *The likelihood of judgment being obtained in collective proceedings for an amount significantly in excess of the amount of the settlement*

  When considering the likelihood of judgment being obtained in collective proceedings for more than the amount of the settlement, the Tribunal need not conduct a detailed analysis of the claims to determine what it would have awarded in damages (if anything) following a trial. Rather, the Tribunal will adopt a broad brush assessment of the position, having regard to the prospect of success and estimated quantum of damages.

- *The likely duration and costs of the collective proceedings if they proceeded to trial*

  This factor is intended to reflect the often costly and time consuming nature of legal proceedings. In light of the additional time and cost of taking a case to trial, it may be preferable to approve a settlement even though a somewhat higher damages award might be granted after trial.

- *Any opinion by an independent expert and any legal representative of the applicants*

  As well as considering the written opinion of an independent expert and/or the lawyers advising the class (or settlement) representative and the settling defendant(s), the Tribunal may require that person to attend the settlement approval hearing and be questioned in relation to their opinion (in a closed hearing if necessary). In giving their opinion to the Tribunal, experts and legal representatives are reminded of their professional duties to the Tribunal. Their role is of particular importance where a CSAO is sought for a direct collective settlement: when there are no collective proceedings, the difficulty for the Tribunal is all the greater in assessing whether the proposed terms are just and reasonable.

- *The views of any represented person / class member / settlement class member (as appropriate)*

  As the principal parties to the collective settlement approval application are agreed on the settlement, class objectors provide the closest thing to an adversarial testing of the settlement terms. Therefore, the Tribunal will consider carefully what any objectors have to say about the settlement to ensure that the class members' interests are served by the settlement. The Tribunal will not, however, infer from a lack of objectors that the settlement is likely to be just and reasonable.

- *The provisions relating to the disposition of any unclaimed balance*

  The Tribunal will consider what will happen to any unclaimed settlement sums. Unlike damages awards in collective proceedings, unclaimed sums may revert to the defendant: Rules 94(9)(g) and 97(7)(g). Reversion to the defendant will not of itself be considered unreasonable, but where a settlement includes provision for reversion, the Tribunal may be concerned to see whether this is conditional upon a threshold of take-up of the settlement fund. For example, a settlement that could result in substantial fees being paid to the lawyers of the class (or settlement) representative and

> a significant part of the settlement sums being paid back to the defendants, while future claims by class members are barred, is unlikely to be viewed as just and reasonable. A settlement may include provision for all or part of the unclaimed balance be paid to the Access to Justice Foundation, as in the case of a judgment in opt-out collective proceedings: paragraph 6.89 above."

12. The Guide also refers to the possibility of barring orders where there is a settlement with one but not other defendants, and that is dealt with at paragraphs 6.130 and 6.131:

> "**Collective settlement with one or more, but not all, defendants**
>
> 6.130 The class (or settlement) representative may reach a collective partial settlement, i.e. agree terms with only one, or several, of a larger number of defendants (or would-be defendants), and that collective partial settlement may be the subject of an application for a CSAO.
>
> 6.131 If the defendants are subject to joint and several liability, for example where they were participants in a cartel, achieving such a partial settlement may present difficulties if the settling defendant(s) are concerned about their potential liability to the non-settling defendant(s) in subsequent contribution proceedings. In those circumstances, the Tribunal may consider incorporating in the approval order a barring provision that prevents the non-settling defendant(s) from claiming contribution from the settling defendant(s), on the basis that if it were subsequently determined that there was such a right of contribution, the class (or settlement) representative will be limited to recover from the non-settling defendant(s) only damages for which those defendants would be proportionally liable.85 If the settling parties apply for such a provision to be included in the Tribunal's order, the Tribunal will permit any non-settling defendant (or potential defendant) to make submissions as to whether an order on those terms should be made."

13. In the present case the Non-Settling Defendants contend that, absent any agreement with them, there is no power to make a barring order as there are no current pending contribution proceedings on foot in order to found the basis of the Settlement Tribunal exercising its powers under sections 1 and 2 of the Civil Liability (Contribution) Act 1978:

> "**1.— Entitlement to contribution.**
>
> (1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).
>
> …
>
> **2.— Assessment of contribution.**

> (1) Subject to subsection (3) below, in any proceedings for contribution under section 1 above the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question.
>
> (2) Subject to subsection (3) below, the court shall have power in any such proceedings to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.
>
> …"

Whilst the Non-Settling Defendants contend that the power to make a barring order under section 2(1) is limited to where there are ongoing claims for contribution, this is not accepted by the Class Representative who contends that on its true construction a barring order can be made to bar contribution claims which have yet to be brought.

