Neutral citation [2022] CAT 53

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1339/7/7/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

28 November 2022

Before:

SIR MARCUS SMITH
(President)
EAMONN DORAN
BRIDGET LUCAS KC

Sitting as a Tribunal in England and Wales

BETWEEN:

MARK McLAREN CLASS REPRESENTATIVE LIMITED

Applicant / 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.

Respondents / Defendants

Heard at Salisbury Square House on 16 November 2022

RULING (COMMUNICATIONS WITH CLASS)

APPEARANCES

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

Daniel Piccinin (instructed by Arnold & Porter Kaye Scholer (UK) LLP, Steptoe & Johnson UK LLP, Baker Botts (UK) LLP and Wilmer Cutler Pickering Hale and Dorr LLP) appeared on behalf of the First to Third, Fifth, Sixth to Eleventh and Twelfth Defendants.

A. INTRODUCTION

(1) The relevant background

1. By a collective proceedings order dated 20 May 2022 (the "Collective Proceedings Order"), the Tribunal authorised Mark McLaren Class Representative Limited to act as class representative to continue collective proceedings against the above-named Defendants. The details of the proceedings are immaterial, save to note that the class is defined as:

> "All Persons (other than Excluded Persons) who during the period 18 October 2006 to 6 September 2015 either Purchased or Financed, in the United Kingdom, a New Vehicle or a New Lease Vehicle, other than a New Vehicle or New Lease Vehicle produced by an Excluded Brand or, in the event such a Person has died on or after 20 February 2020, their Personal Representative."

It is clear that, so defined, the class will include purchasers of vehicles in quantities large or small.

2. The Collective Proceedings Order certified that the proceedings would be on an "opt-out" as opposed to an "opt-in" basis for those domiciled in the UK and on an opt-in basis for those domiciled outside of the UK. The basis upon which the proceedings should be certified was, unsurprisingly, a matter that was debated before the Tribunal, and which was considered in the judgment to which the Collective Proceedings Order is consequential. That judgment (the "Collective Proceedings Judgment") was handed down on 18 February 2022.[1]

3. The question of whether the proceedings should be "opt in" or "opt out" for those domiciled in the UK arose in connection with what were termed "large business purchasers". The Respondents/Proposed Defendants to the application for a collective proceedings order[2] submitted that, if such an order was to be made, it should only be on an "opt-in" basis so far as "large business purchasers" were concerned.[3] In summary, the Proposed Defendants suggested that large business purchasers were those that "either Purchased or Financed, in the United

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[1] Under Neutral Citation Number [2022] CAT 10.
[2] Save for the Twelfth Respondent/Proposed Defendant who adopted a neutral position in respect of the application for a collective proceedings order.
[3] At [151] of the Collective Proceedings Judgment.

Kingdom at least 20,000 New Vehicles or New Lease Vehicles other than one produced by an Excluded Brand during the period 18 October 2006 to 6 September 2015". For the reasons given in the Collective Proceedings Judgment, the notion of a class "split", with some class members "opting in" and some class members "opting out", was rejected by the Tribunal.[4]

4. According to the Collective Proceedings Order, the date for those who are domiciled in the UK to opt out (and those who are domiciled outside of the UK to opt in) was 12 August 2022. The Collective Proceedings Order was, as we have noted, made on 20 May 2022, so a period of almost three months was allowed for a decision to "opt out" (or "opt in").

5. By a series of twenty letters dated 26 July 2022, the solicitors for the Fifth Defendant (Steptoe & Johnson UK LLP) wrote on behalf of all the Defendants except the Fourth Defendant to various large business purchasers concerning their participation in the proceedings. A further letter – dated 27 July 2022 – was written to a further potential large business purchaser by the solicitors for the Sixth to Eleventh Defendants (Baker Botts (UK) LLP), again on behalf of all the Defendants except the Fourth Defendant (together "the Letters"). Copies of examples of these letters are appended to this Ruling as Annex A.[5] The substance of these letters was to purport to warn the addressee:

   (1) That if they did nothing (i.e., if they did not "opt out"), their claim would automatically be within the proceedings.[6]

   (2) That the Defendants[7] would be likely to make an application for disclosure against the addressee if they remained party to the proceedings (i.e., if they did not "opt out"). Thus, the letters written by

[4] At [161] to [170] of the Collective Proceedings Judgment.
[5] These letters have been redacted to exclude subject-specific information that is immaterial.
[6] The letters are actually inaccurate, in that they say that the addressees "will automatically become claimants in the litigation". That is not the effect of a collective proceedings order. A collective proceedings order authorises the class representative to bring claims on behalf of the class: in other words, the claims of class members are prosecuted by the class representative on their behalf.
[7] Save for the Fourth Defendant.

