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IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1329/7/7/19
1336/7/7/19

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

6 March 2020

Before:

THE HON MR JUSTICE MARCUS SMITH
(Chairman)
PAUL LOMAS
PROFESSOR ANTHONY NEUBERGER

Sitting as a Tribunal in England and Wales

BETWEEN:

MICHAEL O'HIGGINS FX CLASS REPRESENTATIVE LIMITED

Applicant / Proposed Class Representative

- v -

BARCLAYS BANK PLC AND OTHERS

Respondents / Proposed Defendants

- and -

MUFG BANK, LTD AND ANOTHER

Proposed Objectors

AND BETWEEN:

MR PHILLIP EVANS

Applicant / Proposed Class Representative

- v -

BARCLAYS BANK PLC AND OTHERS

Respondents / Proposed Defendants

Heard at Salisbury Square House on 13 February 2020

JUDGMENT (TIMING OF CARRIAGE DISPUTE)

APPEARANCES

Mr Daniel Jowell QC, and Mr Gerard Rothschild (instructed by Scott + Scott UK LLP) appeared on behalf of Michael O'Higgins FX Class Representative Limited.

Mr Aidan Robertson QC, Ms Victoria Wakefield QC, Ms Joanne Box and Mr Aaron Khan (instructed by Hausfeld & Co. LLP) appeared on behalf of Mr Phillip Evans.

Mr Daniel Piccinin and Mr David Heaton (instructed by Baker & McKenzie LLP) appeared on behalf of the Barclays Respondents in Cases 1329 and 1336.

Mr Richard Handyside QC and Mr Tony Singla (instructed by Allen & Overy LLP) appeared on behalf of the Citibank Respondents in Cases 1329 and 1336.

Ms Sarah Ford QC and Mr Stefan Kuppen (instructed by Slaughter and May) appeared on behalf of the JPMorgan Respondents in Cases 1329 and 1336.

Mr Josh Holmes QC and Mr Tom Pascoe (instructed by Macfarlanes LLP) appeared on behalf of the NatWest/RBS Respondents in Cases 1329 and 1336.

Mr Brian Kennelly QC and Mr Paul Luckhurst (instructed by Gibson, Dunn & Crutcher UK LLP) appeared on behalf of the UBS Respondent in Cases 1329 and 1336.

Ms Ronit Kreisberger QC (instructed by Herbert Smith Freehills LLP) appeared on behalf of the MUFG Respondents in Case 1336 and Proposed Objectors in Case 1329.

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A. INTRODUCTION

1. Two applications for an opt-out collective proceedings order ("CPO") pursuant to section 47B of the Competition Act 1998 ("CA 98") have been filed at the Tribunal seeking to combine follow-on claims for damages arising from two separate infringement decisions of the European Commission (the "Commission"), both adopted on 16 May 2019 (Case AT.40135 FOREX (Three Way Banana Split) and Case AT.40135 FOREX (Essex Express)) (each a "Decision" and together, the "Decisions").

2. The first application was filed on 29 July 2019 and is brought by Michael O'Higgins FX Class Representative Limited (the "O'Higgins Application). The Applicant is a special purpose vehicle incorporated specifically for the purpose of bringing the proposed collective proceedings. Its sole director and member is Mr Michael O'Higgins, whose most recent professional position was Chairman of the Channel Islands Competition and Regulatory Authorities. The second application was filed on 11 December 2019 and is brought by Mr Phillip Evans (the "Evans Application"). Mr Evans is a former Panel Member and Inquiry Chair at the Competition and Markets Authority.

3. In the Decisions, both of which were adopted pursuant to the settlement procedure, the Commission found that various major banking groups had infringed Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the European Economic Area ("EEA") Agreement by participating in a single and continuous infringement covering the whole EEA in foreign exchange ("FX") spot trading of G10[1] currencies. Those banking groups are referred to in this Judgment by the following shorthand names: Barclays, Citibank, JPMorgan, MUFG, NatWest/RBS and UBS, collectively the "Respondents". The "Three Way Banana Split" Decision was addressed to entities in the Barclays, Citibank, JPMorgan, NatWest/RBS and UBS groups and the infringement the subject of the Decision was found to last from 18 December 2007 to 31 January 2013. The "Essex Express" Decision was addressed to entities in the Barclays, MUFG, NatWest/RBS and UBS groups and the infringement the subject of the Decision was found to last from 14 December 2009 to 31 July 2012.

[1] The G10 FX currencies concerned by the Decisions comprise USD and CAD, JPY, AUD, NZD, GBP, EUR, CHF, SEK, NOK and DKK i.e. 11 currencies altogether, which corresponds to the market convention for currencies covered by the G10 designation.

4. The Respondents to the O'Higgins Application and the Evans Application are addressees of one or both of the Decisions and are the same, save that the O'Higgins Application has not been brought against any MUFG entities.

5. A summary of the O'Higgins Application was published on the Tribunal's website on 9 August 2019 and a case management conference was listed for 6 November 2019 (the "November CMC") to give directions for the future conduct of the application. Shortly before the November CMC, on 4 November 2019, the solicitors acting for Mr Evans wrote to the Tribunal to inform it and the parties to the O'Higgins Application of their intention to file the Evans Application "imminently". Accordingly, in light of the expected similarities between the O'Higgins Application and the Evans Application, in particular that both would be brought on an "opt-out" basis in respect of the same Decisions, the November CMC proceeded on the basis that there was an additional CPO application "waiting in the wings". We shall refer to the O'Higgins Application and the Evans Application collectively as the "Applications".

6. At the November CMC, the Chairman gave directions for the hearing of a preliminary issue in the O'Higgins Application on 13-14 February 2020 for the purposes of determining whether there was anything about the identity and/or funding of the Applicant that would preclude it from being authorised as a suitable class representative pursuant to rule 78 of the Competition Appeal Tribunal Rules 2015 (the "Tribunal Rules"). By the time of the February hearing the parties to the O'Higgins Application had resolved in writing (subject to various reservations made by the Respondents) certain issues raised by the Respondents as to the terms of the funding arrangements put in place by the Applicant, and no longer required a hearing before the Tribunal. In the interim, following the filing of the Evans Application, the Tribunal had proposed that case management issues arising could be dealt with jointly with the O'Higgins Application on the dates already reserved for the February hearing (the "February CMC").

7. This Judgment concerns the primary case management issue raised by the Applicants at the February CMC, which was whether the Tribunal should direct a preliminary issue of which of the Applicants would be the most suitable to act as the class representative for the purposes of rule 78(2)(c) of the Tribunal Rules. The question of which of the Applicants would be the most suitable was referred to by all parties as a "carriage

dispute", mirroring the nomenclature used in other common law jurisdictions. For convenience, we adopt that term in this Judgment.

B. LEGAL FRAMEWORK

8. The statutory regime governing CPOs was introduced by the Consumer Rights Act 2015, which inserted various provisions into CA 1998 with effect from 1 October 2015. In particular, section 47B CA 98 now provides, so far as material:

> "(1) Subject to the provisions of this Act and Tribunal rules, proceedings may be brought before the Tribunal combining two or more claims to which section 47A applies ("collective proceedings").
>
> (2) Collective proceedings must be commenced by a person who proposes to be the representative in those proceedings.
>
> …
>
> (4) Collective proceedings may be continued only if the Tribunal makes a collective proceedings order.
>
> (5) The Tribunal may make a collective proceedings order 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 representative in those proceedings in accordance with subsection (8), and
>
> (b) in respect of claims which are eligible for inclusion in collective proceedings.
>
> (6) Claims are eligible for inclusion in collective proceedings only if the Tribunal considers that they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings.
>
> …
>
> (8) The Tribunal may authorise a person to act as the representative in collective proceedings—
>
> (a) whether or not that person is a person falling within the class of persons described in the collective proceedings order for those proceedings (a "class member"), but
>
> (b) only if the Tribunal considers that it is just and reasonable for that person to act as a representative in those proceedings.
>
> …
>
> (11) "Opt-out collective proceedings" are collective proceedings which are brought on behalf of each class member except—

(a) any class member who opts out by notifying the representative, in a manner and by a time specified, that the claim should not be included in the collective proceedings, and

(b) any class member who—

(i) is not domiciled in the United Kingdom at a time specified, and

does not, in a manner and by a time specified, opt in by notifying the representative that the claim should be included in the collective proceedings. […]"

9. Accordingly, two conditions must be satisfied before the Tribunal may make a CPO:

(1) The claims must be considered by the Tribunal to raise the same, similar or related issues of fact or law and to be suitable to be brought in collective proceedings (section 47B(6) CA 98) (the "Eligibility Condition"); and

(2) The proposed class representative must be authorised by the Tribunal on the basis that it is just and reasonable for that person to act as a representative in the collective proceedings (section 47B(8)(b) CA 98) (the "Authorisation Condition").

10. In short, the Eligibility Condition relates to the claims that may appropriately be certified as eligible for inclusion in collective proceedings, whereas the Authorisation Condition relates to the person who may appropriately be authorised to bring a collective action.