14. As regards the proposed settlement agreement, it is dated 27 September 2023, and that followed a long process of negotiations between the Class Representative and CSAV, both sides being represented by experienced counsel and solicitors and, in the case of the Class Representative, with the assistance of an economic expert in the form of Mr Robinson.

15. Notice has been given to the class members in respect of the application today for approval. There is no submission from any class member that has been received by the Settlement Tribunal as a result of that notice. The Non-Settling Defendants are participating in the hearing today, particularly in relation to the barring order and the reverter mechanism, both of which will be explained later in this judgment. The CSAO application is supported by a great deal of evidence. It consists of:

(1) The second witness statement of Mark McLaren, dated 5 October 2023, who is the sole director of the Class Representative, setting out why he believes that the terms of the CSAO application are just and reasonable.

(2) The fourth witness statement of Belinda Hollway, dated 4 October 2023, who is a partner in the solicitors firm representing the Class Representative, setting out the litigation risks facing the Class

Representative, the factors weighing in favour of and against settlement, and explaining provisions of and negotiations for the CSAO application.

(3) The witness statement of Cormac O'Daly, dated 4 October 2023, who is a partner in the solicitors firm representing CSAV, setting out the factors that CSAV considered when deciding to settle the proceedings.

(4) The witness statement of Edmundo Eluchans, dated 4 October 2023, the Legal Compliance Officer at CSAV, setting out the commercial factors driving CSAV's willingness to settle the proceedings.

(5) The witness statement of Clare Ducksbury, dated 4 October 2023, who is the CEO of Case Pilots Limited, the Claims Administrators in these proceedings, explaining why she considers it would be economical, proportionate and in the interests of the class to defer distribution of the settlement proceeds.

(6) The fourth report of Tom Robinson of BDO, dated 28 September 2023, explaining the basis of his estimate that CSAV were no more than 1.7% of the market share.

(7) The expert report of Jon Lawrence, dated 5 October 2023, who is of counsel and addresses the merits of the proposed settlement.

16. All this evidence has been read and carefully considered as a whole by the Settlement Tribunal. The Class Representative and CSAV propose to settle the case on the basis that the claims against CSAV represent 1.7% of the overall value of the claims against all the Defendants together. The issues for consideration in relation to the approval of this settlement break down as follows:

(1) Is the settlement sum within a reasonable range, such that in broad terms we should approve it subject to looking at the detailed provisions of the agreement?

(2) What is the split between damages and costs, and is this Tribunal satisfied that there has been a proper apportionment between the two?

(3) Is it appropriate to make a barring order in this case, and if so on what terms?

(4) Should there be distribution now of the damages sum, or should that be delayed to a later stage?

(5) Should the reverter mechanism be permitted, and is now the time to determine whether or not the reverter mechanism should be followed?

(6) What is the impact, if any, of the fact that the Case Management and Trial Tribunal has yet to rule on the funding arrangements?

D. THE TRIBUNAL'S ANALYSIS OF THE ISSUES

(1) Issues 1 and 2 considered together: Is the settlement one that we should approve on the basis that the sum is within a reasonable range and the split between damages and costs is appropriate?

17. It is not for this Tribunal to reach a detailed and precise view of the merits of the case; this is not a mini-trial. The present application needs to be dealt with in a proportionate and cost-effective manner, and there may well be an element of rough-and-readiness in our decision and how we have dealt with it. It would defeat the purposes of the settlement proceedings and the public policy of promoting settlements if applications like the present, especially when involving a relatively modest sum, become protracted and expensive.

18. The settlement figure in the present case is £1.5 million, and that is broken down into three parts:

(1) The damages sum of £1.12 million.

(2) The costs of the application for approval of the settlement, £100,000.

(3) The costs generally of £280,000.

19. The damages sum represents between 45% and 106% of CSAV's share of the damages, as estimated by Mr Robinson. Litigation is expensive and uncertain; we cannot determine now, on an application like the present, the precise value of the claims, and what is subjectively speaking the amount that would be likely to be awarded by a Tribunal against this Defendant at the end of the day. However we are satisfied that both the damages sum and the cost sums are fair and reasonable, and we say that not just as regards the overall sum of £1.5 million, but as regards the split between the damages and costs. There may be an issue as to how the costs should be dealt with, particularly in relation to the general costs figure of £280,000, but that can be dealt with by way of a separate application which is currently pending before the Tribunal. It is not for now, but we do direct that none of the £280,000 is to be distributed, or allocated to a specific ledger, or earmarked for particular purposes, until further order of the Tribunal.