Steptoe & Johnson UK LLP and Baker Botts (UK) LLP stated (amongst other things):

> "12. It is likely that the Defendants will seek disclosure of documents from class members who are large business purchasers of new cars (and/or commercial vehicles weighing up to 6 tonnes) and do not opt-out. If the CAT were to order such disclosure, the businesses in question could be ordered to carry out a careful search for (among other things) documents, such as contracts and/or invoices, which show the prices paid for all vehicles, and/or the approach taken to pricing negotiations, during the relevant period (2006 to 2015).
>
> …
>
> 15. If the CAT were to order large business purchasers to provide disclosure then this could involve a commitment of time, effort and cost on the part of the companies in question (although efforts would be made to minimise the extent of the burden where possible).
>
> 16. Any obligation to search for and disclose document would not be confined to documents in the public domain, and would extend to finding and disclosing documents which are confidential …
>
> 17. If [the addressee] purchased relevant vehicles during the period in question and does not intend to opt out of the claim, we suggest that it should take legal advice as to its duties to preserve relevant documents and to exclude them from routine document destruction processes."

6. On 3 August 2022, Mark McLaren Class Representative Limited (hereafter, the "Applicant") made an urgent application under Rules 53 and 88 of the Competition Appeal Tribunal Rules 2015 (the "Rules") for directions. By the application, the Applicant sought three directions, as follows:[8]

   (1) That the Defendants not communicate directly with actual or potential members of the class.

   (2) That the Defendants (with the exception of the Fourth Defendant) provide to the Applicant any and all communications with actual or potential members of the class (including responses to certain letters written by the Defendants).

[8] The precise relief sought was more closely articulated in various draft orders that were exchanged between the parties, and placed before us. In the case of this application, we have found it more helpful to refer to the terms of the application notice itself.

(3) That the Defendants (again with the exception of the Fourth Defendant, for obvious reasons) pay the Applicant's costs of and occasioned by the application on the indemnity basis.

7. Following correspondence between the parties and the Tribunal, the Defendants provided various undertakings (without prejudice to the arguments that they would make in due course) such that the application was no longer urgent. Whatever the position as regards urgency, the extent to which defendants to collective proceedings may communicate with class members or proposed class members is an important point that needs to be addressed.

8. We shall refer to the Defendants, excepting the Fourth Defendant, who was not represented before us, and who has nothing to do with the substance of the application, as the "Respondents".

(2) The parties' contentions

9. The Applicant's primary contention was that the Rules precluded communications of the sort we have described in paragraph 5 above. Although it was accepted that the Rules contained no express prohibition, the Applicant contended that such a prohibition necessarily arose out of what the Rules do say.

10. The Respondents disputed this, and contended in substance that:

(1) The Rules contained no such implied restriction.

(2) The Tribunal should be very slow to read any such implied restriction into the Rules because this was an inhibition of a protected human right, namely the right of freedom of expression.

(3) In any event, it was impossible – or at least very difficult – to frame an appropriate (implied) restriction that differentiated between legitimate communications between a defendant and a class member and illegitimate communications between a defendant and a class member.

(4) The Tribunal has general case management powers to issue specific directions if a problem in the proceedings arises (including in relation to correspondence). The Respondents have general obligations under the Rules to conduct themselves fairly (Rules 4(2)(d) read together with Rule 4(7)). Subject to these controls, there was nothing to prevent the Respondents from engaging in communications with class members. According to the Respondents, the Letters "contained numerous elements that were designed to be conspicuously fair to the recipients", and the conduct of the Respondents in sending the Letters was unimpeachable.

11. The Applicant's alternative contention was that even if there was no prohibition in the Rules, the Respondents' communications crossed the line of what was acceptable, and the Tribunal should exercise its discretion pursuant to its case management powers and grant the order sought.

(3) Structure of this Ruling

12. For the reasons we give in this Ruling, we have concluded that there is a restriction inherent in the Rules that precludes defendants from communicating with class members where a class has been certified (and similarly between proposed defendants and proposed class members at the application stage, where a collective proceedings order is being sought). We consider the precise nature of that restriction in Section B below, and in doing so deal with the Respondent's point (set out in paragraph 10(3) above) that an appropriate restriction cannot be articulated with sufficient clarity. To be clear, we reject the suggestion that the restriction cannot be clearly framed.

