

## It's good to talk (about collective proceedings): the Competition Appeal Tribunal's judgment in *Le Patourel v BT*

*Justin Le Patourel v BT Group Plc & British Telecommunications Plc* [2021]

**Michael Armitage, Barrister, Monckton Chambers**

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[Ronit Kreisberger QC](#), [Nikolaus Grubeck](#), and [Jack Williams](#) represent the successful class representative, Justin Le Patourel. The counsel team are instructed by Mishcon de Reya.

The judgment is available [here](#).

Hot on the heels of the Competition Appeal Tribunal's decision to certify most aspects of the collective proceedings in *Merricks* (a practical inevitability after the Supreme Court's [judgment in that case](#)), the Tribunal has recently handed down its judgment on the contested application for a collective proceedings order ("CPO") in *Justin Le Patourel v BT Group Plc & British Telecommunications Plc*. It becomes only the second competition law claim – and the first stand-alone claim – to be certified for pursuit by way collective proceedings.

### The claim

The proposed class representative ("PCR") applied for a collective proceedings order ("CPO") authorising him to pursue collective proceedings, on an opt-out basis, on behalf of over 2 million BT customers who bought "Standalone Fixed Voice services" or "SFVs", which are a type of landline telephone services at residential addresses. SFV customers can be either "voice only" (where the customer only buys the landline telephone service) or "split purchase" (where the customer also buys a broadband service, but does so under a separate contract with either BT or another supplier and not as part of a bundle with the landline service). The claim alleges that BT abused a dominant position on the markets for both Voice Only SFV services and Split Purchase SFV services by engaging in excessive pricing.

In contrast to *Merricks* and various other CPO applications that are pending

before the Tribunal, BT did not argue that the individual claims were ineligible for inclusion in collective proceedings, e.g. on the basis that they did not raise common issues. However, BT applied for strike-out / summary judgment of the substantive claim, and also opposed certification on an opt-out basis.

The CAT disagreed on both points, holding that the substantive claim had a real prospect of success at trial and that *“the opt-out basis is clearly more appropriate and suitable than the opt-in basis”* (¶125). Plainly the CAT’s decision turned heavily on factors that are individual to the PCR’s claim, and these are not set out in detail below. Instead, I focus below on three aspects of the judgment that are potentially of wider application to professionals who are engaged in this burgeoning field of competition law practice: (i) the role of the merits at the CPO stage; (ii) the stand-alone nature of the claim; and (iii) the Tribunal’s consideration of distribution issues.

#### Consideration of the merits at the CPO stage

The Supreme Court’s decision in *Merricks*, and especially its “relativist” approach to the question of suitability, was generally and correctly regarded as a pro-claimant development. However, the judgment certainly does not open the floodgates to just anyone seeking to bring an aggregate damages claim (no matter how weak it is) on behalf of a large class of consumers. Satisfying the Tribunal that collective proceedings are more suitable than individual claims is a necessary, but not a sufficient, condition for certification. For one thing, as is apparent from the remittal decision in *Merricks* (and the CAT’s refusal to certify the compound interest element of the claim), respondents to CPO applications can challenge a proposed collective claim on the basis that it does not raise common issues and/or that no plausible methodology for calculating class-wide loss has been advanced. Moreover, while the “majority” judgment of the Supreme Court in *Merricks* emphasised that the certification process does not generally involve consideration of the merits of the claim, there are two exceptions, namely (i) the CAT’s power to grant strike-out or summary judgment in collective proceedings (and to hear such an application when it hears the CPO application) and (ii) when the CAT is deciding whether to certify a claim on an opt-out, as opposed to opt-in, basis.

Both of these exceptions arose in *Le Patourel*:

- a. In relation to strike-out / summary judgment, the Tribunal emphasised that there is no material difference in approach: the question is whether the claim has a real, as opposed to “fanciful”, prospect of success, having regard not only to presently available evidence but also that which may reasonably be expected to be produced at trial (including in the form of disclosure from the respondent): ¶25. On reading the judgment, it seems

fair to say that the Tribunal had little difficulty in finding that the excessive pricing claim advanced by the PCR in this case surpassed the strike-out / summary judgment threshold, having regard (*inter alia*) to the expert reports adduced by the PCR in support of the alleged abuse. While this is obviously a matter that will always turn on the particular arguments and evidence before the Tribunal, it is notable that the Tribunal appears to have been struck by BT's decision not to file substantial evidence of its own in relation to certain of its key objections to the claim: see ¶¶72-73, 78, 81. No doubt respondents in future CPO applications will think carefully about the need to file responsive evidence at the CPO stage, although whether doing so is *in fact* necessary will always be case-dependent.