20. Looking at the specific factors that we are required to take into account at Rule 94(9):

(1) Firstly, the applicants' belief that the terms are just and reasonable: Rule 94(4)(c) and Rule 94(9). Both the Class Representative and CSAV, as shown by the evidence, believe that the terms of the proposed settlement are just and reasonable, and the reasons for that are set out in some detail in the evidence as well as in the CSAO application. We are satisfied that the belief of both parties is a reasonable one, and makes a lot of sense.

(2) The amount and terms of the settlement: Rule 94(9)(a). The amount and terms of the settlement are entirely reasonable. Of course, it is possible that the damages figure at the end of the day could be higher, it could be lower, that is just an uncertainty, but what both parties are trying to do is buy certainty, and that is a factor that is well worth having, and the amount is reasonable for the reasons we have already given.

(3) The number or estimated number of persons likely to be entitled to a share of the settlement: Rule 94(9)(b). The Class Representative's view is that the number of persons entitled to a share of the settlement would be a class amounting to millions, and that is highly relevant in approving this settlement, and also in dealing with the later issue, which is should there be distribution now or later. If there was going to be a significant sum to be distributed to each member it would make sense to have distribution now, but if it is only going to be a relatively small sum for each individual person, and it is probably going to be quite expensive to track them all down at this stage, it is just not worth doing.

(4) The likelihood of judgment being obtained in the collective proceedings for an amount significantly in excess of the amount of the settlement: Rule 94(9)(c). It is very difficult for us as a Tribunal at this early stage to take a definitive view as to whether a judgment will be significantly in excess of the sum that has been agreed. We somehow doubt it, and we consider that the settlement figure is certainly within a normal range. We are not going to say it is at the top of the range or the bottom, it is just within the range, which is a reasonable range, and it is not for us to substitute our own view as to the merits in place of the parties' solicitors and counsel, and independent counsel, who have looked at this in a great deal more detail than we can in a relatively short hearing.

(5) The likely duration and cost of the collective proceedings should they proceed to trial: Rule 94(9)(d). These proceedings, like many of these collective proceedings in the Competition Appeal Tribunal, are expensive. They are going to take a long time. But it is to everyone's benefit, not just CSAV's and the Class Representative's but also the Non-Settling Defendants' benefit, to take out defendants who are willing to settle as early as possible. The fewer parties you have, the less costs, the less complexity, and the shorter the hearings.

(6) Any opinion by an independent expert: Rule 94(9)(e). Mr Lawrence is well known by the Tribunal, he is a specialist in this field and knows

what he is doing. He has provided a detailed report, and that has been very helpful. We accept his analysis and we agree with it.

(7) The views of any represented person or other appropriate category of person: Rule 94(9)(f). Notice has been given. We have not received the views of anyone outside this hearing, so there is nothing further, but we are satisfied that with the counsel we have before us today and the submissions that we have recieved, all the pros and cons have been laid out bare before the Settlement Tribunal. There is no point coming to this Tribunal to approve a settlement if you are not going to give a full and frank disclosure of what the position is, and at one point there was a suggestion that there may be issues of privilege. There has already been a limited waiver of privilege in the papers before this Tribunal, and what complicates this is the presence of, and the need to have, the Non-Settling Defendants. Quite often when a court or tribunal is being asked to approve a settlement it is being asked to approve only by those parties who are settling, and it is not seen by anyone else, but we are where we are. However, there is no other representative and no other persons arguing for or against it, and that is why we have to rely to a large extent on the professionalism of the people involved in making the CSAO application and preparing it to give us a full and frank assessment of the position, good or bad.

(8) The provisions regarding the disposition of any unclaimed balance of the settlement: Rule 94(9)(g). The questions of how to deal with unclaimed balances is going to be deferred, we are not going to be deciding that today.

21. And then, there is the question of how any sums received are to be paid and distributed. Again that is not for now, we will come to that point later.

(2) Issue 3: Is it appropriate to make a barring order and, if so, on what terms?

22. Clause three of the settlement agreement provides as follows:

"**3. Barring provision**

3.1 The Parties agree that CSAV's highest estimated share on the relevant market during the relevant period was 1.7%, based on the value of sales in Recital 106 to the (non-confidential) Decision and other publicly available information at exhibit TR19 to TR32 of the First Expert Report of Tom Robinson dated 20 February 2023 (the ***Percentage Market Share***). The Parties further agree that, subject to any judgment, order or indication from the Tribunal prior to the making of a Collective Settlement Approval Order that it does not agree that this is the correct approach, the Percentage Market Share is an appropriate basis on which to determine CSAV's share of the Defendants' collective liability to the Class.