11. The provisions of section 47B and the distinction between the Eligibility Condition and the Authorisation Condition are clearly reflected in rule 77(1) of the Tribunal Rules which provides that:

"77.—(1) The Tribunal may make a collective proceedings order, after hearing the parties, only—

(a) if it considers that the proposed class representative 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 78; and

(b) in respect of claims or specified parts of claims which are eligible for inclusion in collective proceedings in accordance with rule 79."

12. As is clear from rule 77(1), rule 78 deals with the Authorisation Condition and rule 79 deals with the Eligibility Condition. It will be necessary to consider both of the rules in greater detail, and they are set out in paragraphs 59-60 below.

C. TIMING OF THE CPO APPLICATION(S) AND THE PRELIMINARY ISSUE

13. The question of the correct legal approach to the Eligibility Condition will be considered by the Supreme Court in *Mastercard Inc v Merricks*[2] in May 2020. It was common ground in the O'Higgins Application (at the November CMC) and in the Evans Application (at the February CMC) that, in line with the approach taken in other collective actions currently pending before the Tribunal,[3] the question whether or not to grant a CPO should be deferred until the Supreme Court has heard and determined the appeal in *Merricks*.

14. It is difficult to see what other course could properly be taken. It is only when the Supreme Court has provided a definitive statement of the Eligibility Condition that it will be possible to apply that test in other cases, and it would be wasteful of time and costs to seek to anticipate the Supreme Court's approach.

15. Accordingly, the O'Higgins Application was scheduled to be heard in around March 2021: this was to enable sufficient time between the handing down of judgment by the Supreme Court in *Merricks* and the commencement of the hearing of the O'Higgins Application, so as to enable the outcome in *Merricks* to be fully taken into account in the parties' preparations.

16. With the commencement of the Evans Application, and in anticipation of the February CMC, the Tribunal set out its preliminary view as to the appropriate approach in a letter to the parties dated 27 January 2020:

> "As the parties will appreciate, the hearing on 13-14 February 2020 was listed for the provisional purpose of dealing with questions regarding the funding of the O'Higgins Application…
>
> In the meantime, the Evans Application has commenced, and the Tribunal has made clear its intention that at least part of the February hearing be devoted to case managing the Evans Application and its relationship, going forward, with the O'Higgins Application…
>
> …
>
> So far as case management questions are concerned the Chairman of the Tribunal considers that two points, which arise out of the case management conference on 6 November 2019 (the "November CMC"), ought to be stressed:

[2] UKSC 2019/0118, on appeal from [2019] EWCA Civ 674.
[3] See, for example, *UKTC v Fiat Chrysler* and *RHA v MAN SE* [2019] CAT 15.

(1) For the reasons articulated at the November CMC, it is the Tribunal's provisional view that the O'Higgins and Evans Applications ought to culminate in a single substantive hearing, taking place in early 2021. If any party considers that this is not an appropriate course, then the Tribunal would wish to hear from that party.

(2) It follows from this that the two applications ought to be case managed similarly and together, and that what was ordered in the O'Higgins Application ought – all other things being equal – to pertain in the Evans Application. Again, to the extent that any party has issues with this approach, the Tribunal would welcome submissions."

17. Both Applicants submitted that the approach suggested in the Tribunal's letter was not the appropriate course, and that the carriage dispute should be determined as a preliminary issue – probably in June or July of this year – with only the successful party (whether that be Mr O'Higgins or Mr Evans) then proceeding with a single application for a CPO in 2021. Of the various Respondents, Barclays, Citibank and MUFG supported this course of action. JPMorgan, NatWest/RBS and UBS took a neutral stance and restricted their submissions to addressing the extent to which the Respondents should participate in any such carriage dispute.

18. The Tribunal was thus presented with a common front on this point. Whilst it might fairly be said that there were relative degrees of enthusiasm exhibited by the Respondents towards the preliminary issue proposed by the Applicants, no-one opposed the preliminary issue being proposed.

19. Generally speaking, the Tribunal appreciates and welcomes the parties' agreement on points of process and procedure. Given the expertise and experience of the legal teams that generally appear before it, the Tribunal will ordinarily be slow to take a course at variance with the parties' united front. In this case, however, two factors obliged the Tribunal to press the parties – and, in particular, the Applicants – to justify their approach:

(1) The first factor is that the collective proceedings regime in this jurisdiction is a relatively new one. More particularly, this is the first carriage dispute to be heard in this jurisdiction. Whilst, inevitably, preliminary issues turn to a greater or lesser extent on individual factors specific to the cases in which they arise, we consider that Mr Robertson QC (counsel in the Evans Application) was right when he stressed that, to a greater or lesser but nevertheless material extent this carriage dispute would inform other, later, disputes. In these circumstances, it

behoved the Tribunal to consider the question of carriage with particular care, as one having potential wider implications. It is both a tribute to the excellent submissions that we heard, and the difficulty of the issues that arise, that our judgment on the question of whether a preliminary issue should be heard has been reserved.

(2) The second factor is that, until a CPO is in fact made, the Applicants do not represent anyone. In this case, both parties seek an "opt-out" CPO in respect of the classes of person they wish to represent. By definition, until such an order is granted to one or other of the Applicants,[4] they represent no-one but themselves.

D. STRUCTURE OF THIS JUDGMENT

20. It was common ground between the parties that the Tribunal had jurisdiction to hear the carriage dispute as a preliminary issue. The Tribunal does not dissent from that view. The question of whether a preliminary issue on the carriage dispute should be ordered was, as everyone accepted, a question of balancing competing factors.

21. The essential reasons put forward by the Applicants for seeking the early resolution of the carriage dispute were as follows:

(1) The carriage dispute was a discrete matter that was capable of being determined as a preliminary issue at this stage of the proceedings, and this approach would be consistent with the approach in other common law jurisdictions.

(2) Determining the carriage dispute early would be in the best interests of all parties, and especially the proposed class members, and would represent the most efficient use of the Tribunal's resources. In this context, early resolution would:

(i) Save costs, in that the longer there were duplicative applications, the greater the time and legal costs that would be incurred on all sides.

(ii) Avoid confusion amongst members of the proposed class and infighting between the Applicants to the detriment of the proposed class.

[4] Given that both Applications are opt-out applications in respect of the same or similar causes of action, a carriage dispute cannot be avoided: there can, by definition, be only one successful application.

(iii) Avoid undermining or delaying any potential alternative dispute resolution.

22. We consider these factors in the later sections of this Ruling. Thus:

(1) Section F considers the lessons to be learned from other jurisdictions which have had collective action procedures for longer than the United Kingdom and from whose experience we might learn.

(2) Section G considers the extent to which hearing the carriage dispute will result – as the parties contended – in material savings of cost and time, including the time spent by the Tribunal.

(3) Section H considers the extent to which a preliminary issue on carriage will avoid confusion amongst members of the proposed class and infighting between the Applicants.

(4) Section I considers the extent to which a preliminary issue will avoid undermining or delaying any potential alternative dispute resolution, i.e. the extent to which it will promote settlement.

(5) In Section J, we consider whether the carriage dispute is in fact a discrete matter capable of being determined as a preliminary issue at this stage of the proceedings.

23. Section K deals with other matters relevant to the question of whether we should hear the carriage dispute as a preliminary issue, which were not put forward by the parties as advantages of the course they advocated.

24. Before we turn to this weighing of relative advantage and disadvantage, we consider (in Section E below) the approach that it is incumbent upon applicants for CPOs to adopt prior to certification.

E. AN APPLICANT'S DUTIES PRIOR TO CERTIFICATION

25. Where an applicant for a CPO has successfully transited from proposed class representative to class representative, the class representative does exactly that: represent the class. There is an alignment between the interests of the class and the

interests of the class representative. In the first place, the whole point of the statutory test that can result in a CPO is intended to ensure this outcome; in the second place, the class representative's ability to recover more than simply a costs order in his or her favour from the defendants to the collective proceedings turns on successfully invoking the jurisdiction in section 47C(6) CA 98, which itself will likely turn (at least in part) on the manner in which the class has been represented by the class representative.

26. Prior to certification, however, the proposed class representative's primary interest will be in obtaining certification. Although it may safely be presumed that the respondents to the application will be assiduous in pointing out weaknesses in the proposed class representative's application, the fact is that the respondent(s)' interests will be opposed to those of the proposed class. In short, whilst both the proposed class representative and the respondents will be present and represented in court on the CPO application and any prior hearings, the interests of the proposed class will only be indirectly represented, insofar as they are relevant to the proposed class representative's primary interest.

27. Whilst, therefore, it cannot be said that applications up to and including the certification application are without notice (typically the proposed class representative(s) and the respondent(s) will be involved), such applications may be made without the direct participation of the very persons for whom the collective action process is said to exist.

28. In *R. v. The General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington, ex parte Princess Edmond de Polignac*, Scrutton LJ underlined the general importance of the rule of full and frank disclosure:[5]

> "…it has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an *ex parte* statement he should make full and fair disclosure of all the material facts – facts, not law. He must not misstate the law if he can help it – the Court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts…"

29. There is a certain analogy with certification of class actions where similar issues arise as to the ability of parties directly affected to challenge issues before the Court..

30. By way of example, Mr Robertson sought to explain why each Applicant was advocating an early carriage dispute:

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[5] [1917] 1 KB 486 at 514. See also *MRG (Japan) Limited v. Engelhard Metals Japan Limited*, [2003] EWHC 3418 (Comm) at [23] (*per* Toulson J).

