Neutral citation [2025] CAT 38

Case No: 1304/7/7/19

**IN THE COMPETITION APPEAL TRIBUNAL**

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

7 July 2025

Before:

HODGE MALEK KC
(Chair)
HUGH KELLY
EAMONN DORAN

Sitting as a Tribunal in England and Wales

BETWEEN:

**JUSTIN GUTMANN**

Class Representative

- v –

**(1) FIRST MTR SOUTH WESTERN TRAINS LIMITED**

Non-Settling Defendant

**(2) STAGECOACH SOUTH WESTERN TRAINS LIMITED**

Settling Defendant

Determined on the papers

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**RULING (INTERVENTION)**

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## A. INTRODUCTION

1. On 10 May 2024, the Tribunal made a collective settlement approval order ("**CSAO**") in the proceedings brought by the Class Representative (the "**CR**") against Stagecoach South Western Trains Limited ("**SSWT**"). In the CSAO, the Tribunal approved the settlement agreed between the CR and SSWT, as set out in the Revised Settlement Agreement dated 30 April 2024, and amended on 7 February 2025 (the "**Settlement Agreement**"). By that agreement, SSWT agreed to make available up to £25 million in damages for Represented Persons, as defined in the Settlement Agreement, allocated to three "Pots" with distinct evidential requirements. The Parties also agreed that SSWT would pay the CR £4.75 million in Ringfenced Costs in respect of his costs, fees and disbursements incurred in the proceedings against SSWT, and a further £750,000 towards the costs of distribution. In addition, to the extent that the Notified Damages Sum[1] was less than £10.2 million (the "**Non-Ringfenced Costs Limit**"), the CSAO and the Settlement Agreement provide for the CR to apply to the Tribunal for an order to allocate all or part of any undistributed damages (up to the Non-Ringfenced Costs Limit) towards his costs, fees, and disbursements.

2. Pursuant to the Tribunal's Order of 13 February 2025, the CR was to file and serve his application and evidence in relation to a stakeholder entitlement hearing (which was subsequently listed to take place on 11 April 2025) by 4pm no later than 21 days before the hearing. Thereafter, any represented or interested person that wished to make submissions was to file with the Tribunal an application to make submissions no later than 10 days before the hearing. The April hearing was vacated by the Tribunal at the CR's request.

3. On 2 May 2025 the CR made an application, pursuant to the CSAO and Settlement Agreement, for a determination of the Non-Ringfenced Costs to be paid by SSWT to the CR out of undistributed damages in respect of costs, fees or disbursements incurred by the CR in connection with the collective

[1] I.e., the total amount claimed by Represented Persons.

proceedings against SSWT (the "**CR's Stakeholder Entitlement Application**"). A maximum of £9,983,515.09 is said to be available as Non-Ringfenced Costs, being £10.2 million less the Notified Damages Sum of approximately £216,485 as at the date of the report provided by Epiq and exhibited to the CR's sixth witness statement ("**Gutmann 6**") filed with his application. This is a very low rate of take up by class members and falls very much short of the level predicted by the CR at the time of the CSAO: *Gutmann v. First MTR South Western Trains Ltd* [2024] CAT 32 at [77]-[78].

4. The CR seeks an order for payment of Non-Ringfenced Costs corresponding to the total of his costs, fees and disbursements incurred in his action against SSWT, minus the costs recovered from SSWT to date, or alternatively, for the maximum available. The CR estimates these costs (total minus recovered) to amount to £11,466,592, and on that basis would seek an order for payment of the full remaining £9,983,515.09. However, the total amount of his costs remains at present an estimate (based on assumptions explained in Gutmann 6) because it depends in part on the entitlement of the funder ("**Woodsford**") to a Funder's Fee and to a payment in respect of adverse costs protection provided by it to the CR (which in turn may also affect the entitlement of the ATE insurers). It is a matter for the Tribunal to consider what is both fair and reasonable in all the circumstances. Given the very low take up by class members the Tribunal will consider a substantial payment to charity, alongside any claims and representations by stakeholders, to be paid out of any costs, fees and disbursements.

