**Which?, 2 Marylebone Road, London, NW1 4DF**
**Date: 30 March 2015**
**Response by:** Kate Wellington, Senior Lawyer, Policy Advocacy and Enforcement

# Consultation Response

*Sandra McNeish*
*Consumer and Competition Policy*
*Department for Business Innovation & Skills*
*3rd Floor, 1 Victoria Street*
*London SW1H 0ET*

## Competition Appeal Tribunal (CAT) Rules of Procedure

### 1. Introduction

Which? is the largest consumer organisation in Europe with over 800,000 members. We operate as an independent, a-political, social enterprise working for all consumers and are funded solely by our commercial ventures. We receive no government money, public donations, or other fundraising income. Which?'s mission is to make individuals as powerful as the organisations they have to deal with in their daily lives, by empowering them to make informed decisions and by campaigning to make people's lives fairer, simpler and safer.

Which? is the only representative body currently designated under section 47B of the Competition Act 1998 to bring collective actions on behalf of named consumers who have suffered loss through an infringement of UK or EU competition law. In 2007, Which? brought a collective action against JJB Sports on the basis that it had unlawfully fixed the price of replica football shirts. Which? settled that case and was able to provide compensation for a group of consumers who had been victims of the infringement. However, we also identified significant hurdles presented by the existing opt-in regime for collective redress.

Our experience in the JJB Sports case provided evidence of the need for an opt-out regime, which is being introduced by Schedule 8 of the Consumer Rights Act 2015. We are keen to see that the new regime is implemented effectively, allowing collective actions to be brought and resolved efficiently in practice and ensuring that victims of competition law infringements can obtain the compensation to which they are entitled in a timely manner at proportionate cost. The amended CAT Rules will be a key element in ensuring that is possible.

### 2. Summary of our response

Our response focuses on those aspects of the CAT Rules that will have an impact on the collective actions regime. We support the introduction of detailed procedural rules to govern collective actions and believe that on the whole the current proposals strike a good balance between the need for flexibility on the one hand and certainty on the other.

However, we are concerned that some aspects of the proposed Rules will create difficulties in practice. In particular:

- While we agree that certification of collective actions can provide a valuable safeguard against abuse of the regime, introducing a merits assessment as a gateway to bringing opt-out collective actions will create an unnecessary barrier to justice and import cost and delay into collective proceedings.
- Clarification is needed as to which "costs and benefits" of a collective action the CAT should take into account in certifying claims.
- The introduction of the term "common issues" into the Rules is unhelpful. It further muddies the waters as to how the already ambiguous "same, similar or related issues" test will be interpreted.
- If formal settlement offers are not excluded from the collective actions regime, special provision needs to be made to ensure they work effectively in this context given the unique nature of the proceedings and the unique role of the representative.
- The timing of funding orders and jurisdiction challenges should be reviewed to enable the parties to more accurately calculate and account for risk, and to ensure that costs are not wasted in litigating issues unnecessarily.
- The ability for class members to make individual applications throughout the proceedings needs to be balanced against the underlying purpose of representative actions; namely, timely and cost-effective access to justice for the class as a whole as well as procedural efficiency.

## 3. Consultation questions

Which? does not have comments in relation to questions 1 to 17 at the current time.

**Q18: Should Government introduce a presumption into the rules that organisations that offer legal services, special purpose vehicles and third party funders should not be able to bring cases?**

As the consultation document sets out, the Government intends to introduce a rebuttable presumption into the Rules to ensure that collective actions are not brought by law firms, third party funders or special purpose vehicles. In our view, this is not strictly necessary given that the CAT may already take into account whether a proposed representative is a pre-existing body, and the nature and functions of that body (Rule 77(3)(b)). But we do see the merit in making the policy intention clear via an express provision.

If the Government considers it preferable to introduce a presumption, it would be helpful to also include an express provision giving effect to the policy intention in paragraph 7.7 of the consultation document. That is: an express provision that the CAT may override the presumption in circumstances it deems appropriate, including where a genuine representative body offers legal advice (of the kind offered by Which?, Citizens Advice or the Federation of Small Businesses).

Without an express provision to this effect, there is likely to be uncertainty as to the degree of evidence and argument required to rebut the presumption, and there is a risk that in time the underlying policy intention will be lost.

