



COMPETITION APPEAL TRIBUNAL

COLLECTIVE PROCEEDINGS AND COLLECTIVE SETTLEMENTS IN THE COMPETITION APPEAL TRIBUNAL

DRAFT TRIBUNAL RULES

These draft rules set out the proposed procedural rules for collective proceedings and collective settlements in the Competition Appeal Tribunal (“the Tribunal”) (“the Draft Rules”).

Schedule 8 of the Consumer Rights Bill 2013-14 (“the Bill”) will, if enacted, give the Tribunal jurisdiction to hear collective proceedings and to approve collective settlements relating to infringements of competition law.¹

Following the publication of the draft Bill, the Department for Business, Innovation & Skills (“BIS”) asked the Tribunal to develop draft procedural rules to govern collective proceedings and collective settlements. Accordingly, the President of the Tribunal formed a Working Party for this purpose. The membership of the Working Party was made up of persons with particular experience and/or expertise in private actions in competition law (including collective actions). A list of members can be found below.

The Draft Rules have been developed by the Tribunal in conjunction with the Working Party, and are being published in order to explain how it is anticipated that collective proceedings and collective settlements will be brought before the Tribunal. At the time of publication, the Bill had not yet completed the Committee Stage in the House of Commons. Therefore, it may be necessary to revise the Draft Rules to reflect any amendments which are introduced during the Bill’s passage through Parliament.

A copy of the draft rules has been placed in the House of Commons and House of Lords Libraries.

In their consultation “Streamlining Regulatory and Competition Appeals”, Government confirmed its intention to undertake a review of the existing Tribunal rules.² The Draft Rules will form part of that broader review and will be the subject of a formal consultation by BIS at a later date. Any comments on these Draft Rules should be made in accordance with the response guidelines for that formal consultation.

Charles Dhanowa OBE QC (*Hon*)
Registrar, Competition Appeal Tribunal
10 March 2014

¹ See paragraphs 4 – 11 of Schedule 8 to the Bill, which amend the Competition Act 1998
² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229758/bis-13-876-regulatory-and-competition-appeals-revised.pdf



COMPETITION APPEAL TRIBUNAL

Membership of the Collective Actions Working Party

- Sir Peter Roth – President, Competition Appeal Tribunal
- Charles Dhanowa – Registrar, Competition Appeal Tribunal
- Jennifer Reeves – Référendaire, Competition Appeal Tribunal

- Euan Burrows – Partner, Ashurst LLP; member of the Competition Law Association committee
- Tom de la Mare QC – Barrister, Blackstone Chambers
- Jon Lawrence – Partner, Freshfields Bruckhaus Deringer LLP
- Anthony Maton – Partner, Hausfeld LLP
- Rachael Mulheron – Professor of Law, Queen Mary University of London; member of the Civil Justice Council of England and Wales
- Catriona Munro – Partner, Maclay Murray & Spens LLP
- Paolo Palmigiano – General Counsel and Chief Compliance Officer (EMEA), Sumitomo; Chairman, European In-House Competition Lawyers' Association; member of the CBI competition panel
- Rhodri Thompson QC – Barrister, Matrix Chambers; Joint Working Party on Competition Law of the Bar Council and Law Societies

- Nicholas Blaney (observer) – Senior Policy Adviser, Department for Business, Innovation & Skills



COMPETITION APPEAL TRIBUNAL

COLLECTIVE PROCEEDINGS AND COLLECTIVE SETTLEMENTS

EXPLANATORY NOTE TO DRAFT TRIBUNAL RULES

1. These draft rules set out the procedure proposed to govern collective actions in the Tribunal. This draft is based on the version of the Consumer Rights Bill (“the Bill”) introduced to Parliament on 23 January 2014, and may need to be amended in due course to reflect changes made to the Bill during its passage through Parliament. This note should be read alongside the draft rules.
2. The draft rules are in three parts. The first covers collective proceedings, the second collective settlements, and the third costs and fees. Changes will also need to be made to the existing Tribunal rules (referred to as the “principal rules” in the draft).
3. Rule 1 sets out the definitions which apply in relation to this Part.
4. Rule 2(1) provides that the rules in this Part are without prejudice to the Tribunal’s general powers of case management. Therefore, the broad powers granted to the Tribunal by principal rule 44 continue to apply in relation to collective actions. Rule 2(2) provides that the Tribunal may allow collective proceedings, or a collective settlement, in relation to only *part* of a claim. For example, in a stand-alone claim for damages (i.e. where there is no infringement finding by a competition authority), the Tribunal could make a collective proceedings order in relation to the existence of an infringement, but leave causation and quantum issues to be dealt with on an individual basis.

Collective proceedings

5. This part of the rules addresses the procedure for collective proceedings. That is, where proceedings are commenced on behalf of a class of persons by their proposed representative pursuant to section 47B of the amended Competition Act 1998.
6. Rule 3 specifies how collective proceedings are to be commenced in the Tribunal. In essence, the proposed class representative must send a collective proceedings claim form to the Tribunal’s Registrar containing the information required by paragraphs (2) – (4) of this rule. The collective proceedings claim form initiates the proceedings (as in any ordinary claim) and constitutes an application for a collective proceedings order (“CPO”). The CPO authorises the proceedings to continue on a collective basis.
7. Rule 4 sets out what the Tribunal will do upon receipt of a collective proceedings claim form. This includes, for example, acknowledging receipt, publishing a summary on the Tribunal’s website and holding a case management conference to determine next steps in the proceedings.
8. Rule 5 sets out the conditions which must be satisfied before the Tribunal can make a CPO. The first condition is that the proposed class representative meets the criteria specified in Rule 6. The second condition is that the claims are eligible to be included in collective proceedings in accordance with rule 7.
9. Rule 8 specifies what a CPO must include (e.g. a description of the class).
10. Rule 9 requires the class representative to notify the represented class of the CPO, and specifies the basic content requirements of such a notice. The Tribunal may impose additional requirements as to the form or content of the notice depending on the circumstances.

