Economic Evidence in Recent Competition Class Actions in the UK


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1 Introduction

In this chapter, we take stock of the collective proceedings (or "class action") regime in the UK for competition matters following the UK Supreme Court's landmark judgment in *W.H. Merricks v Mastercard International* ("*Merricks*").[1] We focus on the economic assessment advanced at the class certification stage, the debates around that assessment, and their implications for expert economic evidence in competition Collective Proceedings Order ("CPO") matters going forward.

We begin with a brief background on the requirements that Claimant experts must meet for certification. Then we turn to four recent UK class actions:[2] *McLaren v MOL (Europe Africa) Ltd and others* ("*RoRo*");[3] *Gutmann v First MTR South Western Trains Limited and Stagecoach South Western Trains Limited* ("*Trains*");[4] *Le Patourel v BT Group PLC and British Telecommunications PLC* ("*Patourel*");[5] and *Consumers' Association v Qualcomm Incorporated* ("*Qualcomm*").[6]

An important theme emerges from our analysis, namely that the bar for class certification has been set low in the UK. Indeed, the Competition Appeal Tribunal ("CAT") has found that a class may be certified even if some proposed class members would have suffered no loss at all, that experts are entitled to submit provisional methodologies, that there is no need to identify counterfactuals in specific detail, and that precise estimates of loss or damages are not required at the certification stage.

Despite this low bar, there continues to be a significant role for expert economic witnesses from an early stage. On the Claimant side, experts will continue to be required to support allegations of anti-competitive conduct and to propose plausible methodologies for assessing damages. Equally, experts retained by the Defendant will play an important role in "sanity-checking" proposals from the Claimant side, and potentially supporting any strike-out applications.

2 What is Required of a Claimant Expert's Methodology for Class Certification?

For a CPO application to be successful, a Claimant must demonstrate that a claim has a "real prospect of success" at trial.[7] Specifically, Claimant experts must show that their proposed methodology is capable of estimating the damages, and that the required data is likely to be available.[8]

This benchmark draws on the Canadian Supreme Court's *Microsoft* judgment,[9] where the Court concluded that the proposed methodology must be "sufficiently credible or plausible"[10] and provide a "realistic prospect of establishing loss on a class-wide basis".[11] Additionally, the methodology must not be "purely theoretical or hypothetical, but [instead] must be grounded in the facts".[12] Further, there must be some evidence of the availability of data that the methodology requires.[13]

The UK Court of Appeal ("CoA") and Supreme Court endorsed the "*Microsoft* test" as the appropriate criteria in *Merricks*.[14] In this landmark judgment, the Supreme Court clarified several important issues. Amongst other things, the Court concluded that it was sufficient for damages to be calculated on an *aggregate* basis, without requiring an individual assessment of loss.[15] The Supreme Court also noted that the mere fact that finding appropriate data is challenging or that quantifying harm would be difficult cannot be considered good reasons to refuse class certification.[16]

3 *RoRo*

3.1 Background

The case involves "follow-on" claims to the European Commission's ("EC") *Maritime Car Carriers* cartel decision in February 2018.[17] The EC found that the intercontinental carriers transporting new vehicles into the EU had formed a cartel through which they coordinated prices, allocated customers and reduced capacity.[18]

The CPO application was brought on an opt-out basis on behalf of UK consumers and businesses who purchased or financed a new vehicle, or new lease vehicle, between 18 October 2006 and 6 September 2015.[19] The Claimant argued that class members suffered harm (between £57 million and £115 million)[20] because the higher shipping costs were passed on to consumers.[21]

3.2 Proposed methodology

The Claimant's expert proposed a two-stage methodology: the first stage involved estimating the overcharge in transportation costs by applying a regression analysis using data that would be disclosed at the trial stage. Specifically, an average overcharge per brand would be calculated by comparing "cartelised" and "non-cartelised" pricing after controlling for other factors.[22] The Claimant's expert proposed calculating the overcharge per vehicle by dividing the aggregate overcharge by brand, by the total number of vehicles registered in the UK under that brand.[23]