> "But it is a knockout blow to the unsuccessful application. So why are we doing that? Well, the prospect of fighting the case all the way through to certification and then only to lose the carriage dispute would be a major disincentive to Class Representatives. Now it is a risk, of course, we have to accept because this is the first case in which this has arisen. I think the Tribunal needs to look at the wider policy. If you adopt an approach in this case which then is seen as being the model the Tribunal is going to adopt in other cases, then that is going to be a strong disincentive to subsequent Proposed Class Representatives, after the first Class Representative has filed its application. Because you are going to run the risk of having to fight the case all the way up to certification, in order to find out whether you've got carriage or not."

31. Of course, we appreciate that the very significant costs of bringing an application for certification militate in favour of an early resolution, when the matter is viewed from the perspective of the proposed class representative. We consider this important aspect below. But it may very well be that proposed class representatives are so concerned to minimise the costs of making an application, that they pursue an early resolution of the carriage dispute at the expense of failing sufficiently to press the advantages of their application over-and-above those of rival applications. The extent to which a preliminary issue is capable of dealing with the different merits of rival applications is, again, a matter we consider further below.

32. Hence the attractions of an obligation of full and frank disclosure. However, having carefully considered the implications, we are of the view that it would be impractical to impose upon the proposed class representative(s) a duty of full and frank disclosure, simply because that might very well redound to the advantage of the respondents in any given case (who would, of course, receive the benefits of such disclosure) and to the potential disadvantage of the proposed class.

33. We see no way of eliminating these difficulties and consider – with some regret – that applications such as the present will have to be heard on the usual *inter partes* basis. However, we should make clear that we consider it incumbent upon a Tribunal, in this position, to appreciate that (apart from the respondents) the persons most interested in the question of certification are not in fact directly present or represented in court; and that there may well be factors operating upon the proposed representatives of those persons that are not necessarily aligned with the interests of the class of persons whom they wish to represent. Moreover, we consider that the manner in which applicants for CPOs deal with the difficult question of how they present themselves in the period up to certification, when they cannot and do not actually yet represent the class they wish

to represent, can (but does not necessarily have to) constitute a factor that can be taken into account as part of the Authorisation Condition.

34. For our part, the absence of representation for the class, particularly given the essentially common front presented by all of the parties before us, rendered it important for us to probe (perhaps a little more intrusively than is usual) the arguments presented by the parties. We make no apology for this.

F. LESSONS FROM OTHER JURISDICTIONS

(1) Introduction

35. As we have noted, collective proceedings are novel in this jurisdiction; and this is the first carriage dispute within this novel jurisdiction. We consider that there may be much to learn from other jurisdictions, particularly those jurisdictions (like Canada) which appear to have a broadly similar regime to that which pertains here. That said, the teaching of other jurisdictions can be no more than a guide, and the benefit to be derived from a comparative approach operates not at the granular level but broadly, in terms of lessons that can be learned from such jurisdictions.

(2) The Canadian approach

36. All of the parties were agreed that whilst other jurisdictions like the United States and Australia had collective proceedings regimes, it was Canada that represented the best jurisdiction from which lessons could be learned. It was also clear from the cases that were cited to us that many Canadian courts take the view that a carriage dispute should be determined as a preliminary issue prior to certification. In short, the Canadian approach was precisely that articulated by the Applicants: to use the preliminary issue to winnow the proposed class representatives from the multiple down to one; and then to consider at a later hearing whether that remaining proposed class representative should be certified as the class representative.

37. Thus, in *Strohmaier v. British* Columbia *(Attorney General)*, Skolrood J stated:[6]

> "27. As noted above, there is a wealth of authority holding that carriage should be determined in advance of a certification application…

[6] 2017 BCSC 2079.

28. In *Nelson*, Allan J said the following, in connection with a similar issue about whether carriage or certification should go first, at [30]-[31]:

> [30] The objective set out in Rule 1(5), namely, "to secure the just, speedy and inexpensive determination of every proceeding on its merits", is clearly applicable to class proceedings. Such a goal can only be met by determining the carriage issues prior to certification. The real issue is which counsel should have carriage of the class proceedings in the circumstances, having regard to the policy objectives of class proceedings: judicial economy by avoiding multiplicity of individual suits; access to justice by making the prosecution of claims economical; and behavioural modification by calling actual and potential wrongdoers to account.
>
> [31] In my opinion, it is clearly logical as well as fair and expeditious to hear the carriage motion in this case before any certification hearing. I do not agree with Mr Merchant that the law in British Columbia is, or should be, similar to that in Quebec where the first applicant for an Authorization (certification) hearing is heard and only if that application is denied, can the next-in-time applicant apply for Authorization. Alternatively, Mr Merchant suggests that the carriage issue be determined at a joint certification hearing. In my view, such a procedure would entail unwarranted expense and inconvenience.

29. In *Grasby*, McKelvey J said at [25]:

> [25] I have no difficulty in finding that this Court has inherent jurisdiction to order that a carriage motion proceed prior to certification. The inherent jurisdiction of this Court to control its processes and to manage litigation support this finding, as do sections 38 and 94 of *The Court of Queen's Bench Act*. Further, the case law…all demonstrate the practice of carriage motions preceding certification. This approach is primarily to streamline the process and speaks to the issue of judicial economy and access to justice…

30. In *Joel*, Hinkson J, as he then was, endorsed the "reasoned analyses" in both *Nelson* and *Grasby* (at [40]). He concluded at [41]:

> [41] The carriage motion in the *Joel* action must be heard to determine which [British Columbia] action should be certified, and which action should be stayed."[7]

38. This certainly amounts to a ringing endorsement of a practice of hearing carriage disputes as preliminary issues. However, at least from the material that the parties produced before us, the reasons for taking this course as articulated by the Canadian authorities we were shown are – if we may say so – the "usual" reasons advanced in support of preliminary issues, namely the saving of cost and time. We certainly do not seek to minimise the importance of these "usual" reasons – and we consider them below – but there is nothing in the Canadian case law we were shown to suggest that there is

[7] Emphasis supplied by the Judge citing the case.

anything particular about carriage disputes to render them especially suitable to be determined as preliminary issues.

(3) Two cautionary notes: Report of the Law Commission of Ontario

39. In light of this apparently ringing endorsement in favour of preliminary issues in the case-law, we sound two cautionary notes, both derived from the material presented to us by the parties. The first derives from the Final Report on Class Actions of the Law Commission of Ontario,[8] chapter 4 of which considers carriage disputes. Rather than quoting extensively from it, we append chapter 4 to this Judgment.[9] The following points emerge with some clarity.

(1) The present regime in Ontario is not regarded with universal approbation: "[c]lass actions stakeholders were universally critical of the current process". Chapter 4 does not actually describe the "current process" in Ontario, and it is not clear whether that process involves the use of preliminary issues as a matter of course. What is clear is that if it does, then the process does not work; and if it does not, then the use of preliminary issues for carriage disputes is not, without more, put forward as a panacea.

(2) The Law Commission of Ontario (the "LCO") considered two options for resolving the issues surrounding carriage disputes. The first was Quebec's "first-to-file" approach, whereby the proposed class representative that is the first to file has carriage, unless it can be shown that the first filing is in some way an abuse of process. The LCO, whilst noting that this option had its supporters in Quebec, did not recommend it, suggesting that it encouraged a "race to the courthouse" and "bad judgment".

(3) The second option, which the LCO viewed much more favourably, was a proposal by the Australian Law Reform Commission (the "ALRC"):

> "A second carriage model considered by the LCO was a variation of a proposal by the [ALRC] for addressing competing class actions in that jurisdiction. To ensure that carriage is determined as early as possible, the ALRC recommended

[8] Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms: Final Report* (Toronto: July 2019).
[9] See Annex 1 to this Judgment.

> mandatory deadlines in which competing firms are required to file a motion for a carriage order, resulting in a claims bar against subsequently filed actions.
>
> In the ALRC scheme, the filing of a class action would lead to the following steps:
>
> 1. Upon filing a class action, the first plaintiff firm would have to notify potential claimants and their lawyers that a class action had been commenced;
>
> 2. An order would then be made requiring potential claimants and their lawyers to initiate a competing action within a defined period of time (the ALRC recommended ninety days);
>
> 3. At the expiration of this time period, either no competing claims are launched, or a "selection hearing" is scheduled at which the court determines which representative applicant, lawyer and action go forward. Notably, the ALRC recommended that defendant not be involved in the selection hearing or have access to documents (like any funding agreement) that would give defendants a tactical advantage."

(4) It is fair to say that this description of the process implies a preliminary issue regarding carriage: but, like the case-law we have referred to, the necessity or desirability of this as a procedural course is not articulated by the LCO.

