Neutral citation [2025] CAT 69

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1266/7/7/16

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

31 October 2025

Before:

SIR PETER ROTH
(Chair)
HODGE MALEK KC
PROFESSOR RACHAEL MULHERON KC (HON)

Sitting as a Tribunal in England and Wales

BETWEEN:

WALTER HUGH MERRICKS CBE

Class Representative

- and -

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE S.P.R.L.

Defendants

- and -

INNSWORTH CAPITAL LIMITED

First Intervener

- and -

THE ACCESS TO JUSTICE FOUNDATION

Second Intervener

Determined on the papers

RULING (CSAO COSTS, DISTRIBUTION, AND FORM OF ORDER)

A. INTRODUCTION

1. On 21 February 2025, at the conclusion of a contested hearing, we announced our decision to issue a collective settlement approval order ("CSAO") in these proceedings, on the joint application of the Class Representative and the Defendants (the "CSAO Application"). Our reasons for that decision, along with our determination as to how the settlement sum of £200 million was to be paid out and distributed, were set out in a written judgment issued on 20 May 2025: [2025] CAT 28 ("the CSAO Judgment"). This ruling uses the same abbreviations as the CSAO Judgment, save only that we will refer to the 2023 LFA as, simply, "the LFA".

2. Innsworth, the litigation funder that had been funding the claims, objected to many aspects of the proposed settlement, and with the permission of the Tribunal it intervened in the proceedings to oppose the CSAO Application.

3. Following the CSAO Judgment, on 10 June 2025, Innsworth commenced proceedings in the High Court seeking judicial review of the Tribunal's decision ("the JR proceedings"). Innsworth no longer seeks to challenge the amount of the Settlement Sum but challenges the Tribunal's determination as to how the Settlement Sum should be distributed.

4. On 25 June 2025, both Mr Merricks and Mastercard applied for costs as against Innsworth. At the same time, Innsworth applied for payment out to it of over £40 million from the Settlement Sum on account of costs it had funded and expended; submitted that its costs of opposing the CSAO Application should come out of the Settlement Sum; and sought a stay of any further distribution of the Settlement Sum pending resolution of the JR proceedings. On 1 July, Mr Merricks and Mastercard filed separate submissions in response to Innsworth's application. On 2 July, Innsworth filed submissions in response to Mr Merricks' and Mastercard's applications. On 10 September 2025, Mr Merricks' solicitors wrote to revise his costs application to include Mr Merricks' own fees.

5. Also following the CSAO Judgment, Mr Merricks submitted a draft form of CSAO and a draft form of notice to be published inviting class members ("CMs") to submit claims. Both Mastercard and Innsworth have commented on the drafts and Mr Merricks has responded to those comments. Having considered those observations, the Tribunal has decided that it is appropriate and more straightforward to make a single order comprising different sections. That order (the "Order") will incorporate a CSAO and related provisions and also the terms of this ruling, and will be made at the same time as the issue of this ruling.

6. This ruling addresses:

(1) whether Innsworth should be liable for any costs of the CSAO Application;

(2) whether Mr Merricks' costs should be treated differently because of the LFA;

(3) if Innsworth is liable, what is the extent of that liability;

(4) whether there should be a payment on account and if so, for how much;

(5) whether there should be payment out of the Settlement Sum to Innsworth by way of reimbursement of the costs it has expended and funded;

(6) whether Innsworth's own costs of its intervention in the CSAO Application are recoverable out of the Settlement Sum;

(7) the process to be followed for the expert assessment by Mr Gordon-Saker pursuant to the CSAO Judgment;

(8) the form of Notice to be given to CMs; and

(9) to what extent there should be a stay of the provisions of the Order, including any distributions out of the Settlement Sum once that is paid to Mr Merricks.

B. SHOULD INNSWORTH BE LIABLE FOR COSTS?

7. The Tribunal's jurisdiction to order the payment of costs is governed by rule 104 of the CAT Rules, which gives the Tribunal a very broad discretion. Innsworth was not a party to the underlying proceedings but an intervener in the application for a CSAO. The general approach to interveners before the Tribunal is that they are neither able to recover their own costs nor liable for other parties' costs. However, that is not invariably the case. As set out in the Tribunal's *Guide to Proceedings 2015*, which has the status of a Practice Direction, at para 8.10 (citations omitted):

> "The general position is that interveners are neither liable for other parties' costs, nor able to recover their own costs …. However, the matter remains in the discretion of the Tribunal and that approach may be departed from in appropriate circumstances…."

8. The governing principle is to make such order for costs as is just in all the circumstances of the case. Therefore in *Viasat UK Ltd v Ofcom* [2019] CAT 11, the Tribunal ordered that the intervener should recover all its costs from the unsuccessful party because "it was a real target of the application" by that party. Indeed, in the present proceedings, when the Tribunal dismissed an application by Mr Merricks to restrict the use of documents by Innsworth for the purpose of its intervention, Mr Merricks was ordered to pay Innsworth's costs: see [2025] CAT 22. Innsworth was clearly the target of that application.

9. In its stance as intervener, Innsworth actively opposed the CSAO Application made jointly by Mr Merricks and Mastercard. Indeed, it adopted the role of their adversary, challenging almost every aspect of the CSAO Application, including the amount of the settlement and the arrangements proposed for distribution. It filed significant evidence, to which the parties inevitably had to respond, and appeared by leading and junior counsel at the hearing where they made extensive submissions. There can be no doubt that both Mr Merricks' and Mastercard's costs were substantially increased by the position adopted by Innsworth.

