Speech by Ben Tidswell to the Hausfeld/Linklaters/Alix Partners conference on 10 March 2025

Good afternoon everyone.

Let me start by asking you to imagine you are climbing up a big hill with your heavy backpack on. After several hours of hard work, you near the top – but as you get there you realise it isn't the top at all - there is another, larger, peak in the near distance, awaiting your attention. Still plenty more climbing to do.

That's probably a feeling shared by many of us who are involved in the development of the collective proceedings regime in the UK.

Yes, we've had some significant milestones, with:

- The settling of the certification standard by the Supreme Court in Merricks.
- Followed by a number of decisions about certification and the subsequent appeals.
- We've had the post PACCAR funding debates.
- There have been a number of relatively small settlements and now a relatively big one.
- We also have the first judgment in a collective proceeding and two other major trials underway or just completed.

Every stage of that journey has thrown up its own complications and challenges, some of which remain less than fully resolved. And it's plain that we can expect some more tests to come before we can sensibly say that the collective actions regime has fully bedded in.

My personal view is that we will only really be able to judge the success or otherwise of the regime once we've seen a pattern of outcomes which might justify the original policy objectives – which I am sure you will all recall: redress for consumers who have suffered anti-competitive harms, and the deterrent for those who have caused it. The policy setting also recognises that the administrative bodies responsible for competition enforcement have limited resources and can't deal with every problem themselves.

We are certainly seeing more and more commentary in the wider press about this policy tool of the rise of private enforcement, and the collective proceedings regime in particular. Some of that commentary seems to risk a hasty prejudgement of whether or not the plan is working. That judgement will involve an understanding not only of what cases have been successful, and why, but also an appreciation of the way in which that has resulted in compensation getting into consumers' pockets, as well as punishing proven infringers. In my view, we are some way off being able to make that assessment in any reliable way.

However, that doesn't mean we lack important things to discuss and to learn from. Each stage of the development of the regime provides an opportunity for lessons learned and also some indications of what issues might arise in the future. I'd like to share some thoughts with you along those lines. I should add the usual disclaimer that these are my personal views and not necessarily those of the CAT.

The two areas I'd like to focus on this afternoon are: the role of the Class Representative; and the use of expert evidence.

First, to frame the discussion, I'd like to remind you (probably unnecessarily, but please bear with me) of some of the features of these collective proceedings:

- They are easily recognisable as heavy-duty pieces of commercial litigation, with extensive disclosure, extensive factual and expert evidence and the extensive consumption of the resources of the parties and the Tribunal.
- They take several years to get to trials which are often several months in length.
- They are very different from the sort of work that was prevalent in the Tribunal ten years ago. They require considerably more effort and case management from all involved.
- The subject matter is of course familiar to those who have practised before the CAT for many years, but we should recognise that competition law can provide a steep learning curve for those who come to it afresh. In particular, the strong underpinning of economics can often confound the most logical lawyer, while the

combination of law and economics is no doubt a little daunting to those unqualified in either discipline.

- The proceedings are also unique in this jurisdiction in their format and structure – the opt out proceedings in particular are materially different from any other type of proceedings. That means we're having to learn as we go along; there is no obvious, established domestic reference point.
- The practical requirement for third party funding increases the sense of difference, at least as far as the CAT is concerned. There is the capacity for conflicts of interest to arise and the Tribunal is placed in an unusual role in its oversight of the proceedings.
- There is typically an asymmetry between the subject matter knowledge, including technical expertise, of the defendant on one hand and the Class Representative on the other. The Class Representative needs access to lots of information to progress their case; the defendant has the advantage of already having that knowledge but also has the burden of disclosure of relevant documents.

