

Insights

COUNTING THE COSTS OF CERTIFICATION: THE ALLOCATION OF COSTS IN COLLECTIVE PROCEEDINGS

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Costs matter - in collective proceedings, where costs can be staggeringly high at the certification stage alone, costs allocation can be an important factor influencing parties' litigation conduct.

However, costs allocation following contested certification applications has attracted limited commentary. The CAT has recognised that its "*practice as regards [certification] costs is still developing*"^[1] and, as at the date of publication of this article, it has made 13 costs awards dealing with issues related to certification.

These costs awards give rise to novel and complex challenges. How should the CAT's heightened gatekeeper role be reflected in costs allocation? How should costs be awarded where there has been a carriage dispute? Which costs are attributable to the certification dispute?

The CAT has provided valuable guidance on costs awards at the certification stage. In this article, we analyse the CAT's approach to certification costs awards and suggest four refinements to the CAT's approach^[2].

WHAT IS THE CAT'S APPROACH TO CERTIFICATION COSTS AWARDS?

STARTING POINT: COSTS FOLLOW THE EVENT

Unsurprisingly, the CAT has applied the general principle that the successful party at the certification stage is entitled to recover its relevant costs.

If a respondent does not oppose certification, it is not liable for costs at the certification stage.

DISCOUNTS

However, difficulties arise in isolating the costs which should be awarded at the certification stage. The CAT seeks to limit costs awards at the CPO stage to the costs of, and associated with, a respondent's unsuccessful opposition to certification through the application of three interrelated discounts:

1. **The In-Any-Event Discount:** Even in the absence of opposition to certification, the CAT will scrutinise whether a PCR's application meets the certification standard. Costs associated with satisfying the CAT are not *occasioned by* a respondent's opposition to certification. Therefore, they are not reflected in costs awards at the certification stage. For example, in *Le Patourel v BT*, the CAT reduced the costs awarded to the claimant by 20% to reflect the fact that "*there were some costs...which would have been incurred in any event*"^[3]. We term this the 'In-Any-Event Discount'.
2. **The Start Date Discount:** Preparing a certification-worthy claim requires a large up-front investment of costs, even before issuing the claim. Again, these costs aren't *occasioned by* a respondent's opposition to certification, but drawing that distinction can be difficult in practice. To distinguish between these up-front costs and the costs incurred as a result of a respondent's opposition to certification, the CAT has sought to draw a bright line: costs incurred by a PCR before a respondent has filed its CPO Response are not recoverable at the certification stage. We term this the 'Start Date Discount'.
3. **The Issues-Based Discount:** The CAT is willing to discount costs awards at the certification stage "*to reflect significant or material issues on which the respondents succeeded*"^[4]. When doing so, the CAT has generally applied a single, 'broad-brush' percentage discount to the successful party's recoverable costs, rather than making cross-orders dealing with success on specific issues.

REFINEMENT

The CAT has emphasised that "*it is desirable that there should be a level of consistency as regards the approach to costs on CPO applications*"^[5]. Against that background, we identify four proposals to refine the CAT's approach to certification costs.

WHAT HAPPENS TO COSTS THAT ARE SUBJECT TO THE ISSUES-BASED DISCOUNT?

Generally, when the CAT makes an Issues-Based Discount, it orders that the discounted costs become costs in the case, to be paid by the party that is unsuccessful at the conclusion of the overall proceedings. However, Issues-Based Discounts reflect the fact that a party has lost on particular issues. Rather than deferring them for later consideration as costs in the case, we consider they should be rendered irrecoverable. This would be consistent with the usual position in non-collective claims. This approach was adopted in *McLaren v MOL*^[6].

A DIFFERENT START DATE

We think that the Start Date Discount is unnecessary.

