



Neutral citation [2025] CAT 44

Case No: 1304/7/7/19

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

7 August 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 – AtJF & FCJ)**

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## A. INTRODUCTION

1. The relevant background is set out in the Tribunal's Ruling of 7 July 2025: [2025] CAT 38 (the "**Ruling**").
2. In summary, 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<sup>1</sup> 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.
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 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

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<sup>1</sup> I.e., the total amount claimed by Represented Persons.

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 to include any Ruling if practicable (the “**Stakeholder Entitlement Hearing**”).
6. In the Ruling, the Tribunal gave permission to intervene to Charles Lyndon Limited (“**CL**”), solicitors for the Class Representative (“**CR**”), and jointly to Woodsford, and the CR’s ATE insurers (the “**ATE Insurers**”).
7. The Tribunal also gave the Access to Justice Foundation (the “**AtJF**”)<sup>2</sup> permission to submit short written observations in advance of the Stakeholder Entitlement Hearing: see [26]. The AtJF is currently required to file its submissions on 3 September 2025.

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<sup>2</sup> The AtJF is the prescribed charity to receive undistributed funds in the event of a judgment in opt-out collective proceedings: section 47C(5) of the Competition Act 1998.

8. On 18 July 2025, the Tribunal received an application for permission to intervene at the Stakeholder Entitlement Hearing from Fair Civil Justice Limited (“**FCJ**”). FCJ applies to be granted permission to intervene orally at the Stakeholder Entitlement Hearing (the “**FCJ Application**”). If the Tribunal does not consider it possible or desirable for FCJ to make oral submissions, due to the length of the listing or for other reasons, FCJ seeks alternative permission to make written submissions, subject to the same limits as the other interveners or otherwise as the Tribunal may direct.
9. The FCJ Application was opposed by the CR, Woodsford and the ATE Insurers, who filed written submissions on 25 July 2025.
10. On 30 July 2025, the Tribunal wrote to the AtJF to explore whether it would be sensible for the AtJF to formally apply for permission to intervene at the upcoming Stakeholder Entitlement Hearing pursuant to Rules 16 and 50 of the Competition Appeal Tribunal Rules 2015 (the “**Tribunal Rules**”).
11. By a letter from its solicitors dated 31 July 2025, the AtJF formally applied for permission to intervene (the “**AtJF Application**”). The AtJF Application was not opposed by any party.

## **B. APPLICATIONS TO INTERVENE**

### **(1) AtJF Application**

12. The AtJF submits that the matters in issue in the CR’s Stakeholder Entitlement Application which directly affect the AtJF are the parties’ proposals regarding the destination of settlement monies which are not distributed to class members. The AtJF is expressly identified in the CR’s Stakeholder Entitlement Application as a potential recipient of such monies. In particular:
  - (1) The CR indicates in Gutmann 6 that he would support a payment being made to charity out of some of the undistributed damages and specifically mentions the AtJF as a possible recipient.

- (2) The Class Representative says in his Stakeholder Entitlement Application that Woodsford has indicated that it would support a payment to charity, albeit without naming the AtJF specifically in that regard.
- (3) It is unclear to the Tribunal what the Defendants' stance is as regards payment to charity and whether or not it supports and agrees that this should be done in this case.

**(2) FCJ Application**

- 13. The FCJ is a leading consumer and business advocacy group in the UK with a particular interest in class actions and group litigation. It seeks to promote fair access to justice for claimants – and consumers generally – when they have experienced material harm, particularly by promoting alternatives to litigation that are faster and more effective.
- 14. FCJ is a company limited by guarantee, and thus is owned by its members, who include some of the UK's leading business organisations: the British Chambers of Commerce and the Finance and Leasing Association. The other members of FCJ are the European Justice Forum, British American Business and the U.S. Chamber of Commerce. FCJ is a non-profit and it is funded by voluntary donations. It is concerned to ensure that class action litigation in the UK is managed effectively and appropriately, particularly given the limited extent of regulatory control in this area, including in respect of third-party funding.
- 15. FCJ's position, in summary, is that in the circumstances as they have unfolded, the yet undistributed £9,983,515.09 should not be awarded as Non-Ringfenced Costs. FCJ would support the entirety of that sum being awarded to the Foundation, but equally the Tribunal may be of the view that some or all of those monies could be used in an alternative way for the benefit of consumers. Either way, FCJ's position is that those sums should not be allocated as a post hoc incentive to CL or Woodsford / the ATE Insurers in circumstances where the proceedings have failed to distribute a meaningful proportion of the