Pass-through (how much of the alleged upstream overcharge was passed on to consumers) would be assessed in the second stage.[24] This stage relied on industry expert evidence that increases in shipping costs are typically reflected in increased delivery charges, implying a 100 per cent pass-through rate.[25]

The Defendant argued that the proposed methodology did not measure *loss* at all, because the Claimant expert's methodology only considered "delivery prices" rather than the actual prices paid by consumers. Further, they claimed that the proposed methodology measured movements in delivery charges over time,

and thus had no logical connection with whether consumers paid more in the *real* world than they would have paid in a *counterfactual* world (absent collusion).[26] The Defendant also argued that the proposed methodology involved an unjustified assumption of a 100 per cent pass-on to every proposed class member ("PCM"), which was entirely premised on the testimony of the Claimant's industry experts.[27] According to the Defendant, this was not an established way of proving pass-on.[28]

3.3 CAT's judgment

In its judgment, the CAT explained that experts were entitled to submit methodologies that were only provisional at the certification stage.[29] In particular, the CAT rejected the Defendants' criticisms that the Claimant had not followed best practice (as set out in the EC's pass-on guidelines[30]) because, in its view, the question is whether the Claimant's methodology is plausible – not whether it is the best available.[31]

The CAT also noted that it would be disproportional to require the Claimant to narrow the class definition to exclude members that did not suffer any harm, which would involve data that would require further disclosure. According to the CAT, it is not "fatal" that some class members did not suffer damages, as the class definition could be narrowed at a later stage if a significant proportion of class members were found to have suffered no loss under the Claimant's methodology.[32]

4 Trains

4.1 Background

The Claimant alleged that the South Eastern rail franchise ("SE") and South Western rail franchise ("SW") failed to ensure general awareness among their customers about Boundary Fares,[33] which allow Transport for London ("TfL") Travelcard holders to pay *only* a supplemental fee when they are travelling beyond the outer zone covered by their Travelcard, rather than the full fare.[34] According to the Claimant, the Defendant abused their dominant position by "failing to take … sufficient steps to prevent Class Members from being double-charged".[35]

The CPO application was brought on an opt-out basis on behalf of people who incorrectly purchased a full fare for a journey that started from a station within the boundaries of their Travelcard and going to a station outside the coverage of their Travelcard.[36] The Claimant's expert argued that the proposed class would include millions of people who travel to and from London,[37] with aggregate losses estimated at £57 million in the SW claim and £36 million in the SE claim.[38]

The Defendants appealed the CAT's decision to grant the CPO and this appeal was subsequently dismissed by the CoA in July 2022.

4.2 Proposed methodology

The Claimant's expert proposed calculating the overcharge per journey (rather than per individual) using an accounting exercise, which relied on four inputs:

1. *Total number of in-scope journeys*, i.e., any journey on the SE and SW networks during the relevant period which originated within a TfL travel zone and ended outside that specific zone.[39]
2. *Potential savings from the use of Travelcards*, i.e., the difference between the fare actually paid and the fare that could have been paid, which would use data produced by the Defendant in disclosure.[40]
3. *Share of passengers holding a Travelcard in in-scope journeys*, for which the Claimant's expert proposed two proxies. Pre-certification, the Claimant's expert relied on a provisional metric calculated using the share of onward journeys made by bus and underground from London railway stations and the share of journeys on London bus and underground made using Travelcards.[41] After certification, the Claimant's expert proposed conducting a survey to refine this estimate. Specifically, he proposed asking passengers using different stations on which the SE/SW operate whether they had held a Travelcard over the past several years.[42]
4. *Boundary fares actually sold*, using data from disclosure.[43]