13. Sections C and D then deal with the two other objections articulated by the Respondents, namely:

(1) That no such restriction arises out of the Rules, properly construed (see Section C below); and

(2) That such a restriction infringes the Respondents' human rights – or runs the risk of doing so (see Section D below).

To anticipate, for the reasons we give, we consider neither of these objections to be sustainable; that the restriction we frame in Section B arises naturally out of the Rules; and that it in no way infringes the Respondents' human rights. Section E addresses the Respondent's fourth point.

B. FRAMING THE RESTRICTION

14. We consider that the Rules preclude any communication between a defendant or that defendant's legal representative and a member (actual or contingent[9]) of a class identified or identifiable under a collective proceedings order made by the Tribunal where that communication concerns those collective proceedings, unless the Tribunal otherwise orders or (subject always to the Tribunal's supervisory jurisdiction) the parties agree.

15. We consider that precisely the same restriction arises as between a proposed defendant (or that proposed defendant's legal representative) and a proposed member of the class (i.e., someone who could be a member if a collective proceedings order were made) from the time a collective proceedings application is made.

C. CONSTRUING THE RULES

16. Collective proceedings are commenced by a proposed class representative on making an application to commence collective proceedings.[10] A collective proceedings application involves a significant amount of work, including:

(1) Identification of the proposed class representative.[11]

[9] In other words, communications are precluded where the period for opting in or opting out has yet to expire, which of course is the position here.
[10] Rule 75(1).
[11] Rule 75(2)(a).

(2) Description of the proposed class.[12]

(3) A fully pleaded case,[13] verified by a statement of truth.[14]

17. The effect of a successful application for a collective proceedings order is to authorise the continuance of collective proceedings.[15]

18. Thus, the making of an application to commence collective proceedings in and of itself accords the proposed class representative a certain status, which is then continued if the application is successful. That fact is reflected in Rule 76:

(1) The Registrar acknowledges receipt of the application to the proposed class representative.[16]

(2) The Registrar directs service of the collective proceedings claim form on the defendant.[17]

19. Thereafter, the Tribunal "may make a collective proceedings order, after hearing the parties",[18] and provided certain conditions are met.[19] We will come to those conditions in a moment, but it is worth pausing to ask who – for the purposes of Rule 77(1) – the "parties" are. The answer, we consider, is absolutely clear: the "parties" are the proposed class representative and each and every proposed defendant.[20] The "parties" does not include any putative member of the class to be certified. Such persons may in due course become "represented persons",[21] and prior to that point in time might be referred to as "potential" or "putative" represented persons.[22] The one thing such persons are not is a party.

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[12] Rule 75(3)(a).
[13] Rule 75(3)(g). In this regard, note footnote 4 in *Michael O'Higgins FX Class Representative Limited v. Barclays Bank plc*, [2022] CAT 16 ("*O'Higgins*").
[14] Rule 75(4).
[15] See the definition of "collective proceedings order" in Rule 73(2).
[16] Rule 76(1).
[17] Rule 76(1).
[18] Emphasis added.
[19] Rule 77(1).
[20] Identified pursuant to Rule 75(2)(d).
[21] See the definition of "represented persons" in Rule 73(2).
[22] The term is ours: it is not a defined term. Nor is it a term that we will use in this Ruling.

20. The whole point of the collective proceedings regime is that the represented persons are represented by a class representative. Communications regarding the collective proceedings – which begin, as we have stressed, on the making of the application for a collective proceedings order – should be between the parties to those proceedings, and this does not include represented persons or putative represented persons.

21. Not only is this the clear effect of the language of the Rules, the reason for the Rules being so framed accords entirely with the purpose of collective proceedings. Collective proceedings are important because they enable the bringing of claims collectively in circumstances where it would not be efficient or cost effective to bring those claims individually. The point of the regime is to ensure that the class representative incurs one set of costs, rather than each individual class member incurring individual costs. That is why individual class members generally have no exposure to adverse costs orders.[23] Communications regarding the collective proceedings, if directed to class members, are liable to result in costs being incurred not merely to no purpose but to the disbenefit of the regime as a whole. That is why we consider the rule against communication by defendants to the class regarding the collective proceedings to be as absolute as it is.

22. We were taken to materials explaining the extent to which communications between class members and defendants were permitted in other jurisdictions, notably Canada. We were not assisted by these materials, simply because this is a question that turns very much on the precise wording of the Rules, which in this case we consider to be unequivocal. What is, however, interesting is the extent to which other jurisdictions consider control of communications between defendants and class members to be either necessary or generally desirable.[24]

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[23] See Rule 98 and *O'Higgins* at [95](3) to (5).