**Q19: What are your views on the proposed certification criteria, in particular the tests on: assessing the strength of the claim and the availability of alternative dispute resolution?**

Which? agrees that certification of collective actions can act as a legitimate safeguard, ensuring that opt-out actions are available only in appropriate cases. However, it is equally important that the certification process does not act as a barrier to effective redress. We are concerned that several aspects of the proposed certification process will generate uncertainty and cost, undermining the efficient operation of the regime.

Assessing the strength of the claims

Rule 78(3)(a): *In determining whether collective proceedings should be opt-in or opt-out proceedings, the Tribunal will take into account all matters it thinks fit, including but not limited to … the strength of the claims.*

This Rule appears to require a collective action to meet an undefined merits threshold before access to opt-out proceedings will be available.

Experience shows that a merits test at the interlocutory stage of a collective action can generate considerable cost and delay. A merits test has been read into the US regime since (at least) the Supreme Court's decision in *Wal-Mart v Dukes*.[1] Important lessons can be learned from that jurisdiction.

There has been considerable debate in the US courts as to whether the underlying merits of a collective action should be assessed in the course of determining whether common questions of fact or law arise. The Supreme Court in *Wal-Mart* determined that the merits of the claim *should* be considered, and held that "significant proof" of the common question(s) of law or fact is required. The plaintiff class in *Wal-Mart* adduced considerable evidence in pursuit of this requirement, including statistical evidence, factual witness evidence of class members (120 separate affidavits) and an expert report. Wal-Mart adduced similar evidence in reply.

This approach has the effect of turning what should be an interlocutory stage into a mini-hearing of the substantive case, muddying and prolonging the certification process and increasing costs for all parties. The motion for class certification was first filed on 28 April 2003 in *Wal-Mart*. The Supreme Court handed down its judgment, which considered nothing other than certification, on 20 June 2011. The parties were embroiled in interlocutory litigation for over eight years.

[1] *Wal-Mart Stores Inc v Dukes* 131 S.Ct. 2541 (2011).

Many of the safeguards introduced in the UK regime will help to prevent the perceived excesses of the US class action system. But imposing a preliminary merits test risks doing just the opposite; it has the potential to import one of the least helpful and most costly aspects of the US system into our own, undermining the goal of achieving a streamlined and efficient certification process.

To date, the Government has chosen not to include a merits assessment in the certification criteria for opt-out proceedings. We agree with that approach. There is nothing in the consultation document that suggests why a merits test is necessary or that the concerns set out here will be ameliorated in some other way.

If (contrary to our view) a merits test does appear in the Rules as a barrier to opt-out actions, we believe it should be made clear that such test will be satisfied in follow-on cases by the existence of a binding infringement decision. The EU Directive on Antitrust Damages Actions[2] (which was signed into law in November 2014 and must now be implemented in the UK) includes the following provision:

> "It shall be presumed that cartel infringements cause harm." (Article 17)

This means that in follow-on cases (i) liability will already have been established (via the infringement decision) and (ii) it can be presumed that the represented group suffered loss. This should be more than sufficient to demonstrate that a collective action has merit on its face. A detailed assessment of quantum of loss and passing on would then follow in the usual way, if the claim met all the other tests for certification. Expressly setting this out in the Rules will go some way to mitigating the detrimental impacts of the proposed preliminary merits test.

<u>The availability of ADR</u>

Rule 78(2)(b): *In determining whether the claims are suitable to be brought in collective proceedings … the Tribunal will take into account … the availability of alternative dispute resolution* [ADR] *and any other means of resolving the dispute*.

We agree that ADR (including the collective settlements regime and CMA-approved voluntary redress schemes) is an important part of the overall package of reforms introduced by Schedule 8 of the Consumer Rights Act. ADR should be considered in all cases. And given the inherent cost and risk of bringing and defending formal collective proceedings, we have little doubt that it will be.

However, ADR will only be successful if the parties are properly incentivised to resolve a dispute without involving the court (or CAT). To this end, ADR must be underpinned by an efficient and credible formal procedure to act as a "back stop". If the requirement in Rule 78(2)(b) is interpreted as meaning that where any other means of dispute resolution is

[2] Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

available then the applicant will not have access to resolution through the CAT, this will undermine the credibility of the formal route, and remove the incentive to settle out of court to avoid formal proceedings.