(5) The LCO made two further points in relation to this second option. First, that "[t]he LCO does not believe defendants can or should be barred from carriage proceedings". Secondly, that the factors for determining which representative should succeed in a carriage dispute were presently too complex and promoted uncertainty:

> "The LCO agrees that the current list of factors to determine carriage is too complex and promotes uncertainty. In these circumstances, there is a clear need for statutory direction to ensure courts and counsel are able to focus on the most important factors.
>
> The LCO recommends that that court's primary objective in carriage proceedings should be to select the firm that is most likely to advance the claims and interests of class members in an efficient and cost-effective manner. Adding such a provision to the CPA[10] would explicitly prioritize class member's interests and judicial economy in carriage proceedings.
>
> Unlike the ALRC, the LCO believes it is important to identify a limited number of statutory criteria to guide courts in their analysis of choosing between competing firms, including:
>
> - each firm's theory of each case;

[10] The Class Proceedings Act.

- the chances for success at certification and on the merits;
- the experience of counsel in class action litigation or the substantive area at issue; and
- funding and costs arrangements, including resources of counsel.

This approach will focus carriage proceedings on the most important criteria to distinguish between competing firms. The LCO acknowledges the risk that, over time, the list of factors considered by the court may expand through judicial decision-making. This risk is present, but not inevitable. The LCO is confident that courts will interpret these criteria wisely to determine carriage in favour of the firm best able to represent the class in an efficient and cost-effective manner."

(4) A second cautionary note: factors relevant to determining carriage disputes

40. The LCO noted the unsatisfactory complexity surrounding the factors relevant to determining carriage disputes.[11] The factors taken into account – at least in British Columbia – were described by MacDonald J in *Wong v. Marriott International Inc*:[12]

> "23. The question before me is which action is most likely to advance the interests of the class members, provide fairness to the defendants, and promote access to justice, behavior modification, and judicial economy…
>
> 24. In determining which action is in the best interests of the class, [British Columbia] courts consider a list of overlapping and non-exhaustive factors. The factors to consider in determining which action should proceed were set out by Perell J. in *Rogers v. Aphria Inc.*, 2019 ONSC 3698 at [17]:
>
> (1) The Quality of the Proposed Representative Plaintiffs;
> (2) Funding;
> (3) Fee and Consortium Agreements;
> (4) The Quality of Proposed Class Counsel;
> (5) Disqualifying Conflicts of Interest;
> (6) Relative Priority of Commencement of the Action;
> (7) Preparation and Readiness of the Action;
> (8) Preparation and Performance on Carriage Motion;
> (9) Case Theory;
> (10) Scope of Causes of Action;
> (11) Selection of Defendants;
> (12) Correlation of Plaintiffs and Defendants;
> (13) Class Definition;

[11] See paragraph 39(5) above.
[12] 2020 BCSC 55.

(14) Class Period;

(15) Prospect of Success: (Leave and) Certification;

(16) Prospect of Success against the Defendants; and

(17) Interrelationship of Class Actions in more than one Jurisdiction.

25. Different factors speak to different considerations on a carriage motion. As Perell J explained in *Rogers*:

> [18] It is useful to note that: factors (1) to (3) concern the qualifications of the proposed Representative Plaintiffs; factors (4) to (8) concern the qualifications of the proposed Class Counsel; and factors (9) to (17) concern the quality of the litigation plan for the proposed class action. Thus, nine of the factors are about or are connected to case theory, which is understandable, because at the very heart of the test for determining carriage is a qualitative and comparative analysis of the case theories of the rival Class Counsel."

41. It is difficult to take issue with this list of factors: all are clearly relevant to the evaluation of the respective merits of the alternative claimants pressing for carriage of the dispute. What is of interest is to see how these factors are evaluated by the Canadian courts when determining a carriage dispute as a preliminary issue. Taking *Wong* as an example, we see that the position is as follows:

Factor	**Determination of the Court**[13]
(1) **The Quality of the Proposed Representative Plaintiffs**	"I find this to be a minor factor in this carriage motion" (at [36])
(2) **Funding**	"Given the differences between [British Columbia] and Ontario, I place little weight on this factor" (at [42])
(3) **Fee and Consortium Agreements**	"Since all fees are reasonable in terms of the proposed classes, I place little weight on this factor. A lack of a clear mechanism to address conflicts between counsel in the [British Columbia] Consortium weighs against the Wong Action" (at [56])
(4) **The Quality of Proposed Class Counsel**	"I find this to be a neutral factor" (at [68])

[13] In all cases, emphasis supplied in the quotations.

(5) **Disqualifying Conflicts of Interest**	"I place no weight on these issues under this factor" (at [72])
(6) **Relative Priority of Commencement of the Action**	"Since the actions were brought within a relatively close period of time, I decline to give this factor any weight on this motion…" (at [73])
(7) **Preparation and Readiness of the Action**	"Preparation and readiness is not an overriding factor in a carriage hearing…All counsel demonstrate a considerable level of commitment to their actions. I place little weight on this factor" (at [78])
(8) **Preparation and Performance on the Carriage Motion**	"While not determinative, I place some weight on this factor" (at [81])
(9) **Case Theory**	"Krygier counsel argues the lack of understanding of the factual basis for the proposed class proceeding will ultimately make certification more difficult in the Wong and Sache Actions. This is not a certification hearing. At this stage it is neither possible nor appropriate for the court to embark on a detailed analysis of the merits of this class proceeding. The court should only consider whether there are "conspicuous or egregious problems" or "readily apparent advantages and disadvantages in the competing theories…I find this factor to be neutral" (at [82]-[83])
(10) **Scope of Causes of Action**	"At this stage it is inappropriate for this Court to determine whether each and every cause of action will ultimately succeed…The question is whether the causes of action are viable. All counsel provided reasonable rationales for the causes of action they have advanced. The one concern is that the Sache Action did not plead the [British Columbia] Privacy Act. I place some but little weight on this factor" (at [92]-[93])
(11) **Selection of Defendants**	"I find this factor to be neutral" (at [94])
(12) **Correlation of Plaintiffs and Defendants**	"I find this factor to be neutral" (at [95])

(13) **Proposed Class Definition**	"On a carriage motion courts should not delve too far into the merits. I do not find the different class definitions to be of much import in the current case. I find the class definition to be a neutral factor" (at [103])
(14) **Class period**	"It is a weakness of the Wong Action that the class definition does not bear a rational relationship to the common issues of all class members. Mindful that an over-inclusive class "can be pruned" and this issue is more problematic at the certification stage, I place some but not undue weight on this factor" (at [106])
(15) **Prospect of Success: (Leave and) Certification**	"It is not this Court's role on a carriage motion to embark on a detailed analysis of the merits of the different proceedings…Consequently, I find this factor to be neutral" (at [107])
(16) **Prospect of Success against the Defendants**	"While the proposed class proceedings may be scrutinized for "glaring deficiencies", it is inappropriate for this Court to undertake an analysis of which claim is most likely to succeed…Any analysis beyond "glaring deficiencies" is saved for the certification hearing…I therefore find this factor to be neutral" (at [108]-[109])
(17) **Interrelationship of Class Actions in More than one Jurisdiction**	"The interrelationship of class actions favours the Krygier Action. By granting carriage to the Krygier Action there will be a national class action…" (at [132])

42. Appreciating, of course, that this is but a single case, what is noteworthy is:

(1) First, how many of the seventeen factors are neutral, or minor, or of little weight because the proposals of the proposed class representative essentially cannot be differentiated by reference to these factors: see factors (1) to (7), (11) and (12).

(2) Secondly, how many factors are treated as neutral for the purposes of the carriage dispute, when it is clear they will be accorded much greater scrutiny at the certification stage, when however only the proposals of the proposed class representative who survives the carriage dispute will be considered: see factors (9), (10) and (13) to (16) . We leave on one side – for the moment – the extent to which, under the United Kingdom's rules, it is permissible to look at the

merits at the certification stage.[14] But it seems to us to border on the irrational – given that the object of a carriage dispute is to identify which representative will best represent the class in pressing the claims of that class – to leave out of account factors going to exactly that point at the carriage stage, when those same factors will (on our reading of the case-law) be considered at the certification stage. If these factors are relevant to certification, then they are even more relevant, as it seems to us, when it comes to the choice of class representative.

(5) Conclusions to be drawn

43. We are very conscious that we are not comparative lawyers, and that the parties gave us something of a whistle-stop tour of the Canadian jurisprudence as regards the hearing of carriage disputes as preliminary issues. It may be that there is far more to be said about the approach of the Canadian courts: if so, then this was not brought out at the hearing before us. Whilst we accept that, on the face of the material we were shown, the Canadian courts do generally hear carriage disputes as preliminary issues, we are not persuaded that we should – for that reason – necessarily follow the Canadian lead. It may very well be that the saving of costs and time is something that justifies this course: but that is a factor that we are perfectly capable of assessing for ourselves. Indeed, as we have noted, the saving of cost and time is the usual factor that is advanced in support of hearing a preliminary issue in cases very different from carriage disputes.

44. Nothing that the parties showed us persuaded us that there was something in the Canadian experience of handling carriage disputes that was so persuasive as to compel us automatically in favour of the preliminary issue route. To the contrary, the findings of the LCO suggest at least some dissatisfaction with the Canadian approach, and a need for reform. Moreover, our (admittedly extremely limited) review of how the Canadian courts approach the factors relevant to deciding who should (and who should not) have carriage strongly suggests to us that the price of determining a carriage dispute at the preliminary issue stage includes a risk of doing so without an understanding of matters that may be highly material.