10. Innsworth submits that as a matter of principle a funder should not be discouraged from intervening in a CSAO application, and that its perspective

may assist the Tribunal, whereas an adverse costs order here will deter funders from seeking to intervene. We can accept that a funder's involvement in a settlement hearing may assist, e.g. by explaining the basis of its remuneration in the litigation funding agreement, or supporting proposals for how the funder should be paid on distribution. We are not suggesting any general approach to the costs of participation by funders in settlement hearings. The role played by funders (or insurers) in those hearings can constructively assist the settlement process: see *Mark McLaren Class Representative Ltd v MOL (Europe) Africa Ltd* [2025] CAT 4 at [96] ("*McLaren (2025)*"). Nor does anything in this ruling address the considerations which may apply to a class member who seeks to object to a settlement, pursuant to rule 94(7) of the CAT Rules. Our focus is on the particular circumstances of the present case. Innsworth intervened to do battle on a wide front against the CSAO Application by the Settling Parties. And in that battle, it was in all material respects unsuccessful. If Innsworth is not liable for the significant additional costs which its unsuccessful intervention caused Mr Merricks to incur, those costs will have to come out of the Settlement Sum to the detriment of the class, which in our view would not be just.

11. Moreover, we note that Innsworth's position up to and during the hearing of the CSAO Application was that while Innsworth was obliged under the LFA to pay Mr Merricks' costs of applying for the CSAO, that obligation did not extend to such additional costs as were incurred exclusively by reason of Innsworth's intervention. In the letter from its solicitors to the Tribunal of 21 February 2025, responding to the evidence of Mr Merricks' solicitor, Innsworth accepted that it was obliged to pay Mr Merricks' reasonable costs that would have been incurred absent its intervention, but as regards the further costs caused by its intervention Innsworth stated:

> "… Innsworth disagrees that ICL is required to pay out of the Approved Budget for Mr Merricks' CSAO costs occasioned by its intervention - such costs will be costs in the intervention application and fall to be determined by the Tribunal following the CSAO hearing in the usual way."

We agree with that statement.

12. Accordingly, we find that Innsworth should here be liable for both Mr Merricks' and Mastercard's costs, but only to the extent that their costs were properly *increased* by reason of Innsworth's intervention. We address that issue below.

C. SHOULD MR MERRICKS' COSTS BE TREATED DIFFERENTLY BECAUSE OF THE LFA?

13. In its submissions, Innsworth submits, contrary to its previous position, that all the costs of Mr Merricks related to the CSAO Application, including the additional costs incurred by reason of Innsworth's intervention, constitute "Project Costs" under the LFA which Innsworth is contractually bound to pay in any event. On that basis, since Mr Merricks will not bear those costs, Innsworth argues that under the indemnity principle there is no basis on which Mr Merricks can separately obtain an order for costs against Innsworth.

14. If that submission were correct, it would mean that Innsworth would in turn be reimbursed those costs as part of Pot 2 of the Settlement Sum and would indeed earn a profit return on that payment which would come out of Pot 3. In consequence, the additional costs occasioned by Innsworth's unsuccessful opposition to the settlement and its resulting profit return would reduce the amount available for CMs.

15. We accept (contrary to Mr Merricks' argument) that it is open to Innsworth to advance this submission, notwithstanding that it previously argued the contrary. There is no estoppel and Innsworth is free to change its mind. However, we reject Innsworth's submission as misconceived.

16. Innsworth contends that the costs which Mr Merricks seeks to recover come within sub-para (a) of the definition of "Project Costs" in cl. 1.1 of the LFA. The full definition is as follows:

> "The costs and expenses of the Project, after [11 December 2020], comprising:
>
> (a) all costs and expenses referred to in the Approved Budget, including the reasonable legal costs and disbursements of the Lawyers, at all times within and subject to the Approved Budget for the sole purpose of prosecuting and resolving the Claims;

(b) any other costs stated to be treated as Project Costs according to the terms of this Agreement;

(c) the costs involved in the provision and maintenance by the Funder of any Security for Costs, which are in addition to the Approved Budget;

(d) any costs incurred by the Funder in quantifying, challenging or referring to assessment, any Adverse Costs Order(s), which are in addition to the Approved Budget;

(e) any costs and expenses including premium and IPT incurred in connection with ATE Insurances or such fees as the Guarantors may charge for underwriting the adverse costs, in either case such costs and expenses being in addition to the Approved Budget;

(f) any third party direct expenses incurred by the Funder or the Manager in connection with the investigation, evaluation, development and promotion of the Project, such as fees paid to experts (including loss assessors and/or economists), counsel (including independent counsel or lawyers providing a second opinion) and investigators, which are in addition to the Approved Budget;

(g) any VAT or other taxes charged to or assessed against the Funder associated with the costs and activities described above."

17. It is axiomatic that any contract has to be construed against the surrounding circumstances at the time it was entered into, and that regard may be had to the commercial purpose of an agreement in ascertaining its true meaning. Here, the purpose of the LFA was for Innsworth to provide funding to Mr Merricks to pursue the collective proceedings on behalf of the class against Mastercard. That funding was of course subject to limitations and conditions. But the agreement did not have the purpose of funding litigation (and contested applications before the Tribunal) as between Mr Merricks and Innsworth. For essentially this reason, the Tribunal previously rejected Mr Merricks' contention that he should not be liable for the costs which he occasioned Innsworth by reason of his wholly unsuccessful application to restrict Innsworth's access to documents. Mr Merricks argued that under the LFA Innsworth was obliged to discharge those costs. The Tribunal held that this cannot have been the intention of the parties on any commercially sensible construction of the LFA: [2025] CAT 22.