While we do not object to the policy underpinning this criterion, we believe the CAT should be required to take into account whether ADR has been attempted or is otherwise feasible (or similar), as opposed to its "availability". ADR will always be "available" (the representative or the underlying claimants are always free to mediate or negotiate with the defendants, for example). Whether it is feasible is the more poignant question.

Suitability and the "costs and benefits" of collective proceedings

Rule 78(2)(b): *In determining whether the claims are suitable to be brought in collective proceedings … the Tribunal will take into account … the costs and the benefits of continuing collective proceedings.*

We are not sure what is meant by "the costs and benefits" of collective proceedings in this context.

One interpretation of this criterion is that it raises a philosophical or jurisprudential question about the costs and benefits to society of collective redress as a concept. If that is the intended interpretation, then in our view this is an irrelevant consideration; such debate has already been had with the outcome that a collective redress regime was thought appropriate as a matter of Government policy.

If this isn't the intended interpretation, then what costs and benefits will be taken into account? The costs and benefits to whom, if not society at large? Costs and benefits to the parties? There will always be more benefit than cost to represented individuals, and more cost than benefit to infringers, of continuing collective proceedings after the certification stage. Whose interests will be preferred?

As drafted, we are very concerned that the ambiguity of Rule 78(2)(b) will generate significant cost and delay as parties argue about its meaning. One option might be to clarify the drafting to answer the questions posed above. However, in circumstances where the other suitability criteria in Rules 78(2) and 78(3) are comprehensive – and include a requirement that "collective proceedings are an appropriate means for the fair and efficient resolution" of the claims – in our view this additional "costs and benefits" criterion is unnecessary as well as unhelpful, and would best be removed.

Same, similar or related issues of fact or law

Rule 72(2)(j): *"common issues" means the same, similar or related issues of fact or law.*

Rule 78(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 … raise common issues.*

The Consumer Rights Act provides that claims joined in collective proceedings must raise the same, similar or related issues of fact or law. The Rules seek to abridge this formula by introducing the concept of "common issues".

We remain concerned by the requirement in the Act to show that claims brought together as collective proceedings raise "the same, similar or related issues"; we believe this imports considerable uncertainty into the certification process, as seen in other contexts (such as the existing but largely redundant regime in the Civil Procedure Rules (CPR)[3] or the US regime). The additional concept of "common issues" compounds this issue by:

- Increasing the uncertainty surrounding an already nebulous test.
    - The new definition moves us closer to the US position. The US certification process is based on a requirement to demonstrate issues of fact or law "common to" the class. We are concerned that use of the same language will import all of the challenges that the US has encountered with that test.
- Increasing the likelihood of the test being construed unduly narrowly.
    - The word "common" is arguably more akin to "same" or "similar" than "related", and appears to narrow the scope of the issues that were intended to be covered by the Act.

Since the language of "same, similar or related issues" has been used in the Act, it would seem sensible to use it in the Rules also. If this is thought to be too cumbersome, we would suggest using an abridging phrase that is less charged with meaning than "common issues", such as "group issues", "class issues" or "representative issues".

Finally, we note that there is no clarification in the Rules as to when consumer claims (or indeed any claims) will share the "same, similar or related issues". Objectively, all consumers are affected in the same way by a competition law infringement. In the context of a cartel, consumers all pay a higher price for the cartelised product; they all want to know how much redress is payable and by whom. Their claims will raise common or related issues. The problem is that by couching the test in unclear terms the door is left open for extensive debate about precisely what the requirement means and how it applies. We would welcome clarification in the Rules about how the CAT will apply this requirement.

[3] CPR 19.6, see *Emerald Supplies v British Airways Plc* [2010] EWCA Civ 1284 which considerably restricted the usefulness of that provision for competition damages actions.

**Q20: Should formal settlement offers be excluded in collective actions?**

**Q21: If formal settlement offers are not excluded from collective actions, should there be special provision around the disclosure of information relating to the formal settlement offer, and how would they work?**

Overview of our position on formal settlement offers

We entirely agree with the points raised in paragraphs 7.9 to 7.11 of the consultation document about the unique nature of collective actions and the difficulties in applying CPR Part 36 (or a tailored equivalent)[4] in this context. However, we also have sympathy with the view that Part 36 offers a number of benefits. Explicitly setting out the way in which cost consequences attach to settlement offers provides an incentive for claimants to accept offers and for defendants to make offers in the first place (and vice-versa). Part 36 also improves on the common law *Calderbank* regime by providing an explicit and comprehensive procedure.