[14] This is, as we describe further below, very much an open question, which the Supreme Court will have to grapple with in *Merricks*. Even then, the Supreme Court will be considering the Eligibility Condition without actually having a carriage dispute before it which may involve additional considerations.

G. AVOIDING DUPLICATION: SAVING OF TIME AND COSTS

45. The parties contended that the early elimination of one or other of the Applicants would save both the Applicants and the Respondents – and, indeed, the Tribunal – a great deal of time and money. Essentially, it was suggested, a relatively short hearing, heard relatively quickly, in June or July of this year, would:

    (1) "Knock-out" one or other of the Applicants. Whilst no doubt disappointing to the "knocked-out" Applicant, that Applicant would at least have the consolation of avoiding the cost- and time-spend of the later certification application, presently scheduled for March 2021.

    (2) Reduce the cost- and time-spend of the Respondents. Instead of multiple Respondents having to consider two, alternative, applications for certification, the Respondents could play a relatively passive role at the carriage dispute, and then focus their efforts on resisting the application of the (single) proposed class representative at the certification hearing. They would only have to consider a single application for certification; and the applicant losing the carriage dispute, whilst no doubt disappointed, would be spared the costs of preparing for certification.

46. We cannot dismiss these potential advantages in saving the cost and time of the unsuccessful applicant and the Respondents. But we are concerned that they may be overstated. The fact is that hearing carriage as a preliminary issue creates two hearings:

    (1) A hearing to determine carriage, which would essentially be concerned with the Authorisation Condition; and

    (2) A hearing to determine certification, which would essentially be concerned with the Eligibility Condition.

    Whilst we accept that the scope of each of these two hearings will be narrower than the scope of a single, combined hearing, generally speaking a single hearing will be cheaper than two (admittedly narrower in scope) hearings. We are not convinced that hearing the carriage dispute in advance of certification would necessarily produce any material savings of time and cost (other than for the losing carriage dispute applicant). Indeed, it is fair to say that we consider the notion of a preliminary issue to be borne out of the

(undoubtedly unfortunate) fact that the certification hearing cannot take place earlier than 2021. But that is not because of any intrinsic difficulty, in this case, in the question of certification, but simply because the Supreme Court's decision in *Merricks* needs to be considered before that hearing can take place.

47. Absent *Merricks*, we consider that the certification hearing could have been heard in June/July of this year, and perhaps even sooner. Considering a certification process that would not involve a *Merricks*-induced delay, it is altogether less clear what costs and time savings a preliminary issue would bring. An early certification hearing would certainly involve both Applicants and all of the Respondents, just as a carriage dispute would. We are not persuaded that hearing the carriage dispute as a preliminary issue would result in equivalent or greater savings of time or cost at the certification stage so as to make it the appropriate order in the present case in the light of the factors considered below. As we have noted, we suspect that two hearings will be more expensive (both in terms of time and cost) than one, and that proceeding by way of a single certification hearing is actually the more efficient course.

48. Of course, we appreciate that there is an inevitable inclination to fill the time between now and the certification hearing with "meaningful activity". We understand that delaying a hearing almost always involves additional cost. But we would want to make clear that the delay, in this case, is unavoidable, and that if and when it comes to considering the recovery of costs, the Tribunal will be astute to deny recovery of costs incurred simply because the certification hearing is taking place later than it would absent *Merricks*.

H. AVOIDING CONFUSION AMONGST PROPOSED CLASS MEMBERS AND THE RISK OF INFIGHTING

49. It is unsurprising that little evidence was led by the Applicants on this point, since clear articulation of such issues can only operate to the advantage of the Respondents. The point was therefore made by the Applicants somewhat in the abstract.

50. We do not consider this to be a significant point in favour of ordering a preliminary issue in relation to the carriage dispute. We consider that the Applicants have a responsibility to minimise the risk of infighting, and so confusion to the class members. Whilst it is tempting to lay down rules as to what a proposed class representative may

or may not say to those that they seek to represent, we choose not to do so. However, the manner in which a proposed class representative has conducted itself, in the run-up to a certification hearing, will in our judgment, be a material factor (as a part of the Authorisation Condition) to take into account.

I. AVOIDING UNDERMINING OR DELAYING ANY POTENTIAL ALTERNATIVE DISPUTE RESOLUTION

51. The Applicants contended that, whilst the question of carriage remained unresolved, it would not be possible for the Respondents to settle the potential claims against them. We are doubtful that the hearing of the carriage dispute will actually make very much difference to the prospects of settlement. We suspect that the question of settling this potential dispute will probably only arise once the question of certification (as opposed to carriage only) is resolved. If we are wrong about this, we note that section 49B CA 98 provides a procedure for settlement without a CPO having been made. Either way, therefore, the delayed determination of a carriage dispute is not necessarily a bar to a settlement, as the Applicants suggest.

52. We also consider that we need to be cautious when attaching weight to a factor like this. Whilst the courts obviously favour the early settlement of disputes, and will often provide windows in timetables to facilitate settlement discussions between the parties or mediation, the fact that settlement may be promoted should not in general otherwise influence the court in the way that it determines the procedural questions that arise before it. In short, the court should not be deterred from doing what is right in terms of case management by the fact that a different course might be more effective in promoting a settlement.

53. Of course, if the prospects of settlement <u>are</u> promoted by the course the court chooses to take, that is a material benefit, but it is not one that we consider, in this case, is a factor – one way or the other – in persuading us as to the appropriateness of ordering a preliminary issue.

J. THE CARRIAGE DISPUTE IS A DISCRETE MATTER CAPABLE OF BEING DETERMINED AS A PRELIMINARY ISSUE AT THIS STAGE OF THE PROCEEDINGS

(1) Introduction

54. Whilst we accept that we have jurisdiction to order that carriage be determined as a preliminary issue, we do not consider that it is appropriate to make such an order in this case. That is because we are of the view that the carriage dispute is not necessarily a discrete matter capable of being determined in advance of certification.

55. We consider that a carriage dispute can only be regarded as a discrete matter capable of being determined in advance of certification provided there is no interplay between the Eligibility Condition and the Authorisation Condition, which we described in paragraph 9 above. Whilst we consider this to be an arguable reading of the statutory provisions, we consider the contrary to be also arguable. Indeed, in the submissions before us it was, albeit without actually articulating the underlying question of construction, accepted by a number of counsel appearing before us that there was some form of interplay between the two Conditions.

56. We do not consider that it is appropriate to decide this question of construction at this stage. The point was not argued before us, and rightly so. It seems to us that precisely what the Eligibility Condition and the Authorisation Condition entail and how (if at all) they inter-relate, as a matter of law, is a matter that should be fully considered, in light of all of the evidence, at the certification hearing. Since it may be that, properly construed, there is a form of interplay between the two Conditions, such that the Eligibility Condition cannot properly be determined in the case of multiple proposed class representatives without also considering the Authorisation Condition (and *vice versa*), we consider that it would be wrong in principle to hear the carriage dispute as a preliminary issue at this stage in the development of the jurisprudence. We consider that, given the fact that the United Kingdom's collective proceedings regime is still in its infancy, with multiple novel questions being decided in this Tribunal and in the higher courts, it cannot rightly be said that the carriage dispute is a discrete matter capable of being determined in advance of certification.

57. The following paragraphs set out our understanding of the difficult issue of construction that lies before us. Again, we stress that we are not deciding the issue. However, the issue does need to be clearly articulated, because it affects the nature of the evidence that all of the parties – but particularly the Applicants – will have to adduce in due course on the hearing of the Applications in 2021.

(2) The relevant provisions

58. As we have noted, the CA 98 and the Tribunal Rules permit this Tribunal to make a CPO only when two conditions – the Eligibility Condition and the Authorisation Condition – are met.

59. The Authorisation Condition is stated in rule 78:

> "78.—(1) The Tribunal may authorise an applicant to act as the class representative—
>
> (a) whether or not the applicant is a class member, but
>
> (b) only if the Tribunal considers that it is just and reasonable for the applicant to act as a class representative in the collective proceedings.
>
> (2) In determining whether it is just and reasonable for the applicant to act as the class representative, the Tribunal shall 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 applicant seeking approval to act as the class representative in respect of the same claims, would be the most suitable;
>
> (d) will be able to pay the defendant's recoverable costs if ordered to do so;…
>
> (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 shall take into account all the circumstances, including—
>
> (a) whether the proposed class representative is a member of the class, and if so, its 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

(iii) any estimate of and details of arrangements as to costs, fees or disbursements which the Tribunal orders that the proposed class representative shall provide."

60. The Eligibility Condition is stated in rule 79:

"79.—(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 shall take into account all matters it thinks fit, including—

(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 nature of the class;

(e) whether it is possible to determine in respect of any person whether that person 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, including the availability of redress through voluntary schemes whether approved by the CMA under section 49C of the 1998 Act or otherwise.

(3) In determining whether collective proceedings should be opt-in or opt-out proceedings, the Tribunal may take into account all matters it thinks fit, including the following matters additional 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.

…

(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."

(3) Self-standing or inter-related?