18. Essentially on the same basis, we consider that the parties cannot have intended that Innsworth should be contractually bound to pay the costs of Mr Merricks occasioned by its own intervention before the Tribunal to resist Mr Merricks' application to approve a settlement in the interests of the class. Those are costs

which fall outside the scope of the LFA and are to be determined by the Tribunal, as Innsworth previously stated, "in the usual way". Innsworth, like Mr Merricks, is not immune from an adversarial costs order should there be a contested application between them.

19. In our view, this conclusion is reinforced by the wording of cl. 8.1 of the LFA, which states, insofar as relevant:

> "…., the Class Representative undertakes to use his best endeavours to obtain a Costs Award(s) in respect of all his costs and disbursements in connection with the Claims and/or Proceedings (or any Settlement relating thereto). The Parties agree that any Resolution Sum in respect of a Costs Award is to be paid to the Lawyers in the first instance, and the Class Representative hereby irrevocably agrees to direct the Lawyers to immediately pay any such Resolution Sum received by them into the Trust Account and to distribute such sums to the Funder in and towards reimbursement of the Project Costs funded pursuant to this Agreement."

"Costs Award" is defined by cl. 1.1 to mean:

> "Any amount ordered to be paid by any Defendant or any other party *or non-party* to the Proceedings in respect of the Class Representative's costs and disbursement and/or expenses incurred in connection with the Claims and/or the Proceedings." [emphasis added]

And "Resolution Sum" is defined to include "[t]he amount … of money payable in respect of any Costs Award(s)".

20. Accordingly, if (as Innsworth submits) Mr Merricks' additional costs incurred only in contesting Innsworth's submissions and evidence on the CSAO Application were to fall within "Project Costs" and to be funded on that basis by Innsworth, then Mr Merricks would be contractually obliged to seek to obtain a "Costs Award" in respect of those costs from Innsworth. And Mr Merricks would then have to direct his lawyers to pay the costs he thereby recovered from Innsworth into an account for distribution back to Innsworth. We cannot accept that the LFA was intended to produce such a commercially convoluted and absurd position. Moreover, at the end of the day, on that construction Innsworth would still be left paying those costs since the contractually specified "Return" which Innsworth would receive out of a settlement sum expressly excludes "any costs recovered by the Class Representative and paid to the Funder pursuant to Clause 8.1": see Schedule 4 to the LFA.

21. We therefore conclude that the additional costs of Mr Merricks related to the CSAO Application incurred by reason of Innsworth's intervention are not "Project Costs" under the LFA. Contrary to Innsworth's submission, such an award of costs is not precluded by the indemnity principle and Mr Merricks is entitled to obtain an order for costs against Innsworth (see para 12 above).

D. WHAT IS THE EXTENT OF INNSWORTH'S LIABILITY FOR COSTS?

22. Mr Merricks appears to submit that he should recover all his costs resulting from Innsworth's opposition to the settlement. Mr Merricks' Application for Costs refers to the fact that Innsworth made clear that it would seek to intervene to oppose approval of the settlement as soon as that was announced on 3 December 2024, and states:

> "Accordingly, all of the Settling Parties' preparations for the CSAO Application were conducted against the backdrop of a likely intervention from Innsworth. Accordingly, all costs related to the settlement as of 3 December 2024 were greater than they otherwise would have been but for Innsworth's intervention."

23. We have no doubt that the first of these two statements is correct. But it does not mean that the preparations and evidence for the CSAO Application therefore gave rise to significantly higher costs than would, or should, have been incurred in any event. The Tribunal was being asked to approve a settlement in an amount that was only about 1.25% of the value previously placed on the claim (i.e. c. £16 billion[1]), where the class would recover nothing in respect of the great bulk of the claim (i.e. the allegedly higher costs of domestic transactions due to UK interchange fees);[2] and where out of the £200 million settlement at least £45.5 million was attributable to costs. In those circumstances, the Settling Parties would be expected to prepare a very full and detailed application for a CSAO, which they could expect would receive thorough and critical scrutiny from the Tribunal. Moreover, the Settlement Agreement in the present case included the highly unusual feature of a large indemnity from the Defendants to

[1] CSAO Judgment at [23].
[2] Therefore as regards 95% of the claim, the settlement provided no recovery for the class: see CSAO Judgment at [13]-[14].

the Class Representative. Although for reasons given in the CSAO Judgment we found that was not objectionable, this aspect also required detailed explanation, on evidence, to satisfy the Tribunal that the settlement was not tainted by a conflict of interest. The fact that the CSAO Application and evidence were prepared in the expectation of opposition from Innsworth and to address expressed or anticipated objections from Innsworth, does not therefore mean that this work, and the consequent costs, should not have been incurred even if Innsworth had remained neutral regarding the settlement.

24. Mastercard ostensibly acknowledges this, since its Application for Costs states:

> "Mastercard recognises that the majority of its costs of the application are attributable to the need to make a full and fair presentation of the proposed settlement to the Tribunal and so were incurred prior to ICL's intervention and/or would have been incurred in any event."