[24] See, for instance: the guidance provided by Perell J in *Del Giudice v. Thompson*, 2021 ONSC 2206 at [52] to [53]; WB Rubenstein, *Newberg and Rubenstein on Class Actions* (6th ed, 2022) at [9.9]. Also (and we were not referred to these articles) see: VR Johnson, 'The Ethics of Communicating with Putative Class Members', 17 Rev Litig 497 (1998); DR Richmond, 'Class Actions and Ex Parte Communications: Can We Talk', 68 Mo L Rev (2003).

23. The true nature of collective proceedings explains a number of other facets of the collective proceedings regime:

(1) Because the class representative acts in relation to claims of other people, the Rules require collective proceedings to receive the sanction of the Tribunal before they can be continued. The detail of these provisions was set out extensively in *O'Higgins*, and we will not repeat that detail here. A proposed class representative must show that they are appropriate to be appointed as class representative (the so-called authorisation condition in Rule 78) and they must show that the claims being brought are eligible for inclusion in the collective proceedings (the so-called eligibility condition in Rule 79).

(2) Although represented persons are not parties to the collective proceedings, they do have a clear interest in the outcome.[25] It is their claims that the class representative is progressing. That interest is reflected in the fact that there are various rules obliging the class representative to engage with represented persons in certain defined ways, often subject to oversight from the Tribunal. For example:

(i) Rule 81(1) provides that "the class representative shall give notice of the collective proceedings order to class members".

(ii) Rule 87(2)(a) provides that the Tribunal may only give permission for a class representative to withdraw from acting in that capacity "if it is satisfied that the class representative has given notice of the application to withdraw to represented persons".

(iii) Rule 88(2)(d) provides that the Tribunal may order that the class representative give notice to represented persons of any step taken by the class representative.

[25] That is so whether they know about the proceedings or not.

(iv) Rule 88(3) provides that, if the Tribunal directs that participation of any represented persons is necessary in order to determine individual issues, the class representative shall give notice of the further hearings to those persons.

(v) Rule 91(2) provides that "the class representative shall give notice of any judgment or order to all represented persons".

(vi) Rule 94(2) contemplates that any offer to settle by a defendant in the collective proceedings shall be made to the class representative rather than directly to the represented persons themselves. Insofar as such offer prompts an application for a collective settlement approval order by the class representative and the defendant, it is for the class representative to give notice of the application to represented persons/class members pursuant to Rule 94(4)(f) and if the Tribunal approves the proposed collective settlement, it is the class representative which shall give notice of the terms of the settlement and its approval under Rule 94(13).

24. In short, we conclude that the restriction articulated in Section B arises inevitably out of the wording of the Rules and is consistent with, even necessary to, the essential purposes and structure of the collective proceedings regime.

D. THE RESPONDENTS' HUMAN RIGHTS

25. In contending for the right to communicate with class members, the Respondents invoked their Article 10 rights of freedom of expression. It is worth noting the terms of Article 10 of the European Convention on Human Rights (the "Convention"):

> "(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

26. Article 10 is thus a qualified right. Civil litigation involves, in large part, controlled communications between the parties to that litigation. Claims must be articulated in a particular way, must be filed within specific time limits, and must be served on or filed with certain persons. Questions or submissions in court are subject to close judicial control. We simply cannot accept the submission that such rules, including those of this Tribunal – intended to ensure due process (consistent with Article 6 of the Convention) – could constitute infringements of Article 10. We accept that in general, there is no restriction on a litigant contacting a third party who is not subject to the proceedings. However, statutory provision has been made for collective proceedings, for the important reasons we have outlined above. The special position and role of the class representative in those proceedings has been specifically recognised in the Rules. We do not consider that a requirement that the professional representatives of defendants to collective proceedings communicate with the party having the conduct of those proceedings (namely, the class representative through its professional representatives – a person approved by this Tribunal), and preventing communication with persons not having the conduct of those proceedings (namely, the class members) can sensibly be attacked on Article 10 grounds. Were the position to be otherwise, it would cut across the collective proceedings regime.

E. CONCLUSION

27. The application therefore in substance succeeds. The Respondents should not have written the Letters to the class members. That was not proper conduct on the part of the Respondents' representatives; and although we have received assurances from the Respondents' representatives that there will be no repetition of this conduct, we consider that the Applicant should have the benefit of an

order that the Respondents should not further communicate with class members on matters concerning the collective proceedings, as an indication of our views of the conduct of the Respondents.