61. The question is whether the Authorisation Condition and the Eligibility Condition can be determined entirely on their own terms and without reference to each other. To date, that question has not arisen before the courts, for the very good reason that this is the first carriage dispute under this regime, and it is when there are rival proposed class representatives that the issue of the interplay between the two Conditions arises most acutely.

62. As we have noted, the reason that the certification hearing is scheduled for 2021 and not much earlier is because *Merricks* is only due to be heard by the Supreme Court in May 2020. The question before the Supreme Court concerns the correct legal approach to the Eligibility Condition. The Court of Appeal stated the nature of the Eligibility Condition as follows:[15]

> "…a certification hearing is no different from any other interlocutory assessment of the prospects of success in litigation made before the completion of disclosure and the filing of evidence. Its purpose is to enable the CAT to be satisfied that (with the necessary evidence) the claims are suitable to proceed on a collective basis and that they raise the same, similar or related issues of fact or law; not that the claims are certain to succeed. The specific considerations relevant to suitability which are set out in rule 79(2) do not call for a different approach. None of them requires the CAT to be satisfied that the collective claim has more than a real prospect of success."

63. By contrast, the Tribunal adopted a more rigorous approach to certifying collective claims:[16]

> "An application for a CPO is not a mini-trial and the applicant does not have to establish his case in anything like the same way that he would at trial. However, the applicant has to do more than simply show he has an arguable case on the pleadings, as if, for example, he was facing an application to strike out. Collective proceedings on an opt-out basis can bring great benefits, if successful, for the class members which those individuals (or small businesses) otherwise could never achieve; but like almost all substantial competition claims they can be very burdensome and expensive for defendants. The eligibility conditions set out in section 47B(6) CA 98, and adumbrated in the CAT Rules, require the Tribunal to scrutinise an application for a CPO with particular care, to ensure that only appropriate cases go forward."

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[15] [2019] EWCA Civ 674 at [44].
[16] [2017] CAT 16 at [57].

64. It would be idle to speculate whether the Supreme Court will follow the test articulated by the Tribunal, by the Court of Appeal or formulate some third test. What can be said is that the Tribunal's more rigorous approach to ensuring that "only appropriate cases go forward" might well suggest that when deciding whether to make a CPO, the Tribunal must consider not merely the merits of the claims put forward by the proposed class representative in isolation, but in comparison with the merits of the claims put forward by rival proposed class representatives.

65. Indeed, even if the Supreme Court were to adopt the less rigorous standard articulated by the Court of Appeal – a test, essentially, of arguability – that does not necessarily mean that where there are rival proposed class representatives, the comparative merits of the rival claims fall out of account. After all, the Eligibility Condition obliges the Tribunal to be "satisfied by the proposed class representative"[17] that the claims sought to be advanced by that representative meet the eligibility criteria, which obliges the Tribunal to take account of "all matters it thinks fit". Thus, it seems to us perfectly possible for a test of basic arguability to determine whether a class representative is certified, but for a different (relative merits) test to apply when determining which of two or more proposed class representatives should be selected as the class representative.

66. Given that authorising the most appropriate representative is arguably the single most important issue for the represented class, since it directly determines the approach taken to the action that is being brought in their interests, it seems to us plausible that this reading of the statutory regime is the correct one.

67. On the other hand, there is much to be said for the contrary view and for reading the two Conditions as, in effect, self-standing and independent. Considering both the CA 98 and the Tribunal Rules, the two Conditions certainly appear to have been drafted quite deliberately as self-standing, independent, conditions. Of course, both need to be satisfied before a CPO can be made. But it does not follow from this that there needs to be any interplay between the Conditions themselves.

68. In this context, it is significant that rule 78 – which articulates the Authorisation Condition – says nothing about having regard to the strength of the claims that the

[17] To quote from rule 79(1).

proposed class representative wishes to bring. Rule 78 is much more concerned with the standing of the proposed class representative and his or her ability to manage the persons forming the class efficiently and capably. Even more significantly, rule 78 expressly envisages – in rule 78(2)(c) – a carriage dispute, and obliges the Tribunal to select as the class representative the applicant that would be "the most suitable". Whilst no doubt "suitable" could be read as embracing relative merits of claims between rival class representatives, the more natural meaning is that "suitable" is referring to the factors set out in rule 78 itself.

(4) The way forward

69. In these circumstances, it simply cannot now be said that the carriage dispute is, as a matter of law, a discrete matter capable of being determined as a preliminary issue. That may be the case, but it is not necessarily the case. In these circumstances, ordering that the carriage dispute be heard as a preliminary issue is inappropriate.

70. That is not to say that it is not possible to identify the sort of issues that can be determined as preliminary issues. It may be that a CPO application is so clearly defective that it cannot and should not survive all the way to a certification hearing. For example, the funding put in place may be obviously deficient; or the proposed representative plainly unsuitable; or the causes of action to be advanced self-evidently bad. These are all matters which might appropriately be dealt with in advance of the certification hearing. Equally, it is quite possible that a late application for a CPO – say, one made, without justification, days ahead of a certification hearing arranged to determine other, similar, applications – may be disposed of summarily because it is too disruptive of an on-going certification process and liable to cause unnecessary delay. However, these kinds of considerations do not apply in this case.

71. We have considered whether it would be appropriate to decide the legal issue we have articulated but not answered in paragraphs 61-68 above as a preliminary issue itself. That, too, we consider to be inappropriate. In the first place, the likelihood of our answer being appealed (whatever that answer might be) seems to us to be very high. An appeal would inevitably mean that the certification hearing would not take place in March 2021, but at least a year later.

72. Secondly, where the courts are feeling their way as to how a new jurisdiction operates, it is in our view better to consider issues in the round, and not in isolation. We consider that the manner in which issues concerning carriage disputes and certification are resolved is best explored, not in the abstract, but in the light of the facts and the evidence.

73. It follows from this that the Applicants will have to adduce evidence, not merely going to the factors identified in rule 78 and rule 79 (as explained by *Merricks*), but also evidence going to what we call the relative merits of the O'Higgins and Evans Applications. It may be that this evidence ultimately proves to be unnecessary: but that will not be known until the certification hearing is determined.

K. OTHER MATTERS RELEVANT TO THE QUESTION OF A PRELIMINARY ISSUE

74. There are two, other, factors relevant to our consideration, which we mention for completeness' sake:

(1) Were we to hear the carriage dispute as a preliminary issue, there is a risk that whoever lost would seek to appeal. It is not possible to assess the probability of this, but the risk is well above the fanciful. Were there to be an appeal, the certification hearing presently listed for March 2021 would not be able to take place.

(2) The certification hearing was listed for March 2021 because of the forthcoming *Merricks* appeal. Otherwise – as we have stated – the certification hearing would have been listed far earlier. In his submissions, Mr Jowell QC (counsel in the O'Higgins Application) accepted that were a preliminary issue on carriage to be heard in July 2020, there was a risk that the parties might have to make further submissions to this Tribunal on the question of carriage in light of whatever the Supreme Court said in *Merricks*. Again, one cannot speculate, but the risk of this is again well above the fanciful. It follows, in our view, that for precisely the same reason that we are hearing certification in March 2021, we ought not to hear a preliminary issue on carriage before that date.

L. CONCLUSION

75. We have come to the clear conclusion that, because of the novel questions that the carriage dispute gives rise to, the carriage dispute should not be determined as a preliminary issue in this case, but that there should be a single substantive hearing, taking place in March 2021, deciding both whether a CPO should be made at all and, if so, to which class representative.

76. For the reasons given in Section J above, the question of the inter-relationship between the Eligibility Condition and the Authorisation Condition is one yet to be determined, and not without its difficulties. If – and we stress again that we are not deciding this question – there is such an inter-relationship, then we see considerable difficulties in determining a carriage dispute in advance of certification. On the other hand, if the two Conditions are entirely self-contained, and one can be considered and determined without the other being before the Tribunal, then carriage as a preliminary issue becomes altogether more feasible.

77. It is because we consider that the question of the inter-relationship between the two Conditions should be considered and determined at the March 2021 hearing that we reject the application for carriage to be heard as a preliminary issue. We do not consider that this approach condemns all future carriage disputes to be heard alongside the question of certification. As we have noted, how carriage disputes are heard will turn, we consider in substantial part, on the questions we have posed but not answered in Section J above.

78. For this reason, the other factors put forward by the Applicants in support of a preliminary issue on carriage take something of a back seat. Given the issues identified in Section J above, we do not need to answer the question whether the factors identified by the parties absent the issues in Section J would have been sufficient to justify hearing carriage as a preliminary issue.

79. For the reasons given in this Judgment, we refuse to order that the carriage dispute be heard as a preliminary issue.

The Hon Mr Justice Marcus Smith
Chairman

Paul Lomas

Prof Anthony Neuberger

Charles Dhanowa OBE, QC (*Hon*)
Registrar

Date: 6 March 2020

ANNEX 1

CLASS ACTIONS

Objectives, Experiences and Reforms

FINAL REPORT • JULY 2019

LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

CLASS ACTIONS

Objectives, Experiences and Reforms

Final Report

July, 2019

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COMMISSION DU DROIT DE L'ONTARIO

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CONTENTS

Chapter Four
CARRIAGE

A. Introduction

Carriage motions are important events in class action litigation. Multiple statements of claim are often filed in Ontario against the same defendants on behalf of the same, or overlapping, classes seeking identical or similar remedies. In these circumstances, competing class counsel firms must either negotiate an agreement amongst themselves or seek an order designating a firm with carriage of the matter.