5. The CR's Stakeholder Entitlement Application has been listed to be heard at a hearing on 10 September 2025, with a half day on 11 September 2025 in reserve (the "**Stakeholder Entitlement Hearing**").

6. By a letter of 28 May 2025, the Tribunal directed that any application to intervene by any interested party must be filed and served by 4pm on 9 June 2025, setting out the applicant's interest and the issues on which it wishes to address the Tribunal.

7. By a letter of 30 May 2025, the Tribunal confirmed that any such application must address why a party wishes to be heard and on which issues. The Tribunal explained that it will then determine whether that party should be permitted to intervene in the Stakeholder Entitlement Hearing.

8. On 9 June 2025 the Tribunal received applications for permission to intervene from (i) the CR's solicitors, Charles Lyndon Limited ("**CL**"); and (ii) jointly Woodsford, and the CR's ATE insurers (Amtrust Specialty Ltd, Harbour Underwriting Ltd acting as agent for and on behalf of Hamilton Insurance DAC, Lakehouse Risk Services Limited acting as agent for and on behalf of Axis Specialty Europe SE and Accredited Insurance (Europe) Ltd, together the "**ATE Insurers**").

9. The interested parties seek an order, pursuant to Rule 16 of the Competition Appeal Tribunal Rules 2015 (the "**CAT Rules**"), permitting them to be heard at the Stakeholder Entitlement Hearing, and to make submissions and file evidence in advance of that hearing.

10. Neither application for permission to intervene was opposed.

## B. APPLICATIONS TO INTERVENE

### (1) Charles Lyndon Limited ("CL")

11. CL seeks permission to make submissions and file evidence in relation to (i) the payment of its fees from the Non-Ringfenced Costs, and (ii) Woodsford's entitlement to any funder's fee and adverse costs indemnity fee.

12. The Notified Damages Sum of £216,604.91 was paid on 2 June 2025. On this basis, there will be £9,983,395.09 undistributed from the Non-Ringfenced Costs Limit that the Tribunal may order to be allocated towards the CR's costs, fees and disbursements.

13. In summary, CL submits that its interest arises as follows:

(1) It has a direct financial interest in the Non-Ringfenced Costs distribution, as its entitlement to recover its fees hinges on the Tribunal's approval of the distribution of the Non-Ringfenced Costs.

(2) The Tribunal has expressed in these proceedings that it expects "*a clear picture of the actual sums likely to be ultimately made available to the lawyers and the funders*" on various take-up scenarios.[2] CL thus seeks permission to participate at the Stakeholder Entitlement Hearing so that the Tribunal can have the fullest information about: (i) CL's deferred fees and success-fee uplift payable under the partial conditional fee agreements CL and the CR have entered into, and (ii) entitlement to any funder's fee and adverse costs indemnity fee, once Woodsford clarifies what it considers its entitlement to be. In addition, the Tribunal will want to be informed as to how the £4.75 million Ringfenced Costs have been applied and distributed.

(3) CL has an interest in ensuring appropriate provision is made for its fees, which enabled these proceedings to be brought in the first place. As the Tribunal is aware, CL's work was instrumental in achieving the settlement for the benefit of the CR. The settlement is the product of several years of diligent effort by CL. CL therefore seeks to ensure its perspective is heard, given that no other party before the Tribunal can adequately represent CL's own interest in ensuring its fees are paid.

(4) It falls within the Tribunal remit to decide the outcome amongst stakeholders "*fairly and proportionately and in accordance with the principles of justice*" under Rule 4 of the CAT Rules (*Gutmann v Apple* [2025] EWCA Civ 459 at [82]). CL is clearly a stakeholder and can contribute meaningfully to the relevant background and implementation of the funding arrangements in this case, so as to ensure that the Tribunal is best placed to exercise its jurisdiction fairly and proportionately.

