Keynote speech by Ben Tidswell to the Informa EU Competition Law conference on 14 May 2025

Good afternoon.

This session is billed as "A view from the CAT". I hope you won't think I am backing away from that by making the usual disclaimer: what follows are my personal views, as a CAT Chair, rather than the views of the President of the CAT. That is particularly important at the moment, as the current Acting President, Sir Peter Roth, will stand down shortly and will be replaced by a new President.

The new President is of course likely to have views on how the CAT should carry out its functions in the foreseeable future. Those views are likely in particular to shape the procedure of the CAT – the way it does business, and the way the parties are expected to interact with it. We are for example about to embark on a review of the CAT rules, which are obviously the main determinant of the CAT's practice and procedure.

The CAT's approach to case management is also determined to a significant extent by the cases it is asked to resolve. It has no choice about those cases of course, or what the make-up of the different types of cases might be. The CAT's role is simply to deal with those cases justly and proportionately, as the rules require.

Those with longer CVs in the room will recall that the CAT was originally set up in the late 1990s. it was a necessary element of the new competition regime ushered in by the Competition Act 1998 – necessary because it provided the ECHR compliant route of appeal of administrative infringement decisions, which were viewed as quasi – criminal.

The right of appeal right applied to all decisions, including non-infringement decisions, and I recall my first CAT case was acting for the complainant in the OFT's Scottish Milk investigation, which involved an appeal against a case closure. As it was a Scottish case, it was heard in the Sheriff's court in Edinburgh. The then President and the CAT staff travelled up from London, as did all the solicitors and counsel.

I'm pleased to say things have moved on in the 20 or so years since then, and we have a healthy group of Scottish Chairs and legal representatives with good CAT experience to look after cases in Scotland.

With the introduction of the new merger regime in the Enterprise Act 2002, the scope of the CAT's work expanded to cover merger decisions, but it was still very much focused on administrative appeals.

There had of course been a jurisdiction for private actions for damages established over 40 years ago in *Garden Cottage Foods* v *Milk Marketing Board*[1], but that general jurisdiction did not exist in the CAT until much later. At first, only follow on claims (based on a regulatory infringement decision) could be brought in the CAT. That was later expanded to include stand-alone claims and also collective actions, which I will say more about shortly.

These developments greatly changed the make up of the case load at the CAT, especially as large quantities of private damages actions started to flow in, including cases originally filed in the High Court. The infringement decisions in relation to interchange fees and the trucks cartel were powerful drivers of this, but there were and are lots of other private actions, including stand-alone claims.

[1] [1984] AC 130

So, the type and volume of the cases before the CAT has changed very materially over the last 25 years. Of course, we still have appeals of infringement and merger decisions, but the volume of those depends on various factors and only fluctuates within a certain range. The same applies to other regulatory decisions which can be appealed to the CAT. To give you a sense of the extent of the change, the rough figures for the CAT case load at present are as follows:

- There are around 300 active cases
- 33 of those are regulatory appeals
- Of the remaining 270 odd cases, around 60 are collective actions.
- The rest are individual private actions
- that includes a large number of interchange fee and trucks cases.

I'd like to now focus on collective actions. For anyone new to these creatures (and they are unique to the CAT), they are actions under section 47A of the Competition Act 1998 which allows claims which have a common basis to be combined in the name of a class representative. They are, therefore, what most people would recognise as class actions.

These are relatively new types of action. The Competition Act was amended in 2015 to permit them. A small number of claims were filed shortly afterwards, but then there was something of a hiatus while one of those cases, *Merricks v Mastercard*, progressed to the Supreme Court[2]. The issue for the Supreme Court was what level of scrutiny is appropriate when the CAT is deciding whether or not to approve, or to "certify", collective proceedings. Once that question was answered (and it is generally accepted that the Supreme Court set the level of scrutiny at a relatively low level), there was something of a flood of further collective actions filed with the CAT.

Of the 60 cases I mentioned just now, 22 have been certified. Of those, 3 have gone to a full trial, 3 have been refused certification and 1 has settled (though there have been a number of partial settlements as well). The aggregate face value of all of the claims is well north of £100 billion. Many of the proceedings have millions of class members. The chances are fairly high that everyone in this room who is UK domiciled is a class member in at least one of the collective proceedings.

The short point is that these collective proceedings now form a very considerable part of the CAT's case load. There are two particular points arising from this state of affairs that I want to bring to your attention.

The first is that collective proceedings are very different in their nature from the administrative and regulatory work the CAT has historically done. Of course, the subject matter is more or less the same – competition law cases, under Chapter I or Chapter II of the Competition Act. However, procedurally, the collective proceedings are much more like large pieces of commercial litigation than administrative appeals or even individual follow on or stand-alone actions.