However, both Mr Merricks and Mastercard seek to recover significant costs for work carried out not only prior to 2 February 2025, the date on which Innsworth filed its Statement of Intervention, but also prior to 16 January 2025, the date of the filing of the CSAO Application. Although that work may have been directly occasioned by Innsworth's stated position to oppose the settlement, for the reasons we have explained we do not regard it as an *increase* over work that would or should have been undertaken in any event. Therefore, we find that both Mr Merricks' and Mastercard's costs recoverable from Innsworth shall relate to work done after 2 February 2025.

25. For the period after 2 February 2025, we think it is appropriate to order that Innsworth shall pay the costs of the Settling Parties insofar as such costs were increased by reason of its intervention. The Settling Parties had to address and counter the contentions by Innsworth in its Statement of Intervention not only that the Settlement Sum was much too low but that if a settlement of £200 million was approved then a very large proportion of that sum (c. £179 million) should be paid to Innsworth. For the reason we have explained, determination of the extent of such increased costs inevitably involves estimation and can only be done on a broad brush basis. In our judgment, of the legal costs incurred after 2 February 2025, one half of the solicitors' costs and one third of counsel's fees should be regarded as an increase occasioned by Innworth's intervention.

We think that the costs of the economic experts were incurred before 2 February 2025, but insofar as any of their costs were incurred after that date, we should state that we do not regard those costs as attributable to Innsworth's intervention; nor were the costs of Portland Communications.

E. SHOULD THERE BE PAYMENT ON ACCOUNT, AND IF SO HOW MUCH?

26. In accordance with the Tribunal's usual practice, where there is an order for costs subject to detailed assessment, the paying party should make an interim payment on account. Determination of the amount to be paid on account is not a summary assessment of costs, and the Tribunal will look at the matter in the round.

27. The solicitors to both Mr Merricks and Mastercard have put in interim schedules of costs. However, they have taken a rather different approach.

Mr Merricks

28. For Mr Merricks, the schedule includes almost all his costs with only limited exclusions (e.g., Mr Jack Willams' fees for his opinion regarding the pass-on trial, and fees for attendance on the Foundation). The total of that schedule is £1,790,069 plus VAT, made up as follows:

Solicitors' fees	:	£1,523,800
Counsel	:	£ 227,925
Experts	:	£ 38,344
		£1,790,069

Mr Merricks submits that about 65% of this reflects costs of and occasioned by Innsworth's intervention, i.e. £1,163,544.85 plus VAT.

29. As stated above, we exclude from recoverable costs the solicitors' costs incurred prior to 2 February 2025 and also the costs of the expert economists (who provided evaluations for the CSAO Application). We also exclude the costs of Nicholas Bacon KC, who we understand was instructed on certain costs issues

which, in our view, would have arisen irrespective of Innsworth's intervention. On that basis, the total reduces to £837,825 plus VAT, made up as follows:

Solicitors' fees	:	£ 638,225.50
Counsel	:	£ 199,600
		£ 837,825.50

30. We recognise that this was a very substantial CSAO application following major and complex litigation, and that it raised novel and challenging issues. Nonetheless, we regard the total cost of almost £1.8 million as remarkably high and unreasonable, and that of course flows through to the reduced figure of £837,825 following exclusions. In our view, the size of the costs results both from the high hourly charging rates and the extraordinary number of hours worked. As regards hourly rates, the Tribunal has previously made clear in these proceedings that for the purpose of recoverable costs, the rates are to be assessed by reference to the Guideline rates (published with the Guide to the Summary Assessment of Costs) with an uplift of 24% because of the particular complexity of the proceedings: see [2024] CAT 57. The costs submissions for Mr Merricks have recalculated the total on the basis of adjusted hourly rates. Applying that approach to the total and excluding December 2024 and January 2025 reduces the solicitors' fees to £525,423. Innsworth in its responsive submissions has strongly criticised the number of hours devoted to the CSAO Application, particularly at partner (Grade A) level. We do not feel able to consider what would have been reasonable and will accordingly account for this in taking a somewhat lower proportion for the purpose of calculating an interim payment. Counsel's fees refer to only one KC, whereas Mastercard had two KCs and a junior, and Innsworth was represented by a KC and junior counsel. Nonetheless, for a three-day hearing, allowing for all the prior advice and written submissions, we consider that a reasonable and proportionate fee for counsel would be no more than £180,000. That produces a total of £705,423.

31. We do not accept that 65% of all the work reflects an *increase* properly attributable to Innsworth's intervention. As stated above, in our view, the proportion is 50% of solicitors' costs and one third of counsel's fees, and given the very limited exclusions from costs in the schedule we apply those

proportions to the costs shown in the schedule. The resulting figure is £322,711.50. Because of the concern about unreasonable hours worked, we determine that the interim payment should be at 60% of this figure, i.e. £193,626.90, which with VAT amounts in round terms to £232,352.