11. Rule 10 explains that a class member can opt in or opt out of collective proceedings in accordance with the CPO.
12. Rule 11 requires the class representative to maintain a register of persons who have opted in to or out of the collective proceedings.
13. Rule 12 prohibits a class representative from bringing claims in the collective proceedings other than those specified in the CPO.
14. Rule 13 gives the Tribunal the power to stay, vary or revoke a CPO. It also sets out the factors it will take into account in deciding whether to vary or revoke a CPO.
15. Rule 14 provides that, where a class representative settles its individual claim with the defendant(s), it must notify the persons represented in the collective proceedings and the Tribunal.
16. Rule 15 provides that a class representative may only withdraw from acting in that capacity with the Tribunal's permission.
17. Rule 16 sets out the Tribunal's case management powers in relation to collective proceedings.
18. Rule 17 gives the Tribunal the power to order disclosure in collective proceedings, including by persons within the represented class.
19. Rule 18 provides that the collective proceedings are not affected by the failure of a class member to receive a notice, or respond to it, unless the Tribunal orders otherwise.
20. Rule 19 sets out the rules in relation to judgments and orders in collective proceedings. Notably, it requires that the class representative notifies the persons it represents of any judgment or order in the proceedings.
21. Rule 20 addresses aggregate awards of damages (i.e. where damages are awarded without the Tribunal having quantified how much each represented person is entitled to). In particular, it requires the Tribunal to give directions as to how individual entitlements to a part of the aggregate damages award are to be assessed.
22. Rule 21 contains the requirements for the payment of any award of damages, including any undistributed damages.

Collective settlements

23. This part of the rules addresses the procedure for collective settlements. There are two procedures by which the Tribunal may approve the terms of a collective settlement: first, where a CPO has been made and, second, where a CPO has not been made (i.e. settlements pursuant to sections 49A and 49B of the amended Competition Act 1998, respectively).

Collective settlements where a CPO has been made

24. Rule 22 sets out the procedure for collective settlements where there is already a CPO relating to *opt-out* collective proceedings. In essence, where opt-out proceedings are settled, the settling parties apply to the Tribunal for a collective settlement approval order, which the Tribunal will approve provided certain conditions are met (notably that the Tribunal is satisfied that the terms are just and reasonable). A collective settlement approval order is, broadly, binding on the class. This rule specifies, in particular:
 - (i) what an application for a collective settlement approval order must contain;

- (ii) how the Tribunal is to deal with such an application;
- (iii) the factors the Tribunal will consider in determining whether the terms of the collective settlement approval order are just and reasonable;
- (iv) how a person can opt in or out of the collective settlement;
- (v) who is bound by a collective settlement approval order; and
- (vi) the relevant notice requirements.

25. Rule 23 addresses collective settlements where there is already a CPO relating to *opt-in* collective proceedings. In such a case, the Tribunal's permission is required to settle claims where the deadline for opting in to the collective proceedings has not yet passed.

Collective settlements where a CPO has not been made

26. This part of the rules provides that, to collectively settle a claim where a CPO has not been made (i.e. where there are no collective proceedings already in play), the parties must apply for a collective settlement order ("CSO") and a collective settlement approval order. The CSO authorises the settlement representative to act in that capacity in relation to the claims to be settled and the collective settlement approval order approves the terms of the settlement itself.

27. Rule 24 addresses CSOs, which are broadly equivalent to CPOs. Many of the provisions in this rule therefore mirror those which apply to CPOs in rules 3 to 10. In summary, the proposed settlement representative and the would-be defendants apply to the Tribunal for a CSO, which the Tribunal will grant provided certain conditions are met. This rule specifies, in particular:

- (i) how an application for a CSO is to be made;
- (ii) what the Tribunal will do upon receipt of a CSO application;
- (iii) the conditions which must be satisfied before the Tribunal can make a CSO, those being that: (a) the proposed settlement representative meets the criteria specified in paragraphs (9) – (11)¹; and (b) the claims would have been eligible to be included in collective proceedings (had such proceedings been brought) in accordance with rule 7;
- (iv) the contents of a CSO;
- (v) how the settlement representative is to notify the settlement class of the CSO; and
- (vi) the Tribunal's power to vary or revoke a CSO.

28. Rule 25 addresses collective settlement approval orders where there is a CSO (rather than a CPO). Subject to a small number of differences, many of these provisions mirror those which apply on an application for a collective settlement approval order in relation to opt-out collective proceedings (rule 22). As for settlements of opt-out collective proceedings, the settling parties apply to the Tribunal for a collective settlement approval order, which the Tribunal will approve provided certain conditions are met. This rule specifies, in particular:

- (i) what an application for a collective settlement approval order must contain;
- (ii) how the Tribunal is to deal with such an application;
- (iii) the factors the Tribunal will consider in determining whether the terms of the collective settlement approval order are just and reasonable;
- (iv) how a person can opt in to or out of the collective settlement;
- (v) who is bound by a collective settlement approval order;
- (vi) the relevant notice requirements; and
- (vii) that an application for a collective settlement approval order can be made at the same time as an application for a CSO.

¹ Note that the provisions addressing the authorisation of representatives for collective *settlements* assume that the corresponding provisions in the Bill will be brought into line with those relating to the authorisation of representatives for collective *proceedings*.

