Neutral citation [2025] CAT 72

Case No: 1304/7/7/19

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

7 November 2025

Before:

HODGE MALEK KC
(Chair)
HUGH KELLY
EAMONN DORAN

Sitting as a Tribunal in England and Wales

BETWEEN:

JUSTIN GUTMANN

Class Representative

- v –

FIRST MTR SOUTH WESTERN TRAINS LIMITED

Non-Settling Defendant

STAGECOACH SOUTH WESTERN TRAINS LIMITED

Settling Defendant

- and –

CHARLES LYNDON LIMITED

First Intervener

- and –

WOODSFORD GROUP LIMITED

AMTRUST SPECIALTY LIMITED

HARBOUR UNDERWRITING LIMITED ACTING AS AGENT FOR AND ON BEHALF OF HAMILTON INSURANCE DAC

LAKEHOUSE RISK SERVICES LIMITED ACTING AS AGENT FOR AND ON BEHALF OF AXIS SPECIALITY EUROPE SE

ACCREDITED INSURANCE (EUROPE) LIMITED

(together, the Second Intervener)

- and –

THE ACCESS TO JUSTICE FOUNDATION

(Third Intervener)

- and –

FAIR CIVIL JUSTICE

(Fourth Intervener)

Heard at Salisbury Square House on 10 and 11 September 2025

JUDGMENT (STAKEHOLDER ENTITLEMENT)

APPEARANCES

Mr Philip Moser KC and Mr Stefan Kuppen (instructed by Charles Lyndon Limited) appeared on behalf of the Class Representative, Mr Gutmann.

Mr Ben Smiley appeared on behalf of the First Intervener, Charles Lyndon Limited.

Mr Roger Mallalieu KC and Mr Simon Teasdale appeared on behalf of the Second Intervener, Woodsford Group Limited and others.

Ms Sarah Abram KC (instructed by Dentons UK and Middle East LLP) appeared on behalf of the Settling Party, Stagecoach South Western Trains Limited.

Mr Gerard Rothschild (instructed by Fieldfisher LLP for the Access to Justice Foundation) on behalf of the Third Intervener (written submissions only).

Mr Geraint Webb KC, Mr Alexander Hutton KC, and Mr Thomas Mallon (instructed by CMS Cameron McKenna Nabarro Olswang LLP for Fair Civil Justice) on behalf of the Fourth Intervener (written submissions only).

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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**") (together, the "**Settling Parties**").

2. The CSAO was made in the context of collective proceedings combining standalone claims under section 47A of the Competition Act 1998 (the "**CA 1998**") for damages for alleged losses caused by the Defendants' alleged abuse of an alleged dominant position in the relevant passenger rail service market in breach of section 18 of the CA 1998. It was claimed that SSWT (along with the Non-Settling Defendant, First MTR South Western Trains Limited) did not make so-called 'boundary fares' or 'extension tickets' sufficiently available for purchase for travel on its services and/or failed to use its best endeavours to ensure that there was a general awareness among its customers of boundary fares, so as to enable customers to buy an appropriate fare in order to avoid being charged twice for part of a journey. This is alleged to have resulted in class members being double-charged for part of the service provided to them. SSWT disputed any wrongdoing.

B. BACKGROUND

3. The claims in the proceedings relate to travel on routes that formed part of the South Western franchise. They were filed on 27 February 2019 together with similar claims relating to the South Eastern franchise (Case 1304/7/7/19 *Justin Gutmann v First MTR South Western Trains Limited* and *Stagecoach South Western Trains Limited* and Case 1305/7/7/19 *Justin Gutmann v London & South Eastern Railway Limited*) (together, "**Trains 1**"). Further claims in relation to travel on Thameslink, Southern, Great Northern, and Gatwick Express routes were filed on 24 November 2021 (Case 1425/7/7/21 *Justin Gutmann v Govia Thameslink Railway Limited & Others*) ("**Trains 2**").

4. The Collective Proceedings Order ("**CPO**") application hearing in Trains 1 took place on 9 to 12 March 2021. On 19 October 2021, both the South Western and

South Eastern Proceedings were certified, and the claims were held to raise common issues and be suitable to be brought in collective proceedings. All appeals against certification were dismissed by the Court of Appeal on 28 July 2022: [2022] EWCA Civ 1077 ("***Gutmann CA***").

5. The claims in Trains 2 were approved as suitable to be brought in collective proceedings, following a CPO application hearing on 22 March 2023. The Tribunal ordered on 5 April 2023 that Trains 1 and Trains 2 be jointly case managed and tried together.

6. By Order dated 7 July 2023, the Tribunal directed that the trial of the issues arising in the proceedings should be split, with a first trial of the issues relating to abuse, on the assumption that the defendants were dominant. The first trial was heard in June and July 2024. The Tribunal's judgment in favour of the non-settling defendants was handed down on 17 October 2025: [2025] CAT 64.

7. The CR and SSWT reached a settlement in principle and finalised the terms of their proposed settlement agreement on 27 March 2024 (the "**Proposed Collective Settlement**"). The CR and SSWT made a joint application to the Tribunal pursuant to Rule 94 of the Competition Appeal Tribunal Rules 2015 (the "**Tribunal Rules**"), for a CSAO in respect of the Proposed Collective Settlement. The Tribunal considered the Proposed Collective Settlement at a hearing on 29 April 2024. In advance of and during the hearing of the settlement hearing, the Tribunal expressed concerns about the proposed settlement and whether its terms were just and reasonable. The Settling Parties agreed upon a revised settlement in principle and finalised the terms of their revised proposed settlement agreement on 30 April 2024 as amended by a side letter dated 3 May 2024. In its Judgment of 10 May 2024: [2024] CAT 32, the Tribunal held that the terms of the Settling Parties' modified proposed settlement were just and reasonable (the "**CSAO Judgment**").

8. On the same day, the Tribunal made a CSAO in the proceedings brought by the CR against 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 3 May 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 Settling 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 (the "**Distribution Costs**"). 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.

9. 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.

10. On 2 May 2025 the CR made an application (the "**Stakeholder Entitlement Application**"), pursuant to the CSAO and Settlement Agreement, for 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.

11. By its Ruling dated 7 July 2025: [2025] CAT 38 (the "***Intervention I Ruling***"), the Tribunal granted the CR's solicitors (Charles Lyndon Limited ("**CL**")) and the CR's funder and 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 (the "**ATE**

[1] The total amount claimed by Represented Persons i.e. the class members: see para 17(1) below.

Insurers")) permission to be heard at the Stakeholder Entitlement Hearing (the "**Stakeholder Entitlement Hearing**" or "**SEH**"), and to make submissions and file evidence in advance of the SEH.

12. On 7 August 2025, both the Access to Justice Foundation ("**AtJF**") and Fair Civil Justice ("**FCJ**") were granted permission to intervene at the Hearing, such intervention was limited to written statements of intervention (10 pages each) and any evidence relied upon (8 pages each): [2025] CAT 44 (the "***Intervention II Ruling***").

C. THE CR'S STAKEHOLDER ENTITLEMENT APPLICATION

13. The CR applies 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. A maximum of £9,983,515 is said to be available as Non-Ringfenced Costs, being £10.2 million less the Notified Damages Sum of £216,485 as at the date of the report provided by Epiq (the claims administrator) and exhibited to the CR's sixth witness statement ("**Gutmann 6**") filed with his application.