There was a strong belief on the part of class action stakeholders that the system for determining carriage in Ontario is inefficient and unpredictable. This is because carriage fights cause delay, increase costs, and create uncertainty for both the competing plaintiff firms and defendants. For example, a plaintiff firm may invest significant time and resources on behalf of a prospective class that is ultimately wasted and uncompensated. Defendants may be forced to defend multiple, substantially-similar claims initiated months, or years, apart.

The LCO repeatedly heard that there is a lack of predictability and finality in judicial decision-making at both the initial motion and during the lengthy appeal process. This process consumes substantial private and public resources. For these reasons alone, addressing carriage is an important judicial economy priority for the LCO.

Carriage also has important access to justice consequences for the potential class and class members. Carriage motions compel courts to decide between competing plaintiff firms. Not all firms are created equal, nor are all firms skilled in either class action litigation or the substantive law of the matter being litigated. Carriage, therefore, has significant implications for the quality of class representation.

The LCO has concluded that the *CPA* needs dedicated new provisions to better manage and focus carriage hearings in Ontario. The objective of these provisions should be to promote high-quality representation for class members and judicial efficiency, predictability and finality in carriage decisions. These amendments should include:

- Provisions establishing a dedicated process and timetable for determining carriage;
- New, simpler criteria for courts to use when deciding between competing firms;
- Provisions that ensure carriage orders are final; and,
- Rules respecting the costs of carriage motions.

B. The *CPA*

The *CPA* does not have dedicated carriage provisions. At present, a motion to determine carriage is brought by one of the competing class counsel firms, or by a defendant, pursuant to sections 12 and 13 of the *CPA*. Section 12 states that a judge may make "any order to ensure the fair and expeditious determination" of a proceeding. Under s. 13, a court can "stay any proceeding related to the class proceeding".[54]

The initial test for determining carriage was laid out in *Vitapharm v. Hoffman-LaRoche*, where the court identified six factors to be considered in appointing solicitor of record for the class:

- The nature and scope of the causes of action advanced;
- The theories advanced by counsel as being supportive of the claims advanced;
- The state of each class action;
- The number, size and extent of involvement of the proposed representative plaintiffs;
- The relative priority of commencing the class actions; and
- The resources and experiences of counsel.[55]

The list was subsequently expanded by various courts. The factors now also include:

- Funding;
- Definition of class membership;
- Definition of class period;
- Joinder of defendants;
- Correlation between the plaintiff and defendant;
- Prospects for certification;
- Prospects for success at trial; and
- Relationship with actions in other jurisdictions.[56]

Needless to say, this list is comprehensive. In practice, it appears that no single factor predominates, and courts have generally focused on the best interests of the class.[57] Notably, courts have been unwilling to assess the relative quality of each legal team, stating that the motion is not a "beauty pageant".[58]

C. Analysis

Class actions stakeholders were universally critical of the current process.

Interveners commented that the existing carriage process "does not work",[59] it is "unseemly" [60] and one of "the thorniest issues" [61] or "the most difficult aspect" [62] of Ontario's class action regime. Plaintiffs counsel pointed to the uncertainty of the carriage test as a significant problem in the litigation, and that this leads to "unnecessary partnerships with firms in order to ward off carriage risks." More generally, counsel state that these disputes do not serve class members and may in fact help the defendants (because they are present at the motion and get insight into the theory and strategy of the plaintiff's case).[63] Defence counsel also decry the wasted resources that inevitably accrue in defending against multiple class actions.[64]

The most obvious consequence of carriage battles is that they cause delay. Stakeholders advised that negotiations, preparation of materials and argument of carriage motions add roughly one year to the life of a class action.[65] When the carriage order is appealed, the delay is prolonged by another six months or more. In the interim, meaningful progress in the litigation is unlikely. Infighting between counsel does not serve class members.

For competing plaintiff firms, and especially for the firms who are ultimately not awarded carriage, the carriage fight wastes resources. Costs of the motion are usually borne by counsel.

The uncertainty of who will be awarded carriage can also act as a deterrent for reputable firms considering a potential action. This is particularly problematic where one or more of the competing firms files an action with the sole aim of extracting a fee. The LCO agrees that

> *"...[c]ommencing a class action with no intention of actively pursuing it is an abuse of the class action procedure because it acts as a disincentive to the commencement of actions by other counsel and plaintiffs who are, in fact, ready, willing and able to proceed with the prosecution of the action."* [66]

Stakeholders stated that the current procedure for determining carriage does not effectively deter such abusive conduct.

Because defendants are at the carriage motion (though they usually make no submissions), they get an unusual opportunity to learn about class counsel's litigation strategy. Plaintiffs' counsel perceive defendants' presence at the motion to give defendants an unfair advantage.

Due to all of these disadvantages, there is pressure on competing class counsel firms to avoid a motion and to consent to consortiums. While not inherently bad for class members, consortiums can increase the cost of litigation (whether recouped from unsuccessful defendants or paid by class members by way of fees) due to duplication of effort and over-lawyering.

The cost and unpredictability of carriage battles also create perverse incentives for counsel to engage in potentially unethical behaviour. In *Bancroft-Snell v. Visa*, class counsel entered into a fee sharing agreement with a firm in Western Canada, to avoid a protracted carriage fight.[67] The late filing of the competing class action impeded settlement discussions, and class counsel made the economically rational decision to pay the competitor its investment in the actions out of the settlement proceeds, even though nothing had been achieved for the class, in exchange for the competitor staying its rival actions. The Court of Appeal described this practice as "buying off" competitors in order to settle carriage, and noted that "fee-sharing agreements between competing law firms to avoid litigation over who has carriage of a class action are becoming more common in the industry."[68] Ultimately, the Court of Appeal held that carriage settlements may be inevitable and come at a cost, but it is a cost to be borne by class counsel, not by the class either indirectly through a marked up contingency fee or directly from the proceeds of settlement.

The LCO agrees with the Court of Appeal that "competing actions [...] provide little or no benefit to the members of the class" and that carriage motions ought to be discouraged.[69]

1. Options for Discussion

In light of these circumstances, the LCO believes that statutory amendments are needed to bring greater focus, predictability and finality to carriage hearings. In reviewing the procedure for determining carriage in other jurisdictions, at least two options present themselves. The first option is the "first to file" approach used in Québec. The second is inspired by the Australian Law Reform Commission's (ALRC) proposed amendments to the Australian federal class action regime.[70] The LCO considers both options below.

Québec's First-to-File Rule

Québec's first-to-file rule arose in 1999 in order to efficiently address competing class actions filed by different firms regarding the same subject matter.[71] It was justified as a more reasonable approach in circumstances where perfection in representation is not required.[72] While efficient, the rule has distinct disadvantages in that it potentially promotes a race to the courthouse and hastily drafted, poorly researched actions.

Such were the facts in *Schmidt*.[73] In this case, the plaintiff filed proceedings in several provinces simply to occupy the field without properly pleading a cause of action. The Court of Appeal did not adopt the common law approach to carriage motions, but also confirmed the court's discretion to depart from the first to file rule where, on the face of the record, it would not be in the interests of the proposed class.

The Court of Appeal thus rejected a rigid application of first-to-file, and modified rules as follows:

1. The first motion for authorization to be filed will, in principle, be the first to be heard;
2. Subsequent motions will be stayed and will proceed only if the first-class action is not authorized;
3. The priority of the first motion may be challenged by lawyers litigating the subsequent class actions; and
4. The onus is on the lawyers in the subsequent cases to show that the first action constitutes an abuse of the first-to-file rule and is not in the best interests of the class.
5. Judges considering motions challenging should not use as criteria the level of preparation, resources or experience of counsel, which involve a highly discretionary and largely subjective excuse. [74]

Québec's first to file rule is controversial. The Ontario-based stakeholders consulted by the LCO universally rejected this approach, believing that this model encourages a "race to the courthouse" and bad judgment, without regard to the best interests of class members.[75] Experts in Québec, however, advised the LCO that the post-*Schmidt* rule has proven efficient and effective in practice.

The ALRC Model: Mandatory Notice, Fixed Deadline

A second carriage model considered by the LCO was a variation of a proposal by the Australian Law Reform Commission (ALRC) for addressing competing class actions in that jurisdiction. To ensure that carriage is determined as early as possible,

the ALRC recommended mandatory deadlines in which competing firms are required to file a motion for a carriage order, resulting in a claims bar against subsequently filed actions.