So, let's look at what we have learnt about the role of the Class Representative so far. First, it is a demanding role in a number of varied respects. There is a range of skills which weren't so clearly defined early on, but are now well signalled by recent developments. Here's a list of some of the more interesting things a Class Representative may be called on to do:

- Negotiate the finance documents. This is not just about getting all the funding in place but also concerns the management of any alterations that may be required. For example, I expect the PACCAR decision has created much new expertise in construing the Courts and Legal Services Act.
- They need to understand in detail the technical legal and economic issues. The Class Representative is of course the client for all practical purposes, and a professional client being paid to act in the best interests of the class. The need to understand all material details of the case is linked to the next point.
- They will have to take strategic decisions about the proceedings – sometimes on short notice. Some of these decisions will be difficult

– and potentially consequential. They are not the sort of decisions that lawyers like to be responsible for. So the Class Representative may feel a little lonely when having to make these decisions.

- A key task is to oversee and control costs, which is of course much harder than it looks, especially in large, fast-moving litigation.
- Similarly, it is crucial to manage costs protection (for example, updating budgets and ATE cover). The recent costs decision in *Le Patourel* is an interesting caution about the perils of not being on top of the costs – and shows that isn't just limited to one's own side's costs.
- The Class Representative will probably need to make decisions about settlement and whether that is in the best interests of the class.
- They'll need to manage the hurly burly of litigation.
- They will have to maintain and assert independence and be clear about the potential for conflict between the contractual arrangements (such as with funders, lawyers) and their duties to the class and the Tribunal

That is by any standards a fairly daunting – and exhausting - looking list for any one person to manage. And of course, no-one is saying that the Class Representative has to do it alone.

That's my second point. The Class Representative will have a team round them, most notably the legal team but also, one would hope, an engaged and committed consultative committee. The importance of that committee is likely to become apparent when there are (and there almost certainly will be) issues to decide which might involve conflicting interests of the funders and possibly the legal team. Managing and getting the best out of that committee is not just part of the role, but very much in the Class Representative's own interests.

Thirdly, and sticking with the point about potential conflicts, we all need to recognise that some of the practical steps taken at the commencement of proceedings may well have consequences later on.

Let me give you an example. If the lawyers and the funders initiate the concept behind the case, confirm their roles in the proceedings and even put in place the contractual arrangements relating to funding and legal

services – which I understand is often the practice – if all that happens before the Class Representative is appointed then it does call into question the ability of the Class Representative to exert suitable challenge to the funder, the lawyers and the contractual arrangements they inherit.

My question for those who are putting such arrangements together is this: how and when is the Class Representative given the opportunity to assess the funding and retainer arrangements, through the lens of the best interests of the class? And how is that going to be evidenced, so that the Tribunal will be able to accept it at face value, rather than having to conduct its own inquiry?

You'll remember that many of the tools available to the Tribunal to regulate such things can only be exercised towards the end of the proceedings – in the context of a settlement or in relation to distribution.

It's not very helpful for anyone in the system for the rebalancing of funder and class members interests to be imposed by the Tribunal at the end of the case, where the exercise might turn out to be quite painful for everybody involved. Much better, I suggest, to get it demonstrably right up front.

I do think that, over time, it will become easier to manage these types of issues as we get more outcomes, which will in turn provide guidance and will effectively set the standard for much of the relevant activity. We recently had a visit to the CAT from an Australian Federal Court judge with deep experience of their class action regime. One of the many interesting points he made was that, over a ten-year period, problems tend to be resolved into standard practices which everyone understands and adheres to. We are already seeing that happen in relation to certification, where we now have a library of decisions from the CAT, the Court of Appeal and of course the Supreme Court. That is likely to be the case soon for some other areas, such as settlement and the assessment of commercial returns to funders.

Finally on this subject, I am aware that there is a Class Representatives Network and that this group publishes guidance material. That seems very sensible and useful and I would encourage it to be a dynamic exercise, reflecting developments as we go along. I would hope that this

sharing of ideas and experience will hasten the standard setting process and that will in turn give confidence to putative Class Representatives. We all know that collective proceedings won't happen unless there are willing and capable people to take on the role.