28. By way of postscript, and in order to be absolutely clear, we should deal with the canard that this non-communication obligation in some way inhibits defendants to collective proceedings from properly exercising their rights of defence:

(1) The suggestion was made that there was a proper purpose in writing to the class members in this case because of the need to secure disclosure. If and to the extent that disclosure from class members is sought or required, that is a matter that should be raised with the class representative and/or the Tribunal to which reference was made in the Collective Proceedings Judgment.[26] In this case, if there was a genuine and immediate concern that class members might destroy important documentation, that was a matter that should have been raised in terms with the Tribunal on the certification application so that the Tribunal could, if it considered appropriate, have ensured that a document preservation regime was incorporated into the class representative's litigation plan. If the concern only arises at a later point in time, it can be raised with the Tribunal and directions sought.

(2) We do not accept the suggestion that investigations by defendants in order to defend themselves will be prejudiced or inhibited. In the first place, only communications with class members concerning the collective proceedings are prohibited. In the second place, to the extent that direct communication with class members is necessary or desirable to obtain evidence (for example, a questionnaire to determine the extent of pass on), that is a process that should be conducted under the overall supervision of the Tribunal and not as a litigation "free for all". As to that, we do not rule out the possibility of the parties themselves coming to an agreed position on the content of communications from defendants

[26] At [169].

to class members, but that will depend on the particular facts of each case. In the end, it is the Tribunal which has the ultimate responsibility for supervising the conduct of collective proceedings, and in particular the extent to which it is appropriate to involve individual class members.

29. In light of our decision on the proper construction of the Rules, our views on the substance of the Letters are not strictly relevant. However, for completeness:

(1) We do not accept the Respondents' suggestion that the Letters were couched in terms that were "conspicuously fair". We accept that the Letters included passages from the Collective Proceedings Judgment addressing the Tribunal's view on disclosure and, for example, were deliberately and carefully couched so as only to advert to the fact that it was "likely" a disclosure application would be made. We also accept that they were copied to the Applicant and, to that extent, were "transparent". However, the overwhelming tenor of the Letters, targeted as they were at some of the largest purchasers identified by the Defendants as potential class members, was that if they did not opt-out they would be likely to become involved in a time-consuming and expensive disclosure process: a process, we might add, that this Tribunal had not ordered. Furthermore, in advising these potential class members to take legal advice, the Defendants in effect envisaged that they would expend at least either time or money – or both – in doing so.

(2) The content of the Letters, therefore, cut across and undermined the potential benefits of collective proceedings, at least for these particular class members and potentially for all class members if and in so far as it influenced the potential make-up of the class. Even if we were wrong in our construction of the Rules, therefore, in our view the terms of the Letters were such that they should plainly not have been written.

30. This Ruling is unanimous.

Sir Marcus Smith
President

Eamonn Doran

Bridget Lucas KC

Charles Dhanowa O.B.E., K.C. (*Hon*)
Registrar

Date: 28 November 2022

ANNEX A

Steptoe
STEPTOE & JOHNSON UK LLP

26 July 2022

[redacted]

Urgent - for the attention of the Chief Executive Officer and Head of Legal

Our Ref: AR/LJS/026318.00007
Your Ref:

This letter is not a circular. It relates to an important legal development with consequences for [redacted]. We recommend that you provide it to your legal advisers immediately.

Dear Sir or Madam

1. The Competition Appeal Tribunal (the **"CAT"**) is a court in the United Kingdom which handles litigation concerning cartels. The CAT has recently ordered that certain categories of companies will automatically become claimants in the litigation described below, unless they take steps to opt out by 12 August 2022.

2. We are writing on behalf of the Defendants (as defined below) to inform you about applications which the Defendants are likely to make in relation to [redacted] if [redacted] remains in the litigation. The purpose of doing so is to ensure that [redacted] is not taken by surprise.

A. Background – the litigation

3. A specially-incorporated company, called Mark McLaren Class Representative Limited (**"McLaren"**), has commenced litigation in the CAT (the **"Claim"**). The title of the Claim is *Mark McLaren Class Representative Limited v MOL (Europe Africa) Limited*, and the CAT's case number is 1339/7/7/20.