Costs and fees

29. Rule 26 gives the Tribunal the power to award costs to or against the class representative in opt-out collective proceedings. It also specifies the limited circumstances in which costs orders can be made in respect of represented persons other than the class representative.

March 2014



COMPETITION APPEAL TRIBUNAL

Draft Rules: Collective Proceedings and Collective Settlements

(To be included in Part V of the Competition Appeal Tribunal Rules)

N.B. References to “principal rules” refer to the existing rules contained in the existing Competition Appeal Tribunal Rules 2003 (S.I.1372 / 2003). Ultimately these rules will be consolidated into the principal rules and be renumbered.

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Scope and interpretation

1. (1) The rules in this Part concern collective proceedings pursuant to section 47B of the 1998 Act and collective settlements pursuant to sections 49A and 49B of the 1998 Act.
- (2) In this Part—
 - (a) “aggregate award of damages” means an award of damages made by the Tribunal in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of each represented person;
 - (b) “application for a collective proceedings order” means the application referred to in rule 3(2)(e);
 - (c) “class member” means a person falling within the class described in the collective proceedings order for those proceedings, or a collective settlement order, as applicable;
 - (d) “class representative” means the person referred to as the representative in section 59 of the 1998 Act, being a person who is authorised to bring the collective proceedings and includes, for the purposes of these rules, a sub-class representative;
 - (e) “collective proceedings” means proceedings which by virtue of section 47B(1) of the 1998 Act may be brought before the Tribunal combining two or more claims to which section 47A of the 1998 Act applies;
 - (f) “collective proceedings order” means an order made by the Tribunal authorising the continuance of collective proceedings;
 - (g) “collective settlement” means the settlement of claims by virtue of section 49A or 49B of the 1998 Act;
 - (h) “collective settlement order” means an order authorising the settlement representative to act in relation to the collective settlement;
 - (i) “collective settlement approval order” means an order of the Tribunal approving a proposed collective settlement;
 - (j) “common issues” means the same, similar or related issues of fact or law;
 - (k) “domicile date” means the date specified in the collective proceedings order or collective settlement order, as applicable, for the purposes of determining whether a person is domiciled in the United Kingdom;
 - (l) “opt-in collective proceedings” means collective proceedings which are brought on behalf of each class member who opts in by notifying the class representative, in a manner and by a time specified by the Tribunal, that the claim should be included in the collective proceedings;
 - (m) “opt-out collective proceedings” means collective proceedings which are brought on behalf of each class member except—

- (i) any class member who opts out by notifying the class representative, in a manner and by a time specified by the Tribunal, that the claim should not be included in the collective proceedings; and
 - (ii) any class member who is not domiciled in the United Kingdom at a time specified and does not, in a manner and by a time specified by the Tribunal, opt in by notifying the class representative that the claim should be included in the collective proceedings;
- (n) “represented person” means a class member who, in accordance with rule 10—
- (i) has opted in to opt-in collective proceedings;
 - (ii) was domiciled in the United Kingdom on the domicile date and has not opted out of opt-out collective proceedings; or
 - (iii) has opted in to opt-out collective proceedings;
- (o) “settlement representative” means a person who is authorised by a collective settlement order to act in relation to a collective settlement.

General

2. (1) These rules are without prejudice to the Tribunal’s general powers of case management under principal rule 44, including, where there are multiple claims, its power to consolidate proceedings or hear two or more claims together or transfer all or any part of any proceedings.
- (2) A collective proceedings order and a collective settlement order may be limited to only some parts or issues in the claims to which it relates.

COLLECTIVE PROCEEDINGS

Manner of commencing proceedings under section 47B of the 1998 Act

3. (1) Proceedings under section 47B of the 1998 Act must be made by sending a collective proceedings claim form to the Registrar.
- (2) The collective proceedings claim form shall state—
- (a) the full name and address of the proposed class representative;
 - (b) the full name and address of the proposed class representative’s legal representative;
 - (c) an address for service in the United Kingdom;
 - (d) the name and address of each defendant to the proceedings;
 - (e) that the proposed class representative is making an application for a collective proceedings order;

- (f) whether the order sought is for opt-in collective proceedings or opt-out collective proceedings;
 - (g) whether the parties have used an alternative dispute resolution procedure; and
 - (h) that the proposed class representative believes that the claims which it is sought to combine in the collective proceedings have a real prospect of success.
- (3) The collective proceedings claim form shall contain—
- (a) a description of the proposed class;
 - (b) a description of any possible sub-classes and, if so, how it is proposed that their interests may be represented;
 - (c) an estimate of the number of class (or sub-class) members and the basis for that estimate;
 - (d) a summary of the basis on which the proposed class representative seeks to be authorised to act in that capacity pursuant to rule 6;
 - (e) a summary of the basis on which it is contended that the criteria for certification and approval in rule 7 are satisfied;
 - (f) whether the claims are in respect of an infringement decision, and if so whether that decision has become final within the meaning of section 58A of the 1998 Act;
 - (g) a concise statement of the relevant facts, identifying - where applicable - any relevant findings in an infringement decision;
 - (h) a concise statement of any contentions of law which are relied on;
 - (i) the relief sought in the proceedings, including an estimate of the amount claimed in damages (where applicable), including whether an aggregate award of damages is sought, supported with any calculations which have been undertaken to arrive at the claimed amount;
 - (j) observations on the question in which part of the United Kingdom the proceedings are to be treated as taking place for all or for any purpose;
 - (k) such other matters as may be specified by practice direction,

and its contents shall be verified by a statement of truth signed and dated by the proposed class representative or on his behalf by his duly authorised officer or his legal representative.