I'm now going to change subject and talk about expert evidence for a few minutes. I know there is a panel discussion on this subject later this afternoon and I hope the thoughts that follow will stimulate some of that discussion.

Experience tells us that the economic evidence in competition cases needs careful management. Just by way of one example, remember the observations of the CAT in the *Trucks* judgment. I could cite many others in which the Tribunal has expressed frustration about the failure of the expert process to deliver a solid base of evidence on which a good decision can be made.

From the Tribunal's perspective, the best thing is to have several different types of evidence which has been well tested and which we can use to reach a conclusion. Sometimes this is referred to as "triangulation" – meaning multiple different sources to rely on.

The worst thing is to have little or no evidence that can be properly tested, because the experts haven't properly addressed each other's positions and the Tribunal is none the wiser after the expert evidence about what can reliably be used to base a decision on.

So we have a strong interest in careful management of the expert process. This might include the following:

- Settling a list of expert issues early in the proceedings – this avoids the "ships in the night" problem, where the experts develop different arguments and don't engage properly with each other. One of the useful features of collective proceedings is that the economic issues are fairly well identified up front, in the CPO process and the requirement to set out a methodology for resolving the economic issues. I am a firm believer in taking advantage of that to button down, as far as possible, the expert issues well in advance of the service of expert reports.

- Next, ensuring that the inputs for the economic evidence are readily available. That might be factual evidence, other expert evidence or access to documents or data – this is all about making the best possible evidence available at trial. I'm going to come back to this in a minute when I talk about the "expert led approach".
- Another important case management task is making sure there is a suitable sequence for expert reports so that points can be raised and answered. The important point here is that it undermines the whole expert process if new points pop up just before, or even during, the trial. The Tribunal then loses the benefit of considered debate between the experts. Sometimes, it is unavoidable that new points emerge at a late stage, but it also lends itself to gaming and ambushes, and, if there is a sniff of that, then you can expect a fairly firm response from the Tribunal.
- The next step is asking the experts to meet to discuss their reports and insisting that their discussion is well documented in an informative joint expert statement. This should not be seen as an opportunity to have the last word or to rehearse arguments that are already well set out in reports. At its most useful, it is a concise summary of propositions which reflect the main issues and which set out the expert positions and short reasons. In that format, it's a very helpful document for the Tribunal and, I expect, counsel.

No doubt this list could be much longer. The objective of all of these activities is to get to trial with confidence that the issues between the experts have been identified, developed, documented and discussed before they are summarised in a convenient working document for the Tribunal. This is necessary to ensure that the Tribunal has before it the evidence it needs to make a decision. It is also important to avoid ambushes, obfuscation of poor points and the giving of advocacy rather than proper expert evidence.

On that last subject – experts engaging in advocacy - I don't think anyone will be surprised by me saying that there are concerns among CAT Chairs, and I think more broadly in the judiciary, about the adherence of some experts to their duties to the Tribunal.

Just to remind you of what those duties require, this is what the CAT Guide to Proceedings says ay [7.67]:

> *7.67 As under Part 35 of the CPR, it is the duty of the expert to help the Tribunal on matters within his or her expertise: that duty overrides any obligation to the person from whom the expert has received instructions or by whom he or she is paid: see Aberdeen Journals v OFT [2003] CAT 11 at [288]. Expert evidence presented to the Tribunal should be, and should be seen to be, the independent product of the expert uninfluenced by the pressures of the proceedings. An expert witness should never assume the role of an advocate and should not omit to consider material facts which could detract from the expert's concluded opinion...*

There are some very good experts who appear before the CAT and are beyond criticism. However, there are also those who seem not to understand their duties. It may be unfair, but my impression is that this is more likely to be the case with experts who are less familiar with the CAT and its approach, and possibly for those who are less familiar with the approach in the UK.

It is quite a difficult issue to regulate, as we all know this is an adversarial system. We are expecting opposing experts to have different views and to defend those views. There is plenty of room for genuine disagreement about, for example, whether commercial activity in a real-world setting is or is not consistent with economic theory.