4. McLaren is pursuing the Claim on behalf of (among others) all UK companies which, between 2006 and 2015, purchased new cars (and/or commercial vehicles weighing less than 6 tonnes). Purchases of certain brands of vehicle (the **"Excluded Brands"**) are excluded from the claim: the most common Excluded Brands are Fiat, Mini, Opel, Renault Trucks, Rover MG, Saab, Seat, Skoda, Smart and Volvo.

5. The Claim is against various companies which shipped vehicles into the European Economic Area (the **"EEA"**) (from places of manufacture outside the EEA). The Claim alleges that those companies (the **"Defendants"**) overcharged the vehicle manufacturers for shipping services, and that those overcharges were ultimately passed on to, and paid by, vehicle purchasers.

6. McLaren has established a website to provide general information about the Claim: www.cardeliverycharges.com. We were not involved in the production of that website and express no comment on any of its content.

7. The CAT's website contains various documents relating to the progress of the proceedings: https://www.catribunal.org.uk/cases/13397720-mark-mclaren-class-representative-limited. These include an order made by the CAT on 20 May 2022 which sets out the precise scope of the Claim, including the full list of Excluded Brands.

8. This letter is sent on behalf of the Defendants[7], and is sent by way of information only. It is not legal advice, and does not give rise to a client relationship with this firm.

B. [redacted]'s involvement in the Claim

9. The CAT has ordered that UK companies which purchased relevant vehicles in the UK between 2006 and 2015 will automatically become class members on 13 August 2022, unless they avail themselves of the right to opt out.

10. A company may opt out by writing to optout@cardeliverycharges.com or Car Delivery Charges, PO Box 13260, Braintree, CM7 0PL, stating that it is opting out of the Claim. **To be effective, the opt-out instruction must be received on or before 12 August 2022.** If a potential class member chooses to opt out, it would no longer receive any benefits or burdens from participating in the Claim, and it may be entitled to bring separate proceedings in its own name rather than as part of the class (your legal advisers will be able to advise about this).

11. We understand that [redacted] was a purchaser of new vehicles in the UK during the relevant period. Accordingly, unless all of the purchases were of Excluded Brands of vehicle, it will by default become a class member on 13 August 2022 if it does not exercise its right to opt out before then.

C. Potential disclosure obligations

12. It is likely that the Defendants will seek disclosure of documents from class members who are large business purchasers of new cars (and/or commercial vehicles weighing up to 6 tonnes) and do not opt-out. If the CAT were to order such disclosure, the businesses in question could be ordered to carry out a careful search for (among other things)

[7] Except the Fourth Defendant, which has not instructed us to send this letter.

documents, such as contracts and/or invoices, which show the prices paid for all vehicles, and/or the approach taken to pricing negotiations, during the relevant period (2006 to 2015).

13. Disclosure may also be sought in relation to the question of whether class members passed on (to their customers) any overcharge.

14. The CAT is aware that, in due course, the Defendants may seek such disclosure from such large business purchasers. In a judgment issued on 18 February 2022, in the context of considering whether large business purchasers should be included on an *"opt out"* basis (as has now been ordered), the CAT made the following comments about that possibility:

> *"168. Apart from increased scrutiny of the claim by Large Business Purchasers when deciding whether to opt in, the key benefit that the Respondents rely on as achievable through opt-in proceedings relates to disclosure. In our view this is not a good reason to accede to the Respondents' proposal, and any genuine issue that arises in relation to disclosure should be capable of being dealt with in another way.*
>
> *169. The Tribunal has power under rule 89(1)(c) to order disclosure by any represented person, defined in rule 73(2) to include class members who have not opted out of opt-out proceedings as well as those who have opted in to opt in proceedings. ... the Tribunal has a broad discretion. It may well be that disclosure would not ordinarily be ordered from members of an opt-out class, but nothing precludes it. If an order for disclosure against certain class members was determined to be reasonably necessary and proportionate (Ryder Ltd v Man SE [2020] CAT 3 at [35(7)]), then we would expect that a way could and would be found to achieve that so as to ensure that the proceedings can be disposed of fairly. Examples might include some form of costs protection so that the burden is not shouldered unfairly as between class members, or potentially giving the relevant class members the option of being excluded from the claim by removing them under rule 85(3) (if not rule 82(2)), if the opportunity to opt-out would otherwise have expired.*
>
> *170. We would also observe that disclosure from certain Large Business Purchasers may be of limited relevance. Whilst it could assist in relation to the levels of discount that they were able to negotiate (whether in relation to the overall price or any delivery charge element) and potentially in relation to pass-on by certain types of businesses to their customers, it would not obviously assist in determining the levels of discount obtained by other purchasers or, for example and if relevant, the approach to setting vehicle list prices."*

15. If the CAT were to order large business purchasers to provide disclosure then this could involve a commitment of time, effort and cost on the part of the companies in question (although efforts would be made to minimise the extent of the burden where possible).