settlement sum and therefore have failed to provide adequate (if any) redress for the members of the class.

16. FCJ says that its submissions will consider, amongst other things, the following:

- (1) Any assessment of whether collective proceedings should be deemed to be “successful” should encompass consideration of the actual compensation achieved by members of the class. Where the vast majority of members of the class fail to obtain remedies then consideration should be given as to whether they are, in reality, in any better position than if the proceedings had failed or substantively failed – or had never been brought at all.
- (2) When considering the financial rewards which those advancing and funding of collective proceedings are permitted to obtain, the Tribunal should have careful regard to the assurances provided by those entities at early stages in the proceedings, the levels of actual compensation achieved, and the reasons for any disparity between the two.
- (3) Those advancing and funding the claims should be aware that if, ultimately, they are able to achieve only *de minimis* take up, contrary to assurances and/or expressions of optimism at an earlier stage of the proceedings, then such failings may have implications in terms of the financial recovery achieved by those advancing and funding the claims.
- (4) Consideration should be given as to the oversight which might be put in place in future proceedings, whether by direction or order or otherwise, in respect of take-up. FCJ is able to adduce evidence about comparative approaches in North America on notice measures.
- (5) Why, having regard to all the relevant circumstances of these proceedings, the interests of justice will best be served if the unclaimed sums are allocated to the AtJF or in some other way which directly benefits consumers.

17. FCJ submits that there should be no Order as to costs of this application and, if the application is granted, as to costs more generally of FCJ's intervention at the hearing.
18. The CR, Woodsford and ATE Insurers oppose the FCJ Application for the following reasons:
  - (1) Contrary to the impression given in its application, FCJ is not an impartial, consumer-focussed organisation. Nor is it a statutory body, NGO or charity. Its intervention is not sought in the interests of the public.
  - (2) FCJ acts in the interests of large businesses and lobbyist organisations, such as the US Chamber of Commerce's Institute for Legal Reform, which have established it and which fund it. They are, or represent the interests of, businesses which might (in other cases) be defendants to collective actions in the Tribunal. FCJ seeks to reduce the scope and number of class actions being brought in the Tribunal, not promote and enhance the effectiveness of the jurisdiction. Its members' interests are served by seeking to undermine the viability of funding and legal representation for such claims, and thereby the ability of class representatives to bring such claims.
  - (3) In those circumstances, the Tribunal is unlikely to be assisted by evidence or submissions from a such a partial institution, or one whose interests and objectives are so adverse to those of the Tribunal collective action regime itself (it is notable, for example, that it criticises the Tribunal's decision – upheld by the Court of Appeal – even to certify the claim).
  - (4) The CR, as a court-appointed fiduciary, has consistently advanced the interests of the class. He has done so by securing a settlement for the class in the proceedings, establishing a comprehensive claims process with the assistance of his case administrators and legal team, and, subject to his obligations under his funding arrangements, expressing his

support for a significant portion of the undistributed damages to go to the AtJF.