It is common for parties to engage in protracted correspondence prior to the making of the CPO application, and between the time of making the CPO application and the filing of the CPO

Response. The CAT recognised this in *McLaren v MOL* where it elected not to apply the Start Date Discount, reasoning that “*it would be wrong not to take account of the substantial costs incurred in dealing with correspondence before [CPO Responses were filed] that raised objections to the grant of the CPO, including objections that were not pursued*”^[7]. The CAT’s approach in *McLaren v MOL* should be the general starting point, which would be consistent with standard costs principles.

“DOUBLE-DISCOUNTING”?

The discounts applied by the CAT have overlapping rationales. The Issues-Based Discount reflects a PCR’s failure on certain issues. The In-Any-Event Discount reflects the fact that the PCR would have to have developed its case before the CAT in light of the CAT’s own scrutiny.

What if a respondent is successful in disputing an issue^[8] which the CAT would have raised of its own motion? Conceivably, these same costs would be subject to concurrent Issues-Based and In-Any-Event Discounts.

In practice, the CAT has guarded against this vigilantly. For example in *McLaren v MOL*, it expressly excluded any matters subject to the Issue-Based Discount from its calculation of the In-Any-Event Discount^[9]. We think this approach should be extended and adopted generally. The In-Any-Event Discount should, by definition, exclude costs which *could* be subject to an Issues-Based Discount.

CARRIAGE DISPUTES

The allocation of costs as between competing applicants for certification presents novel and intractable challenges. There are a number of potential outcomes in a carriage dispute, each of which raises different costs issues. We propose the following general principles for dealing with the costs of carriage disputes:

Scenario	Proposed costs allocation
Both PCRs meet the certification standard. Only one PCR is certified ^[10] .	Each PCR should bear its own costs of the carriage dispute.
One PCR meets the certification standard, the other does not.	The successful PCR should be entitled to claim their costs of the carriage dispute from the unsuccessful PCR.
Neither PCR meets the certification standard ^[11] .	Each PCR should bear its own costs of the carriage dispute (regardless of whether the CAT

	<p>expressed a preference as between the competing applications).</p> <p>The PCR's should be jointly and severally liable for the respondent(s)' costs.</p>
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CONCLUSION

Costs awards at the certification stage present significant challenges. The CAT has provided valuable guidance on this issue, but there is scope for further development, including through the refinements that we propose above. The development of a sound and consistent costs award policy is important for the continuing development of the collective active regime more generally, given the large cost sums involved and the potential for those cost awards to incentivise desired conduct by the parties to these claims.

[1] *UK Trucks Claim Ltd v Stellantis N.V. (formerly Fiat Chrysler Automobiles N.V.); Road Haulage Association Ltd v Man SE* [2022] CAT 51 at [9].

[2] These issues, along with further proposed refinements, are addressed in detail in our recently published article in *Global Competition Litigation Review*: E. Coulson, A. Leitch and B. Bolderson, 'A Certified Muddle: The Costs of Collective Proceedings' [2023] 16 G.C.L.R. Issue 2, 61-72.

[3] *Justin Le Patourel v BT Group Plc* [2021] CAT 32 at [8].

[4] *UK Trucks Claim Ltd v Stellantis N.V. (formerly Fiat Chrysler Automobiles N.V.); Road Haulage Association Ltd v Man SE* [2022] CAT 51 at [11].

[5] *Walter Hugh Merricks CBE v Mastercard Incorporated and Others* [2017] CAT 27 at [16].

[6] *Mark McLaren Class Representative Ltd v MOL (Europe Africa) Ltd and others* [2022] CAT 18.

[7] *Ibid* at [27].

[8] But unsuccessful in bringing a broader certification challenge.

[9] *Mark McLaren Class Representative Ltd v MOL (Europe Africa) Ltd and others* [2022] CAT 18 at [31].

[10] As in *UK Trucks Claim Ltd v Stellantis N.V. (formerly Fiat Chrysler Automobiles N.V.); Road Haulage Association Ltd v Man SE* [2022] CAT 51

[11] As in *Mr Phillip Evans v Barclays Bank Plc; Michael O'Higgins FX Class Representative Ltd v Barclays Bank Plc* [2022] CAT 42.

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