16. Any obligation to search for and disclose documents would not be confined to documents in the public domain, and would extend to finding and disclosing documents which are

confidential. (The CAT has the power to order that any confidential documents are disclosed into a *"confidentiality ring"*, which could limit the number of people who can see them, and parties who receive documents in disclosure must generally not use those documents for any purpose other than the litigation in question.)

17. If [redacted] purchased relevant vehicles during the period in question and does not intend to opt out of the claim, we suggest that it should take legal advice as to its duties to preserve relevant documents and to exclude them from routine document destruction processes.

D. Concluding comments

18. In this letter, we have drawn your attention to the existence of the Claim and the possibility that [redacted] will automatically become a class member.

19. We have also made you aware of the possibility that, in due course, the Defendants are likely to seek an order for disclosure from class members which are large business purchasers, and that (if such an order is granted) certain action could be required by [redacted].

20. We have also suggested that [redacted] take legal advice regarding its duties in relation to document preservation.

21. We suggest that [redacted] obtain legal advice about the content of this letter generally, so that it can make an informed decision as to how to proceed in connection with this matter, including whether to join the class by default or to opt out of the class by 12 August 2022.

Yours faithfully

Steptoe & Johnson UK LLP.

STEPTOE & JOHNSON UK LLP

cc: Scott + Scott UK LLP (solicitors for McLaren)

BAKER BOTTS (UK) LLP

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BY EMAIL AND FIRST CLASS POST

[redacted]

[redacted]

Urgent – for the attention of [redacted] and the office of [redacted]

This letter is not a circular. It relates to an important legal development with consequences for [redacted]. We recommend that you provide it to your legal advisers immediately.

Dear Sir or Madam,

1. The Competition Appeal Tribunal (the **"CAT"**) is a court in the United Kingdom which handles litigation concerning cartels. The CAT has recently ordered that certain categories of companies will automatically become claimants in the litigation described below, unless they take steps to opt out by 12 August 2022.

2. We are writing on behalf of the Defendants (as defined below) to inform you about applications which the Defendants are likely to make in relation to [redacted] if [redacted] remains in the litigation. The purpose of doing so is to ensure that [redacted] is not taken by surprise.

A. Background – the litigation

3. A specially-incorporated company, called Mark McLaren Class Representative Limited (**"McLaren"**), has commenced litigation in the CAT (the **"Claim"**). The title of the

Claim is *Mark McLaren Class Representative Limited v MOL (Europe Africa) Limited*, and the CAT's case number is 1339/7/7/20.

4. McLaren is pursuing the Claim on behalf of (among others) all UK large business purchasers which, between 2006 and 2015, purchased new cars (and/or commercial vehicles weighing less than 6 tonnes). Purchases of certain brands of vehicle (the **"Excluded Brands"**) are excluded from the claim: the most common Excluded Brands are Fiat, Mini, Opel, Renault Trucks, Rover MG, Saab, Seat, Skoda, Smart and Volvo.

5. The Claim is against various companies which shipped vehicles into the European Economic Area (the **"EEA"**) (from places of manufacture outside the EEA). The Claim alleges that those companies (the **"Defendants"**) overcharged the vehicle manufacturers for shipping services, and that those overcharges were ultimately passed on to, and paid by, vehicle purchasers.

6. McLaren has established a website to provide general information about the Claim: www.cardeliverycharges.com. We were not involved in the production of that website and express no comment on any of its content.

7. The CAT's website contains various documents relating to the progress of the proceedings: https://www.catribunal.org.uk/cases/13397720-mark-mclaren-class-representative-limited. These include an order made by the CAT on 20 May 2022 which sets out the precise scope of the Claim, including the full list of Excluded Brands.

8. This letter is sent on behalf of the Defendants[1], and is sent by way of information only. It is not legal advice, and does not give rise to a client relationship with this firm.

B. [redacted]'s involvement in the Claim

9. The CAT has ordered that UK persons and businesses which purchased relevant vehicles in the UK between 2006 and 2015 will automatically become class members on 13 August 2022, unless they avail themselves of the right to opt out.