- (4) There shall be annexed to the collective proceedings claim form—
- (a) a copy of any infringement decision referred to in paragraph (3)(f) and any other document referred to in the collective proceedings claim form;
 - (b) a draft collective proceedings order; and
 - (c) a draft of the notice referred to in rule 9.

- (5) Unless the Tribunal otherwise directs, the signed original of the collective proceedings claim form (and its annexes) must be accompanied by ten copies certified by the proposed class representative or his legal representative as conforming to the original.

Response to a collective proceedings claim form

4. (1) On receiving a collective proceedings claim form, the Registrar shall send an acknowledgment of receipt to the proposed class representative and send a copy of the claim form to each defendant or direct that the proposed class representative do so.
- (2) The Registrar shall, as soon as practicable, publish a summary of the collective proceedings claim form on the Tribunal website.
- (3) As soon as practicable, the Tribunal shall hold a case management conference to give directions in relation to the application for a collective proceedings order.
- (4) The Tribunal may give directions —
- (a) as regards any question concerning service out of the jurisdiction;
 - (b) as to the time by which the defendant must respond to the application for a collective proceedings order;
 - (c) as to the time by which any person with a legitimate interest (including any class member) may object to the application for a collective proceedings order or the authorisation of the proposed class representative;
 - (d) regarding the hearing of the application; or
 - (e) as to a stay of proceedings while the parties attempt to compromise the proceedings by alternative dispute resolution or other means.
- (5) Subject to any directions of the Tribunal, the defendant need not, before the hearing of the application for a collective proceedings order, file an acknowledgement of service or defence to the collective proceedings claim form.
- (6) A defendant who opposes an application for a collective proceedings order does not, by doing so, lose any right that the defendant may have to dispute the Tribunal's jurisdiction.

Determination of the application for a collective proceedings order

5. (1) The Tribunal may make a collective proceedings order, after hearing the parties, only—
- (a) if it considers that the person who brought the proceedings is a person who, if the order were made, the Tribunal could authorise to act as the class representative in those proceedings in accordance with rule 6; and
 - (b) in respect of claims or specified parts of claims which are eligible for inclusion in collective proceedings in accordance with rule 7.
- (2) If the Tribunal makes a collective proceedings order it may attach such conditions to the order or give such directions as it thinks fit, including—

- (a) directions for the filing of an acknowledgement of service and defence, and other pleadings; and
- (b) directions regarding any class member who is a child or person who lacks capacity within the meaning of the Mental Capacity Act 2005.

Authorisation of the class representative

6. (1) The Tribunal may authorise a person to act as the class representative—
- (a) whether or not that person is a class member, but
 - (b) only if the Tribunal considers that it is just and reasonable for that person to act as a class representative in the collective proceedings.
- (2) In determining whether it is just and reasonable for a person to act as the class representative, the Tribunal will consider whether that person—
- (a) would fairly and adequately act in the interests of the class members;
 - (b) does not have, in relation to the common issues for the class members, a material interest that is in conflict with the interests of class members;
 - (c) (if there is more than one person seeking approval to act as the class representative in respect of the same claims) would be the most suitable person to act as such;
 - (d) will be able to pay the defendant's recoverable costs if ordered to do so; and
 - (e) where an interim injunction is sought, will be able to satisfy any cross-undertaking in damages required by the Tribunal.
- (3) In determining whether the proposed class representative would act fairly and adequately in the interests of the class members for the purposes of paragraph (2)(a), the Tribunal will take into account all the circumstances, including—
- (a) whether the proposed class representative is a member of the class, and if so, his suitability to manage the proceedings;
 - (b) if the proposed class representative is not a member of the class, whether it is a pre-existing body and the nature and functions of that body;
 - (c) whether the proposed class representative has prepared a plan for the collective proceedings that satisfactorily includes—
 - (i) a method for bringing the proceedings on behalf of represented persons and for notifying represented persons of the progress of the proceedings; and
 - (ii) a procedure for governance and consultation which takes into account the size and nature of the class; and
 - (d) any estimate of and/or details of arrangements as to costs, fees or disbursements which the Tribunal orders that the proposed class representative must provide.

- (4) If the represented persons include a sub-class of persons whose claims raise common issues that are not shared by all the represented persons, the Tribunal may approve a person who satisfies the criteria for approval in paragraph (1) to act as the class representative for that sub-class.

Certification of the claims as eligible for inclusion in collective proceedings

7. (1) The Tribunal may certify claims as eligible for inclusion in collective proceedings where, having regard to all the circumstances, it is satisfied by the proposed class representative that the claims sought to be included in the collective proceedings—
- (a) are brought on behalf of an identifiable class of persons;
 - (b) raise common issues; and
 - (c) are suitable to be brought in collective proceedings.
- (2) In determining whether the claims are suitable to be brought in collective proceedings for the purposes of paragraph (1)(c), the Tribunal will take into account all matters it thinks fit, including but not limited to —
- (a) whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues;
 - (b) the costs and the benefits of continuing the collective proceedings;
 - (c) whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class;
 - (d) the size and the nature of the class;
 - (e) whether it is possible to determine for any person whether he is or is not a member of the class;
 - (f) whether the claims are suitable for an aggregate award of damages; and
 - (g) the availability of alternative dispute resolution and any other means of resolving the dispute.
- (3) In determining whether collective proceedings should be opt-in or opt-out proceedings, the Tribunal will take into account all matters it thinks fit, including but not limited to the following additional matters to those set out in paragraph (2)—
- (a) the strength of the claims; and
 - (b) whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover.
- (4) At the hearing of the application for a collective proceedings order, the Tribunal may hear any application by the defendant—

- (a) under principal rule 40(1), to reject in whole or part any or all of the claims sought to be included in the collective proceedings; or
 - (b) under principal rule 41(1), for summary judgment as if the defence had been filed.
- (5) Any member of the proposed class may apply to make submissions either in writing or orally at the hearing of the application for a collective proceedings order.

