IN THE COMPETITION APPEAL TRIBUNAL **Case no. 1339/7/7/20**

B E T W E E N : -

MARK MCLAREN CLASS REPRESENTATIVE LIMITED

Applicant and Class Representative

-and-

(1) MOL (EUROPE AFRICA) LTD
(2) MITSUI O.S.K. LINES LIMITED
(3) NISSAN MOTOR CAR CARRIER CO. LTD
(4) KAWASAKI KISEN KAISHA LTD
(5) NIPPON YUSEN KABUSHIKI KAISHA
(6) WALLENIUS WILHELMSEN OCEAN AS
(7) EUKOR CAR CARRIERS INC
(8) WALLENIUS LOGISTICS AB
(9) WILHELMSEN SHIPS HOLDING MALTA LIMITED
(10) WALLENIUS LINES AB
(11) WALLENIUS WILHELMSEN ASA
(12) COMPANIA SUD AMERICANA DE VAPORES S.A.

Defendants

APPLICATION FOR APPROVAL OF PAYMENT OF STAKEHOLDER COSTS

For the Class Representative:

Signature: 

Name: Belinda Hollway

Position: Partner

Dated: 18 October 2023

A INTRODUCTION AND SUMMARY

1. By this application ("the **Related Costs Application**"), the Class Representative ("**CR**") seeks an order that part of the damages paid to it by the Twelfth Defendant, Compañía Sud Americana de Vapores S.A. ("**CSAV**"), pursuant to their proposed settlement ("the **CSAV Settlement**") be used to cover 1.7% of the CR's current relevant costs, fees and disbursements.

2. In particular, the CR brings this application in order to pay a relative proportion of fees which are currently owed by the CR to third parties who have taken a stake in these proceedings ("the **Stakeholders**"), including the litigation funder of this claim, Woodsford Group Limited ("**Woodsford**"); the insurers who provided after-the-event (ATE) insurance to back Woodsford's indemnity to the CR; and the CR's solicitors, Scott+Scott UK LLP ("**SSUK**"), and relevant counsel, who have acted for the CR under discounted conditional fee agreements ("**DCFAs**"). The CR's obligations to those Stakeholders arise under its respective agreements with each Stakeholder as a result of the successful conclusion of the CSAV Settlement, subject to the approval of the Tribunal.

3. The Related Costs Application is made pursuant to rules 53(2)(n), 98(1) and/or 104(2) of the Competition Appeal Tribunal Rules 2015 No. 1648 (the "**Rules**"), and by analogy with rule 93(4): see paragraphs 19 to 25 below. For the reasons set out in § 4 of Hollway 5 (defined at paragraph 5(b) below), the Related Costs Application is also made by reference to rule 94(4)(b) if and to the extent that the Tribunal considers it appropriate to refer to that rule as well.

4. For the reasons set out more fully below and in the evidence in support of this Stakeholder Application, the CR believes that its proposal to use part of the CSAV Settlement damages payment in this way is appropriate in all the circumstances, and the CR therefore respectfully invites the Tribunal to make such an order in the terms set out in the draft annexed to the Related Costs Application at Annex 1.

5. The Related Costs Application is supported by the following documents:

(a) the third witness statement of Mr Mark McLaren ("**McLaren 3**"), the sole director and sole member of Mark McLaren Class Representative Limited, the CR, together with exhibit MM3.1;

(b) the fifth witness statement of Ms Belinda Hollway ("**Hollway 5**"), the partner at Scott+Scott UK LLP ("**SSUK**") with conduct of these proceedings for the CR, together with exhibit BAH5.1 and 5.2;

(c) the first witness statement of Mr Steven Friel ("**Friel 1**"), the chief executive officer of Woodsford;

(d) the first witness statement of Mr Jonathan Simon ("**Simon 1**"), an executive director within Willis Towers Watson Public Limited Company ("**WTW**"), the firm responsible for brokering the ATE insurance arrangements in these proceedings via arrangements between Woodsford and ATE insurers;

(e) the draft order sought; and

(f) a draft notice to publicise to the represented persons the filing of the Related Costs Application and the CR's proposal that the Related Costs Application be heard along with the CSAO Application at the hearing listed for 6 December 2023.