10. A person/business may opt out by writing to optout@cardeliverycharges.com or Car Delivery Charges, PO Box 13260, Braintree, CM7 0PL, stating that it is opting out of the Claim. **To be effective, the opt-out instruction must be received on or before 12 August 2022.** If a potential class member chooses to opt out, it would no longer receive any benefits or burdens from participating in the Claim, and it may be entitled to bring separate proceedings in its own name rather than as part of the class (your legal advisers will be able to advise about this).

11. We understand that [redacted] was a purchaser of new vehicles in the UK during the relevant period. Accordingly, unless all of the purchases were of Excluded Brands of vehicle, it will by default become a class member on 13 August 2022 if it does not exercise its right to opt out before then.

[1] Except the Fourth Defendant, which has not instructed us to send this letter.

C. Potential disclosure obligations

12. It is likely that the Defendants will seek disclosure of documents from class members who are large business purchasers of new cars (and/or commercial vehicles weighing up to 6 tonnes) and do not opt-out. If the CAT were to order such disclosure, the businesses in question could be ordered to carry out a careful search for (among other things) documents, such as contracts and/or invoices, which show the prices paid for all vehicles, and/or the approach taken to pricing negotiations, during the relevant period (2006 to 2015).

13. Disclosure may also be sought in relation to the question of whether class members passed on (to their customers) any overcharge.

14. The CAT is aware that, in due course, the Defendants may seek such disclosure from such large business purchasers. In a judgment issued on 18 February 2022, in the context of considering whether large business purchasers should be included on an *"opt out"* basis (as has now been ordered), the CAT made the following comments about that possibility:

> *"168. Apart from increased scrutiny of the claim by Large Business Purchasers when deciding whether to opt in, the key benefit that the Respondents rely on as achievable through opt-in proceedings relates to disclosure. In our view this is not a good reason to accede to the Respondents' proposal, and any genuine issue that arises in relation to disclosure should be capable of being dealt with in another way.*
>
> *169. The Tribunal has power under rule 89(1)(c) to order disclosure by any represented person, defined in rule 73(2) to include class members who have not opted out of opt-out proceedings as well as those who have opted in to opt in proceedings. ... the Tribunal has a broad discretion. It may well be that disclosure would not ordinarily be ordered from members of an opt-out class, but nothing precludes it. If an order for disclosure against certain class members was determined to be reasonably necessary and proportionate (Ryder Ltd v Man SE [2020] CAT 3 at [35(7)]), then we would expect that a way could and would be found to achieve that so as to ensure that the proceedings can be disposed of fairly. Examples might include some form of costs protection so that the burden is not shouldered unfairly as between class members, or potentially giving the relevant class members the option of being excluded from the claim by removing them under rule 85(3) (if not rule 82(2)), if the opportunity to opt-out would otherwise have expired.*
>
> *170. We would also observe that disclosure from certain Large Business Purchasers may be of limited relevance. Whilst it could assist in relation to the levels of discount that they were able to negotiate (whether in relation to the overall price or any delivery charge element) and potentially in relation to pass-on by certain types of businesses to their customers, it would not obviously assist in determining the levels of discount obtained by other purchasers or, for example and if relevant, the approach to setting vehicle list prices."*

15. If the CAT were to order large business purchasers to provide disclosure then this could involve a commitment of time, effort and cost on the part of the companies in question (although efforts would be made to minimise the extent of the burden where possible).

16. Any obligation to search for and disclose documents would not be confined to documents in the public domain, and would extend to finding and disclosing documents which are confidential. (The CAT has the power to order that any confidential documents are disclosed into a *"confidentiality ring"*, which could limit the number of people who can see them, and parties who receive documents in disclosure must generally not use those documents for any purpose other than the litigation in question.)

17. If [redacted] purchased relevant vehicles during the period in question and does not intend to opt out of the claim, we suggest that it should take legal advice as to its duties to preserve relevant documents and to exclude them from routine document destruction processes.

D. Concluding comments

18. In this letter, we have drawn your attention to the existence of the Claim and the possibility that [redacted] will automatically become a class member.

19. We have also made you aware of the possibility that, in due course, the Defendants are likely to seek an order for disclosure from class members which are large business purchasers, and that (if such an order is granted) certain action could be required by [redacted].

20. We have also suggested that [redacted] take legal advice regarding its duties in relation to document preservation.

21. We suggest that [redacted] obtain legal advice about the content of this letter generally, so that it can make an informed decision as to how to proceed in connection with this matter, including whether to join the class by default or to opt out of the class by 12 August 2022.

Yours faithfully

Baker Botts (UK) LLP

Baker Botts (UK) LLP

cc: Scott + Scott UK LLP (solicitors for McLaren)