The collective proceedings order

8. (1) A collective proceedings order must authorise the class representative to act as such in continuing the collective proceedings and must—
- (a) state the name and address for service of the class representative or, where there are sub-classes, representatives;
 - (b) state the name of each defendant;
 - (c) describe or otherwise identify the class and any sub-classes;
 - (d) describe or otherwise identify the claims certified for inclusion in the collective proceedings;
 - (e) state the remedy sought;
 - (f) state whether the collective proceedings are opt-in or opt-out collective proceedings;
 - (g) specify the domicile date;
 - (h) specify the time and the manner by which—
 - (i) in the case of opt-in collective proceedings, a class member may opt in; and
 - (ii) in the case of opt-out collective proceedings, a class member who is domiciled in the United Kingdom on the domicile date may opt out and a class member who is not domiciled in the United Kingdom on the domicile date may opt in;
 - (i) order the publication of a notice to class members in accordance with rule 9; and
 - (j) specify the part of the United Kingdom in which the collective proceedings are to be treated as taking place.
- (2) In describing or otherwise identifying the class for the purposes of paragraph (1)(c), it is not necessary for the order to name or specify the number of the class members.

Notice of the collective proceedings order

9. (1) The class representative must give notice of the collective proceedings order to class members in a form and manner approved by the Tribunal.

- (2) The notice referred to in paragraph (1) must—
- (a) incorporate or annex the collective proceedings order;
 - (b) identify each defendant;
 - (c) contain a summary in plain and easily understood language of the collective proceedings claim form and the common issues;
 - (d) include a statement explaining that any judgment on the common issues for the class members or any sub-class will bind represented persons in the class, or those within the sub-class, as the case may be;
 - (e) draw attention to the provisions of the order setting out what a class member is required to do and by what date so as to opt into or opt out of the collective proceedings, as the case may be; and
 - (f) give such other information as the Tribunal directs.

Opting in and opting out of collective proceedings

- 10.** (1) A class member may on or before the time and in the manner specified in the collective proceedings order—
- (a) in the case of opt-in collective proceedings, opt into the collective proceedings; or
 - (b) in the case of opt-out collective proceedings, either—
 - (i) opt out of the collective proceedings; or
 - (ii) if not domiciled in the United Kingdom at the domicile date, opt into the collective proceedings.
- (2) A class member who does not opt in or opt out in accordance with paragraph (1) may not do so without the permission of the Tribunal.
- (3) In considering whether to grant permission under paragraph (2), the Tribunal will consider all circumstances, including in particular—
- (a) whether the delay was caused by the fault of that class member; and
 - (b) whether the defendant would suffer substantial prejudice if permission were granted.
- (4) A class member who has already brought a claim that raises one or more of the common issues set out in the collective proceedings order may not be a represented person unless, before the specified time, the class member discontinues or applies, as regards a claim brought in England, Wales or Northern Ireland, to stay that claim or, as regards a claim brought in Scotland, to sist that claim.

Class records

11. (1) Once a collective proceedings order has been made, the class representative must establish a register on which it will record the names of those class members who, in accordance with rule 10, opt in or opt out, as the case may be, of the collective proceedings.
- (2) The class representative must, on request, make such register available for inspection by the Tribunal and any defendant and by such other person as the Tribunal may direct.

Scope of the collective proceedings

12. A class representative may not in collective proceedings bring different claims or bring claims against different defendants to those specified in the collective proceedings order.

Stay, variation or revocation of the collective proceedings order

13. (1) The Tribunal may at any time, either of its own initiative or on the application of the class representative, a represented person or a defendant, make an order for the variation or revocation of the collective proceedings order, or for the stay or sist of collective proceedings generally.
- (2) In deciding whether to vary or revoke a collective proceedings order, the Tribunal shall take account of all the relevant circumstances, including in particular –
 - (a) whether the criteria for certification of claims set out in rule 7 still apply or apply in the same way as when the order was made; and
 - (b) whether the class representative continues to satisfy the criteria for authorisation set out in rule 6 and if not, whether a suitable alternative class representative can be authorised;
 - (c) whether the Tribunal has granted the class representative permission to withdraw pursuant to rule 15 and he will not be replaced.
- (3) If the Tribunal makes an order under paragraph (1), the order may also make further provision including—
 - (a) that the proceedings should be discontinued in whole or in part or continue between different parties and, for that purpose, the Tribunal may—
 - (i) order the addition, removal or substitution of parties; or
 - (ii) order the amendment of the collective proceedings claim form;
 - (b) that there be substituted as the class representative another person who satisfies the criteria for approval in rule 6;
 - (c) as regards costs.
- (4) If the Tribunal varies the collective proceedings order so as to alter the description or identification of class members, it may also make any other orders that it considers appropriate, including an order relating to the specified time for the purposes of rules 8 and 10.

Individual settlement by the class representative

14. (1) If the class representative is a member of the class and settles in whole or part his personal claim included within the collective proceedings, he must promptly give notice of that fact:
- (a) to all represented persons; and
 - (b) to the Tribunal.

Applications for withdrawal by the class representative

15. (1) A class representative may only withdraw from acting in that capacity in the collective proceedings if the Tribunal gives permission for the withdrawal.
- (2) The Tribunal will only give permission for the withdrawal under paragraph (1)—
- (a) if it is satisfied that the class representative has given notice of the application to withdraw to represented persons in a form and manner approved by the Tribunal; and
 - (b) on conditions as to costs that the Tribunal considers just.
- (3) If the Tribunal gives permission for the class representative to withdraw from acting in that capacity and no substitute class representative is approved, the Tribunal will give directions for the future conduct of the proceedings which may include provision that the proceedings should continue as one or more proceedings between different parties or be discontinued.