Mastercard

32. The schedule for Mastercard's costs has excluded costs of a broader range of work which it recognises would have been undertaken in any event. Secondly, it has included all costs of work which it considers were specific to and caused entirely by Innsworth's intervention. Thirdly, for costs categories which cover both costs incurred by reason of the intervention and costs which would have been incurred in any event, it states that "on the avowedly approximate but conservative basis" it has apportioned one third of costs after the date of the intervention application as attributable to the intervention. For example, it has allowed one third of counsel's fees. On that basis, its total costs attributable to the intervention are stated to be £740,448, broken down as follows:

Solicitors' fees	:	£632,715.50
Counsel's fees	:	£107,732.50

However, this total includes work prior to 2 February 2025, the date of Innsworth's statement of intervention. Deducting that earlier period, the total reduces to £557,870.33, made up as follows:

Solicitors' fees	:	£479,554.50
Counsel's fees	:	£ 78,315.83

33. As with Mr Merricks, the hourly rates charged by Mastercard's solicitors are substantially above the Guideline rates (plus a 24% uplift), with the exception of trainees/paralegals and the costs lawyer. The excess varies as between some 57% for Grade A solicitors, 27.5% for Grade B solicitors and 63% for Grade C solicitors. Given the distribution of work between these grades, and allowing for the fact that no adjustment is needed to the trainee/paralegal rates, on a broad brush approach we reduce the solicitors' fees by 45% to £263,754.97. Given

that Mastercard excluded many of its solicitors' costs from the schedule on the basis that they did not relate to Innsworth's intervention, we will not make any further reduction. However, we reduce Counsel's fees to the equivalent allowed for Mr Merricks, i.e. to £60,000, representing one third of £180,000. This produces a total of £323,754.97. We note that this total is only slightly below the costs allowed for Mr Merricks although it includes the costs of preparing the costs submissions, which are not included in the adjusted figure for Mr Merricks. Because much of Innsworth's evidence concerned interactions with Mr Merricks and his solicitors, we would indeed expect that estimation of Mastercard's costs will result in a lower figure than Mr Merricks' costs.

34. Mastercard seeks a payment on account of 60% of the estimated allowable costs. On the figures adjusted as set out above, we determine that it should receive an interim payment of £194,253.

The costs of the present applications

35. As noted above, Mastercard's schedule includes its costs of the costs application. Mr Merricks has set out those costs (including the costs of opposing Innsworth's application for distribution) separately as amounting to solicitors' fees of £22,885 and counsel's fees of £6,300 (plus VAT in each case). Given our determination that both Settling Parties should recover their costs from Innsworth and receive payment on account, and that we make a higher deduction from Mr Merricks' claimed costs than from Mastercard's claimed costs, we think that (a) Mastercard should recover 80% of its costs of its costs application, and (b) Mr Merricks should recover 70% of its costs of its costs application (including the costs of opposing Innsworth's application for distribution).

36. We see no reason to adjust the payment on account for Mastercard set out in para 34 above, since that is put at the moderate proportion of 60% of estimated total allowable costs.

37. For Mr Merricks, the costs application alone is stated to have involved 29 hours of solicitors' time (including 6 hours of partner's time) in addition to 30 hours of paralegal time. That seems to us an extraordinarily high amount when the costs submissions were drafted by leading counsel (involving 7 hours of his

time), so that the solicitors' work was primarily preparing the costs schedule. Substituting the Guideline Rate + 24% as above, the total solicitor fees reduce to £18,138.52. Taking a broad brush approach, we estimate the reasonable and proportionate costs (for both solicitors and counsel) of Mr Merricks' costs application at £20,000, such that 70% amounts to £14,000. We shall order an interim payment of £12,000 plus VAT, i.e. £14,400.

Mr Merricks' fees

38. As noted above, by his solicitors' letter dated 10 September 2025, annexing a short costs schedule, Mr Merricks sought to "update" his costs application by claiming also the costs of his own time. He has been paid throughout the proceedings a modest rate for his time, most recently at £150 per hour. The letter states that Mr Merricks has in fact invoiced Innsworth for his time for period up to 28 March 2025, and that Innsworth has paid those fees. But he now states that he considers that this was an error, that the costs should be paid by Innsworth pursuant to an order of the Tribunal, and that if this is so ordered he will then issue a credit to Innsworth so that these costs do not fall to be paid under the LFA and come out of the Settlement Sum.

39. The amount of Mr Merricks' fees throughout the CSAO Application process, from December 2024 to May 2025, works out at £14,078.70, and he seeks 65% of those fees (i.e. £9,151.16) as being attributable to Innsworth's intervention. In addition, he seeks £525 for his time spent reviewing the Costs Application itself and his solicitors seek a further £2,460 for their costs of preparing the "update" to the Costs Application.

40. For the reasons set out at para 24 above, we exclude time spent in December 2024 and January 2025 from these costs. For the rest, we estimate the percentage increase caused by Innsworth's intervention at 50% of the time spent. Accordingly, the fees work out at £4,564.35.

41. The claim in respect of the Costs Application itself is for 3½ hours of Mr Merricks' time. We regard that as disproportionate for an application of that nature, drafted by solicitors and counsel, and will allow 2 hours, i.e. £300. The total recoverable for Mr Merricks' fees is therefore £4,864.35.

42. The fees of the solicitors for the update require adjustment in line with the Guideline Rates (+ 24%). That reduces the sum from £2,460 to £1,814.12. Presumably VAT is to be added to that sum although it is not included in the costs schedule, bringing the figure up to £2,176.94.

43. We do not think it is necessary to require detailed assessment of this additional aspect of the costs application, and we therefore award Mr Merricks costs in respect of his fees in the amount of £4,864.35 and summarily assess the legal costs of what is in effect an amendment to the Costs Application at £1,750 plus VAT, i.e. £2,100.

