

# TRUCKS LITIGATION: COURT OF APPEAL FINDS CONFLICT WITHIN THE RHA'S CLASS BUT UPHOLDS CERTIFICATION

On 25 July 2023, the Court of Appeal delivered its judgment regarding two connected appeals, which sought to challenge the Competition Appeal Tribunal's (CAT's) [decision](#) last year to grant the Road Haulage Association's (RHA's) application for a Collective Proceedings Order (CPO) for follow-on damages in the Trucks litigation.

The first appeal, brought by MAN and DAF (being prospective defendants to the RHA's CPO), challenged the CAT's decision to allow the RHA's class to include both purchasers of new trucks and purchasers of used trucks, on the basis that this gave rise to an irreconcilable conflict of interest within the RHA's class. The second appeal was brought by UK Truck Claims Ltd (UKTC), an SPV whose rival CPO application to the RHA's was rejected by the CAT. UKTC agreed with MAN and DAF's conflict argument and argued that, for this and other reasons, UKTC should have been granted its application.

The Court of Appeal's judgment provides guidance as to the degree of diverging interests that is acceptable within a CPO class, and how diverging interests may be managed. It has also provided some welcome clarity as to the Court of Appeal's jurisdiction to hear appeals from the CAT. While the Court of Appeal agreed with the appellants' arguments as to the existence of a conflict of interest within the RHA's class, it upheld the RHA's certification for an opt-in CPO subject to certain important modifications, with the matter remitted to the CAT for further determination.

## Legal framework

The UK's collective proceedings regime was introduced by the Consumer Rights Act 2015, which amended the Competition Act 1998. Applicants for a CPO must meet two conditions. First, the proposed class representative must be authorised by the CAT on the basis that it is "just and reasonable" for them to act as a representative in the proceedings (the authorisation condition). Second, the claims must be certified by the CAT as eligible for inclusion in collective proceedings

(the eligibility condition). In considering whether claims are eligible for inclusion in collective proceedings, the CAT will consider a number of factors including whether they: (i) raise common issues of fact or law; and (ii) are suitable to be brought in collective proceedings.

## Background

### *The CPO applications and the CAT's judgment on certification*

Both the RHA's claim and UKTC's claim sought follow-on damages arising from the European Commission's Trucks decision in 2016 pursuant to which the Commission found that five European truck manufacturing groups had infringed Article 101 of the Treaty on the Functioning of the European Union.

Naturally, there was overlap between the UKTC and RHA applications. However, a material difference was that the UKTC certification application concerned new trucks only, whereas the RHA application was for new and used trucks. Further, while the RHA sought certification as class representative on an opt-in basis, UKTC sought certification on an opt-out basis (though it presented opt-in proceedings as an alternative).

The CAT found that both applications were in principle eligible and suitable for collective proceedings. Faced with the question as to whether to certify both claims, the CAT did not determine whether, as a matter of law, it could certify opt-in and opt-out proceedings to proceed in parallel. Instead, the CAT held that it would substantially increase the costs and complexity of the proceedings if both the RHA and UKTC claims were certified and that it would therefore be inappropriate to do so. It thus had to choose between the claims. It preferred the RHA claim for several reasons, which are explored in further detail [here](#).

### *The grounds of appeal*

During the certification hearing, the truck manufacturers argued that the inclusion of both new and used trucks in the RHA's class led to an

irreconcilable conflict of interest on the part of the RHA and its legal advisors. They contended that it would be in the interests of new truck claimants to argue that there was no or little pass-on in the resale price of used trucks; whereas used truck claimants would adopt the opposite position. The CAT rejected this criticism, taking the view that all class members shared a common interest in establishing that there was an overcharge on the sale of new trucks at as high a level as possible. While their interests may diverge on the quantification of the pass-on of that overcharge in the resale of a truck, if that were fairly disclosed to the class members (upon opting-into the proceedings) it would not prevent the RHA from fairly representing the class.

The CAT granted MAN and DAF permission to appeal the certification judgment on the ground that the CAT erred in holding: (i) that it was just and reasonable for the RHA to represent a class that included both new and used truck purchasers; (ii) that such claims were suitable for inclusion in a single collective action with a single class representative; and (iii) that the issue of the alleged overcharge on used trucks or the amount of any resale pass-on was a common issue. The CAT granted UKTC permission to appeal on similar grounds, including that the CAT erred in failing to consider the possibility of granting only part of the RHA's application to allow both applications to proceed to avoid intra-class conflicts of interest. The CAT refused UKTC permission to appeal on other grounds, including that the CAT erred in preferring the RHA's individuated opt-in application over UKTC's aggregate damages opt-out application without properly considering the advantages of opt-out applications. UKTC then applied for permission to appeal on a modified version of these grounds from the Court of Appeal, which the Court considered as part of its substantive appeal judgment.