So, I am reluctant to suggest any hard edged rules to you. It is one of those situations where, if it looks like a duck, swims like a duck and so on – well you are going to know what it is when you see it.

So all these offences should be easily recognisable:

- Lengthy, repetitive and tendentious reports. Just as an aside, anything the authors of these reports can do to reduce their volume would be welcome. I can tell you that it is very difficult to navigate and sensibly absorb reports which are hundreds of pages long, especially where there are multiple reports and even more so when there are multiple reports from multiple parties. Long is not

better – in fact it is likely to obscure the most powerful points in the report.

- Advancing selective opinions, where obvious (and usually contrary) points are not mentioned. This applies particularly to empirical work, where tables of results sometimes seem to be organised by desired outcome, rather than logic.
- In a similar vein, failing to be transparent in relation to unhelpful analysis which is not put forward.
- Taking positions which will obviously not stand up under cross examination.
- Turning to oral evidence and cross examination for some examples:
    - A refusal under cross examination to accept what is logically obvious.
    - A refusal under cross examination to engage with sensible hypotheticals to test a point.
    - A tendency to respond to questions with irrelevant material, often espoused at considerable length.

It does surprise me to see some of these behaviours play out in proceedings before the CAT. My sense is that we are pretty good at spotting this behaviour, especially given the high quality economic expertise on almost every panel. Perhaps it's our fault for not calling it out more obviously at the time, or later in judgments, but there is a natural reluctance to criticise individuals and it can lead to perceptions of unfairness. I can assure you that we are not often taken in by it, and it does have consequences, for the credibility of the expert and therefore for the merits of the client's case. So it is not serving your client's interests in any way.

It is absolutely right that the evidence given by an expert should be theirs alone, but that doesn't mean that the instructing lawyers should overlook the sort of behaviour we have just discussed. I do therefore suggest that the lawyers instructing these experts have an important role to play here, not just by reminding the expert of what the duty actually means in practice, but also by ensuring that the expert complies with their duty in all respects. It seems to me that the interests of the client

and the Tribunal are fully aligned on that point, for the reasons I have given.

Let me say a few words about the so-called “expert led approach”. I think this may have been misunderstood to some extent. In my mind, it is nothing more ambitious than recognising, in the context we discussed a moment ago, that the views and concerns of the experts themselves need to be understood by the Tribunal, if we are going to make the right decisions about the expert procedure in any case.

To take the obvious (and possibly the most contentious) example, let’s think about the data which an expert might need in order to carry out empirical analysis. Surely, a sensible starting point in deciding what data should be disclosed, in what form, is to:

- Ask the experts what they need and how it is best presented.
- Seek a measure of agreement between them so they are working from the same data in the same format.

Sometimes it might also be useful to ask the experts what factual inputs they need. For example, evidence from market participants, either in the form of factual evidence, surveys or some other form of expert evidence.

That does not however, at least in my mind, mean that the experts’ views should shape all aspect of the disclosure or the evidence gathering. There may be all sorts of issues which are not economic ones and every case will have different dynamics. Every Chair is likely to have some preference as to how they wish to approach management of the case. There should be no prescription of how and to what extent the experts are given influence over the procedure.

I know there has been some controversy about the concept. That might be because of the way it has worked in particular cases. It might also be because it represents a degree of loss of control by the legal teams.

In any event, it seems to be to be a useful way of thinking about these economics heavy cases. Going back to the point about how big and complex these cases are – and having now had the benefit of trying one myself – we should recognise the risk of sprawling, ill focused cases which become almost impossible to try sensibly, let alone in a reasonable time frame.

That’s why, in my view, the parties should be thinking hard in every case – from an early stage - about how the economic issues can best be progressed and how the experts can be asked to lead on aspects of that.

I think I am about to run out of time if we are going to have any questions, so I will stop talking now. Thank you for your attention.