The Defendant argued that it was unrealistic to consider every passenger who held a valid Travelcard and did not purchase a Boundary Fare as a Claimant. They argued that passengers may be aware that they can use Boundary Fares, but may have intentionally chosen not to purchase them. For example, they may have considered the savings too small to be worth the effort, or they were being reimbursed for the ticket and therefore were not interested in the price difference.[44]

The Defendant also argued that the Claimant's expert did not propose a "realistic and plausible way" to estimate the share of passengers holding a Travelcard in in-scope journeys.[45] Specifically, they claimed that the Claimant's expert "should have designed, at least on a provisional basis, a survey for the purpose of the CPO applications".[46]

4.3 CAT and CoA judgments

The CAT disagreed with the Defendant's claim that the Claimant had failed to outline a credible and workable methodology to estimate damages at the certification stage. The CAT also noted:

> "*[T]o establish that conduct is an abuse does not require the identification of a counterfactual in specific detail. For example … in an unfair pricing case, an excessive price can be shown to constitute an abuse without specifying precisely what would be the non-excessive price. Here, the alleged abuse is partly based on an objective outcome (lack of customer awareness) and the [Claimant] is understandably not in a position to specify precisely the manner in which the Respondents should have organised their businesses to achieve a different outcome.*"[47]

The CAT explained that it was "fundamental" to complex competition cases that precise estimates of loss or damages were not required.[48] The CoA agreed with the CAT, and stated that an appropriate methodology at the certification stage should identify the issues, rather than the answers.[49] The CAT and the CoA also judged that, contrary to the Defendant's claims, it was "wholly disproportionate" to expect the Claimant to have designed a provisional survey at the certification stage.[50]

5 Patourel

5.1 Background

The Claimant alleged that British Telecom ("BT") abused its dominant position in standalone fixed voice ("SFV") services through unfair and excessive pricing practices. SFV covers "voice only" ("VO") services, i.e., consumers purchasing *only* voice services (without accompanying broadband), as well as consumers that *split* their voice and broadband (split purchase consumers, "SPCs"), i.e., consumers getting voice from BT but their broadband separately (either from BT or another provider).[51]

An investigation by Ofcom concluded that competition problems existed in the SFV market. Specifically, Ofcom found that consumers had little choice in suppliers, that price competition was weak, and that there were no promotional efforts, which led to higher prices.[52] Specifically, Ofcom found that while the wholesale cost of providing these services had fallen 27 per cent in real terms from December 2009 to June 2017, rental prices had risen 23–47 per cent. Ofcom was particularly concerned with potentially "vulnerable" VO customers.[53] More than 40 per cent were over 75 years old.[54]

In response to Ofcom's concerns, BT made a voluntary proposal, committing to reduce line rental prices for VO customers and better inform SPCs about more affordable services.[55] The Claimant sought damages for payments made prior to BT's commitment, amounting to £182 million for the VO customers and £287 million for the SPCs.[56]

5.2 Proposed methodology

The Claimant's expert argued that VO customers and SPCs form two distinct markets within the broader market of SFV services, and that neither of these markets overlaps with dual-play bundles, i.e., fixed voice plus broadband.[57] Further, the Claimant's expert suggested that BT was dominant in both markets.[58]

The Claimant's expert alleged that BT abused its market position by pricing excessively. Following the established approach,[59] he attempted to show that the price was significantly above cost ("Limb 1") and unfair either in itself or compared to other products ("Limb 2").[60] Specifically, the Claimant's expert relied on BT's 2009 retail line rental price, which Ofcom considered to be the relevant "competitive" benchmark.[61] With regard to Limb 1, he alleged that BT's price was "significantly" and "persistently" above this benchmark.[62] To demonstrate that BT's price was unfair, i.e., Limb 2, he relied on the same metric.