- (5) The Tribunal will already have the benefit of a wide range of perspectives from the various parties to the litigation, stakeholders, interveners and the AtJF, as well as its own extensive experience and understanding of the regime, aided by a now quite extensive body of case law at Tribunal, Court of Appeal and Supreme Court level, with which the Tribunal will be familiar. FCJ will not add anything (useful or relevant) which could not be supplied adequately by the existing parties and interveners, and it has no interest of its own in these proceedings (for example, it is not a related or similar business whose own commercial interests might be directly affected by the decision) which would warrant intervention, even on a limited basis. FCJ's proposed submissions would merely replicate arguments already before the Tribunal, thereby offering no material assistance and risking unnecessary duplication and additional cost.
- (6) FCJ's principal allegation, that the CR's notice, outreach and claims administration measures were deficient, is contradicted by the documented and adaptive strategies implemented by the CR and his administrators to maximise participation.

- 19. Accordingly, the CR, Woodsford and ATE Insurers submit that FCJ does not meet the test in Rule 16 of the Tribunal Rules. It does not have a 'sufficient interest' in the proceedings, and even if did, the Tribunal should not exercise its discretion to permit an intervention by such a partial and unnecessary additional party.

### **C. THE FRAMEWORK FOR INTERVENTION**

- 20. The framework for intervention was set out in the Ruling: see [17] to [19]. In summary, the application of Rule 16 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 of the Tribunal Rules.

#### **D. THE TRIBUNAL'S ANALYSIS**

21. As explained in the Ruling, 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.

##### **(1) The AtJF Application**

###### **Sufficient interest**

22. The AtJF is the prescribed charity to receive undistributed funds in the event of a judgment in opt-out collective proceedings: section 47C(5) of the Competition Act 1998. The matters in issue in the CR's Stakeholder Entitlement Application i.e. the destination of settlement monies which are not distributed to class members directly affect the AtJF. The AtJF was granted permission to intervene in the *Merricks* collective proceedings, limited to a written statement of intervention regarding the determination of the settling parties' collective settlement approval order application: see the Tribunal's Order of 29 January 2025.

###### **Discretion**

23. The AtJF will provide the Tribunal with submissions that allow the Tribunal to understand the merit in those aspects of the parties' proposals which could lead to a distribution to the AtJF. For example, the AtJF will help to fill gaps in the information before the Tribunal. The other stakeholders who are likely to be making submissions at the forthcoming Stakeholder Entitlement Hearing are

not necessarily incentivised to articulate the merits of the proposed option of a distribution to the AtJF. If there is to be a distribution to the AtJF there will be an issue as to the amount.

**(2) The FCJ Application**

**Sufficient interest**

24. In the Tribunal's view, the matters in issue in the proceedings which affect FCJ and its members, are precisely those problems which are likely to be relevant in determining the issues at the upcoming Stakeholder Entitlement Hearing; in particular the risks posed to collective proceedings in this jurisdiction if the financial rewards available to claimant lawyers and funders are inversely proportional to the take up they achieve in practice.
25. The submissions of FCJ are likely to provide assistance to the Tribunal in determining the issues and FCJ will provide an important counterpoint to the aligned interests of the CR, Woodsford and ATE Insurers at the Stakeholder Entitlement Hearing. The Tribunal's jurisprudence and learning in relation to the settlement of collective proceedings is at an evolving stage and few decisions have been given in the area. The Tribunal is keen to get the balance right between all the interests involved and to reach fair outcomes.

**Discretion**

26. An important feature of these proceedings is the extremely low take up by members of the class. The Tribunal has flagged its concerns in relation to this issue. FCJ's position is in marked contrast to various of the submissions which, it is understood, will be advanced by existing parties or interveners at the Stakeholder Entitlement Hearing.

**E. CONCLUSION**

27. The AtJF and FCJ are each granted permission pursuant to Rule 16 of the Tribunal Rules to intervene at the upcoming Stakeholder Entitlement Hearing,

such intervention is limited to written statements of intervention (10 pages each) and any evidence relied upon (8 pages each). The parties have agreed directions in advance of the Stakeholder Entitlement Hearing.

28. This Ruling is unanimous.

Hodge Malek KC  
Chair

Hugh Kelly

Eamonn Doran

Charles Dhanowa CBE, KC (*Hon*)  
Registrar

Date: 7 August 2025