F. SHOULD THERE BE A PAYMENT OUT TO INNSWORTH OUT OF THE SETTLEMENT SUM?

44. Innsworth seeks an order for immediate payment out of the Settlement Sum of £41,505,287.86, comprising:

(1) £40,682,007.17, representing the monies in Pot 2 relating to Innsworth's payments in respect of Mr Merricks' costs, fees and disbursements to 30 November 2024;

(2) £146,350 representing Innsworth's own costs of "non-counterfactual causation", i.e. its own costs to mid-October 2024;

(3) £676,930.69, representing monies paid out or submitted for payment by Innsworth since the CSAO Application and before the CSAO Judgment.

45. As regards (1) and (2) above, Innsworth relies on the holding in the CSAO Judgment that it should receive these sums: see at [148]-[153].

46. As regards (3) above, that figure is the sum of three elements:

(1) part-payment of the invoice from Mr Merricks' solicitors for December 2024: Innsworth has paid £650,076.99 (and challenged the reasonableness of the balance of £418,863);

(2) Mr Merricks' own invoices for December 2024 to March 2025, in the total amount of £16,853.70; and

(3) the adverse costs paid on behalf of Mr Merricks to Visa following his failed No Adverse Costs Application in the pass-on proceedings, following the order of Green J: see the CSAO Judgment at [156]. Those costs were agreed at £10,000.

47. Innsworth is correct that under the terms of the CSAO Judgment, it would be entitled to reimbursement for these payments out of Pot 2. That is subject only to the determination in this ruling that Innsworth is liable for part of Mr Merricks' own costs in the amount of £4,864.35: para 43 above.

48. However, as noted at the outset, Innsworth has commenced JR proceedings challenging the CSAO Judgment. It is true that Innsworth is not now seeking to challenge the Tribunal's approval of the overall Settlement Sum of £200 million. But it is seeking to challenge the apportionment of that sum, including the reservation of £100 million for the class as Pot 1. Unsurprisingly, Innsworth is not seeking to challenge the Tribunal's determination that there should be ring-fenced in the Settlement Sum a fund for reimbursement of all the monies it has paid out and expenses properly incurred, i.e. the principle underlying Pot 2. But if Innsworth should succeed in setting aside the Tribunal's allocation of one half of the Settlement Sum as ring-fenced for the class, it is by no means inevitable that the concept of Pot 2 will survive.

49. As stated in the submissions on behalf of Mr Merricks, the Tribunal's determination regarding the three 'Pots' was a package, and the decision regarding Pot 2 was impacted by the decision concerning Pot 1. It would be open to the Divisional Court (or on further appeal, a higher court) to hold[3] that a different approach to distribution is appropriate: e.g., that the entire Settlement Sum should first be offered to the class on a per capita basis, with reimbursement to Innsworth to come out of undistributed damages. Should that course be

[3] Alternatively, if the court could only quash the Tribunal's distribution decision and not itself direct a different distribution because of the nature of JR proceedings, it could indicate what form of distribution would be lawful and remit the matter accordingly to the Tribunal.

adopted, although it seems likely that take-up would be low such that undistributed damages would exceed £41.5 million, that is not certain. There is as yet no experience in the UK of such a very wide distribution of damages from collective proceedings, albeit there has been a very low level of take-up following settlement with one of the defendants in the *Gutmann* trains proceedings: see *Gutmann v First MTR South Western Trains Ltd and Stagecoach South Western Trains Ltd* [2025] CAT 38 at [22]. We appreciate that Innsworth no longer supports this course, but if the approach adopted by the Tribunal was found to be unlawful, the Court would not be confined to substituting Innsworth's preferred alternative.

50. Accordingly, we think that it is important to 'hold the ring' until resolution of the JR proceedings which Innsworth commenced. We therefore hold that payment to Innsworth of monies from Pot 2 should await the resolution of its JR application.

51. We should add that although this has the effect of delaying any reimbursement to Innsworth (and to the class), if Innsworth had been successful in opposing the CSAO Application then there would have been no settlement, no Settlement Sum would have been paid, and Innsworth would have had to wait very much longer for any potential reimbursement as well as expending substantially more funds in paying Mr Merricks' costs of participation in part 2 of the pass-on trial due to be held in these proceedings along with the Merchant Umbrella Proceedings, and which took place between 24 March and 3 April 2025.

52. This decision is not inconsistent with the permission granted on 28 May 2025 to Mr Merricks' solicitors to discharge from the Settlement Sum various invoices from third parties in the total amount of a little under £60,000. Those invoices largely concern fees of Epiq and of Opus 2 International for e-Bundle access. We understand from the letter from WFG dated 1 August 2025 that it has now been agreed between Mr Merricks and Innsworth that these costs constitute Project Costs which would therefore fall to be accounted under Pot 2. The further minor disbursements referred to in that letter fall to be treated similarly.

G. ARE INNSWORTH'S COSTS OF THE CSAO APPLICATION RECOVERABLE FROM THE SETTLEMENT SUM?

53. As mentioned above, Innsworth was represented by leading and junior counsel at the hearing of the CSAO Application. It contends that its own costs of its intervention fall to be paid out of the Settlement Sum. Innsworth has not disclosed the level of those costs, but our experience of this case suggests that they are substantial.

54. Innsworth submits that these costs come within sub-para (f) of the definition of "Project Costs": see para 16 above. If that is correct, then not only is Innsworth entitled to reimbursement of those costs (subject only to review for reasonableness[4]) out of Pot 2, but it will receive a further return of 50% of those costs out of Pot 3.