The Defendant argued that the Claimant's expert's proposed methodology collapsed Limb 2 into Limb 1 without any additional analysis, i.e., claiming that the price was excessive *and thus* unfair.[63] In addition, the Defendant alleged that the Claimant's expert ignored wider competitive dynamics in the industry.[64] They also argued that Ofcom did not impose a pricing remedy for SPC customers, which they considered to be inconsistent with the Claimant's theory of excessive pricing.[65]

5.3 CAT's judgment

The CAT granted the CPO application.[66] This may open the door for similar follow-on proceedings resulting from other decisions by other regulators with similar powers (and policy objectives) to take regulatory actions to protect consumers they consider vulnerable.[67]

6 *Qualcomm*

6.1 Background

This case was brought on behalf of all consumers who made purchases of LTE-enabled smartphones manufactured by either Apple or Samsung.[68] The Claimant alleged that Qualcomm has a dominant position in the supply of LTE chipsets and argued that Qualcomm abused this position by charging inflated royalties for the use of its patents. The Claimant argued that these inflated royalties were eventually passed on to the final smartphone consumers.[69]

Specifically, the Claimant argued that Qualcomm imposed a "no licence, no chips" policy. Qualcomm owns several standard essential patents ("SEPs") pertaining to LTE mobile technology. According to the Claimant, Qualcomm's "no license, no chips" policy meant that anyone wishing to purchase LTE chipsets must also have a licence for Qualcomm's patents. As a result, a licensee (e.g., an original equipment manufacturer – "OEM") would allegedly pay royalties in respect of all smartphones sold – even if the device was using a non-Qualcomm chipset.[70]

Qualcomm's policies have been litigated in various proceedings in other jurisdictions.[71] However, the Claimant did not rely on previous proceedings and brought this matter as a standalone action. The Claimant's proposed opt-out class included all consumers who purchased first-hand LTE-enabled Apple or Samsung smartphones in the UK from 1 October 2015 onwards.[72] The Claimant estimated that the class included approximately 29 million people, with aggregate damages of £482.5 million, or an average of £7.56 per handset purchased.[73] Assuming that most consumers would have purchased two or more handsets between 2015 and 2020, the Claimant estimated the average damages per class member to be £16.64.[74]

6.2 Proposed methodology

The Claimant's expert proposed a four-step methodology: (1) estimating the relevant value of commerce; (2) estimating damage to OEMs; (3) assessing the degree of pass-on to consumers; and (4) applying an appropriate interest rate.[75]

In estimating the pass-on to the proposed class (step 3), the Claimant's expert proposed a hedonic regression. This essentially involves assessing the relationship between a product's price and its characteristics in a way that can be used to derive a monetary value for a particular set of features that are not individually priced.[76] In this case, the characteristics used were the various cost components of each type of phone.[77] According to the Claimant's expert, regression coefficients would inform about the rate of cost pass-on to consumers for each component. However, the proposed methodology would not be able to identify the pass-on rate for the key variable, royalty payments. This is because there was likely to be limited variation in Qualcomm's royalty rates.

As a remedy, the Claimant's expert proposed to estimate pass-through rates for other cost components, and to measure the impact of a step change in royalty rates by assuming that its pass-through rate would be similar to other components.[78] The proposed approach was contested heavily by the Defendants, and debated extensively by the parties. However, the CAT found the methodology to be "plausible" and ultimately determined that this was an issue to be resolved at trial.[79]

6.3 CAT's judgment

The CAT found that the Defendant's numerous criticisms of the Claimant's proposed methodology were issues to be tested at trial, and not at the certification stage.[80] The CAT also disagreed with the Defendant's claim that permitting the proposed class proceedings to continue would cost more in legal fees than class members would collectively receive.[81]

Note

The views expressed in this chapter are solely those of the authors, who are responsible for the content, and do not necessarily represent the views of Cornerstone Research.