14. As set out in the report by Epiq, only 15,274 claims were submitted during the claim period, comprising 159 claims under Pot 1, 422 claims under Pot 2, and 14,693 claims under Pot 3. Epiq conducted a detailed analysis of the claims submitted, and rejected claims that it determined were: (i) fraudulent; (ii) submitted by individuals residing outside of the UK who did not opt into the claim; (iii) duplicative of another claim; (iv) not covered by the terms of the settlement; and (v) submitted without sufficient evidence. In total, 7,290 claims were validly submitted during the claim period. The total value of those claims is £216,485.[2]

[2] As explained in the CR's seventh witness statement dated 27 August 2025, a further four valid Pot 3 claims had been identified, which would increase the Notified Damages Sum by another £120 to £216,724.91 and bring the total number of claims to 15,278. The CR, however, did not consider it necessary to amend the Notified Damages Sum to reflect these additional claims, on the basis that bank details have not yet been collected for all claimants.

15. The steps taken by the CR, CL, Epiq and other third parties prior to and during the claim period are set out in the second witness statement of Mr Rodger Burnett dated 2 May 2025. Mr Burnett is a Director and a solicitor with CL.

16. 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's total costs amount to £18,788,166,[3] and on that basis he seeks an order for payment of the full remaining £9,983,515. Trains 1 and Trains 2 are both funded by Woodsford Group Limited ("**Woodsford**" or "**WGL**") under Litigation Funding Agreements ("**LFAs**"). The relevant parts of the LFAs are set out in Section E below.

17. Clauses 2.5 and 2.6 of the Settlement Agreement are important and are set out in full in para 41 below. In summary, the main relevant terms of the Settlement Agreement are as follows:

    (1) SSWT would pay damages of up to £25,000,000, against which Represented Persons were entitled to submit claims during a 6-month Claim Period. This sum is made available across three "Pots" with distinct evidential requirements. The total amount claimed by Represented Persons is termed the "Notified Damages Sum" under the Settlement Agreement.

    (2) SSWT would pay £4,750,000 in respect of costs, fees, and disbursements incurred by the CR. These are termed as "Ringfenced Costs" under the Settlement Agreement.

    (3) SSWT would pay a further £750,000 by way of contribution towards the CR's costs in respect of notifying and distributing the Notified Damages Sum to the class.

[3] As set out in the third witness statement of Mr Rodger Burnett dated 8 September 2025.

(4) To the extent that the Notified Damages Sum was less than £10,200,000 (the "**Non-Ringfenced Costs Limit**"), the CR may apply to the Tribunal at a Stakeholder Hearing for an order to allocate all or part of the undistributed sum (up to the Non-Ringfenced Costs Limit) towards a further payment in respect of CR costs, fees, and disbursements. Any such further payment is termed the "Non-Ringfenced Costs" under the Settlement Agreement. To the extent that the Non-Ringfenced Costs were less than the available undistributed sum, the remainder reverts to SSWT.

18. This means that significant amounts of the sums available for damages under the settlement will remain undistributed and may be paid to Stakeholders or revert to SSWT.

19. The CR has recovered £6,546,968 in costs of which he considers £5,848,996 relates to SSWT: see Table 4 in para 54 below. That sum comprises one third of the interim payments on account of costs made following the Tribunal's Order dated 18 January 2022 and the Court of Appeal's judgment dated 28 July 2022, and 100% of the £4.75 million in Ringfenced Costs and £750,000 in Distribution Costs recovered through the Settlement Agreement. The £4.75 million figure for Ringfenced Costs was calculated using an estimate of the costs that had been incurred in pursuing the claim against SSWT alone, and this sum has been recovered and distributed. The total remaining costs, fees and disbursements the CR now seeks to recover amount to an estimated £12,939,170. As set out at para 16 above, given that this amount is greater than the available funds, Mr Gutmann, in fact, now seeks a payment of £9,983,515 by way of Non-Ringfenced Costs (see para 13 above). Having reviewed the level of total remaining costs, fees and disbursements, the Tribunal is satisfied that the costs not already recovered as against SSWT exceed £9,983,515, even though there are disputes between the Stakeholders as to the amounts of what they claim to be their entitlements. This does not necessarily mean that the Tribunal would order that the CR receives the entirety of the available funds for distribution amongst Stakeholders.

20. Whilst the Settlement Agreement did not provide for a payment to charity, it was agreed by the CR, CL, Hausfeld, the CR's Counsel, Woodsford and the ATE Insurers prior to the SEH that the AtJF should receive a payment of £4 million, less the amount distributed to class members (£216,725) (the "**Payment to Charity**"). The effect of the agreed Payment to Charity would therefore be that the class members and the AtJF, together, would receive a combined total of £4 million. If the proposed Payment to Charity is accepted by the Tribunal, the amount of Non-Ringfenced Costs available for distribution to the Stakeholders is then £10.2 million less £4 million, i.e. £6.2 million. This avoids the wholly unsatisfactory outcome in a case where substantial sums are made available by a defendant in settlement, that the vast majority of that ends up in the hands of the Stakeholders and not class members or a charity for the benefit of others.

21. The Stakeholders are far apart on their respective claims to entitlement, the amount of actual costs, fees and disbursements, what proportion of costs should be allocated to the claim against SSWT, the rate of return for funders and ATE Insurers and how the balance of the Non-Ringfenced Costs should be allocated or distributed. The Tribunal does not need to resolve all these issues as, at the end of the day, the sum remaining from the Non-Ringfenced costs (£6.2 million) cannot possibly satisfy all Stakeholder claims and the Tribunal has to look back and decide what is fair and reasonable bearing in mind the claims made, the sum available and the overall lack of success in these proceedings in terms of outcome for class members. There should be no expectation nor entitlement to anything more than a modest rate of return in relation to the claim against SSWT from the sums made available by SSWT under the Settlement Agreement.

22. Woodsford relies upon the second and third witness statements of Mr Steven Friel ("**Friel 2**" and "**Friel 3**"). Mr Friel is a solicitor and Chief Executive Officer at Woodsford Group Limited.

23. CL relies upon the first witness and second witness statements of Ms Dorothea Antzoulatos ("**Antzoulatos 1**" and "**Antzoulatos 2**"). Ms Antzoulatos is a Director at CL, solicitors for the CR in the proceedings.

24. Both Woodsford and CL submitted revised calculations of costs during and after the SEH and, notwithstanding requests from the Tribunal to do so, were not able to agree on the levels of costs incurred or reconcile their different calculations.

25. The CR has instructed Crescient, a consultancy specialising in litigation risk and funding, to assist in the engagement of the Stakeholders, and to provide an outside assessment of the funding arrangements in this case, and of their reasonableness in the specific context of this settlement.

D. THE LEGAL FRAMEWORK

26. Section 47C of the CA 1998 provides:

> "[…]
>
> (3) Where the Tribunal makes an award of damages in opt-out collective proceedings, the Tribunal must make an order providing for the damages to be paid on behalf of the represented persons to—
>
> (a) the representative, or
>
> (b) such person other than a represented person as the Tribunal thinks fit.
>
> (4) Where the Tribunal makes an award of damages in opt-in collective proceedings, the Tribunal may make an order as described in subsection (3).
>
> (5) Subject to subsection (6), where the Tribunal makes an award of damages in opt-out collective proceedings, any damages not claimed by the represented persons within a specified period must be paid to the charity for the time being prescribed by order made by the Lord Chancellor under section 194(8) of the Legal Services Act 2007.
>
> (6) In a case within subsection (5) the Tribunal may order that all or part of any damages not claimed by the represented persons within a specified period is instead to be paid to the representative in respect of all or part of the costs or expenses incurred by the representative in connection with the proceedings."