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[2] *Justin Gutmann (Class Representative) v First MTR South Western Trains Ltd (Non-Settling Defendant) and Stagecoach South Western Trains Ltd (Settling Defendant)* [2024] CAT 32 (Judgment on Collective Settlement Approval, 10 May 2024) at [65].

**(2) Woodsford and the ATE Insurers**

14. Woodsford and the ATE Insurers submit that any determination by the Tribunal at the Stakeholder Entitlement Hearing of: (a) the amount of the Non-Ringfenced Costs to be paid by the Settling Defendant, (b) any payment to charity and (c) the allocation of the balance of the Non-Ringfenced Costs between the Stakeholders will have a direct financial impact on Woodsford and the ATE Insurers and may amount to an effective determination of their rights and interests.

15. Given that matters concerning the Non-Ringfenced Costs are, by their very nature, ones which do not directly affect the interests of the class members (save indirectly through any interest the class might be said to have in a payment to the relevant charity), and given that the CR himself has no direct interest in the allocation of the Non-Ringfenced Costs (save (a) indirectly on behalf of the class members by reference to the payment to charity and (b) in ensuring he complies with his obligations pursuant to the terms of the Settlement Agreement and the funding arrangements), it is the stakeholders, including Woodsford and the ATE Insurers, who have the primary interest in the issues to be addressed at the Stakeholder Entitlement Hearing.

16. This is particularly so given that, in light of the terms of the Settlement Agreement, it is clear that any payment to Woodsford and the ATE Insurers out of the residual balance of any Non-Ringfenced Costs will be less than the amount of their prima facie contractual entitlement under the funding arrangements. In short, despite this case having resulted in a successful settlement for the class members, Woodsford and the ATE Insurers (and indeed the other stakeholders) may ultimately be paid less than the sums they might reasonably have expected under the terms of the funding arrangements for having supported this case to its successful conclusion. In those circumstances, and bearing in mind the essentially non-recourse nature of funding arrangements in opt-out collective actions, Woodford's and the ATE Insurers' financial interest in the allocation of such sums as are available for payment to Stakeholders is particularly acute.

## C. THE FRAMEWORK FOR INTERVENTION

17. The framework for intervention was set out succinctly by Roth J in the main *Gutmann Trains* proceedings: [2023] CAT 23, at [5] – [9]:

> "5. Rule 16 of the Competition Appeal Tribunal Rules 2015 ("the CAT Rules") states insofar as relevant:
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> "(1) Any person with sufficient interest in the outcome may make a request to the Tribunal for permission to intervene in the proceedings…
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> …
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> (5) The request shall contain—
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> (a) a concise statement of the matters in issue in the proceedings which affect the person making the request;
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> (b) the name of any party whose position the person making the request intends to support; and
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> (c) a succinct presentation of the reasons for making the request…
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> (6) If the Tribunal is satisfied, having taken into account the observations of the parties, that the intervening party has a sufficient interest, it may permit the intervention on such terms and conditions as it thinks fit."
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> 6. Rule 4 of the CAT Rules sets out the "Governing principles" and includes the following:
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> "(1) The Tribunal shall seek to ensure that each case is dealt with justly and at proportionate cost.
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> (2) Dealing with a case justly and at proportionate cost includes, so far as is practicable—
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> (a) ensuring that the parties are on an equal footing;
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> (b) saving expense;
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> (c) dealing with the case in ways which are proportionate—
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> (i) to the amount of money involved;
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> (ii) to the importance of the case;
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> (iii) to the complexity of the issues; and
>
> (iv) to the financial position of each party;
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> (d) ensuring that it is dealt with expeditiously and fairly; …"
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> 7. The application of rule 16 has been considered on a number of occasions by the Tribunal. In *B&M European Value Retail v CMA* [2019] CAT 8, the Tribunal noted that the rule involves a two-stage process. There is, first, the

threshold question whether the applicant has shown a "sufficient interest" in the outcome of the proceedings; if that is satisfied, it is then a question of discretion for the Tribunal as to whether to permit an intervention, having regard to the governing principles set out in rule 4. The Tribunal reiterated this approach in its subsequent ruling in *Sabre Corp v CMA* [2020] CAT 16 at [8].