However, we do have concerns with a wholesale application of Part 36 to the collective actions regime. Given the nature of the proceedings and the non-commercial role of the representative, the effect would be to skew the risk profile of collective actions and to discourage – rather than encourage – efficient and fair settlement of claims. In our view, the Rules around collective settlements and formal settlement offers need to be tailored slightly to ensure that the application of Part 36 does not have unintended consequences that are detrimental to all parties, as well as the CAT.

Problems with a wholesale application of Part 36 to collective actions

In the context of collective actions, if a defendant makes a formal settlement offer that offer could either be:

- rejected by the representative, in which case the proceedings would continue (possibly to trial); or

- accepted by the representative, in which case a proposed collective settlement (based on the offer) would be presented to the CAT for consideration under Rules 93 to 96.

The provisions introduced by the Consumer Rights Act state that a collective settlement should be "just and reasonable" in order to be approved by the CAT. We agree that this is the right approach. But how will representatives know whether a settlement offer is just and reasonable? They will not be privy to the data needed to assess the true loss to victims of an infringement. This information lies exclusively in the hands of the defendants.

In addition, if a representative rejects a settlement offer because the representative cannot tell whether the offer is just and reasonable, and it turns out (after trial) that the offer *was*

[4] "Part 36" will be used here as short-hand for the cost consequences of formal settlement offers set out in CPR Part 36 and mirrored in CAT Rule 48.

reasonable, the representative will have to pay the defendant's costs of the proceedings from the time the offer was made. These cost consequences mean that rejecting an offer carries a huge financial risk.

So when a defendant makes a settlement offer, a representative must either accept the offer on behalf of the represented class without knowing whether it is reasonable, or reject the offer and risk paying the defendant's costs if it turns out the offer was in fact reasonable. The structure of the system thus motivates defendants to make unreasonably low offers and motivates representatives to under-deliver for represented victims.

The traditional answer to this kind of problem is to allow disclosure of documents. But disclosure generally comes late in the case. In collective proceedings for competition law infringements, disclosure will take place many months (perhaps years) after the commencement of a claim. One response might be to bring the disclosure process forward. The difficulty with this, however, is that early and cost-efficient settlement is largely incompatible with the considerable cost and delay associated with full disclosure in cases of this kind.

We believe the answer to this problem is that the collective settlement regime must give the party who suffers from a lack of information (in this case, the representative) a means to be confident that a settlement offer is reasonable. This needs to be done without jeopardising the objective of reaching timely and cost-efficient collective settlements. This will only be achieved by ensuring that the regime gives defendants an incentive, at an early stage, to make a just and reasonable settlement offer instead of an unreasonable one.

Our proposed solution

We would propose that, if Part 36 is applied to collective actions, the Rules around collective settlements and formal settlement offers should be tailored to ensure that the application of Part 36 does not have the consequences described above. This could be achieved by:

- Ensuring that the party who makes an offer must demonstrate to the CAT that the resulting collective settlement is just and reasonable. The opposing party can help to assess the evidence put forward and make submissions on matters within its knowledge to assist the CAT in its assessment.

- Specifying that if the CAT is not satisfied that an offer is just and reasonable then no costs consequences will apply to that offer. If the CAT cannot be sure that the offer is fair, then the party receiving the offer cannot be expected to be sure of this either, and should not suffer a costs penalty in such circumstances.

The requirement on a defendant to show that its offer is just and reasonable removes the incentive to make an unreasonably low offer. The representative can feel confident in accepting an offer, in the knowledge that if such offer does not represent a fair deal for the represented class this will be borne out before the CAT. Yet it also prevents a representative from being required to stand before the CAT and endorse an "agreed" collective settlement for approval, where the representative has no knowledge of whether the settlement terms

are just and reasonable. Avoiding this kind of scenario is in the interests of the representative, the represented class and the CAT.

In cases where a representative is in a position to determine the loss incurred by victims prior to full disclosure (for whatever reason), and the representative makes a settlement offer which is accepted, the onus should then be on the representative to show that the resulting collective settlement is just and reasonable. If the representative could not do so, no costs consequences would apply for the representative's benefit. In this way, the proposal does not benefit either representatives or defendants to the detriment of the other. Rather, it ensures that the risk profile of collective proceedings is not skewed by attaching beneficial costs consequences to unreasonable offers.