27. Rule 93 of the Tribunal Rules states:

> "(1) Where the Tribunal makes an award of damages in opt-out collective proceedings, it shall make an order providing for the damages to be paid on behalf of the represented persons to—
>
> (a) the class representative; or
>
> (b) such person other than a represented person as the Tribunal thinks fit.
>
> […]

> (3) An order made in collective proceedings in accordance with paragraphs (1) and (2), may specify—
>
> (a) the date by which represented persons shall claim their entitlement to a share of that aggregate award;
>
> (b) the date by which the class representative or person specified in accordance with paragraph (1)(b) shall notify the Tribunal of any undistributed damages which have not been claimed;
>
> (c) any other matters as the Tribunal thinks fit.
>
> (4) Where the Tribunal is notified that there are undistributed damages in accordance with paragraph (3)(b), it may make an order directing that all or part of any undistributed damages is paid to the class representative in respect of all or part of any costs, fees or disbursements incurred by the class representative in connection with the collective proceedings.
>
> (5) In exercising its discretion under paragraph (4), the Tribunal may itself determine the amounts to be paid in respect of costs, fees or disbursements or may direct that any such amounts be determined by a costs judge of the High Court or a taxing officer of the Supreme Court of Northern Ireland or the Auditor of the Court of Session.
>
> (6) Subject to any order made under paragraph (4), the Tribunal shall order that all or part of any undistributed damages is paid to the charity designated in accordance with section 47C(5) of the 1998 Act and a copy of that order shall be sent to that charity."

28. In *Justin Gutmann v Apple Inc and others* [2024] CAT 18 ("***Gutmann v Apple CAT***"), the Tribunal stated at [12]:

> "… the Tribunal has a supervisory role in determining how proceeds are to be distributed at the end of the proceedings. This means the Tribunal can, at the end of proceedings, revisit whether it is prepared to endorse the payment of the agreed sums to the Funder. At this stage it may have better visibility as to the proportionality of the Funder's fee in relation to the damages awarded and the complexity of the proceedings and can, if necessary, require further evidence to be presented in relation to the appropriateness of the Funder's fee."

29. In *Justin Gutmann v Apple Inc and others* [2025] EWCA Civ 459 ("***Gutmann v Apple CA***"), the Court of Appeal rejected the argument that on a judgment the Tribunal had no power to make an order that would result in payment to a funder in priority to the class members (i.e., the funder is not restricted to being paid out of undistributed damages).

30. In *Gutmann v Apple CA*, the Chancellor made clear that a class representative's proposed distribution of damages is always subject to the wide supervisory jurisdiction of the Tribunal. The Chancellor explained:

"78…[s.47(3)(a)] contemplates that the CAT will make an order for the damages to be paid on behalf of the represented persons (i.e. the class) to the CR. It does not prescribe what the CR does with the damages once received and accordingly it would be open to him to pay the funder and the lawyers, subject always to the control of the CAT under its supervisory jurisdiction. Sub-section (3)(b) contemplates that the CAT will make an order for a proportion of the damages to be paid on behalf of the class to such third party as the CAT thinks fit. These are wide unrestricted powers given to the CAT which can clearly include payment to the funder or the lawyers of a proportion of the damages in priority to the class…

[…]

81. There is nothing surprising or unusual about the CAT ordering payment to funders or lawyers from the award in priority to the class. Subsection (3) is predicated on the CAT having entered judgment in favour of the class so that there has been a successful outcome to the proceedings, which have only been possible because the funder was prepared to fund them on the terms of the LFA, which entitles the funder to its return in the event of a successful outcome, subject always to the amount that it recovers by way of return being approved by the CAT …The supervisory jurisdiction of the CAT will ensure that what is recovered is not excessive.

82. The wide powers conferred on the CAT by section 47C(3) are reflected in the CAT Rules. These include not just Rule 93 which deals with distribution of an award but, as Green LJ pointed out in argument, Rules 2 and 4 which impose a free-standing duty on the CAT to apply the general principles set out in Rule 4. The general principles give the CAT broad overarching powers to ensure that costs and expenses are dealt with fairly and proportionately and in accordance with the principles of justice. This would include ordering that the funder and the lawyers are paid in priority to the class, a form of order which might be particularly necessary where the CAT considers that the take-up of the damages award by the class may be high because, for example, the CAT is proposing to order distribution by way of an account credit, which was a course which this Court considered in *Le Patourel* at [99] would be open to the CAT. In those circumstances, contrary to Apple's submission, the funder and the lawyers could not be properly and appropriately remunerated from unclaimed damages under section 47C(6).

[…]

97. In all the circumstances, I have concluded that the CAT does have jurisdiction to order that the funder's fee or return can be paid out of the damages awarded to the class in priority to the class. Whether or not such an order should be made would be a matter for the CAT in the exercise of its supervisory jurisdiction, in the event that it made an award of damages in favour of the class.

[…]

99… the arrangement made in the LFA was importantly always subject to the supervisory jurisdiction of the CAT to determine what is the appropriate order to make… Any issue as to the reasonableness of the funder's return is to be addressed at the time of distribution…"

31. The Court of Appeal held that there is on distribution no difference between an award of damages and a sum of money paid under a settlement agreement. The Chancellor (with whom Green LJ and Birss LJ agreed) stated: "In both the case of a settlement and an award by the CAT at the end of collective proceedings, what the CR receives is "damages"" and "the idea of two lines of distinct jurisprudence, one for awards by the CAT and one for settlements is unthinkable and unprincipled": see [65] and [93].

32. In *Mark McLaren Class Representative Ltd v MOL Europe (Africa) Ltd* [2024] CAT 47 the Tribunal stated:

> "17. Collective proceeding are subject to the close supervision of the Tribunal, not just because of their complexity, but also because of the inherent potential conflicts of interests between the class members and those who work together to make such proceedings possible in a practical sense. The CR cannot realistically bring these proceedings without lawyers, funders and insurers. The lawyers all need to be paid and funders must have a good chance of recovering their outlay, plus interest and any funders fees for it to be worthwhile for them to put their capital at stake. Funders work on a portfolio basis recognising that they may lose some actions, but in others they may do well such that as a minimum they make a reasonable rate of return. Lawyers and funders may agree terms with the CR, but at the end of the day the payment of costs and expenses is subject to the approval of the Tribunal, which must balance the interests of not just the class members and the stakeholders, but in doing so must bear in mind the importance of having a workable collective proceedings regime. As noted by Green LJ in *Le Patourel v BT Group plc* [2022] EWCA Civ 593 ("*Le Patourel*"), at [29]:
>
> > "29. Pulling the threads together, the principal object of the collective action regime is to facilitate access to justice for those (in particular consumers) who would otherwise not be able to access legal redress. Embraced within this broad description is the proposition that the scheme exists to facilitate the vindication but not the impeding of rights. Also included is the proposition that a scheme which facilitates access to redress will increase ex ante incentives of those subject to the law to secure early compliance; prevention being better than cure. Finally, emphasis is laid on the benefits to judicial efficiency brought about by the ability to aggregate claims.""