55. We cannot accept this submission. And to be clear, in stating in the CSAO Judgment at [148(2)] that the figure there referred to did not include Innsworth's costs of contesting the settlement and the CSAO hearing, we did not mean that those costs could be included. That question was not addressed.

56. As stated above at paras 13-21, we consider that "Project Costs" is not to be interpreted as covering the costs of adversarial proceedings as between Mr Merricks and Innsworth. And as we have observed, that was effectively the substance of Innsworth's intervention. There is, in our view, a clear distinction between Innsworth taking independent advice regarding a proposed settlement, or indeed the prospects of the litigation going forward (e.g. for the purpose of deciding whether to provide additional funds or, conversely, whether to seek to terminate funding pursuant to cl. 12.1 of the LFA), and on the other hand intervening in the Tribunal proceedings to oppose an application made by the Class Representative. Innsworth's intervention was not made to assist the Settling Parties in satisfying the Tribunal that the arrangements proposed were reasonable, but in a determined attempt to defeat the proposal, including as regards the amount of the return that would be paid to Innsworth.

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[4] Innsworth accepts that these costs should be subject to expert assessment on the same basis as its costs of obtaining advice on counterfactual causation: CSAO Judgment at [153].

57. Innsworth's position here was therefore in sharp contrast to the position of the funder in *McLaren (2025)*. There, the funder had filed evidence supporting the applications for a CSAO, and the funder was represented (jointly with the insurers) as an interested party at the hearing to clarify its position as regards potential claims against part of the damages and address any concerns from the Tribunal. As the Tribunal there noted, this was critical to the Tribunal's decision to approve the proposed settlements: judgment at [96]. It was expressly on this basis that the Tribunal then allowed the funder to recover its costs out of the costs, fees and disbursements element of the settlement sums: *Mark McLaren Class Representative Ltd v MOL (Europe) Africa Ltd (Costs)* [2025] CAT 24 at [12].

58. We should emphasise that we are not suggesting that Innsworth's intervention to oppose the Settling Parties' proposals was inappropriate. But when a funder chooses to take that stance in its own commercial interests, it should not expect that its costs of such a wholly unsuccessful intervention will be deducted from the amount of the settlement.

59. As regards specifically sub-para (f) of the definition of Project Costs in the LFA, that covers expenses incurred by the funder "in connection with the investigation, evaluation, development and promotion of the Project". The "Project" is defined in cl. 1.1 as:

> "The pursuit of the Claims and the conduct of the Proceedings, acting consistently with the Overarching Purpose."
>
> And the "Overarching Purpose" is defined as:
>
> "To facilitate the just resolution of the Claims and the Proceedings according to law and as quickly, inexpensively and efficiently as possible in accordance with the Approved Budget with the aim of maximising Settlement or judgment proceeds net of Project Costs and minimising all risks, including in particular the risk of the Proceedings being unsuccessful."

60. In our judgment, the "promotion" of either the "pursuit of the Claims" or the "conduct of the Proceedings" in order to maximise "Settlement or judgment proceeds *net of Project Costs*" cannot on their proper interpretation mean that the costs of a wholly unsuccessful intervention before the Tribunal to oppose the CSAO Application constitute "Project Costs" which fall to be deducted from the Settlement Sum.

61. Indeed, were the position to be otherwise, that would have the perverse result that the greater the efforts, and therefore expense, which Innsworth made and incurred in unsuccessfully opposing the settlement agreed between the Settling Parties, the greater the deduction[5] to be made from the Settlement Sum, to the prejudice of the class. The position is compounded under the terms of the CSAO as determined by the CSAO Judgment, since Innsworth would earn a 50% return on such costs and therefore benefit financially, to the detriment of the class, from its failed intervention.

62. For the avoidance of doubt, we should add that we consider that the position is the same, by parity of reasoning, as regards Innsworth's costs of the JR proceedings. As regards any costs of Mr Merricks regarding the JR proceedings, we have already held that those are to come out of Pot 3: see the CSAO Judgment at [197] (where the reference to an "appeal" is to be read as encompassing a judicial review, since it clearly referred to a challenge by Innsworth). Innsworth invites the Tribunal to reconsider the position, on the basis that these should properly be regarded as Project Costs. However, it follows from our reasoning in Section C above that these are not Project Costs.

H. THE PROCESS OF EXPERT ASSESSMENT

63. The CSAO Judgment held that insofar as various solicitor-client costs are to be paid or reimbursed out of the Settlement Sum, it was important to ensure that those costs are reasonable: i.e. the payment or reimbursement is limited to reasonable costs: see at [153], [158] and [165]. For that purpose, the Tribunal has appointed Mr Gordon-Saker to as an expert to assess the reasonableness of those costs and report to the Tribunal accordingly: [160].

64. Following circulation of a confidential draft of this ruling and the Order to the legal advisors of the parties and of Innsworth, the solicitors for Innsworth submitted that following the provision by Mr Merricks of detailed bills of costs, Innsworth should have the opportunity to submit points of dispute to those claimed costs, and then Mr Merricks could submit points of reply (and the same

[5] Subject only to assessment of the costs for reasonableness. Since solicitor-and-client costs are assessed on an indemnity basis, there is no control for proportionality.

process would apply to Innsworth's own claim for costs that fell to be assessed). WFG for Mr Merricks strongly opposed this proposal.