Case management of the collective proceedings

16. (1) The Tribunal may, at any time, give any directions it thinks appropriate for the case management of the collective proceedings.
- (2) Without limitation to the generality of paragraph (1), such directions may, in particular, order that—
- (a) the common issues for the class be determined together;
 - (b) the common issues for a sub-class be determined together;
 - (c) issues that are relevant only to certain represented persons (“individual issues”) be determined in further hearings either separately or at the same time; or
 - (d) the class representative give notice in such manner as the Tribunal directs to represented persons of any step taken by the class representative.
- (3) If the Tribunal directs that the participation of any represented persons is necessary in order to determine individual issues, the class representative must give notice of the further hearings to those persons in a form and manner approved by the Tribunal.

Disclosure

- 17.** (1) Notwithstanding the Tribunal's general powers under these rules to order disclosure, the Tribunal may order, on any terms it thinks fit, disclosure to be given—
- (a) by any party to the collective proceedings to any other party;
 - (b) by the class representative to any or all represented persons; and
 - (c) by any represented person to any other represented person (including a person within a different sub-class), the class representative or the defendant.

Notices

- 18.** If a class member or represented person does not receive, or fails to respond to, a notice, this does not affect a step taken, order made, or judgment given, in the collective proceedings, unless the Tribunal orders otherwise.

Judgments and orders

- 19.** (1) A judgment or order of the Tribunal made in collective proceedings may specify the sub-class of represented persons or individual represented persons to whom it shall not apply.
- (2) The class representative must give notice of any judgment or order to all represented persons in a form and manner approved by the Tribunal.
- (3) The notice referred to in paragraph (2) must (unless ordered otherwise by the Tribunal)—
- (a) incorporate or annex the judgment or order;
 - (b) if it relates to a judgment on common issues in favour of represented persons, include a statement in plain and easily understood language—
 - (i) explaining that represented persons may be entitled to individual remedies;
 - (ii) stating the steps that must be taken to claim that remedy; and
 - (iii) stating the consequences of failing to take those steps;
 - (c) if it relates to a judgment on common issues against represented persons, include a statement—
 - (i) informing them that an appeal may be brought only by the class representative; and
 - (ii) stating the date by which the class representative would have to serve a notice of appeal or application for permission to appeal;
 - (d) if the Tribunal has specified under paragraph (1) that some represented persons are not bound by the judgment or order, a statement to that effect; and
 - (e) give such other information as the Tribunal directs.

Assessment of damages

- 20.** (1) Where the Tribunal makes an aggregate award of damages, it shall give directions for assessment of the amount that may be claimed by individual represented persons out of that award.
- (2) Directions given pursuant to paragraph (1) may include –
- (a) a method or formula whereby such amounts shall be quantified;
 - (b) provision for making an interim payment before the final amount which a represented person may receive is determined;
 - (c) appointment of an independent third party to determine a claim or dispute by any represented person regarding the quantification of the amount which he will receive, and provision for payment of the costs of that independent third party; and
 - (d) a requirement that the apportionment of the aggregate award as between represented persons is approved by the Tribunal.
- (3) The class representative shall give notice to represented persons, in such manner as the Tribunal shall direct, of any hearing to determine what directions should be given pursuant to paragraph (1), and any represented person may apply to make submissions either in writing or orally at that hearing.

Distribution of award

- 21.** (1) Where the Tribunal makes an award of damages in opt-out collective proceedings, it must make an order providing for the damages to be paid on behalf of the represented persons to—
- (a) the class representative; or
 - (b) such person other than a represented person as the Tribunal thinks fit.
- (2) Where the Tribunal makes an award of damages in opt-in collective proceedings, it may make an order as described in paragraph (1).
- (3) An order made in collective proceedings pursuant to paragraph (1), shall specify—
- (a) the date by which represented persons must claim their entitlement to a share of that aggregate award;
 - (b) the date by which the class representative or person specified pursuant to paragraph (1)(b) shall notify the Tribunal of any undistributed damages which have not been claimed; and
 - (c) any other matters as the Tribunal thinks fit.
- (4) Where the Tribunal is notified that there are undistributed damages pursuant to paragraph (3)(b), it may make an order directing that all or part of any undistributed damages is paid to the class representative in respect of all or part of any costs, fees or disbursements incurred by him in connection with the collective proceedings.

- (5) In exercising its discretion under paragraph (4), the Tribunal may itself determine the amounts to be paid in respect of costs, fees or disbursements or may direct that any such amounts be determined by a costs judge of the High Court or a taxing officer of the Supreme Court of Northern Ireland or the Auditor of the Court of Session.
- (6) Subject to any order made under paragraph (4), the Tribunal shall order that all or part of any undistributed damages is paid to the charity designated in accordance with section 47C(5) of the 1998 Act and a copy of that order shall be sent to that charity.

COLLECTIVE SETTLEMENTS

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

22. (1) Where a collective proceedings order has been made in respect of claims and the Tribunal has specified that the proceedings are opt-out collective proceedings, an application for a collective settlement approval order may 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.
- (2) The application referred to in paragraph (1) must—
- (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 representative(s) 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) annex 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 (9) of this rule will apply; or
 - (ii) class members, in a case where it is expected that paragraph (10) of this rule will apply.
- (3) Unless the Tribunal otherwise directs, the signed original of the application for a collective settlement approval order (and its annexes) must be accompanied by ten copies

certified by the class representative or his legal representative as conforming to the original.