33. In *Gutmann v Apple CA*, the Court referred to the Tribunal's CSAO Judgment and said this:

> "87. In *Gutmann v First MTR South-Western Trains Limited* [2024] CAT 32, there was a provision in the settlement for "Ringfenced Costs" in respect of the CR's costs, fees and disbursements to be paid prior to distribution: see [13(2)] of the judgment. The CAT recognised that there were potential conflicts of interest between the class and the lawyers and funders but determined that the CR and the lawyers had done their best to represent the interests of the class.

At [42] to [47] of the judgment, the CAT said this about the significance of the settlement process:

> "42. So why do we have this settlement approval process? Well, it is largely because we have these apparent conflicts of interest. The CR here, Mr Gutmann, is the champion of the class. He has an overriding obligation and interest to ensure that the class is properly represented, and good claims are pursued for the benefit of the class. He has to enter into arrangements with lawyers, experts and funders - as a result of which he judges there is the best chance for them to obtain damages so that class members are compensated as fully as possible, taking into account the inherent risks in litigation.
>
> 43. …Here, the parties are all represented by very capable and experienced lawyers. There is no question in our mind that, whilst there is a conflict, they have done their best to serve the interests of the class over and above their own interests.
>
> 44. Here the conflict is more acute, given the existence of a partial conditional fee agreement ("CFA"), under which the lawyers are being paid […] per cent of their usual rates on an ongoing basis but, if they are successful, they get paid more usual rates. This type of arrangement is not unusual.
>
> 45. But the ethical obligations as counsel and solicitors, as officers of the court, mean that they must promote the interests of the class members. The Tribunal appreciates that lawyers can be remunerated in different ways, be it a flat rate, a full CFA, or a partial CFA. There are other possibilities. It is not just a question of the lawyers, there are the funders: they put their capital at risk, they fund the case and without the funders, many of the cases for collective settlement proceeding cases will not be able to get off the ground. Lawyers will not take on cases like the present without some form of payment, and funders are central to providing the capital for this (see, for example, *Gutmann CA* at [83]).
>
> 46. Funders generally operate on a portfolio basis and will only fund cases if they expect to make a reasonable return over that whole portfolio. The fact that they may want a higher return than would seem justified on an individual case is to be explained by the fact they have a book of claims, of which some will bear fruit and others will not bear fruit. The ones that do not bear fruit will make a loss and funders need to be able to make up for that loss in other cases that are successful.
>
> 47. The Tribunal recognises that funders and funding are integral to the viability of the three claims being brought by the CR, as recognised by the Court of Appeal in *Evans v Barclays Bank* [2023] EWCA Civ 876 at [130]."

88. The CAT went on to say at [53]:

> "Because of the conflicts we have identified, it is all the more important that we have full and frank disclosure of all the material before the Tribunal, so the Tribunal is in the best possible position to ensure that any settlements and distribution plans are fair and reasonable for the class members. Not just fair and reasonable for the class representatives themselves and for the defendants, but we will not ignore the interests of others such as the lawyers, the experts and the funders, because we have an interest not just in this case

> but in future cases. If the lawyers and the funders are not going to get a return in this case, then they may be deterred from acting in further cases.""

34. In *McLaren Class Representative Ltd v MOL Europe (Africa) Ltd* [2025] CAT 4 the Tribunal explained that success is an important factor when assessing whether the terms of a proposed settlement are reasonable:

> "21. In assessing whether the terms of a proposed settlement are reasonable and ultimately what sums should be paid to stakeholders out of a settlement, success is a highly important factor. Success can be measured in a number of ways and success, for the purposes of a funding or conditional fee arrangement, is not necessarily a success for the class members as a whole. In determining success for the purpose of approving a settlement and distribution of costs, fees and disbursements, the Tribunal will also look to see whether the proceedings are a success overall, which includes the amounts of damages available for class members, the likely and actual take up by class members and what may happen with the amounts not taken up either in terms of reversion to defendants, or payment to charity or being made available to stakeholders (subject to the approval of actual payments out to stakeholders by the Tribunal). A successful outcome can include appropriate proxies to distribution to the individual claimants for any unclaimed damages, including charity as aforementioned but also, in appropriate cases, by way of a cy-près mechanism or to the Access to Justice Foundation. The Tribunal appreciates that not all claims brought by way of collective proceedings will have a successful outcome. The claims may fail at trial. The CR may be advised that it is unlikely to succeed at trial in the light of disclosure and expert evidence, such that it may end up either discontinuing the proceedings or seeking the approval of a settlement with either no or a relatively small amount of damages for class members. Such results are inherent in litigation where outcomes are often uncertain."

35. The Tribunal is aware of the importance of funders and the need for them to make a proper rate of return. As stated in *McLaren Class Representative Ltd v MOL Europe (Africa) Ltd* [2024] CAT 47:

> "21. In cases where there is a successful outcome, whether by way of settlement or judgment against defendants, it is for the Tribunal to determine how any damages are to be dealt with in terms of distribution to class members, and payments of costs and expenses, including any return for funders. How that exercise is to be carried out is very much fact and case specific, and the Tribunal would endeavour to act fairly to all those concerned, mindful of the incentives and the need for a funding market for collective proceedings. Funding will dry up if funders are unable to recover their costs and disbursements and make a profit even on cases where there is a successful outcome overall. The importance of funders to collective proceedings and of proceedings being economically viable for them has been repeatedly remarked upon in the authorities, including *O'Higgins v Barclays Bank plc* [2023] EWCA 876 at [129]; *Consumers Association v Qualcomm* [2022] CAT 20 at [100]; and *UK Trucks Claim Limited v Stellantis* [2022] CAT 25 at [110]."

36. In *Merricks v Mastercard Incorporated and others* [2025] CAT 28 ("***Merricks CSAO***"), the Tribunal discussed the principles on distribution and payments. It said this at [112]:

> "…The argument that when there is an application before the Tribunal and the parties provide a draft order then the Tribunal must either accept or reject the terms of that order is in our view fundamentally misconceived. The Tribunal must determine the application, but just because the parties have agreed on the terms of the order which they seek, that does not tie the hands of the Tribunal. The Tribunal must itself decide what is the appropriate order to make in the circumstances, in accordance with the governing statutory provisions."

37. In *Merricks CSAO* the Tribunal explained that several factors come into play when deciding what rate of return should be awarded to a funder at the distribution stage. As funders operate on a portfolio basis, it would be helpful to know the actual rates of return across the relevant portfolio: [185]. The Tribunal will seek to determine what is a reasonable rate of return in all the circumstances of the case: [188].

38. The Tribunal directed that a proportion of the settlement sum not claimed and payable to class members should go to the AtJF: [71], [200] to [204].

39. In the *Intervention I Ruling* the Tribunal stated:

> "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."

40. The Tribunal said this in the *Intervention II Ruling*:

> "25…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."

E. KEY CONTRACTUAL PROVISIONS

41. For the matters in issue, the relevant provisions of the Settlement Agreement are:

""**Damages Sum"** means the payment to be made by SSWT to the CR in respect of any alleged loss or damages suffered by the Class, being a sum of up to £25,000,000 (in words: twenty-five million pounds Sterling) which shall be inclusive of interest.