65. We reject the submission made on behalf of Innsworth. Such a three-stage process is in our view unnecessary. Costs judges are accustomed to assessing very substantial costs bills where costs are claimed out of the legal aid or another fund pursuant to CPR rules 47.18 or 47.19 without points of dispute or replies. Adopting the process urged on behalf of Innsworth would be more complicated, slower, and considerably more expensive. Accordingly, the process will involve the submission of detailed bills by Innsworth and Mr Merricks, as the case may be, with the claiming party addressing only their own costs. The format of the bills is to be directed by Mr Gordon-Saker (but may be similar to that required by the CPR: see CPR PD 47, para 5); and the claiming party is obliged to respond to queries which Mr Gordon-Saker may raise.

66. As explained in the CSAO Judgment, Mr Gordon-Saker will be acting as an expert advising the Tribunal. His report with therefore not be binding on the Tribunal and Mr Merricks and Innsworth will have the opportunity if they so wish to make submissions upon his report once it is produced before the Tribunal makes a final determination: see at [160].

67. We think it is appropriate for Mr Gordon-Saker to assess the reasonableness of Mr Merricks entire solicitor-client costs of the CSAO Application, insofar as those costs have not been paid to date by Innsworth, and of Mr Merricks' present application for costs and of opposing Innsworth's application for distribution, although part of those costs will be recovered from Innsworth pursuant to paras 25 and 35 above. It will also be necessary for Mr Gordon-Saker to determine what part of Mr Merricks' costs of solicitors and counsel concerning the CSAO Application were incurred after 2 February 2025. That is because we have held that one half of the solicitors' costs and one third of the counsel's fees incurred after that date represent increases attributable to the opposition of Innsworth; and that those costs and fees therefore do not constitute Project Costs recoverable out of Pot 2: para 21 above. That proportion of Mr Merricks' reasonable solicitor-client costs of the CSAO Application incurred after that date, insofar as not recovered from Innsworth pursuant to the present ruling, will accordingly be paid out of Pot 3 and not Pot 2.

68. Pursuant to the CSAO Judgment at [160], Mr Gordon-Saker will also be asked to assess the reasonable costs of Mr Merricks' participation in the assessment process itself. As stated at [196(3)], those costs are to come out of Pot 3.

I. THE NOTICE

69. Pursuant to rule 94(13), Mr Merricks is to give notice of the terms of the settlement and its approval to the CMs in a form and manner approved by the Tribunal.

70. We note that the draft Notice submitted by the Settling Parties provides in the third bullet that the Tribunal's order approving the Settlement Agreement will be both available on the claim website and annexed to the Notice, whereas the eighth bullet states only that it is on the claim website. We think that the latter course is preferable. It is desirable to keep the Notice as simple as possible, so that it can be downloaded or copied as a free-standing 4-page document, whereas the Order is complex and, inevitably, legalistic.

71. Subject to this amendment, we approve the terms of the draft Notice and the proposals for publicising it in the Administration Plan exhibited to Mr Merricks' fourth witness statement.

J. TO WHAT EXTENT SHOULD MATTERS BE STAYED?

72. Since the JR proceedings do not seek to challenge the Settlement Sum, there is no reason to stay payment by Mastercard of that sum pursuant to the Settlement Agreement.

73. Mr Merricks recognises that distribution from Pot 1 cannot take place pending the JR proceedings, and has explained why a two-stage distribution of the Settlement Sum with repeated notification to the class is not practicable. On that basis, we agree that distribution of Pot 1 should be stayed. Since distribution to CMs cannot proceed, we think it sensible for publication of the Notice to CMs to be stayed similarly.

74. We have determined above that distribution of Pot 2 should similarly be stayed.

75. As regards Pot 3, we consider that:

(1) payment should be made to Innsworth of £22,000 comprising the costs of the Documents Application. These are not Project Costs but Mr Merricks' liability pursuant to the order of the Tribunal. Therefore, irrespective of the outcome of the JR proceedings, it seems to us clear that Mr Merricks has to pay this sum before any distribution to the class. Although Innsworth has not expressly sought this sum, we see no reason for payment to be delayed;

(2) if Innsworth receives permission in its application to bring JR proceedings, there will be liberty to Mr Merricks to apply to the Tribunal for payment out on account of his costs of participating in those proceedings. Any such application should be accompanied by a full explanation of the amount sought; and

(3) the total amount that will come into Pot 3 cannot be ascertained for some time. Except for (1) and (2), distribution of Pot 3 should therefore be stayed.

76. As regards costs:

(1) It is desirable the assessment of costs by Mr Gordon-Saker should proceed so far as possible. Indeed, it seems to us that the only aspect of that assessment process which obviously cannot proceed concerns assessment of the costs which Mr Merricks may incur by intervening in the JR proceedings. Accordingly, the assessment process will not be stayed. If Mr Gordon-Saker considers that any aspect of his assessment should await, for example, the assessment of party-and-party costs under adverse costs orders, he will be able to adjourn that part of his assessment.

(2) There is no reason to stay the payments to be made by Innsworth pursuant to this ruling.

77. This ruling is unanimous.

Sir Peter Roth Chair	Hodge Malek KC	Prof Rachael Mulheron KC (Hon)

Charles Dhanowa CBE, KC (*Hon*)
Registrar

Date: 31 October 2025