

COMPETITION APPEAL TRIBUNAL BLESSES THE FIRST APPLICATION FOR SETTLEMENT UNDER THE COLLECTIVE PROCEEDINGS ORDER REGIME

On 6 December 2023, the Competition Appeal Tribunal (“**CAT**”) heard the first application for settlement under the collective proceedings order regime as part of the McLaren collective proceedings. These proceedings combine follow-on claims for damages arising from a European Commission decision which found a cartel involving the twelve McLaren defendants in the market for deep sea carriage services. This application for settlement was made jointly by the Class Representative (“**CR**”) and the twelfth defendant, Compañía Sud Americana de Vapores S.A. (“**CSAV**”), the smallest of the twelve defendants, whose estimated market share was 1.7%.

The CAT approved the settlement in principle, on a pragmatic and measured basis, explaining that a settlement application is not a mini trial and must not turn into protracted satellite litigation to avoid undermining the public policy of encouraging settlements. The CAT noted that its role was not to conduct a full merits assessment but instead to assess whether the proposed settlement was just and reasonable. In this case, the proposed settlement concerned the smallest of the defendants for the relatively small sum of £1,500,000, and the claim will continue for the remaining defendants. Given the comparatively low stakes, the CAT was eager to keep proceedings within sensible bounds, to ensure the costs did not outweigh the benefits of settlement.

Overall, the CAT found the amount of the settlement to be within a reasonable range, but noted that the validity of the CR’s funding arrangements (which are currently being challenged) would need to be determined before the settlement could take effect. Given the size of this settlement, it remains to be seen how the regime will deal with more complex settlements for larger, more significant, defendants.

Key issues

For a settlement of collective proceedings to take effect, the CAT must first approve the settlement. The CAT must determine whether the proposed settlement is “just and reasonable”, taking into account the factors set out in rule 94(9) of the CAT Rules. In this case, the CAT made its assessment by reference to six key issues:

Issues 1 and 2 - was the settlement sum within a reasonable range such that it should be approved, and was the split between damages and costs appropriate?

Expert evidence from the CR quantified CSAV's share of the damages to be £2,422,500. The proposed settlement amount was £1,500,000 in total, made up of three parts: (i) £1,120,000 in damages; (ii) £280,000 for the costs incurred to date in bringing the claim; and (iii) £100,000 for the costs incurred in the making of this settlement application.

The CAT found that both the damages and costs sums proposed represented amounts that were within a fair and reasonable range. The CAT stated that it was not its role to reach a precise view on the merits of the case, this was not a mini trial and it would undermine the public policy of encouraging settlements if settlement was to become a form of protracted satellite litigation. The CAT therefore explained there would have to be an element of "rough and ready justice", while at trial the CAT may ultimately determine that the damages owed are in fact higher or lower than the settlement amount. The CAT noted that in settlement, the parties are buying certainty at an earlier stage, and doing so at a price that is within a reasonable range. The CAT noted that a settlement benefits all parties, and that as these are complex, time consuming and expensive proceedings, by removing one defendant there is a benefit to the overall proceedings in reducing the complexity and costs that will be incurred on an ongoing basis.

Issue 3 – barring

The proposed settlement agreement included a provision by which claims of contribution from the other eleven defendants would be barred against CSAV. Counsel for the non-settling defendants argued that the CAT did not have jurisdiction to make this order other than by consent of the parties. Consent was not originally forthcoming from the non-settling defendants, as the settlement agreement was premised on CSAV having a 1.7% market share and so, following the settlement, any subsequent damages would be reduced by 1.7%. The non-settling defendants submitted that the evidence for the 1.7% was inadequate, and that ultimately this was an issue that should be determined at trial, particularly as, if at trial CSAV were found to have a higher percentage of the market share, the non-settling defendants would have been unfairly prejudiced by the settlement agreement which only agreed to reduce damages by 1.7%.

After hearing each party's position, the CAT proposed a pragmatic approach to avoid this barring issue preventing the settlement. The CAT acknowledged that there were valid concerns on both sides - there was limited incentive for CSAV to settle without a barring order but equally the non-settling defendants had rational concerns. As such, the CAT suggested that the settlement agreement should provide for a barring order for CSAV and a reduction in the damages claim for 1.7%. However, if the CAT ultimately decides that CSAV's market share is higher than 1.7%, the damages will be reduced by the market share percentage ultimately decided. In return, the non-settling defendants agreed not to appeal against the CAT's approval of the settlement and would consent to the order. This position was ultimately agreed in principle by the parties, subject to instruction from the non-settling defendants.

Despite the CAT's proactive approach in this case, the CAT explained the jurisdictional question was one that could run to the Court of Appeal if the CAT was to make the order other than by consent. Given the limited sums at stake, the CAT noted that it would seem disproportionate for the parties to incur such costs and that they should instead reach a pragmatic compromise. It remains to be seen what approach the CAT will take in the context of larger settlement sums, where incurring such costs would not seem disproportionate.

Issue 4 – timing for distribution

The CAT determined that, given the small sum and the large class, it would make sense for distribution of the damages to be deferred until after the conclusion of the collective proceedings or such other time as the CR considers it economical, proportionate and in interests of the Class to seek to distribute it, subject to approval by the CAT. The distribution of the £100,000 in costs in relation to this settlement application was though allowed to proceed. The distribution of the £280,000 in costs in relation to the wider claim was postponed, subject to a separate order pending before the CAT relating to the CR's application for these funds to be used to cover 1.7% of the CR's costs.

Issue 5 – reversion of funds

The settlement agreement provided clauses as to how the parties envisaged damages which were not claimed by class members being reallocated. The CAT reiterated the long-standing position that damages which are awarded by a court cannot then revert to the party who paid the damages, they must go to charity, however a settlement sum agreed between the parties can revert to the party who paid if they are not claimed. During the hearing, the parties clarified that they were not seeking for the CAT to determine reversion at this stage, and the CAT agreed it was not the appropriate time to do so. The CAT will need to make such a determination at a later stage, when it is clear how damages will be assessed and attributed.

Issue 6 – funding

Following PACCAR, the validity of the CR's funding arrangements are currently being challenged. A ruling on this is expected in early 2024. The CAT was keen to avoid a scenario where the settlement pre-empted the outcome of the funding dispute, such that the settlement agreement was approved, costs and damages were paid out and the CPO was then revoked. While the CR agreed that it would remain liable to pay costs, a scenario could arise where the CR ended up holding funds from the damages settlement which may be no longer payable to the class. To avoid this issue, the CAT approved the settlement, conditional on eventual approval of the funding arrangements. As such, the £1,120,000 damages sum will be held in escrow, pending final determination of the funding matters, including any appeals.

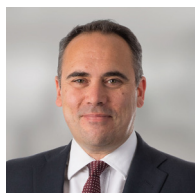
Reflections

Overall, the CAT appears to be conscious of the benefits that settlement can bring to parties, guiding the parties toward potential solutions and is prepared to take a broad axe approach to ensure that the settlement application did not become a mini-trial. It remains to be seen whether a similar approach would be taken to settlements where there are larger sums at stake or which dispose of the entire set of collective proceedings, rather than a single party.

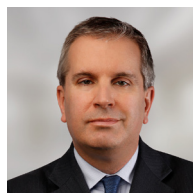
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