Large amounts of money are at stake and the litigation budgets are similarly very large. There is often very heavy disclosure, extensive factual evidence and a great deal of expert evidence. Some of the cases are follow on claims, but many are not, so the class representative is seeking to establish liability – the commission of an infringement – as well as causation and quantum. Many of the cases are under Chapter II of the Competition Act (abuse of dominance), so they involve very extensive evidence about market definition and

[2] [2020] UKSC 51

other economic matters. The list of disputed issued can be very long indeed. The trials are also long – of the three cases so far to go to full trial, the shortest was eight weeks long and the longest thirteen weeks.

You can perhaps see why we are reviewing the rules. In fact, the rules have served us very well to date – manly because their philosophy has always been to allow the tribunal hearing any particular case a great deal of discretion to fit the case management to the circumstances of the case. That flexibility has allowed us to deal with these quite different proceedings without too much difficulty, often by finding innovative ways to deal with problems.

That brings me to my second point, which is that new regimes inevitably throw up new problems. New problems tend to be very interesting, but they also generally take time to work through and inevitably some of them end up on appeal as the regime settles down. We have certainly seen that happen with the approach to certification, not just in relation to the threshold (see *Merricks*, which we have just discussed) but also the finer detail of the two main tests which the CAT applies for certification decisions – the authorisation and suitability requirements in rules 78 and 79. I think it is now fair to say that there is reasonable clarity about what is required in order for a collective proceeding to be certified. One hopes that, as a result, certification hearings going forward will be shorter, more focused and less frequently appealed.

I would like to spend the rest of the time available to me on some of the new issues which we are facing in relation to collective actions. There are three related areas:

1. The role of the class representative
2. The approval of funding arrangements
3. Settlements and the division of recoveries

These are important issues. They are, taken together, large determinants of whether the policy objectives underlying the collective proceedings regime are to be fulfilled – that is the compensation of those who suffer loss from competition infringements, regardless of whether their individual loss is sufficient to justify a claim, and the deterrence of anti-competitive behaviour that harms consumers.

<u>The role of the class representative</u>

We are now seeing increasing scrutiny of the role of the class representative. For example, in *Reifa v Apple*[3], the Tribunal declined to certify the collective proceedings because it was concerned about the extent to which the class representative was engaged in and had oversight of the funding arrangements. This highlights a very important issue, which is the role the class representative has to protect the interests of class members and the potential for that to conflict with the interests of the funders.

Litigation funding is a necessary feature of almost all collective proceedings. Without third party funding, the class representative is unlikely to be able to accumulate sufficient financial resources to cover the costs of the proceedings and to manage adequately the risk of an adverse costs award.

There is a well-developed and apparently vibrant funding market (the existence of 60 funded cases is evidence of that). These are presumably commercial funds who have commercial investors, who in turn have legitimate expectations of reasonable commercial returns to

[3] [2025] CAT 5

match the risk and funding costs involved. While one hopes and assumes that they recognise the interests of the class members in any recovery scenario, the simple fact is that returns going to funders are potentially at the expense of the class members, and vice versa. That's a conflict of interest which the class representative needs to be aware of and to manage as and when it arises. It is a fundamental part of the class representative's role.

That is why the Tribunal in *Reifa* declined the application for certification – it was not satisfied that the proposed class representative properly understood and was able to carry out that aspect of the role.

I think there are some other aspects of the class representative's role which will in due course be explored in more detail. It is not a small role. Here are some of the things a class representative might be expected to do:

- Negotiate the finance documents.
- 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.
- 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.
- 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 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.

We have seen some indications of the pressures on class representatives in relation to the *Merricks* collective proceeding, which is the case which has fully settled. I will say a bit more about that in a minute, but it is interesting that (as reported in the press) there are apparently arbitration proceedings between Mr Merricks and the funder in that case, relating to Mr Merrick's decision to enter into a settlement with Mastercard at a certain financial level.

I anticipate that other decisions which class representatives are called on to make throughout the case will in due course be subject to scrutiny. It is important to remember that a collective proceeding supplants an individual's ability to prosecute their own individual claim. Once certified, and unless the class member opts out, the class member is bound by the outcome. It seems only right that there should be a recognition of responsibility and some degree of accountability by the class representative in those circumstances.

<u>The approval of funding arrangements</u>

I'm now going to move on to the approach taken by the CAT to the approval of funding arrangements. Broadly speaking that has been to leave the question of the reasonableness of any return to funders until the time a settlement is reached or there is a judgment for damages.

There are good reasons for that approach – at the time of certification there are many known unknowns, such as the extent of any recovery, the time it has taken to reach an outcome, the amount of legal fees incurred, any potential costs awards and so on. These are all things

that seem likely to feed into a consideration of the appropriate division of any recoveries between the class members and the funders.