6. Certain parts of the supporting evidence contain information which is commercially sensitive and/or legally privileged and confidential, and in respect of which the CR therefore makes a request under rule 101(1) for confidential treatment. The relevant words, figures and/or passages of the statements, and the relevant exhibits, are identified clearly in Friel 1 and Hollway 5. The reasons supporting the request for confidential treatment are explained in Friel 1 at §§ 7-8 and in McLaren 3 at § 9.

7. The remainder of this application is structured as follows:

(a) **Section B** sets out salient elements of the factual background to the Related Costs Application; and

(b) **Section C** addresses the matters relied upon by the CR in support of the Related Costs Application.

B FACTUAL BACKGROUND

(1) The Collective Proceedings

8. The Related Costs Application is made in the context of collective proceedings combining follow-on claims under section 47A of the Competition Act 1998 for damages for losses caused by the Defendants' breach of statutory duty in infringing Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the Agreement on the European Economic Area (the "**Collective Proceedings**"). The Defendants' liability was determined by the European Commission in an infringement decision adopted on 21 February 2018, in Case AT.40009 – *Maritime Car Carriers* (the "**Decision**"). The Decision was addressed to all of the Defendants and found that the cartel operated between 18 October 2006 and 6 September 2012.

9. In its Re-Amended Claim Form, the CR alleges that vehicle shipping costs were unlawfully inflated as a result of the Defendants' anticompetitive conduct, and that these inflated charges were passed on through the supply chain as part of the delivery charges which are ultimately paid by the first person to purchase or finance a vehicle.

10. On 20 February 2020, the CR filed its application for a collective proceedings order ("**CPO**"). On 20 May 2022, the Tribunal certified the claims as eligible for inclusion in opt-out collective proceedings and made the CPO accordingly. Pursuant to §§ 5-6 of the CPO, the notice period for persons domiciled within the United Kingdom ("**UK**") wishing to opt out, and persons domiciled outside of the UK wishing to opt in, was set to expire after 12 August 2022.

11. Meanwhile, on 8 and 9 November 2022, the Court of Appeal heard an appeal by the First to Eleventh Defendants (i.e., all Defendants except CSAV) against the Tribunal's certification decision. On 21 December 2022, the Court of Appeal handed down its judgment dismissing all of the Defendants' grounds of appeal to the Tribunal's certification judgment, subject only to a matter of case management which was remitted to the Tribunal. On 17 July 2023, permission to appeal to the Supreme Court was refused.

(2) The proposed collective settlement with CSAV

12. On 19 July 2023, the CR and CSAV reached an in-principle agreement to settle the Collective Proceedings as against CSAV. The CR and CSAV finalised their settlement on the terms set out in the settlement agreement dated 27 September 2023 (the "**Settlement Agreement**").

13. Insofar as relevant to the Related Costs Application, the terms of that Settlement Agreement include the following:

    (a) Pursuant to clause 2, in full and final settlement of the collective proceedings against CSAV, and subject to the Tribunal making a collective settlement approval order ("**CSAO**"), CSAV agreed to pay the CR (on behalf of the class) a total of GBP 1,500,000. That settlement sum comprises three elements: (i) £1,120,000 in damages (the "**Damages Sum**"); (ii) £100,000 by way of contribution to the CR's costs of this CSAO Application (or, if such costs are less than £100,000, an additional sum towards settlement of CSAV's share of the costs of the collective proceedings); and (iii) £280,000 in full and final settlement of CSAV's share of the costs of the collective proceedings (excluding any costs awards already made and settled).

    (b) The Damages Sum constitutes 1.7% of the total damages figure for the entire claim against all the Defendants in these Collective Proceedings if the proposed CSAV settlement was grossed up based on CSAV's market share percentage. CSAV's market share has been calculated as 1.7% of the Defendants' total market share, based on the number of vessels: see, e.g., Robinson 4 §§ 3.2-3.4; McLaren 2 § 12; and Hollway 4 §§ 47-53.

    (c) Clause 4 provides that the Damages Sum shall be held in escrow until the conclusion of the collective proceedings or such other time as the CR considers it economic, proportionate and in the interests of the class to seek to distribute it, and the Tribunal approves the CR doing so.

    (d) Clause 5 makes provision for the CR and CSAV to apply jointly to the Tribunal for a CSAO (the "**CSAO Application**"), as they have since done: see paragraph 14 below. Among other matters, that CSAO Application sought an order in respect of

inter partes costs, fees and disbursements related to the CSAV Settlement (i.e., the second and third elements of the settlement sum: see sub-paragraph (a) above).