b. In relation to opt-in vs opt-out, the Tribunal helpfully clarified that where a PCR seeks certification on an opt-out basis only, they will still need to satisfy the Tribunal that an opt-out action is more appropriate than an opt-in action, by reference to the factors in Rule 79(3) of the CAT Rules 2015, which include the strength of the claim: ¶110. The CAT's Guide to Proceedings 2015 refers to the need for the strength of the claim to be "*more immediately perceptible in an opt-out than an opt-in case*", giving the example of a follow-on damages claim. *Le Patourel* makes clear that it is not only follow-on claims that can be sufficiently meritorious to be pursued as opt-out proceedings, as is clear from its observation that the merits "*could only assist BT...if it could persuade us that this is a very weak claim even if it could surmount the summary judgment/strike-out threshold*": ¶124 (emphasis added). The precise relevance of the merits of the claim in the context of a decision on opt-in vs opt-out is likely to be addressed in future cases, including, potentially, the *Trucks*, *FX* and *Boundary Fares* CPO applications that are currently awaiting judgment.

### The stand-alone nature of the claim

*Le Patourel* is noteworthy as an example of a stand-alone claim passing muster at the certification stage. The willingness of funders to back stand-alone claims in appropriate cases has been a striking feature of the collective proceedings regime to date (including in the *Boundary Fares* case, *Which? v Qualcomm*, and the two "app store" claims that have been issued against Apple and Google). It is notable, however, that the PCR in the present case was able to point to provisional findings by Ofcom that provided strong *prima facie* evidence in support of his excessive pricing allegations. The Tribunal gave short shrift to BT's arguments that the Ofcom review could not be "read across" to the present context, or that its provisional nature rendered it irrelevant. Importantly, the PCR was not seeking to suggest that the "*mere fact (or threat) of price control in any given case equates to a finding of abuse*" (¶60). Rather, the PCR was relying on the Ofcom review as evidential

support for its case (including its expert's analysis). This suggests that those bringing standalone claims in future will do well to consider whether there are useful regulatory materials (both in this jurisdiction and elsewhere) that can be drawn on, and that the Tribunal will not be sympathetic to argument that such materials are irrelevant (at least at the CPO stage).

### Distribution issues

In *Merricks*, the Supreme Court held that while it will "*generally*" be premature to consider proposals for the distribution of aggregate damages at the certification stage, there may be cases where it is appropriate to do so. In fact, the PCR's proposals for distribution were central to BT's argument that the claim should not be certified on an opt-in basis. BT pointed to the fact that the PCR himself had relied on BT's ability to identify and contact current or recent customers as demonstrating that the distribution of damages would be straightforward. It argued that precisely the same considerations meant that the claim could sensibly be brought on an opt-in basis, and that this was fatal to the PCR's application for opt-out certification. See e.g. ¶¶110-111, 119.

This is a line of defence that has featured in other CPO applications that are pending before the Tribunal. In this case, the Tribunal rejected it, relying heavily on a distinction drawn by the PCR between a consumer (i) making an active decision to join a claim at the outset (as in an opt-in case) and (ii) claiming a share of the damages "pot" at the distribution stage: ¶112. The Tribunal appears to have been persuaded by the argument that the distribution of damages in this case could be done automatically, by simply crediting the relevant BT accounts (the Tribunal here cited an observation made by the President of the Tribunal during oral argument at the certification hearing in the *Boundary Fares* case). The Tribunal also dismissed BT's contention that a distribution method involving some kind of automatic distribution to the class members (which might involve a claims administrator or BT itself) would be precluded by rule 93(1) of the CAT Rules 2015. That said, in other cases, the possibility of automatic distribution of this kind may be unavailable (e.g. cases where there is no direct contractual relationship between the class and defendant). In such cases, it may be more difficult for a PCR simultaneously to contend that opt-in proceedings are impracticable but that a sufficient number of the class members can be expected to claim a share of the damages award to render the proceedings worthwhile. The pending judgment on the application for a CPO in *Boundary Fares* may well address this point further.

### Conclusion

With a series of other CPO applications awaiting judgment, and hearings in both the *Qualcomm* and *McLaren* cases coming up in November 2021, this is an exciting period for practitioners in the class action space. The UK's

collective proceedings regime is, at last, gathering steam.

**The author is a barrister at Monckton Chambers with a particular specialism in collective proceedings, having been instructed (to date) for both applicants and respondents in claims including *Mobility Scooters, Trucks, Boundary Fares, McLaren (RoRo), Which? v Qualcomm and Kent v Google (Play Store)*.**

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