Endnotes

1. *Mastercard Incorporated and others v. Walter Hugh Merricks CBE*, Supreme Court of the United Kingdom, Case No: UKSC 2019/0118, 11 December 2020.
2. This chapter is not intended to address all current matters on this subject. Matters not discussed herein do not impact our overall conclusions.
3. *Mark McLaren Class Representative Limited v. MOL (Europe Africa) LTD and Others*, Competition Appeal Tribunal, Case No: 1339/7/7/20, 18 February 2022.
4. *Justin Gutmann v. First MTR South Western Trains Limited and Stagecoach South Western Trains Limited*, Competition Appeal Tribunal, Case No: 1304/7/7/19. The CPO application was jointly heard with the CPO application in *Justin Gutmann v London & South Eastern Railway Limited*, Competition Appeal Tribunal, Case No: 1305/7/7/19. Order of the President (Directions for hearing of CPO Applications), available at https://www.catribunal.org.uk/sites/default/files/2019-04/1304-1305_Gutmann_Order_090419.pdf, accessed on 28 September 2022.
5. *Justin Le Patourel v. BT Group PLC, and British Telecommunications PLC*, Competition Appeal Tribunal, Case No: 1381/7/7/21, 27 September 2021.
6. *Consumers' Association v. Qualcomm*, Competition Appeal Tribunal, Case No: 1382/7/7/21, 17 May 2022.
7. *Walter Hugh Merricks v. Mastercard Incorporated and others*, Court of Appeal, [2019] EWCA Civ 674, 16 April 2019, ¶ 44, ("*Merricks (Court of Appeal)*").
8. *Merricks (Court of Appeal)*, ¶¶ 38–44.
9. *Pro-Sys Consultants Ltd v. Microsoft Corporation*, 2013 Supreme Court of Canada, ¶ 57.
10. *Microsoft*, ¶ 118.
11. *Microsoft*, ¶ 118.
12. *Microsoft*, ¶ 118.
13. *Microsoft*, ¶ 118.
14. *Merricks (Court of Appeal)*, ¶¶ 38–44; *Merricks*, ¶¶ 152–155.
15. *Merricks (Supreme Court)*, ¶¶ 58, 77. We note that in contrast to *Merricks*, in *Lloyd v. Google*, an opt-out representative action where the Claimant sought damages from Google citing a breach of the Data Protection Act 1998, the Court held that aggregate damages were not available for claims brought using the representative action mechanism. See *Lloyd v. Google*, Supreme Court of the United Kingdom, [2021] UKSC 50, 10 November 2021, ¶ 80.
16. "*Merricks v. Mastercard*: What does the Supreme Court's Judgment Mean for the Future of Collective Proceedings in the UK?", Slaughter and May, 18 December 2020.
17. Case No: AT.40009 – *Maritime Car Carriers*, European Commission, 21 February 2018.
18. *RoRo*, ¶¶ 5–6.
19. *RoRo*, ¶ 10. The collusion spanned 18 October 2006 to 6 September 2012. However, the CPO defines a longer "relevant period" that includes a three-year "run-off" period during which the alleged cartel continued to have an impact. In addition, some brands that were transported to the UK through other means were excluded.
20. Estimates rise to £71 million and £143 million if simple interest is included. See *RoRo*, ¶ 13.
21. *RoRo*, ¶ 12.
22. *RoRo*, ¶ 77. The Claimant's expert proposed to exclude three years after the end of the cartel, as this was considered a period of adjustment where prices returned to competitive levels.
23. *RoRo*, ¶ 84.
24. *RoRo*, ¶ 79.