3.2 Subject to this Agreement and the Tribunal making a Collective Settlement Approval Order, McLaren agrees to exclude the Percentage Market Share from the total value of commerce relevant to the Collective Proceedings, and the damages which McLaren seeks from the Non-Settling Defendants will be reduced accordingly.

3.3 As part of the Approval Application the Parties will jointly ask the Tribunal to impose:

(a) a barring provision along the lines of that referred to at paragraph 6.131 of the Tribunal Guide which will prevent the Non-Settling Defendants from claiming contribution from CSAV, or CSAV Released Parties, including if the Tribunal were subsequently to determine that CSAV was liable to the Class for a greater share of the damages caused to the Class than the Percentage Market Share basis described at clause 3.1 above; and

(b) a provision pursuant to which the Non-Settling Defendants will be prevented from subsequently arguing that CSAV, or CSAV Released Parties, were responsible for a greater proportion of the harm done to the Class than the Percentage Market Share and/or that McLaren has settled a portion of the Collective Proceedings greater than the Percentage Market Share

(together, the ***Barring Provision***)."

23. In relation to the barring order one of the issues is do we have jurisdiction at all to make a barring order? Mr Hoskins KC on behalf of the Non-Settling Defendants says we do not have jurisdiction as there are no contribution proceedings before the Tribunal and the power to make a barring order under section 2(2) of the Civil Liability (Contribution) Act 1978 is limited to where there are contribution proceedings at the time of the barring order, not potential contribution proceedings in the future. Whether he is right or wrong, it is a point that could easily go up to the Court of Appeal, and for that reason the Settlement Tribunal is most grateful that the parties have been able to resolve this whole issue of whether or not there should be a barring order.

24. We have no doubt that a barring order is desirable in a case like the present, because without a barring order there is little incentive on a settling defendant to settle, because they then are still going to be stuck in the proceedings and subject to contribution claims, and that is just too great a risk to take. The advantage of having a barring order is clear. We get certainty and it promotes a settlement. We will have fewer parties, the costs and complexities of the proceedings will be reduced, and for the Non-Settling Defendants there is an advantage in having a barring order because the claim against them is reduced in amount. But we fully accept that in the absence of an agreement between the parties, there will need to be further argument on the barring order.

25. Fortunately, the Non-Settling Defendants and the other parties have reached an agreement in principle to resolve this matter, and if that goes ahead then that has got the full blessing of this Tribunal. A mechanism is going to be agreed whereby CSAV will be released completely from these proceedings and not subject to any claims by the Non-Settling Defendants, but the amount being claimed against the remaining Non-Settling Defendants will be reduced by Mr Robinson's estimate of market share, which is 1.7%. However, if the Case Management and Trial Tribunal at the end of the day decides that the level of contribution, or the market share, should be greater than 1.7% then the claims against the remaining Non-Settling Defendants will be reduced proportionately.

(3) Issue 4: Should distribution be made now or deferred?

26. Clauses 4.1 to 4.4 of the settlement agreement provide as follows:

> "**4. Distribution and reversion**
>
> 4.1 McLaren confirms that, by this Agreement, CSAV is the first Defendant to settle in the Collective Proceedings.
>
> 4.2 The Parties agree that, subject to any deduction for costs, fees and disbursements approved by the Tribunal, the Damages Sum shall be held in escrow until the conclusion of the Collective Proceedings or such other time as McLaren considers it economical, proportionate and in the interests of the Class to seek to distribute it, and the Tribunal approves McLaren's Distribution Application.
>
> 4.3 McLaren shall in due course make an application seeking the Tribunal's approval to distribute the Damages Sum, less any deduction for costs, fees and disbursements approved by the Tribunal, to Represented

Persons in accordance with a distribution plan prepared by McLaren in conjunction with a claims administrator and in a manner in which McLaren considers to be just and reasonable (the ***Distribution Application***). McLaren's main objective will be to make as many Represented Persons as possible aware of their right to a share of the Distribution Sum and to encourage them to come forward to claim their share of the Distribution Sum.

4.4 McLaren shall provide CSAV with notice of the Distribution Application and any future applications relating to the treatment of the Settlement Sum (including, but not limited to distribution to class members, payment of costs, fees and disbursements, and treatment of any residual Damages Sum following distribution)."