(e) Clause 6 states that the CR shall file a separate application relating to costs, fees and disbursements (i.e., the Related Costs Application) to be paid from the Damages Sum. While *inter partes* costs related to the CSAV Settlement are to be dealt with in the CSAO Application, the Related Costs Application envisaged by clause 6 seeks the Tribunal's approval of payment of various costs, fees and disbursements for which the CR is liable.

14. On 6 October 2023, the CR and CSAV filed and served the CSAO Application. That CSAO Application is listed to be heard on 6 December 2023.

(3) Relevant agreements between the CR and the Stakeholders

15. A successful settlement of the Collective Proceedings as against CSAV constitutes the basis for the Stakeholders to seek payments from the CR under their respective agreements with the CR. In particular:

(a) Under the revised litigation funding agreement ("**LFA**") – signed on 9 October 2023 following the Supreme Court's decision in *R (oao PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28 ("***PACCAR***") and replacing the original LFA dated 18 February 2020 – Woodsford is entitled a fixed fee return based on Woodsford's outlay in these proceedings to date, together with other sums as specified under the LFA. The sums for which the CR seeks permission to pay Woodsford are discussed in McLaren 3 §§ 39-44; Hollway 5 § 47; and Friel 1 §§ 31-43.

(b) Deferred and contingent insurance premia are owed to the ATE insurers upon a "*Successful Outcome*", as defined in the relevant ATE policy, which includes the CSAV Settlement. That ATE insurance was obtained to cover the exposure to adverse costs in these proceedings: see McLaren 3 § 45; Simon 1 §§ 12-15; and Friel 1 § 44 in particular.

(c) The CR also has obligations to SSUK under the terms of the DCFA it concluded with the firm on 18 February 2020. The total amount which the CR would, in

principle, be liable to pay SSUK if the Related Costs Application is granted is discussed at McLaren 3 §§ 25, 47-48; Hollway 5 §§ 51-54.

(d) Similarly, the CR has obligations to its team of counsel under DCFAs it has concluded with them. Again, the total amounts which the CR would, in principle, be liable to pay each relevant member of its counsel team if the Related Costs Application is granted are discussed at McLaren 3 §§ 25, 49-50; Hollway 5 §§ 55-58.

16. The total sum due to the Stakeholders as a result of these contractual commitments which the CR owes to them is £24,170,142 and 1.7% of that sum is £410,892 (the "**Proposed Stakeholder Entitlements**"): Hollway 5 § 60.

17. Further, under the CR's litigation funding arrangements with Woodsford, the CR has agreed, when making the CSAO Application, to apply simultaneously for an order that its costs, fees and disbursements incurred in connection with the Collective Proceedings will be paid from the proceeds of the CSAV Settlement – specifically, from the Damages Sum – prior to the distribution of any such proceeds to any of the persons whom the CR represents in these Collective Proceedings: see, in particular, clause 10.1 of the revised LFA; and the discussion at McLaren 3 § 30; Hollway 5 §§ 48-50; and Friel 1 § 30.

C THE RELATED COSTS APPLICATION

(1) The order sought by the Related Costs Application

18. In those circumstances, and for the reasons set out in the Related Costs Application and the supporting evidence, the CR seeks an order directing that, prior to the distribution of the Damages Sum and prior to the payment into escrow of the Damages Sum pursuant to clause 4 of the Settlement Agreement, a proportion of the Damages Sum payable under the Settlement Agreement shall be paid to the CR equal to the amount of the Proposed Stakeholder Entitlements, i.e., in respect of costs, fees and/or disbursements incurred by the CR in connection with the Collective Proceedings.

(2) The Tribunal's discretion to make the order sought

(a) The Tribunal's discretion in respect of costs

19. Rule 98 makes provision in respect of costs and fees under Part 5 of the Rules (relating to collective proceedings and collective settlements). Insofar as relevant, rule 98 provides a very wide discretion, i.e., that "*costs may be awarded to…the class representative*".

20. Rule 53(1) also confers a wide discretion on the Tribunal, which "*may at any time, on the request of a party or of its own initiative, at a case management conference, pre-hearing review or otherwise, give such directions as are provided for in paragraph (2) or such other directions as it thinks fit to secure that the proceedings are dealt with justly and at proportionate cost*." And rule 53(2) includes directions "*(n) for the award of costs or expenses…*". (Rule 53 applies to collective proceedings in accordance with rule 74.)