Implementing amendments

Implementation of this proposal would require:

- CAT Rules 45 to 48 (the Part 36 equivalent) to be applied to Part V of the Rules. If Government is minded to do this, we would suggest repeating those provisions in Part V itself (perhaps under the "Collective Settlements" heading), as a number of tweaks will be required for the collective actions context.

- A new provision to the effect that, if a collective settlement approval order is sought for a proposed collective settlement that is based on a formal offer, and the CAT declines to make the collective settlement approval order, the cost consequences in Rule 48 will not apply to that offer.

- An amendment to Rules 93(2)(c) and 96(2)(c) to state that, where the proposed collective settlement is based on a formal offer, it is "the offeror" as opposed to "the applicants" who must believe the terms of the proposed settlement are just and reasonable.

This could be coupled with an abridged disclosure procedure, by which the CAT and the offeree party could seek documents to assess the offeror's representations about whether the settlement is "just and reasonable". However, any such provision must be underpinned by the Governing Principles in Rule 3 (including cost-effectiveness, proportionality and expedition); it is in no-one's interests for preliminary disclosure to turn into a frontloaded version of the full disclosure procedure.

**Q22: Do you have any other comments on the proposed Rules; in particular do you consider there are other changes that could be made to achieve the objectives set out in the Terms of Reference?**

We believe that a small number of additional changes to the Rules could assist in achieving the objectives of cost-effectiveness and proportionality of proceedings. The following comments all relate to Part V of the Rules.

The ability to challenge jurisdiction after a collective proceedings order has been made

Rule 75(6): *A defendant who opposes an application for a collective proceedings order does not, by doing so, lose any right that the defendant may have to dispute the Tribunal's jurisdiction.*

If a defendant wishes to challenge the CAT's jurisdiction, then in our view it should do so upfront. It is axiomatic that jurisdiction should be determined as a preliminary issue.

We believe that it is incongruous for the CAT to hear arguments from the parties about making a collective proceedings order (CPO) - and indeed to make a CPO - prior to the defendant arguing that the CAT is not entitled to have done this at all. Everyone involved needs to know whether the CAT has jurisdiction to grant a CPO before it goes ahead and does so.

If a jurisdiction challenge was heard after certification and was successful, the parties and the CAT would have wasted a considerable amount of time, effort and money arguing about the CPO for no reason. Consumers may have also missed their opportunity to participate in another case (where the existence of another case is the basis for the jurisdiction challenge).

We would advocate:

- removing Rule 75(6) for the reasons set out above;
- amending Rule 75(5) to provide that the defendant need not file an acknowledgement of service or defence to the collective proceedings claim form prior to the hearing of the application for a CPO, *but* if it intends to dispute the Tribunal's jurisdiction it must notify the Tribunal of this within (say) 14 days of receiving the claim form;[5]
- giving the CAT an additional power under Rule 75(4) to give directions relating to a jurisdiction challenge at the first case management conference.

The timing of funding orders

Rule 92(4): *Where the Tribunal is notified that there are undistributed damages pursuant to paragraph (3)(b), it may make an order directing that all or part of any undistributed damages is paid to the class representative in respect of all or part of any costs, fees or disbursements incurred by him in connection with the collective proceedings.*

This Rule implements new section 47C(6) of the Competition Act, as inserted by the Consumer Rights Act. Section 47C(6) was introduced during the Consumer Rights Act's passage through Parliament, as it became clear that the way in which collective actions are funded will be of vital importance to the viability of the regime. Section 47C(6) implements the Government's

[5] This would mirror the requirements in CPR Parts 10 and 11.

policy that representatives should have their costs of bringing a collective action reimbursed from the pool of damages, but only after victims of the infringement have had a reasonable opportunity to obtain compensation. This makes it more likely that potential representatives will be willing to take the financial risk of coming forward to bring a claim on behalf of others.

We are concerned that Rule 92(4) does not meet the policy objective enshrined in section 47C(6). The Rule is permissive; there is no obligation on the CAT to make an order allowing the representative to recoup its costs from undistributed damages (the CAT "may" do so). Further, discretion to make such order only arises "[w]here the Tribunal is notified that there are undistributed damages". This will be at the very end of the case.