25. *RoRo*, ¶¶ 83, 96, 103.
26. *RoRo*, ¶¶ 18, 95.
27. *RoRo*, ¶¶ 19, 95.
28. *RoRo*, ¶ 92.
29. *RoRo*, ¶ 60.
30. EC Pass-On Guidelines, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52019XC0809(01)&from=EN.
31. *RoRo*, ¶ 100.
32. In fact, according to the CAT, in the circumstances a "simple [and] clear" definition may be preferable. *RoRo*, ¶¶ 59, 61.
33. To assess general awareness about Boundary Fares, the Claimant commissioned a "mystery shopper" survey. The survey found that when a Travelcard was not initially mentioned by the customer, in 89.4 per cent of enquiries in SW and 83.5 per cent of enquires in SE, the clerk quoted a full journey price. Even when a Travelcard/Boundary Fare was mentioned, the Travelcard was incorporated into the ticket price only in 71.7 per cent of cases in SW and 58.2 per cent of cases in SE. See *Trains*, ¶ 26.
34. *Trains*, ¶ 3.
35. *Trains*, ¶ 24:
    > "*Each Respondent is alleged to have abused that dominant position. … [The] core allegation of abuse is [as follows]: [t]he abuse, which is continuing, consists in the Proposed Defendants' neglecting of their special responsibility as dominant undertakings through failing to take any or sufficient steps to prevent Class Members from being double-charged for part of the service provided to them. In practice, the abuse consists in failing to make Boundary Fares sufficiently available for sale, and/or failing to ensure, for example through better staff training, amended sales procedures, or increased customer-facing information, that customers are aware of the existence of Boundary Fares and buy an appropriate fare which avoids them being charged twice for part of their journeys.*"
36. *Trains*, ¶ 4.
37. The Claimant's expert estimated the SW class to be 2.1 million customers and the SE class to be 0.9 million customers. *Trains*, ¶ 5.
38. *Trains*, ¶ 35.
39. *Trains*, ¶¶ 145–146.
40. *Trains*, ¶ 147.
41. *Trains*, ¶¶ 148–149.
42. *Trains*, ¶ 160. Naturally, this would require the Defendant to recollect their Travelcard holding patterns over the past several years.
43. *Trains*, ¶ 150.
44. *Trains*, ¶¶ 157–158. Also, see *Trains*, ¶ 126, for a full list of cases where passengers intentionally do not get Boundary Fares.
45. *Trains*, ¶ 157.
46. *Trains*, ¶ 162.
47. *Trains*, ¶ 68. While it is unclear whether the CAT would require the Claimant to specify an appropriate counterfactual in a matter involving allegations of collusion, it did note in *RoRo* that estimating the difference between what class members would pay in the counterfactual scenario relative to the actual world was an "issue for trial". See *RoRo*, ¶¶ 128, 130, 134.
48. The CAT stated that damages could be estimated using a "broad axe". See *Trains*, ¶ 141. The CoA agreed, and stated that the CAT could rely on the broad axe to simplify some of the challenges in estimating damages based on the data available. See *London and South Eastern Railway Limited, First MTR South Western Trains Limited and Stagecoach South Western Trains Limited v. Justin Gutmann*, Court of Appeal, July 28, 2022, ¶ 58 ("*Trains Appeal Judgment*").