27. This Tribunal considers it makes a lot of sense to defer any distribution until later on. The amount of the settlement is relatively small. To distribute now will bring an element of costs and complexity in a stage when it is not necessary. There are potentially millions of potential class members and any individual class member will only receive a small sum so the Tribunal does agree that the distribution should be deferred along the lines suggested by the Class Representative.

(4) Issue 5: Reverter

28. Clauses 4.5 to 4.8 in the settlement agreement provide as follows:

"4.5 To the extent that any of the Distribution Sum remains after distribution, and after any other payments directed by the Tribunal, McLaren will seek a direction from the Tribunal that the Damages Sum or the remainder of the Distribution Sum, whichever is lower, will revert back to CSAV by way of the process envisaged in the final subparagraph of paragraph 6.125 of the Tribunal Guide (the ***Reverter***).

4.6 In the event that McLaren agrees provisions that are similar in form or effect to those set out in paragraph 4.5 above with any of the Non-Settling Defendants, McLaren agrees that CSAV will receive the Reverter in full on a 'first in last out' basis, not pro-rated with the entitlement of any of the Non-Settling Defendants (i.e. CSAV would be entitled to be paid the Reverter before the payment of any subsequent reversion(s) agreed in any future settlement(s) with any or all Non-Settling Defendant(s)).

4.7 By way of illustration only:

<u>Example 1:</u>

- The Distribution Sum is £100 million;

- £90 million is distributed (whether directly to the Class or otherwise as directed by the Tribunal following the Distribution Application), meaning £10 million of the Distribution Sum remains after distribution;

- The remainder of the Distribution Sum is £10 million and the Damages Sum is £1.12 million meaning the Damages Sum is the lower; therefore

- CSAV will receive the Damages Sum (£1.12 million) by way of reversion; and

- The remaining £8.88 million of the Distribution Sum shall be considered 'undistributed' for the purposes of Rule 93 of the Rules and paragraphs 6.87 to 6.90 (including footnote 70), 6.98 and 6.125 of the Guide, subject to any reversion provisions in any future settlement(s) with any Non-Settling Defendants.

Example 2:

- The Distribution Sum is £100 million;

- £99 million is distributed (whether directly to the Class or otherwise as directed by the Tribunal following the Distribution Application), meaning £1 million remains after distribution;

- The remainder of the Distribution Sum is £1 million and the Damages Sum is £1.12 million meaning the remainder of the Distribution Sum is the lower; therefore

- CSAV will receive £1 million by way of reversion; and

- None of the Distribution Sum shall be considered 'undistributed' for the purposes of Rule 93 of the Rules and paragraphs 6.87 to 6.90 (including footnote 70), 6.98 and 6.125 of the Guide.

4.8 For the avoidance of doubt, any terms of this Agreement relating to the Reverter will only be enforceable following the Tribunal's approval of the reversion mechanism set out in this agreement."

29. During the course of this hearing, it was clarified on behalf of the settling parties that they are not asking this Tribunal today to decide whether or not there should be a reverter and if so in what terms.

30. This Tribunal indicated during the course of argument that it was not comfortable to decide the reverter issue today and that it is really an argument for another day. The terms provided at clauses 4.5 to 4.8 are reasonable but whether or not the Tribunal itself will make an order in those terms is really a matter for another day because it is just too early to see the shape of the Case

Management and Trial Tribunal's decision and how damages are going to be assessed and attributed by that Tribunal.

31. At present, there is no distribution plan before the Tribunal; it has not been determined how damages are going to be assessed or allocated and it has not been determined whether or not the Tribunal is going to be invited at trial to decide the amount of the relevant share for each Defendant and how much they should be paying out of the ultimate damages itself.

32. This Tribunal notes that one clarification has been made in relation to the reverter position at clause 4.5, and that has been dealt with by way of letter dated 6 December 2023 from the solicitors for the Class Representative, which makes clear that the reverter mechanism does not apply to any damages sum awarded by the Case Management and Trial Tribunal.

(5) Issue 6: Funding

33. The funding arrangement is currently pending before the Case Management and Trial Tribunal that has been constituted to deal with the merits of this case. This is going to be resolved fairly quickly and so any order we make approving a settlement is going to be subject to the funding arrangement being approved by the Case Management and Trial Tribunal and there will be liberty to apply in due course if in fact the funding arrangement is not approved by the tribunal.

E. CONCLUSION

34. Subject to that mentioned above at [33], we unanimously approve the CSAO application.

Hodge Malek KC
Chair

William Bishop

Eamonn Doran

Charles Dhanowa OBE, KC (*Hon*)
Registrar

Date: 6 December 2023