21. A further wide discretion is conferred by rule 104(2): "*The Tribunal may at its discretion…at any stage of the proceedings make any order it thinks fit in relation to the payment of costs in respect of the whole or part of the proceedings.*"

22. It is further noted that rule 94(4)(b) provides that a settlement approval application should "*set out the terms of the proposed settlement, including any related provisions as to the payment of costs, fees and disbursements*." The CSAV Settlement is not conditional on the success of the Related Costs Application, but the Related Costs Application is referred to in the Settlement Agreement at clause 6. Therefore, the Related Costs Application is also made by reference to rule 94(4)(b), if the Tribunal regards it as appropriate to do so.

(b) The Tribunal's discretion in respect of the payment of undistributed damages

23. By analogy, the CR also refers to rule 93(4), which provides that, where the Tribunal is notified that there are undistributed damages (i.e., damages to which no represented persons have claimed their entitlement to a share of an aggregate award in opt-out collective proceedings), the Tribunal "*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 the class representative in connection with the collective proceedings*."

24. In relation to rule 93(4), the Tribunal's 'Guide to Proceedings' 2015 (the "**Guide**") provides, at § 6.89, that, where a class representative seeks an order that the undistributed damages be used to cover all or part of its costs, fees and disbursements, the class representative must make an application to the Tribunal. That application must specify how much is being claimed and how those costs, fees and/or disbursements were incurred. Any such claim can only be made out of undistributed damages insofar as the class representative has not recovered its costs from the defendant.

25. Further the Guide provides, at § 6.90, that, since the defendant(s) have no interest in the amount to be paid on account of the class representative's costs, fees and disbursements, they do not have a right to be heard.

(3) The exercise of the Tribunal's discretion

26. The order sought by the Related Costs Application is appropriate for the Tribunal to make in all the circumstances. In particular, it is appropriate in its amount, in its timing and in the manner in which it is being made.

(a) The amount sought is appropriate in all the circumstances

27. By analogy with the requirements of the Guide § 6.89 in respect of an application under rule 93(4), the Related Costs Application specifies how much is being claimed and how those costs, fees and/or disbursements were incurred: see McLaren 3 §§ 37-50; Hollway 5 §§ 40-60; and Friel 1 §§ 20-44.

28. In particular, as Mr Friel explains, the amount claimed constitutes 37.5% of the Damages Sum.

29. As explained at paragraph 13(a), the Related Costs Application is <u>not</u> in respect of the £380k in *inter partes* costs to be paid by CSAV to the CR under the Settlement Agreement. As explained at Hollway 5 §§ 16-17, those costs fall to be considered as part of the CSAO Application as costs, fees and disbursements relating to the proposed CSAV Settlement: see rule 94(4)(b), which provides that a collective settlement approval application should "*set out the terms of the proposed collective settlement*, *including any related provisions as to the payment of costs, fees and disbursements*."

30. The supporting evidence further explains that the Related Costs Application also excludes and gives credit for the other costs which the CR has already recovered from the defendants to date, i.e., costs awards made in the CR's favour following the CPO hearing, the CPO appeal, and the hearings to date in respect of the communications to class members by certain of the Defendants: see McLaren 3 § 39(c); Hollway 5 § 60; and Friel 1 § 32.

31. Overall, the returns sought by the Stakeholders are appropriate in all the circumstances. In particular:

    (a) The risks associated with litigation funding are considerable, and the sums due to the Stakeholders under their respective agreements with the CR properly reflect the risk taken by the Stakeholders in committing to the claim in the context of the legal funding market prevailing at the time the Collective Proceedings were issued, i.e., at a time when the UK collective proceedings regime was in its infancy, no collective action had yet been certified (albeit that the Court of Appeal had overturned the Tribunal's refusal of a CPO in *Merricks*), and the further appeal to the Supreme Court in that lead case of *Merricks* was still pending, and the litigation funding market therefore reasonably regarded collective actions as an expensive, high-risk investment: see McLaren 3 §§ 15, 26-27; Hollway 5 §§ 18-27, 64; Friel 1 § 45.

    (b) In any event, the funder and ATE insurer were selected through competitive processes: McLaren 3 §§ 10-16; Hollway 5 §§ 29-32; Friel 1 §§ 51-55 and Simon 1 §§ 12-17.