[…]

"Distribution Costs" means the payment to be made by SSWT to the CR in respect of the costs of notifying and distributing the Notified Damages Sum to the Class, being £750,000 (in words: seven hundred fifty thousand pounds Sterling) (including Value Added Tax).

[…]

"Non-Ringfenced Costs" means the additional payment to be made by SSWT to the CR in respect of his costs, fees and disbursements (within the meaning of Rule 93(4) of the Tribunal Rules and excluding any costs awards already made and settled between the CR and SSWT and/or the Non-Settling Defendant), being a sum up to £10,200,000 (in words: ten million two hundred thousand pounds Sterling) (including Value Added Tax) subject to the order of the Tribunal and on the terms set out in this Agreement.

"Non-Ringfenced Costs Limit" means £10,200,000 (in words: ten million two hundred thousand pounds Sterling).

[…]

"Ringfenced Costs" means the payment to be made by SSWT to the CR in respect of his costs, fees and disbursements (within the meaning of Rule 93(4) of the Tribunal Rules and excluding any costs awards already made and settled between the CR and SSWT and/or the Non-Settling Defendant), being £4,750,000 (in words: four million seven hundred fifty thousand pounds Sterling) (including any applicable Value Added Tax).

[…]

2.4 In relation to the Damages Sum, the Parties agree that:

(a) The Damages Sum shall be allocated to the following three "Pots" with distinct evidence thresholds in relation to each Pot as detailed in Annex 1 of this Agreement:

(i) Pot 1: £19,000,000 of the Damages Sum shall be allocated to Pot 1. The amount claimed under Pot 1 will be the actual difference in price between the fare paid for by a Represented Person and the appropriate Boundary Fare. There shall be no limit on the number of claims a Represented Person can make or the total sum payable to any Represented Person in relation to Pot 1. Where available, equivalent point-to-point fares will be used as a proxy to calculate the sum that is payable to Represented Persons claiming for Boundary Fares that were not available in the Relevant Period. Of this Pot, £15,390,000 shall be allocated to Represented Persons who purchased their tickets directly from SSWT for use on its services; the remaining £3,610,000 shall be allocated to

Represented Persons who purchased from third party retailers for use on SSWT's services.

(ii) Pot 2: £4,000,000 of the Damages Sum shall be allocated to Pot 2. SSWT agrees to pay £5 for each valid claim up to a maximum of 20 claims per Represented Person (for a maximum of £100 in total per Represented Person) in relation to Pot 2.; and

(iii) Pot 3: £2,000,000 of the Damages Sum shall be allocated to Pot 3. SSWT agrees to pay £5 for each valid claim up to a maximum of six claims per Represented Person (for a maximum of £30 in total per Represented Person) in relation to Pot 1. Represented Persons who purchased fares for use, in part or in whole, on SSWT's services in the Relevant Period shall be entitled to make a claim on a Pot subject to satisfying the relevant evidence requirements.

For the avoidance of doubt, the CR shall reject claims on the Pots which are for tickets purchased for use on other train operating companies' services.

No sum is payable by SSWT in respect of interest on any claim made from each or any of the three pots.

(b) If the total amount claimed by Represented Persons on the allocated sum within a Pot exceeds the allocated funds for that allocated part of the Pot as set out in Clause 2.4(a) above, the amounts claimed by each Represented Person shall be proportionally reduced on a *pari passu* basis. For example, if claims on Pot 2 are £5,000,000 (and there is no transfer of funds from Pot 3 as provided in Clause 2.4(b)(ii)) each claim shall be reduced by 20% to £4 per claim.

The only exception to this will be if there are, after the Claim Period, remaining funds not subject to a valid claim in Pot 2 or Pot 3, then:

(i) any amount unclaimed from Pot 2 will, if Pot 3 is oversubscribed, be transferred to Pot 3 and will be available to be recovered by Represented Persons on the basis applicable to Pot 3; or

(ii) alternatively, any amount unclaimed from Pot 3 will, if Pot 2 is oversubscribed, be transferred to Pot 2 and will be available to be recovered by Represented Persons on the basis applicable to Pot 2; and

(iii) following a transfer of any unclaimed amount from Pot 2 to Pot 3, or from Pot 3 to Pot 2, as applicable and set out in (i) and (ii) above, any amount that remains unclaimed in Pot 2 or Pot 3 will be transferred to Pot 1 and will be available to be recovered by Represented Persons on the basis applicable to Pot 1. For the avoidance of doubt, there will be no transfer from Pot 1 to Pots 2 and 3.

(c) Within 1 month from the end of the Claim Period, and subject to Clause 2.4(a) above, the CR shall notify SSWT by email (via their respective solicitors) of the total amount validly claimed by Represented Persons, up to a maximum of £25,000,000 (the **"Notified Damages Sum"**). This sum may be subject to adjustment should any amounts be determined as a result of the audit not to have been validly claimed.

(d) Subject to SSWT being satisfied with results of the audit of claims as set out in Annex 2, the Notified Damages Sum shall be paid within 21 days of the date of receipt of such notification (the **"Damages Sum Notification Date"**), by wire transfer, without deduction, to the bank account indicated in Clause 2.2 above. The wire transfer should be referred to as "Notified Damages Sum – SSWT Settlement". SSWT will provide evidence of payment to the CR via the CR's solicitors, Charles Lyndon Limited.

2.5 In relation to the Non-Ringfenced Costs, the Parties agree that:

(a) To the extent that the Notified Damages Sum is less than the Non-Ringfenced Costs Limit, subject to the Tribunal's order determining the Non-Ringfenced Costs following a Stakeholder Hearing a sum up to the difference between the Non- Ringfenced Costs Limit and the Notified Damages Sum shall be paid by SSWT to the CR towards the Non-Ringfenced Costs up to a maximum of £10,200,000 provided that the total of the Ringfenced and Non-Ringfenced Costs to be paid by SSWT to the CR will not be more than the CR's Costs. Recovery of the CR's Non-Ringfenced Costs shall always be subject to the Non-Ringfenced Cost Limit of £10,200,000 (after deduction of the Notified Damages Sum). For example, if the Notified Damages Sum amounts to £6,000,000, then no more than £4,200,000 will be paid towards the Non-Ringfenced Costs. For the avoidance of doubt, if the Notified Damages Sum exceeds £10,200,000, the Non-Ringfenced Costs payable shall be £0.

(b) To the extent that the Notified Damages Sum is less than the Non-Ringfenced Cost Limit the CR will apply to the Tribunal for a Stakeholder Hearing for an order to allocate any undistributed sum (up to the Non-Ringfenced Costs Limit and in accordance with Clause 2.5(a)) towards costs, fees and disbursements following the distribution of the Notified Damages Sum to the eligible Represented Persons.

(c) Subject to SSWT being satisfied with results of the audit of claims as set out in **Annex 2**, the Non-Ringfenced Costs due under this Agreement shall be paid within 21 days of the Tribunal's order, by wire transfer, without deduction, to the bank account indicated in Clause 2.2 above. The wire transfer should be referred to as "Non-Ringfenced Costs – SSWT Settlement". SSWT will provide evidence of payment to the CR via the CR's solicitors, Charles Lyndon Limited.

2.6 To the extent that the sum of the Notified Damages Sum and the Non-Ringfenced Costs as determined by order of the Tribunal is lower than

the Damages Sum, the Parties agree that SSWT will retain the remainder of the Damages Sum."