- (4) 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 (2)(f);
 - (c) for further evidence to be filed on the merits of the proposed collective settlement; and
 - (d) for the hearing of the application.
- (5) Any represented person or, in a case where paragraph (10) of this rule 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.
- (6) 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.
- (7) 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 (9) of this rule applies, or of any class member in a case to which paragraph (10) of this rule 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 shall revert to the defendants shall not of itself be considered unreasonable.
- (8) A collective settlement approval order shall 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.
- (9) Where the Tribunal approves the collective settlement *after* the expiry of the period specified in the collective proceedings order pursuant to rule [8(1)(g)(ii)] within which persons may opt out or (if not domiciled in the United Kingdom) opt in to the collective proceedings, the collective settlement approval order binds all represented persons except—
- (a) a person who opts out of the collective settlement by notifying the class representative in a manner and by a time specified in the collective settlement approval order; and
 - (b) a person who is not domiciled in the United Kingdom on the domicile date and does not opt in to the collective settlement by notifying the class representative in a manner and by a time specified in the collective settlement approval order.
- (10) Where the Tribunal approves the collective settlement *before* the expiry of the period referred to in paragraph (9), the collective settlement approval order binds all class members except—
- (a) a person who opts out of the collective settlement by notifying the class representative in a manner and by a time specified in the collective settlement approval order; and
 - (b) a person who is not domiciled in the United Kingdom on the domicile date and does not opt in to the collective settlement by notifying the class representative in a manner and by a time specified in the collective settlement approval order.
- (11) If the Tribunal approves the proposed collective settlement, the class representative must give notice of the terms of the settlement and its approval, in a form and manner approved by the Tribunal, to the represented persons in a case to which paragraph (9) applies, or to the class members in a case to which paragraph (10) applies, and to any other persons as the Tribunal may direct.
- (12) If one or more of the represented persons or class members are to be omitted from the collective settlement, the Tribunal may permit the proceedings to continue as one or more claims between different parties and for that purpose—
- (a) order the addition, removal or substitution of parties;
 - (b) order the amendment of the collective proceedings claim form; or
 - (c) make any other order that it considers appropriate.

Collective settlements where a collective proceedings order has been made: opt-in proceedings

23. Where a collective proceedings order has been made in respect of claims and the Tribunal has specified that the proceedings are opt-in collective proceedings, the class representative may not without the permission of the Tribunal settle those proceedings before the expiry of the time specified in the collective proceedings order as the time by which a class member may (without the permission of the Tribunal) opt in to those proceedings.

Collective settlements where a collective proceedings order has not been made

Collective settlement order

24. (1) An application for a collective settlement order may be made to the Tribunal by—
- (a) a person who proposes to be the settlement representative in relation to the collective settlement; and
 - (b) the person who, if collective proceedings were brought in respect of the claims would be a defendant in those proceedings (or where more than one person would be a defendant in those proceedings, such of those persons as wish to be bound by the proposed collective settlement).
- (2) The application for a collective settlement order referred to in paragraph (1) shall—
- (a) identify the proposed settlement representative;
 - (b) provide a summary of the basis on which the proposed settlement representative seeks to be authorised to act in that capacity pursuant to paragraphs (9) – (11);
 - (c) identify the person or persons who would be a defendant or defendants in collective proceedings and who it is proposed will be parties to the collective settlement;
 - (d) provide a description of the proposed settlement class;
 - (e) provide an estimate of the number of class members and the basis for that estimate;
 - (f) provide details of the claims to be settled by the proposed collective settlement;
 - (g) provide a summary of the basis on which the claims, if they had been made in collective proceedings, would satisfy the requirements of rule 7; and
 - (h) annex—
 - (i) a draft collective settlement order;
 - (ii) a draft of the summary referred to in paragraph (5); and
 - (iii) a draft of the notice referred to in paragraph (15).
- (3) Unless the Tribunal otherwise directs, the signed original of the application for a collective settlement order (and its annexes) must be accompanied by ten copies certified by the proposed settlement representative or his legal representative as conforming to the original.

[Response to an application for a collective settlement order]

- (4) On receiving an application for a collective settlement order, the Tribunal may give any directions it thinks fit, including for the hearing of the application.
- (5) The Registrar shall, as soon as practicable, publish a summary of the application for a collective settlement order on the Tribunal website.

[Determination of the application for a collective settlement order]

- (6) The Tribunal may make a collective settlement order only—
 - (a) if it considers that the person who proposes to be the settlement representative is a person who, if the order were made, the Tribunal could authorise to act as the settlement representative in relation to the collective settlement in accordance with paragraphs (9) – (11); and
 - (b) in respect of claims which, if collective proceedings were brought, would be eligible for inclusion in such proceedings in accordance with rule 7.
- (7) At the hearing of the application for a collective settlement order, the Tribunal may make—
 - (a) a collective settlement order; and
 - (b) any other order or give any other directions as it considers appropriate.
- (8) Any member of the proposed settlement class may apply to make submissions either in writing or orally at the hearing of the application for a collective settlement order.
- (9) The Tribunal may authorise a person to act as the settlement representative only if it considers that it is just and reasonable.
- (10) In determining whether it is just and reasonable for a person to act as the settlement representative, the Tribunal will consider whether that person—
 - (a) would fairly and adequately act in the interests of the class members; and
 - (b) does not have, in relation to the common issues for the class members, a material interest that is in conflict with the interests of the class members.
- (11) In determining whether the proposed settlement representative would act fairly and adequately in the interests of the class members for the purposes of paragraph (10)(a), the Tribunal will take into account all the circumstances, including—
 - (a) whether the proposed settlement representative is a member of the settlement class, and if so, his suitability to manage the settlement;
 - (b) if the proposed representative is not a member of the settlement class, whether it is a pre-existing body and the nature and functions of that body; and
 - (c) whether the proposed settlement representative has prepared a plan for the collective settlement that satisfactorily includes—
 - (i) a method for notifying the class members of the fact and progress of the collective settlement; and
 - (ii) where the proposed collective settlement involves payment of an aggregate amount, a procedure for determination of claims by class members to be paid out of that amount that takes into account the size and nature of the settlement class.