Representatives (and potentially their advisers) therefore bear two risks in relation to costs:

(i) there might be insufficient undistributed funds to cover costs; and

(ii) even where there are sufficient undistributed funds, there is no way of knowing in advance whether the CAT will allow such funds to be used to cover costs.

We believe that the first risk is both necessary and acceptable; having insufficient undistributed funds means that a high level of redress has been achieved for victims. However, the second risk is unnecessary and unhelpful.

The CAT should have the power to make an order under Rule 92(4) at its discretion, but a representative should be able to apply for such order *at the outset of the proceedings*, so that everyone knows where they stand on funding. This will avoid adding further uncertainty into the already challenging funding structure that the Act was attempting to address.

Ability for class members to intervene instead of opting out

Rule 78(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 [CPO].*

Rule 84(1): *The Tribunal may at any time, either of its own initiative or on the application of the class representative, a represented person or a defendant, make an order for the variation or revocation of the [CPO], or for the stay or sist of collective proceedings generally.*

Rule 93(5): *Any represented person or … any class member may apply to make submissions either in writing or orally at the hearing of the application for a collective settlement approval order.* [See also Rules 95(8) and 96(5) which contain similar provisions for pre-CPO settlements]

Rule 93(7)(f): *In determining whether the terms are just and reasonable, the Tribunal shall take account of all relevant circumstances, including … the views of any represented person … or of any class member.* [See also Rule 96(7)(f) which contains a similar provision for pre-CPO settlements]

Rule 95(17): *The Tribunal may, either of its own initiative or on the application of a class member or party, make an order for the variation or revocation of the collective settlement order.*

We believe that giving class members the ability to make ad hoc interventions throughout collective proceedings has the potential to cause damaging delays and further uncertainty. It also runs counter to the very concept of opt-out, representative proceedings.

It will never be possible or appropriate to keep the class fully apprised of all aspects of the claim. This is true in relation to the factual evidence (particularly where a confidentiality ring is in place), the detailed economic analysis, privileged legal advice, without prejudice discussions, and the "long game" case strategies of the parties. Thus class members will inevitably not have a full picture of the complexities of the case. To allow such individuals to apply for (among other things) amendments to the CPO or a stay of the proceedings would be disruptive and unhelpful to all involved, including the rest of the represented class.

One purpose of certification is to ensure that the representative can be trusted to act in the interests of the whole class in a fair and sensible way, free from material conflicts. If the CAT – with comprehensive oversight of what is happening in a case - believes that the representative has been compromised in some way, then the CAT has the power to amend the CPO, replace the representative or otherwise direct the parties' behaviour. This is a sufficient safeguard to ensure the proper conduct of an already vetted representative.

If an individual class member is disgruntled, their remedy is to opt out of the proceedings. The Rules make it clear that an individual will be able to opt out of collective proceedings and, additionally, a collective settlement. Participation in collective proceedings is thus never compulsory. The "opt-out" element exists to protect individuals' rights under Article 6 of the European Convention on Human Rights and is sufficient to do so. Ongoing participation in the claim itself runs counter to the purpose of a "representative" action.

If an individual feels strongly about how a claim should be run, they can run an independent claim. They should not be allowed to disrupt and delay the collective claim to the detriment of the whole class by making interventions. In our view, each of the Rules set out above is damaging to the regime and should be removed. At the very least, class member applications should be limited to the stage at which a CPO is first being considered by the CAT (i.e. Rule 78(5)).

<u>Costs of class member interventions</u>

Rule 97(2): *Costs relating to an application made by a class member, whether or not he is a represented person pursuant to a collective proceedings order, may be awarded to or against that class member.*

Rule 97(2) compounds the difficulties with class member interventions outlined above, as it means that a representative and/or defendant can be made liable for the costs of a successful application - even where they acted entirely reasonably – given the general rule that costs follow success.

Representatives take a calculated risk when they start proceedings, and in most cases will take out insurance to cover the chance of paying the defendants' costs. But the potential cost of class member applications is completely unknown. Inclusion of the ability for applicants to claim their costs injects yet more risk into the process for representatives, and more uncertainty for defendants.

If (counter to our view) class member interventions are allowed, we would suggest at least amending Rule 97(2) to provide:

> "Costs relating to an application made by a class member … may be awarded against that class member, or to that class member where a party who opposed the application acted unreasonably in doing so."

**Which?**
**April 2015**