42. The key provisions of the Litigation Funding Agreement dated 17 September 2018 ("**the Trains 1 LFA**") are as follows:

> "1.4 **"Adverse Costs"** means the Defendant's costs, including any VAT, which the Class Representative or the Funder is properly liable to pay the Defendant in the Action.
>
> 1.5 **"Adverse Costs Deed Of Indemnity"** means a deed of indemnity between the Funder and the Class Representative in respect of Adverse Costs, on terms approved in advance in writing by the Funder.
>
> 1.6 **"Adverse Costs Exit Fee"** means six point two five percent (6.25%) of the limit of indemnity under the Adverse Costs Deed Of Indemnity, as such limit may be amended from time to time with the consent of the Funder.
>
> 1.7 **"Adverse Costs Indemnity Fee"** means one hundred and fifty percent (150%) of the limit of indemnity under the Adverse Costs Deed Of Indemnity, as such limit may be amended from time to time with the consent of the Funder
>
> […]
>
> 1.30 **"Funder's Outlay"** means the amount of Action Costs paid by the Funder or payable pursuant to a Funding Notice served in accordance with this Agreement, plus all other costs reasonably incurred by the Funder in connection with the Action.
>
> […]
>
> 1.42 **"Stakeholder Proceeds"** means (i) any Recovered Costs; (ii) any amount paid from Undistributed Damages to the Class Representative pursuant to an Order of the Court in respect of the costs, fees or disbursements incurred by the Class Representative within the meaning of CAT Rule 93(4); and (iii) any amount allocated in a Collective Settlement Approval Order to the Class Representative's costs, fees or disbursements within the meaning of CAT Rule 94.
>
> […]
>
> 3. **The Class Representative's principal obligations**
>
> 3.1 **To pursue the Action**
>
> The Class Representative will:
>
> […]
>
> 3.1.8 pay the Funder's Fee, save that the Class Representative's obligation to pay the Funder's Fee is reduced to the extent that the amount which the CAT orders and/or approves should be paid to the Class

Representative in respect of this obligation falls below the amount of the Funder's Fee.

[…]

3.1.10 Subject to Clauses 3.1.1 to 3.1.7 (inclusive):

3.1.10.1 take all reasonable steps to minimise and control the quantum of the Action Costs and the Additional Action Costs (if any);

[…]

4. **The Funder's principal obligations**

4.1 The funder will:

4.1.1 act in good faith in all its dealings with the Class Representative and in its dealings with the Class Representative's advisors, including the Solicitors and Counsel;

[...]

8. **Adverse Costs and Security for Costs**

[...]

8.2 The Funder shall use its best endeavours, until the date falling three months after the date of a CPO, to obtain ATE insurance to cover its potential liability for Adverse Costs under the Adverse Costs Deed Of Indemnity:

8.2.1 with an A-rated and internationally recognised A TE insurer; and

8.2.2 on terms which are satisfactory to the Funder and in the best interests of the Class Members.

8.3. If the Funder is not able to obtain ATE insurance pursuant to clause 8.2 by the date falling three months after the date of a CPO, the Funder may thereafter obtain an ATE insurance policy to cover its potential liability under the Adverse Costs Deed Of Indemnity, but it is not obliged to do so.

8.4 Subject to clause 8.5, the Funder shall become entitled to payment of the Adverse Costs Indemnity Fee under clause 9.4 upon the issuance of a claim form in the Action.

8.5 If the Funder obtains ATE insurance to cover the entirety of its potential liability for Adverse Costs under the Adverse Costs Deed Of Indemnity, the Funder shall become entitled to the Adverse Costs Exit Fee instead of the Adverse Costs Indemnity Fee under clause 9.4.

8.6 If the Funder obtains ATE insurance to cover part (but not the entirety) of its potential liability for Adverse Costs under the Adverse Costs Deed Of Indemnity, the Funder shall become entitled to a proportion

of the Adverse Costs Exit Fee (equal to the insured proportion of the Funder's potential liability under the Adverse Costs Deed Of Indemnity) and a proportion of the Adverse Costs Indemnity Fee (equal to the uninsured proportion of the Funder's potential liability under the Adverse Costs Deed Of Indemnity) under clause 9.4. For example, if the Funder's potential liability under the Adverse Costs Indemnity is ten million pounds (£10m) and the Funder obtains A TE insurance cover for that potential liability of six million pounds (£6m), i.e. sixty percent (60%), the Funder would be entitled to 60% of the Adverse Costs Exit Fee and 40% of the Adverse Costs Indemnity Fee under clause 9.4.

[…]

9. **Proceeds and Stakeholder Proceeds**

9.1 Subject to any Order of the Court to the contrary, the Class Representative shall seek payment of any and all Proceeds directly into the Proceeds Account.

[...]

9.5 In the event that successive recoveries of Stakeholder Proceeds are made, from any Defendant or from any third party or otherwise in connection with the Causes of Action, the duties under this Clause 9 shall apply anew to each successive recovery of Stakeholder Proceeds.

10. **Funder's Fee**

Payment of Funder's Fee from Undistributed Damages

10.1 If, in the event of a Collective Settlement Approval Order being made, under which the Court approves the payment to the Class Representative of costs, fees and disbursements within the meaning of and under CAT Rule 94 and other than from Undistributed Damages, the Funder's Fee shall be the greater of a fixed fee or a percentage of the Proceeds, calculated in accordance with the following table:

Period	**Funder's Outlay as at the date of receipt of Stakeholder Proceeds (X)**	**Fixed Fee**	**Percentage of Proceeds**
1	X is equal to or more than zero and less than or equal to two million pounds ($0 \leq X \leq$ £2,000,000)	Two million five hundred thousand pounds (£2,500,000)	Eight point five percent (8.5%) of Proceeds

2	X is more than two million pounds and less than or equal to four million pounds (£2,000,000 < X ≤ £4,000,000)	Eight million five hundred thousand pounds (£8,000,000)	Seventeen percent (17%) of Proceeds
3	X is more than four million pounds (£4,000,000 < X	Fifteen million pounds (£15,000,000)	Twenty-five point five percent (25.5%) of Proceeds"

10.2 If the Court either:

10.2.1 approves the payment to the Class Representative of costs, fees and disbursements within the meaning of and under CAT Rule 93(4) from Undistributed Damages; or

10.2.2 as part of a Collective Settlement Approval Order, approves the payment to the Class Representative of costs, fees and disbursements within the meaning of and under CAT Rule 94 from Undistributed Damages,

the Funder's Fee shall be the greater of a fixed fee or a percentage of the Proceeds, calculated in accordance with the following table:

Period	**Funder's Outlay as at the date of receipt of Stakeholder Proceeds (X)**	**Fixed Fee**	**Percentage of Proceeds**
1	X is equal to or more than zero and less than or equal to two million pounds (0 ≤ X ≤ £2,000,000)	Three million five hundred thousand pounds (£3,500,000)	Eleven point five percent (11.5%) of Proceeds

2	X is more than two million pounds and less than or equal to four million pounds (£2,000,000 < X ≤ £4,000,000)	Eleven million five hundred thousand pounds (£11,000,000)	Twenty three percent (23%) of Proceeds
3	X is more than four million pounds (£4,000,000 < X	Twenty-one million pounds (£21,000,000)	Thirty-four point five percent (34.5%) of Proceeds"

43. The LFA between CR and Woodsford dated 30 September 2021 provides funding for the claim against GTR (the "**Trains 2 LFA**"). Clauses 3.1.10.1 and 4.1.1 of the Trains 2 LFA mirror the equivalent clauses in the Trains 1 LFA. In addition, Clause 8.2 of the Trains 2 LFA provides:

> "8.2 The Funder shall use its best endeavours, until the date falling three months after the date of a CPO in the Action, to obtain ATE insurance to cover its potential liability for Adverse Costs under the Adverse Costs Deed Of Indemnity:
>
> 8.2.1 with an A-rated and internationally recognised ATE insurer; and
>
> 8.2.2 on terms which are satisfactory to the Funder and in the best interests of the Class Members."