49. *Trains Appeal Judgment*, ¶ 56.
50. *Trains*, ¶ 162.
51. *Patourel*, ¶ 3.
52. *Patourel*, ¶¶ 10–13.
53. Vulnerable consumers are particularly susceptible to poor conditions. For example:
    > "*[O]ften elderly people who have remained with the same landline provider for many decades – are getting increasingly poor value for money. They are particularly affected by price increases, and, we consider, are in need of additional protection in a market that is not serving them well enough.*" *Patourel*, ¶¶ 10–13.
54. *Patourel*, ¶¶ 10–13.
55. *Patourel*, ¶ 16.
56. *Patourel*, ¶ 18.
57. *Patourel*, ¶ 37.
58. *Patourel*, ¶ 37.
59. Judgment of the Court of 14 February 1978. *United Brands Company and United Brands Continentaal BV v. Commission of the European Communities* ("*Chiquita Bananas*"), Case No: 27/76, ¶¶ 251–252.
60. *Patourel*, ¶ 45.
61. *Patourel*, ¶ 41.
62. *Patourel*, ¶ 43.
63. *Patourel*, ¶ 83.
64. *Patourel*, ¶¶ 71–80.
65. *Patourel*, ¶ 96. The Defendant also argued that (1) the Claimant erred by "read[ing] across" conclusions from an *ex ante* Ofcom review to *ex post* competition analysis, (2) Ofcom did not conclude BT pricing was unlawful, (3) BT customers could have mitigated their losses by taking available actions, and (4) BT's competitors were also charging similar prices. *Patourel*, ¶¶ 49, 52, 62–65, 89, 103.
66. BT appealed the CAT's judgment to the CoA, but it was unsuccessful. https://www.bailii.org/ew/cases/EWCA/Civ/2022/593.html.
67. Financial Conduct Authority, "Guidance for firms on the fair treatment of vulnerable customers", available at https://www.fca.org.uk/publications/finalised-guidance/guidance-firms-fair-treatment-vulnerable-customers, accessed on 15 September 2022; Ofwat, "Customers in vulnerable circumstances", available at https://www.ofwat.gov.uk/out-in-the-cold-next-steps/customers-in-vulnerable-circumstances, accessed on 15 September 2022; Ofgem, "Consumer vulnerability protections", available at https://www.ofgem.gov.uk/energy-policy-and-regulation/policy-and-regulatory-programmes/consumer-vulnerability-protections, accessed on 15 September 2022.
68. LTE-enabled smartphones are those mobile phones which use a set of standards for mobile communication called the Long Term Evolution and LTE-Advanced standards, which are the main standards used in 4G mobile communication. See *Qualcomm*, ¶¶ 3, 8.
69. *Qualcomm*, ¶¶ 3, 13.
70. Alternatively, the manufacturer could try to purchase its chipsets from another chipset manufacturer, which had licensed Qualcomm's patents. However, according to the Claimant, Qualcomm licensed its patented SEP technologies to rival chipset producers only if their chips would be sold to OEMs that already had licences for Qualcomm's SEP technologies. *Qualcomm*, ¶ 16.
71. See, for example: *FTC v. Qualcomm*, 411 F.Supp.3d 658 (N.D. Cal. 2019); *FTC v. Qualcomm* 969 F.3d 974 (9th Cir. 2020); *In re Qualcomm Antitrust Litigation* 328 F.R.D 208 (N.D. Cal. 2018) for US litigation; and *Tenzer v. Qualcomm* [2018] QCCS 3447 for Canada.
72. *Qualcomm*, ¶¶ 28–29.
73. *Qualcomm*, ¶ 32.
74. *Qualcomm*, ¶ 32.
75. *Qualcomm*, ¶ 61.
76. *Qualcomm*, ¶ 64.
77. Consumers' Association Class Action, Transcript of CPO Application Hearing, Day 2 ("*Qualcomm Class Action Transcript*"), p. 13.
78. *Qualcomm*, ¶ 66; Qualcomm Class Action Transcript, p. 19.
79. *Qualcomm*, ¶ 92.
80. For instance, the Defendant argued that the Claimant's plan to seek data from Apple and Samsung to supplement their methodology amounted to an "empty promise", because the Claimant's litigation plans and budgets allegedly did not account for third-party disclosures. The CAT did not accept this argument, because it felt that it was unrealistic for the Claimant to outline a detailed, complete and budgeted plan to gather evidence at the certification stage. Likewise with reference to the Defendant's criticisms of the Claimant's expert's proposed methodology, the CAT explained that the Claimant's expert was not required to propose a detailed methodology at the certification stage. Consequently, the Tribunal would assess the robustness of the Claimant's methodology at a later stage, when it was fully developed and had incorporated relevant data, including data from third-party disclosure. This was, again, therefore an issue for trial, and not cause to issue summary judgment. See *Qualcomm*, ¶¶ 75, 93, 100.
81. *Qualcomm*, ¶¶ 101, 105–106.

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