8. In the *B&M* case, the major supermarket retailer, Tesco PLC, applied to intervene in a challenge to the CMA's decision to appoint another retailer ("B&M") as a "Designated Retailer" under the Groceries (Supply Chain Practices) Market Investigation Order 2009. Designated Retailers were subject to a series of obligations, including the duty to comply with the Groceries Supply Code of Practice ("the Code"). Tesco itself was a Designated Retailer and submitted that it wished to ensure that a consistent approach was adopted to maintain a level playing field amongst grocery retailers. It argued that it could 'add value' due to its experience of having been regulated under the 2009 Order and provide a commercial perspective in relation to how the provisions of the Code applied in practice. It further submitted that that was the first case in relation to designation of new retailers under the 2009 Order and raised issues of a wider public interest. Neither B&M nor the CMA opposed Tesco's application. The Tribunal accepted that Tesco had a sufficient interest in the proceedings but as a matter of discretion held that the application should be refused as it was not satisfied that Tesco would provide material 'added value' to the issues in the case. Since it appeared that in essence Tesco wished to provide evidence in support of the CMA's case, it could more proportionately do so by collaborating with the CMA.

9. The Tribunal in *Sabre* similarly refused an application by the American Society of Travel Advisors, the world's largest association of travel agents, to intervene in a challenge to the decision of the CMA prohibiting a merger between two US companies involved in the provision of software and technology to the airline industry. Nor have such refusals been limited to private parties. In *Flynn Pharma Ltd and Pfizer Inc v CMA* [2019] CAT 2, the Tribunal refused an application by the Office of Communications ("Ofcom") to intervene in the consequential stage of the proceedings concerning costs, where the CMA argued that 'costs follow the event' should not be the starting point for a decision on costs against the CMA as the public competition authority. In support of its application, Ofcom submitted that the decision of the Tribunal on costs in those proceedings was likely to have a direct effect on Ofcom in the future due to its concurrent jurisdiction (with the CMA) to make enforcement decisions pursuant to the prohibitions under UK and EU competition law, and further that the Tribunal's decision could also affect Ofcom's position on costs in relation to appeals against its regulatory decisions taken under the Communications Act 2003. Among the considerations which led the Tribunal to refuse Ofcom's application were that it would not be consistent with the just and proportionate conduct of the proceedings. The Tribunal stated, at [15]:

> "We are concerned to keep the scope of these proceedings in relation to costs within reasonable bounds and to avoid expanding their scope unduly.""

18. In the *Merricks* collective action, Mr Merricks' funder opposed the proposed settlement and was granted permission to intervene in relation to the

determination of the CSAO application: see [2025] CAT 28 at [3] and the Tribunal's Order of 23 January 2025.

19. In *Mark McLaren*, the funder and the ATE insurers were granted permission to intervene. When several defendants reached a settlement with the class representative, the funder and insurers, who were neither class members nor defendants, had a clear stake in how the settlement proceeds (especially costs) would be allocated. The Tribunal exercised its discretion to invite the funders' legal counsel to participate at the approval hearing as "Interested Parties", noting in a subsequent costs ruling that it "*gave leave for the Interested Parties to make submissions at the settlement hearing",* and that this representation was *"critical to the settlement approval process"*: [2025] CAT 24 at [12].

## D. THE TRIBUNAL'S ANALYSIS

20. The Settlement Agreement provides:

> "… a hearing before the Tribunal following distribution of the Notified Damages Sum to Represented Persons, where the Class Representative will apply for payment of the remainder of the CR's Costs, to the extent that the Non- Ringfenced Costs Limit exceeds the Notified Damages Sum and in accordance with the provisions of this Agreement."