### *Protective Judicial Reviews*

In parallel with the appeals and applications for permission to appeal, MAN, DAF and UKTC issued judicial review claims on a "protective" basis, in case the Court of Appeal did not have jurisdiction to hear their arguments by way of appeal.

### **The Court of Appeal's judgment**

#### *Jurisdiction*

The Court of Appeal considered that all of the prospective grounds of appeal advanced by the appellants were within its jurisdiction. It held that it has jurisdiction to hear an appeal where the subject of appeal is a decision of the CAT that the proposed

collective proceedings cannot be certified. This includes decisions as to aspects of certification as well as decisions as to whether proceedings can be certified at all. Moreover, a respondent can appeal a decision to grant certification where the decision would have been "the end of the road as matters then stood" if certification had been refused. If the CAT had refused to certify the RHA proceedings as regards used trucks, that would have been the end of the road for used trucks claimants.

#### *The conflict of interest*

The Court of Appeal held that the CAT erred in its conclusions that: (i) there was only a potential conflict of interest at this stage; (ii) it was not necessary to identify any sub-classes of new truck purchasers and used truck purchasers at this stage; and (iii) the potential conflict could be dealt with in the future by active CAT case management. It held that MAN, DAF and UKTC were right that there was an actual conflict of interest within the RHA's class which had already arisen. This "obvious" conflict had to be addressed at the start of proceedings when proposed members of the RHA's class (PCMs) were to opt in to the class, rather than at an indeterminate point in the future.

The CAT was wrong to accept the suggestion that the RHA's expert could be an expert for both sides of the new / used truck divide, and to suggest that a suitably worded notice giving notice of the collective proceedings to PCMs (**Rule 81 notice**) would result in informed consent on the part of PCMs to abide by the determination of the RHA and its expert as to the acceptable level of new-used pass-on to be advocated in the proceedings.

The Court held that the class as currently certified would not allow the RHA to comply with its duty to act in the best interests of all class members. It held that while there may be situations in which, on minor or peripheral issues, a class representative may be able to act in the best interests of the majority of the class provided that it does not significantly harm the minority, where there is an identifiable conflict of interest on a major issue in the case, a class representative is not entitled to prefer the interests of some members to the detriment of others.

The Court did not consider that two separate class representatives (i.e., one acting on behalf of new truck purchasers and one acting on behalf of used truck purchasers) were required to address the conflict. It agreed with the CAT's view that this would likely lead to undesirable and unnecessary cost and complexity. The Court rejected UKTC's argument that the existence

of an actual conflict meant that the RHA, being in a fiduciary relationship with class members, could not act on behalf of both sub-classes.

The Court held that the RHA could remain certified to act for both new and used truck purchasers on the condition that the conflict within the RHA's class is managed appropriately. This will require the RHA class to have separate sub-classes for purchasers of new and used trucks, with an information barrier within the RHA's organisation separating the two. The RHA will have to have separate teams acting for each of the sub-classes and instruct different firms of solicitors and counsel and different experts. The sub-classes will also need to have separate funding in place to avoid the risk of a funder siding with the members of one of the sub-classes.

Moreover, the Rule 81 notice which the RHA must give to potential class members will have to explain "in detail" to all class members in both sub-classes the nature and extent of the conflict in relation to resale pass-on and how it will be resolved.

The details of these arrangements and the Rule 81 notice (once worked out) will be remitted to the CAT for approval.

#### *UKTC's remaining grounds*

The Court of Appeal refused permission to appeal on UKTC's third ground, which it said sought to challenge the decision of the CAT on matters which are quintessentially multifactorial assessments by a specialist tribunal. It held that UKTC was seeking to re-run the arguments it ran before the CAT for preferring its application over that made by the RHA.

On UKTC's fourth ground, the Court of Appeal granted a stay of UKTC's application until: (i) the conflict issue within the RHA's class and the Rule 81 notice have been properly resolved; and (ii) the outcome of the [Paccar Supreme Court](#) case on funding was known. Judgment in that case was handed down on 26 July 2023.

#### **Implications for the future**

By its judgment, the Court of Appeal has helpfully clarified the position on jurisdiction with respect to appeals from the CAT: where the decision goes to certification (or aspects thereof), the effect of which would mean the "end of the road" for (all or part of) the collective proceedings, it will fall within the Court of Appeal's jurisdiction.

The Court of Appeal's judgment provides helpful guidance for future collective proceedings which involve an actual conflict between different members of the same proposed class. Unless the conflict concerns "minor or peripheral" issues, a proposed class representative will not be entitled to prefer the interests of some members to the detriment of others. As in this case, any such conflict may need to be addressed by the use of sub-classes with separate representation, solicitors, barristers, experts and funding. Any such conflict will also need to be made clear in the notice given to class members.

Slaughter and May acts for MAN in these proceedings.

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