[The collective settlement order]

- (12) A collective settlement order must authorise the settlement representative to continue to act in relation to the collective settlement and must—
- (a) state the name and address of the settlement representative;
 - (b) state the name of each party to the collective settlement who would be a defendant had collective proceedings been brought;
 - (c) describe or otherwise identify the settlement class;
 - (d) describe or otherwise identify the claims to be settled by the collective settlement;
 - (e) specify the domicile date; and
 - (f) order the publication of a notice to class members in accordance with paragraph (15).
- (13) A collective settlement order may include any other provision the Tribunal considers appropriate.
- (14) In describing or otherwise identifying the settlement class for the purposes of paragraph (12)(c), it is not necessary for the order to name or specify the number of the class members.

[Notice of the collective settlement order]

- (15) The settlement representative must give notice of the collective settlement order to class members in a form and manner approved by the Tribunal.
- (16) The notice referred to in paragraph (15) must—
- (a) incorporate or annex the collective settlement order;
 - (b) contain a summary in plain and easily understood language of the claims to be settled by the collective settlement;
 - (c) include a statement explaining that the subsequent making of a collective settlement approval order will bind:-
 - (i) a class member domiciled in the United Kingdom on the domicile date who does not opt out of the collective settlement; and
 - (ii) a class member who is not domiciled in the United Kingdom on the domicile date who opts in to the collective settlement; and
 - (d) give such other information as the Tribunal directs.

[Variation or revocation of the collective settlement order]

- (17) The Tribunal may, either of its own initiative or on the application of a class member or party, make an order for the variation or revocation of the collective settlement order.

Collective settlement approval order

25. (1) Where the Tribunal has made a collective settlement order, an application for a collective settlement approval order may be made to the Tribunal by—
- (a) the settlement representative; and
 - (b) the person who, if collective proceedings were brought in respect of the claims, would be a defendant in those proceedings (or where more than one person would be a defendant in those proceedings, such of those persons as wish to be bound by the proposed collective settlement).
- (2) The application referred to in paragraph (1) must—
- (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 representative(s) 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) annex a draft collective settlement approval order; and
 - (f) set out the form and manner by which the settlement representative proposes to give notice of the application to members of the settlement class.
- (3) Unless the Tribunal otherwise directs, the signed original of the application for a collective settlement approval order (and its annexes) must be accompanied by ten copies certified by the class representative or his legal representative as conforming to the original.
- (4) 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 (2)(f);
 - (c) for further evidence to be filed on the merits of the proposed collective settlement; and
 - (d) for the hearing of the application.
- (3) Any member of the proposed settlement class may apply to make submissions in writing or orally at the hearing of the application for a collective settlement approval order.
- (4) At the hearing of the application, the Tribunal may make a collective settlement approval order where it is satisfied that terms of the collective settlement are just and reasonable.

- (5) 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 if the claims were made in collective proceedings for an amount significantly in excess of the amount of the settlement;
 - (d) the likely duration and cost of proceedings if the claims were made in collective proceedings which proceeded to trial;
 - (e) any opinion by an independent expert and any legal representative of the applicants;
 - (f) the views of any member of the settlement class; 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 shall revert to the parties paying or contributing to the settlement amount shall not of itself be considered unreasonable.
- (6) A collective settlement approval order shall specify the time and manner by which—
 - (a) a class member who is domiciled in the United Kingdom on the domicile date may opt out of the collective settlement; and
 - (b) a class member who is not domiciled in the United Kingdom on the domicile date may opt in to the collective settlement.
- (7) A collective settlement approval order binds all class members except—
 - (a) a person who opts out of the collective settlement by notifying the class representative in a manner and by a time specified in the collective settlement approval order; and
 - (b) a person who is not domiciled in the United Kingdom on the domicile date and does not opt in to the collective settlement by notifying the class representative in a manner and by a time specified in the collective settlement approval order.
- (8) If the Tribunal approves the proposed collective settlement, the settlement representative must give notice of the terms of the settlement and its approval, in a form and manner approved by the Tribunal, to the class members and to any other persons as the Tribunal may direct.
- (9) An application for a collective settlement approval order may be made at the same time as an application for a collective settlement order.

COSTS AND FEES

Costs

- 26.** (1) Subject to paragraph (2), in opt-out collective proceedings costs may be awarded to or against the class representative, but may not be awarded to or against a represented person who is not the class representative, save that
- (a) if the Tribunal has approved the appointment of a class representative for a subclass, costs associated with the determination of the common issues for the subclass may be awarded to or against that person, and not the class representative for the whole class; and
 - (b) costs associated with the determination of individual issues in accordance with rule 16(2)(c) may be awarded to or against the relevant individual represented persons.
- (2) Costs relating to an application made by a class member, whether or not he is a represented person pursuant to a collective proceedings order, may be awarded to or against that class member.

AMENDMENTS TO OTHER PARTS OF THE RULES

Rule 45 Security for Costs

The insertion of a new paragraph 45(5)(h)

- (h) the claimant has been authorised to act as the class representative in collective proceedings under rule [] and there is reason to believe that the claimant will be unable to pay the defendant's costs if ordered to do so.