21. Stakeholders are defined in the Settlement Agreement as "*the CR's legal team including … Charles Lyndon Limited and the Funder and any other third party who assisted the CR in the SW Proceedings.*"

22. In deciding how the balance of the Non-Ringfenced Costs (£9,983,395) is to be dealt with, the Tribunal will need to consider a multiplicity of factors, including success. These proceedings have been a limited success in that whilst the proceedings were settled on the basis of substantial sums being made available by the Defendants in a standalone action where the Tribunal considered that the outcome of any trial was far from certain, the very low take-up by Class Members very much colours that and makes the success qualified and potentially disappointing. The CR and the Stakeholders should appreciate that in determining the CR's Stakeholder Entitlement Application, the Tribunal will

bear in mind what it stated in *McLaren v. MOL (Europe Africa) Ltd* [2025] CAT 4 at [22] and [100]:

> "22. Collective proceedings should be brought for the benefit of class members and not predominantly for the benefit of stakeholders. The Tribunal would wish to avoid outcomes where little goes to class members, and the primary beneficiaries of the proceedings are the stakeholders. Even where there is a low take up by class members it does not mean that the balance of the settlement sum should go to stakeholders, and the parties and the Tribunal would wish to consider at least a proportion of the sum going to charity or some other distribution which does not mean that the balance is all taken by stakeholders or reversion to defendants.
>
> …
>
> 100. When it comes to the distribution phase and the consideration that needs to be given by the Tribunal of the claims for costs, fees and disbursements in favour of stakeholders, the Tribunal would want a great deal more information as to what sums are being claimed by each stakeholder and how they have been calculated. In relation to funders the Tribunal would want to be informed of how its claims for payments from the CR under the funding arrangements have been incurred and calculated. It may be necessary to determine what is a reasonable rate of return for funders on the facts of this particular case and for that the Tribunal may need details of its funding model and rates of return. These matters will be for determination at a later stage but stakeholders should expect that these aspects will require careful consideration and scrutiny by the Tribunal in the light of the overall success of the proceedings."

23. It is hoped at the Stakeholder Entitlement Hearing that the Tribunal, the parties and the Stakeholders will work together to reach an outcome that is fair to all concerned, whilst reaching a result that the current proceedings do not end up predominantly for the benefit of Stakeholders, with only a small proportion going to Class Members and charity.

**Sufficient interest**

24. Both CL and Woodsford/ATE Insurers have a sufficient interest in how the Non-Ringfenced Costs are calculated and distributed. This is clear from the matters set out above. They are all seeking to benefit from the balance of the Non-Ringfenced Costs.

**Discretion**

25. In the light of the financial interests that CL and Woodsford/ATE Insurers have in the determination of the CR Stakeholder Entitlement Application, and the

information and assistance that they can provide in reaching a fair outcome, the Tribunal exercises its discretion in allowing the applications to intervene. It should be clear from this Ruling and previous decisions in relation to collective settlements the type of information that the CR and the Interveners should supply to the Tribunal on a full and frank disclosure basis. The CR and the Stakeholders, despite the conflicts of interest involved, have an important role in assisting the Tribunal in this matter.

26. The parties and the Stakeholders are invited to agree draft directions for the hearing and to consider what sum should go to charity. In addition, this Ruling will be sent to the Access to Justice Foundation, who will be given liberty to submit any observations or representations it may wish to be considered (limited to 5 pages).

## E. CONCLUSION

27. CL and Woodsford/ATE Insurers are given permission to intervene. Any evidence on their behalf shall be filed with the Tribunal by 4pm on 23 July 2025. Written submissions on behalf of each shall be limited to 15 pages. They may appear at the hearing of the CR's Stakeholder Entitlement Application and may make oral submissions limited to 45 minutes each for the CL and Woodsford/ATE Insurers.

28. This Ruling is unanimous.

Hodge Malek KC
Chair

Hugh Kelly

Eamonn Doran

Charles Dhanowa CBE, KC (*Hon*)
Registrar

Date: 7 July 2025