In the ALRC scheme, the filing of a class action would lead to the following steps:

1. Upon filing a class action, the first plaintiff firm would have to notify potential claimants and their lawyers that a class action had been commenced;
2. An order would then be made requiring potential claimants and their lawyers to initiate a competing action within a defined period of time (the ALRC recommended ninety days);
3. At the expiration of this time period, either no competing claims are launched, or a "selection hearing" is scheduled at which the court determines which representative applicant, lawyer and action go forward.[76] Notably, the ALRC recommended that defendant not be involved in the selection hearing or have access to documents (like any funding agreement) that would give defendants a tactical advantage.[77]

2. Comparing the Options

Key informants from Québec advised the LCO the first-to-file rule operates much differently in practice than Ontario stakeholders might believe. They advised the LCO that there is considerable merit in the Québec approach. Nevertheless, the LCO believes the Québec rule may not be well suited for Ontario for the following reasons:

- the timing and structure of Québec's authorization process is different than Ontario's certification process;
- the first to file rule's "abuse" test is a very high legal standard that provides a considerable advantage to the first filing firm, irrespective of whether there are equally, or more, capable subsequent filers;
- the LCO remains concerned about the potential risk of encouraging a race to the courthouse, rather than high quality claims; and,
- Although the LCO has come to appreciate many benefits of the first-to-file rule, particularly post-*Schmidt*, it is nonetheless important that virtually all of Ontario's class action stakeholders have rejected this approach.

The LCO sees considerable promise in the second option. The procedure does not over-weight speed of filing in carriage determinations. Rather, the ALRC model provides a structured – though time-limited – opportunity for two or more plaintiff firms to prove to the court why their firm is best suited to represent the class. In this manner, the ALRC model balances the interests of class members (and the court) in identifying the most capable legal representation with the need for expediency and certainty in carriage decisions. The ALRC model also establishes a level-playing field between plaintiff firms who can and should be encouraged to compete on the basis of the quality of their representation, not the speed of their filings. The final and significant advantage to the ALRC model is that it deters late, opportunistic filings and the resulting pressure to pay off competing firms.

From an Ontario perspective, an important criticism of the ALRC approach is the requirement that the initial filing firm notify potential competitors of the action. There is a concern that an equivalent process in Ontario would encourage or promote "copycat" claims. The LCO believes that this is a legitimate concern that suggests adaptation, not rejection, of an ALRC-based approach.

Most importantly, copycat claims can be vetted through active case management. Pleadings that are virtually identical to earlier pleadings are easily detectable. The factors for choosing between firms, explored below, do not favour opportunitistic counsel who have a track record of bringing such claims, or who have invested little in the case at bar.

3. Factors for Choosing Between Firms

As noted above, courts in Ontario have identified up to 14 different factors for determining which firm should be appointed to represent the class in a carriage proceeding. By way of contrast, the ALRC rejected a multi-factorial list of considerations on the basis that it can be unwieldy. Instead, the ALRC proposed two guiding principles: courts must choose "the proceeding that best advances the claims and interest of group members in an efficient and cost-effective manner" and must consider "the stated preferences of the group members".[78]

The LCO agrees that the current list of factors to determine carriage is too complex and promotes uncertainty. In these circumstances, there is a clear need for statutory direction to ensure courts and counsel are able to focus on the most important factors.

The LCO recommends that that court's primary objective in carriage proceedings should be to select the firm that is most likely to advance the claims and interests of class members in an efficient and cost-effective manner. Adding such a provision to the *CPA* would explicitly prioritize class member's interests and judicial economy in carriage proceedings.

Unlike the ALRC, the LCO believes it is important to identify a limited number of statutory criteria to guide courts in their analysis of choosing between competing firms, including:

- each firm's theory of each case;
- the chances for success at certification and on the merits;
- the experience of counsel in class action litigation or the substantive area at issue; and,
- funding and costs arrangements, including resources of counsel.

This approach will focus carriage proceedings on the most important criteria to distinguish between competing firms. The LCO acknowledges the risk that, over time, the list of factors considered by the court may expand through judicial decision-making. This risk is present, but not inevitable. The LCO is confident that courts will interpret these criteria wisely to determine carriage in favour of the firm best able to represent the class in an efficient and cost-effective manner.

The first criteria (theory of the case), second criteria (chances for success) and fourth criteria (funding) reflect the prevailing view of courts and plaintiff counsel about the appropriate criteria to decide carriage motions. These are common sense, necessary and legally appropriate factors for the court's consideration.

The LCO's third proposed criteria ("experience of counsel in class action litigation and in the substantive area at issue") requires further explanation. There is no question that "experience of counsel" must be a fundamental consideration in carriage proceedings. The LCO believes, however, that "experience of counsel" requires further statutory elaboration. In our view, there is a risk that "experience of counsel" will be interpreted *exclusively* as meaning experience of counsel *in class action litigation*. If so, the statute could effectively bar new entrants to the plaintiff class action "marketplace," including small or emerging firms that have specialized experience and/or a mandate in the substantive area of law at issue. Permanent, statutory privileging of a small number of existing plaintiff firms cannot be justified on public policy or access to justice grounds. As a result, the LCO believes the statute should explicitely state that courts should consider both class action experience and experience in the substantive area of law at issue. "Experience of counsel" should also be interpreted broadly to incude consideration of their past cases, the outcomes of those cases (including take-up rate information where available), length of time to resolution, and so on.

In the past, some courts have worried about turning carriage motions into a "beauty contest." This concern, while understandable, should perhaps be updated in light of the importance of the court's role in evaluating competing firms on carriage motions. The quality of plaintiff counsel is directly related to all three class action objectives: access to justice, judicial economy, and behaviour modification. The importance of the court's decision on carriage matters is further heightened given the LCO's recommendation regarding appeals of carriage orders, discussed below.

4. Case Management

In addition to the statutory reforms proposed above, the LCO strongly encourages courts to case manage carriage proceedings proactively. The LCO's carriage recommendations are designed to focus the court's discretion on the best interests of the class and judicial economy, the most significant carriage issues. These reforms will only be successful, however, if they are combined with assertive case management and judicial decision-making that weeds out "copy cat" or extortive claims. Courts should consider using pre-carriage case management conferences and/or cost orders to prevent this behaviour. Courts could also choose, in some circumstances, to decline to hold a carriage motion.

5. Defendants at Carriage Motion

Several plaintiffs' counsel submitted that defendants' counsel should not be present at the carriage hearing as the hearing gives a defendant insight into plaintiffs' legal strategies and resources.[79]

The LCO does not believe defendants can or should be barred from carriage proceedings. There is no way to exclude the defendant without offending the open court principle. That said, the current practice of redacting funding agreements for disclosure to defendants can be adapted to carriage motions to address concerns about giving defendants an unfair preview of the plaintiff's strategy. For example, documents filed on the carriage motion could be redacted but still made available in full to inquiring class members on a confidential basis. The details of this process are best addressed in the Practice Direction we recommend for class actions in Ontario.

6. Carriage Motion Judge

Many stakeholders advised the LCO that it is not appropriate for the case management judge to hear the carriage motion. In this view, judges can become too wedded to the successful claim or uncomfortable choosing between counsel or firms who appear before them frequently.

The LCO believes this is a reasonable concern that could be reflected in the Practice Direction we propose, subject to two qualifications: first, while it may be preferable for non-case management judges to hear carriage motions, this concern must be balanced with the need for expediency. Second, we believe there is a need for consistent training for courts considering carriage motions, as will be discussed below.

7. Appeals

Several stakeholders recommended that the carriage order be final, and not subject to any appeal rights.[80] There is merit to this proposal. As class membership inevitably overlaps between competing actions, class members do not lose their rights when one firm is chosen over another. There is no significant unfairness, therefore, to removing rights of appeal from the unsuccessful law firm in a carriage fight. This amendment would reduce delay and significantly reduce costs to firms and to the court system.

8. Costs

The practice to date has been for judges to not award costs of the carriage motion to the successful firm. This practice makes sense. Courts, however, do not always stipulate that the successful firm's costs are not to be passed on to the class. As a result, the *CPA* should be amended to specify that costs of carriage motions cannot to be recouped by class counsel from class members.

9. Judicial Training

Finally, the LCO sees considerable merit in the development of consistent training for courts considering carriage motions. This guidance could perhaps be developed through the National Judicial Institute. The need for this training would be acute if non-class action specialist judges are hearing carriage motions, as discussed above.

Recommendations

Carriage Motions

6. The LCO recommends the *Act* be amended to add specific provisions addressing carriage of class actions. The provisions should specify that:
   - A party filing a class action is required to register the action with the CBA Class Action Registry concurrently;
   - A carriage motion by competing firms must be brought within sixty days of the issuance of the first action;
   - If a carriage motion is filed, it should be heard as soon as the court schedule permits;
   - The court's objective in carriage proceedings is to identify the firm that best advances the claims and interest of group members in an efficient and cost-effective manner. As part of this process, the court should consider:
     - each firm's theory of the case;
     - the chances for success at certification and on the merits;
     - the expertise and experience of counsel in class action litigation or the substantive area of law at issue; and,
     - funding and costs arrangements, including the resources of counsel.

Claims Bar

7. The LCO recommends that the *Act* be amended to specify that an order determining which firm has carriage for the case will include a claims bar.

No Appeal of Carriage Decisions

8. The LCO recommends the *Act* be amended to specify that carriage orders are final and cannot be appealed.

Costs

9. The LCO recommends the *Act* be amended to specify that costs of carriage motions are not to be recouped by class counsel from the class.

Carriage Motion Judge

10. The LCO recommends that carriage motions not be heard by the case management judge overseeing a class action.

Judicial Training

11. The LCO recommends the development of uniform or consistent guidance/training for courts considering carriage motions.