44. Clause 3 of the **Revised Deed of Priority** dated 24 July 2023 provides:

> "**PRIORITIES**
>
> 3. It is agreed that, subject to any Order of the Court to the contrary, all sums due to any of the Parties pursuant to the Agreements shall be paid out of any Stakeholder Proceeds in accordance with the terms of this agreement until all such sums are discharged or until the Stakeholder Proceeds are exhausted, in accordance with and subject to the following order of priorities:
>
> 3.1. First, to reimburse the Funder in respect of (i) any amount the Funder has paid or is payable towards Adverse Costs up to the

limit of indemnity under the Pre-Certification ATE Policy; and (ii) any unpaid premium due and payable by the Funder to the Pre-Certification ATE Insurer;

3.2 Second, pari passu and pro rata:

3.2.1. to reimburse the Funder (i) the Funder's Outlay; and (ii) without duplication under clause 3.2.2, any amount paid or payable by the Funder towards Adverse Costs in addition to any amount paid under clause 3.1; and

3.2.2 to reimburse, without duplication under clause 3.2.1, the Post-Certification ATE Insurers any amount already paid or payable by them towards Adverse Costs; and

3.3 Third, *pari passu* and *pro rata*, to pay:

3.3.1. the Funder: (i) the Funder's Fee; and (ii) the Adverse Costs Indemnity Fee or the Adverse Costs Exit Fee as applicable;

3.3.2. Charles Lyndon an amount of seven hundred thousand pounds (£700,000) (inclusive of VAT where applicable) in respect of fees incurred by Charles Lyndon in relation to the Action prior to 24 May 2018;

3.3.3 Hausfeld an amount of one hundred and fifteen thousand pounds (£115,000) (inclusive of VAT where applicable) in respect of fees incurred by Hausfeld in relation to the Action prior to the date of the LFA;

3.3.4. the Solicitors an amount equal to one hundred percent (100%) of the amount previously paid or payable by the Funder towards the Solicitors' fees pursuant to the LFA;

3.3.5. Mr Moser KC an amount equal to fifty percent (50%) of the amount previously paid or payable by the Funder towards Mr Moser KC's fees pursuant to the LFA; and

3.3.6. Mr Kuppen an amount equal to: (a) forty-two point eight six percent (42.86%) of the amount previously paid or payable by the Funder pursuant to the LFA towards Mr Kuppen's fees incurred prior to 1 November 2021; and (b) fifty percent (50%) of the amount previously paid or payable by the Funder pursuant to the LFA towards Mr Kuppen's fees incurred from 1 November 2021 onwards;

3.3.7 Ms Littlewood an amount equal to fifty percent (50%) of the amount previously paid or payable by the Funder towards Ms Littlewood's fees pursuant to the LFA; and

3.3.8. The Post-Certification ATE Insurers any amounts due under the Post-Certification ATE Insurance Policy; and

3.4. Fourth*, pari passu* and *pro rata*, to pay the Solicitors, Counsel and other third parties with whom the Class Representative has concluded a Legal Costs Agreement or other agreement previously approved by the Funder any further amounts due to them under such agreements."

F. STAKEHOLDER POSITIONS AS TO DISTRIBUTION

45. The Stakeholders (WGL/ATE Insurers on one side and CL on the other) have very different positions on how the Non-Ringfenced Costs should be distributed under their contractual arrangements referred to at Section E above, reflecting different views on the basis for calculating various costs and fees, the basis for allocating costs across different proceedings and defendants, and the basis for allocating the Non-Ringfenced Costs to the Stakeholders. The most recent attempt by WGL/ATE Insurers and CL to reconcile their respective calculations of the costs and fees to be used as the basis of WGL/ATE Insurers' claims for recovery from a distribution of Non-Ringfenced Costs was set out by the parties in their post-hearing submissions, set out in Table 1 below.

Table 1: The Parties' Entitlement Calculations in respect of WGL/ATE Insurers[4]

	WGL/ATE Insurers' entitlement calculation £	CL's entitlement calculation £	Difference £
Funder's Outlay	6,117,506	2,044,586	4,072,920
Sums received by WGL	-5,315,737	-4,594,996	-720,741
Funder's fee	21,000,000	5,999,000	15,001,000
Additional Funder's Fee for Appeal funding	401,274	133,758	267,516
Adverse Costs Indemnity fee	1,500,000	500,000	1,000,000
Adverse Costs Exit Fee	562,500	187,500	375,000
Post-CPO contingent premia	3,780,000	1,260,000	2,520,000
Balance:			
WGL	24,265,543	4,269,848	19,995,695
ATE Insurers	3,780,000	1,260,000	2,520,000

46. The Stakeholders state that differences in Funder's Outlay and Funder's Fee arise from the fact that:

(1) WGL/ATE Insurers contend that the Funder's Outlay under the Trains 1 LFA is to be calculated by reference to the total outlay under that agreement (i.e., all outlay in respect of Trains 1).

(2) CL contends that the Funder's Fee is to be calculated by reference only to that part of the Funder's investment which relates to SSWT – and that the relevant sum is arrived at by dividing the total outlay by 3 (to reflect the three Defendants in Trains 1). The difference in the Funder's Fee is also reflected by the fact that it is calculated by reference to Table 10.3 of the Trains 1 LFA, rather than Table 10.2, because there has already been a recovery in excess of the Funder's Outlay attributable to SSWT.

[4] Submission by WGL and CL of 15 September 2025 (Enclosure 3 of CL's letter of 15 September 2025 to the Tribunal) and WGL's letter of 30 October 2025 to the Tribunal.

47. The difference in Post-CPO contingent premia is that CL has allocated one quarter of the cost to SSWT, on the basis that there are four defendants across Trains 1 and Trains 2 cases which benefit from the premia.

48. The Stakeholders also have very different proposals as to distributions. The distribution proposed by WGL/ATE Insurers is as set out in Table 2, below.[5]

Table 2: WGL's Non-Ringfenced Costs Distribution Proposal

Party	**Revised Deed of Priority Waterfall Layer**	**Contractual Entitlement £**	**Amount Payable from £6.2m £**	**% of Contractual Payment payable**
WGL (reimbursement of money spent, not already reimbursed)	2	801,769	801,769	100%
WGL Success Fees	3	23,463,773	4,011,402	17%
ATE Insurer (Deferred & Contingent premiums)	3	5,040,000	861,646	17%
Solicitors	3	2,374,796	405,999	17%
Counsel	3	697,141	119,184	17%
Total		**32,377,479**	**6,200,000**	

49. The WGL/ATE proposal assumes that their Contractual Entitlements are based on all costs relating to Trains 1 and that payment is made according to the payment waterfall set out in the Revised Deed of Priority. Costs are allocated across Trains 1 and Trains 2 based on the number of relevant defendants and whether or not the cases were being case managed together. For the period when the cases were being managed together, three quarters of the costs would be allocated to Trains 1. The effect of WGL/ATE Insurers' proposal is that they receive £5.7m of the £6.2 million available for distribution.