All of that has meant that the CAT has not generally engaged in detail with the reasonableness of the contractual return to the funder – unless on the face of the funding arrangements the funder's return is so large as to be manifestly unreasonable. Instead, the CAT has tended to scrutinise the terms of the funding arrangements that might in some way affect the proper prosecution of the claim by the class representative.

For example, the extent of committed funding and the process for replenishing that if it were to become exhausted, which might mean the funder has an unreasonable influence on the course of the litigation.

We now have guidance from the Court of Appeal in *Gutman v Apple*[4], which was handed down last month. The argument there concerned the ability of the CAT to permit funders to receive their returns before class members are paid. The Court of Appeal has confirmed that the CAT has jurisdiction to make such an order, if it thinks that is the proper course of action. The Chancellor's judgment, with which Lord Justices Green and Birss agreed, also contains some interesting and useful observations about the scope of the CAT's powers in relation to distribution and funder's returns. Given time constraints, I will just pick out a few:

- The CAT has a wide supervisory jurisdiction in the event that damages are available for distribution to the class.
- That jurisdiction applies consistently across settlements and awards of damages by the CAT itself. Whether the damages arise from a settlement or a judgment, it is for the CAT to determine how those damages are to be dealt with in terms of distribution to class members, and payment of costs and expenses including any return for funders.
- Any issue of the reasonableness of the funder's return can and should be addressed at the time of distribution.
- The funding arrangements are entered into by the class representative on behalf of the class and class members are bound by those arrangements.
- The class representative is the "champion of the class" and is expected to address any conflict of interest between the funders and the class appropriately, with the assistance of advisers and following the guidance of the CAT in exercising its supervisory jurisdiction.

<u>Settlements and the division of recoveries</u>

All of that begs the question of how the CAT is going to determine what a reasonable return for funders is, and I will now briefly touch on that subject in the context of settlements. There is a limit to what I can usefully and properly say about this, as the only judgments we have so far are partial settlements, in which the CAT has not fully addressed the question of who gets what. We are I think only days away from another important decision, which is the CAT's detailed judgment on the terms of the *Merricks v Mastercard* settlement, following the in-principle approval of the settlement amount by the CAT in February this year. I anticipate that we are going to learn a great deal about the issues relating to distribution and the balancing of the various interests of the different parties.

One of the features of the settlement hearing in *Merricks* was the intervention by the funder, who played an active role in arguing not just about the level of settlement but also the

[4] [2025] EWCA Civ 459

appropriate distribution arrangements to reflect its reasonable return. Given the observations of the Chancellor in *Gutman v Apple*, we can also expect the *Merricks* settlement judgment to be very relevant to any future judgment in which a class representative recovers damages on behalf of the class.

I do think that over time some good guidance will emerge from these distribution decisions which will more or less set a tariff (or perhaps more likely a range) and will manage everyone's expectations and bring more commercial certainty. That has, I understand, been the experience in class actions in Australia, where the jurisdiction is considerably more mature than our collective actions regime.

The CAT's task will of course be to make sure that that class members are receiving substantial recoveries (at least in aggregate) while at the same time allowing a proper commercial incentive for funders to fund collective proceedings, so as to ensure the proceedings can be funded and launched. Those are both necessary conditions for the delivery of the dual policy objectives of compensation and deterrence, which justified the creation of the regime in the first place.

Conclusions on developments in collective proceedings

I expect the relationship is between these three points will now be fairly obvious. The class representative agrees the funding arrangements and has the responsibility to control costs. The costs are likely to be a significant driver of the funder's return. The funding arrangements and the costs are only likely to be subject to detailed consideration by the CAT at the time of any outcome – whether that is a settlement or a judgment. In the absence of any established guidance, for much of the life of the collective proceedings there is considerable uncertainty for everyone involved about what the outcome of eventual scrutiny by the CAT might be.

That puts a real focus on the decisions and actions of the class representative to manage both aspects – the funding arrangements and the costs. The funders and the lawyers ought to have a vested interest in that active management and should support it, as it will create more predictability.

In due course we will have some guidance. However, I suspect it will only reinforce the need for careful consideration of funding arrangements and costs management in all of these collective proceedings.

In conclusion, as we move through the different stages of this relatively new collective proceedings regime, new issues are appearing on a regular basis. The CAT is breaking new ground with many of the solutions it is finding, with the assistance of the parties. We are now in the phase where we will see development of a body of precedent relating to distributions to class members and funding returns. I think that will also shed some interesting light on the role of class representatives.

It is probably not an exaggeration to say that the outcome of these developments will have a significant impact on whether the collective actions regime is considered a success in policy terms. That may have some implications for the continued operation of the current regime, as well as any further developments in class action regimes in the UK. As they say, watch this space!