    (c) Further, the returns due to the Stakeholders under the relevant agreements are reflective of prevailing market rates and particularly taking into account the foregoing points about the level of perceived risk in such an investment, the quantum of estimated damages in the present case, and the impending expiry of the relevant limitation period: see Hollway 5 §§ 28-32, 64.

    (d) Furthermore, and even in those inauspicious circumstances, the amount of return to Woodsford on its investment on this claim in the UK is comparable to the returns obtained by other funders, even in Australia, which has a more established and lower risk collective proceedings regime and a much more mature litigation

funding market. Given that those differences between the regimes in Australia and the UK meant that the UK was (and still is) a higher risk environment than Australia, it would be logical to have expected that Woodsford would have demanded a higher return to fund this claim in the UK than the returns for funders in Australia. Instead, as just noted, the return was comparable: see Friel 1 §§ 57-59.

(b) The timing of the order sought is appropriate in all the circumstances

32. Further, the timing of the order is appropriate in all the circumstances and, in particular, it is appropriate for the CR to be paid the Proposed Stakeholder Entitlements from the Damages Sum prior to distribution for the further reasons explained in the supporting evidence.

33. As noted in Hollway 5 § 71, the importance of the availability of litigation funding to secure access to justice for collective proceedings which would not otherwise be viable has rightly and repeatedly been recognised by HM Government, Parliament in creating the UK collective proceedings regime, and by the highest appellate authorities since the advent of that regime in 2015: see the passages from Hansard cited in *Merricks v Mastercard Inc* [2017] CAT 16, [2018] Comp AR 1 §§ 126-127; and the judgments of the Supreme Court and the Court of Appeal in, e.g., *Mastercard Inc v Merricks* [2021] 3 All E.R. 285, SC ("***Merricks SC***"), §§ 73, 98; *BT Group plc v Le Patourel* [2023] 1 All E.R. (Comm) 667 ("***Le Patourel CA***") §§ 77-78; *O'Higgins v Barclays Bank plc* [2023] EWCA Civ 876 § 129.

34. The ability of funders, ATE insurers and lawyers acting on a contingent (or partially contingent basis) to obtain a timely return on their investment in the high-risk activity of supporting collective actions is critical to maintaining the attractiveness of the UK litigation funding market to funders: see Hollway 5 §§ 71-72; Friel 1 §§ 33-35; and, again, the judgments of the Supreme Court and the Court of Appeal in *Merricks SC* § 98; *Le Patourel CA* § 78; *London and South Eastern Railway Ltd v Gutmann* [2022] ECC 26, CA, § 83.

35. There are further sound policy reasons why it is appropriate for the Tribunal to make the order sought at this time, i.e., following settlement and prior to distribution, including that it removes any perception of conflict at the time of distribution between the

obligations of the CR to maximise distribution and the CR's contractual commitments to stakeholders: see Hollway 5 § 76; and Friel 1 § 33 and 60(f).

36. The Tribunal can also take some reassurance that the order is unlikely to result in authorising the payment of costs, fees or disbursements out of sums which might otherwise be distributed to the class, on the basis of the available data regarding the take-up rates among represented persons in opt-out proceedings: see Hollway 5 §§ 74-75.

(c) The manner in which the order is sought is appropriate in all the circumstances

37. Mr McLaren explains how the CR proposes to publicise the Related Costs Application to represented persons to enable them to consider whether they may wish to make representations regarding the Related Costs Application and/or to attend the hearing where the Related Costs Application is considered by the Tribunal: McLaren 3 § 36.

38. Furthermore, notwithstanding the Tribunal's guidance that defendants have no interest in the amount to be paid on account of the class representative's costs, fees and disbursements, and consequently that they have no right to be heard on the Related Costs Application, the CR has served a copy of the Related Costs Application on each of them for completeness.

39. These and the other steps set out above further demonstrate that this Related Costs Application has been brought properly and the CR is fully cognisant of his responsibilities to represented persons, to the Tribunal and to adhere to the standards expected of class representatives under the collective proceedings regime.

(4) The draft Order and notice

40. The draft Order sought by the Related Costs Application is at Annex 1.

41. The draft proposed notice for publicising the Related Costs Application is at Annex 2.

SARAH FORD KC

NICHOLAS GIBSON

SARAH O'KEEFFE