50. The distribution proposed by CL in Antzoulatos 2 is set out in Table 3 below. The Contractual Entitlements calculated by CL are based on an allocation of one-third of the costs in the Trains 1 Case (Gutmann 6). Costs that are shared between Trains 1 and Trains 2 are allocated on a 50:50 basis. CL provided an

[5] Friel 2, paragraph 25.

updated calculation of its costs relating to both Trains 1 and SSWT which is set out in Table 6.

Table 3: CL's Non-Ringfenced Costs Distribution Proposal[6]

	Lawyers	Contractual Entitlement attributable to SSWT £	Already Paid from Proceeds Received £	CL's proposed payment from £6.2m £	% Of Contractual Entitlement
Deferred Fees & Costs	WGL Outlay	2,044,586	2,044,586	-	100%
	CL	3,128,033		3,128,033	100%
	Hausfeld	862,517		862,517	100%
	Counsel	240,753		240,753	100%
	Total	**6,275,889**	**2,044,586**	**4,231,303**	
Success Fees	WGL Fee	5,980,410	3,054,410		51%
	CL	1,614,010		758,585	47%
	Hausfeld	862,517		405,383	47%
	Counsel	240,753		113,154	47%
	ATE	1,680,000		653,680	39%
	Total	**10,377,690**	**3,054,410**	**1,930,802**	
Total	WGL Outlay	2,044,586	2,044,586	-	100%
	WGL Success Fee	5,980,410	3,054,410	-	51%
	CL	4,742,043		3,886,618	82%
	Hausfeld	1,725,034		1,267,900	74%
	Counsel	481,506		353,907	74%
	ATE	1,680,000		653,680	39%
	Total	**16,653,579**	**5,098,996**	**6,162,105**	

52. The Contractual Entitlements calculated by CL are based on an allocation of one-third of the common costs in the Trains 1 Case (Gutmann 6 paragraph 18). Costs that are shared between Trains 1 and Trains 2 are allocated on a 50:50 basis (Antzoulatos 1, paragraph 43). The effect of CL's proposal is that they (and the other lawyers) and the ATE Insurers receive the entirety of the £6.2 million remaining for distribution with no further sums distributed to the Funder. CL contends that the Funder has already recovered its outlay together with an appropriate rate of return out of the sums in costs already paid by SSWT.

[6] Antzoulatos 2, Table 4.

53. CL assumes that the amount of Funder's Fee already paid is £3,054,410, calculated as the difference between the total amounts already received by Woodsford (£5,098,996) and the amount of Funder's Outlay costs attributable to SSWT (£2,044,586). CL calculates £653,680 for the ATE 'Success Fee'. The remaining payments of Success Fees proposed by CL are to solicitors and counsel and are calculated pro rata to the deferred fees.

54. Sums received by the CR in relation to Trains 1 and their allocation to SSWT are shown in Table 4 below.

Table 4: CR's Receipts[7]

	Total Received £	**Proportion to SSWT %**	**Allocated to SSWT £**
Tribunal's CPO of 18 January 2022	780,000	33%	260,000
Court of Appeal's Order of 28 July 2022	266,988	33%	88,996
Tribunal's CSAO of 10 May 2024 – re costs and disbursements	4,750,000	100%	4,750,000
Tribunal's CSAO re Distribution Costs	750,000	100%	750,000
Total	**6,546,988**		**5,848,996**

[7] Antzoulatos 1, paragraphs 12 and 13.

55. The Funder's Outlay for Trains 1, as calculated by WGL, is shown in Table 5 below.[8]

Table 5: Funder's Outlays

Item	WGL Calculation £
Expenditure to Date of CSAO (10 May 2024)	
CL fees	781,611
Hausfeld fees	778,185
Counsel's fees	1,160,861
Justin Gutmann fees	75,580
Disbursements	1,319,556
ATE insurance deposit premia	924,000
Other funders costs	2,108
Total to 10 May 2024	**5,041,901**
Expenditure date of CSAO – 13 August 2025	1,075,605
Total to 13 August 2025	**6,117,506**

56. The most recent calculations by the Stakeholders of costs are summarised in Table 6 below.[9]

[8] Friel 2, paragraphs 62 and 63.
[9] WGL Letter of 30 October 2025 to the Tribunal and CL's letter to the Tribunal of 15 September 2025 (Enclosure 2).

Table 6: Entitlements in relation to Trains 1

	Fees	CL Calculation £	WGL Calculation £	Difference £
CL	Paid Fees	1,022,502	781,611	240,891
	Deferred Fees	7,097,501	4,193,278	2,904,223
	Success Fees	5,342,154	4,193,278	1,148,876
Hausfeld	Paid Fees	773,784	778,185	-4,401
	Deferred Fees	2,587,550	2,748,947	-161,397
	Success Fees	2,587,550	2,748,947	-161,397
Counsel	Paid Fees	1,258,372	1,451,341	-192,969
	Deferred Fees	718,492	697,426	21,066
	Success Fees	718,492	697,426	21,066
3rd Party Disbursements	Paid Fees	2,207,769	1,818,743	389,026
	Unpaid	25,000		25,000
ATE Premia	Paid Fees	2,198,000	1,848,000	350,000
	Unpaid	3,780,000	3,780,000	0
Funder's Fees	Funder's Adverse Costs Exit Fee	625,000	562,500	62,500
	Funder's Costs Indemnity Fee	-	1,500,000	-1,500,000
	Funder's Fee	21,401,274	21,401,273	1
Total		**52,343,440**	**49,200,955**	**3,142,485**

57. CL explains that the reasons for the differences include:

(1) The WGL calculation only includes costs incurred up to 9 April 2025 and funding notices received after that date and so may not include all costs.

(2) The parties have applied different allocation methodologies to calculate the costs allocated between Trains 1 and Trains 2.

(3) The costs incurred in relation to distribution of £750,000 have not been included by WGL.

58. CL's analysis of how the £750,000 paid by SSWT in relation to Distribution Costs was paid is shown in Table 7 below.[10]

Table 7: Allocation of Distribution Costs

Item	£
Epiq and media costs	450,000
CL	240,000
AlixPartners	60,000
Total	**750,000**

59. As set out in WGL's letter to the Tribunal of 30 October 2025, the Stakeholders disagree on the total amount of paid and unpaid ATE Premia, attributable to Trains 1, as shown in Table 8 below.[11]

Table 8: ATE Premia for Trains 1

	Paid/Unpaid	CL's calculation £	WGL's Calculation £
Pre-CPO Deposit Premium	Paid	294,000	294,000
Pre-CPO Contingent Premium	Paid	504,000	504,000
Post-CPO Deposit Premia	Paid	1,400,000	1,050,000
Post-CPO Contingent Premium	Unpaid	3,780,000	3,780,000
Total		**7,238,000**	**5,628,000**

60. CL's calculation assumes all the Post-CPO Deposit Premia (£1,400,000) and Post-CPO Contingent Premium is attributable to Trains 1, but WGL consider that the policy includes Trains 2, and so has allocated 75% of these amounts to Trains 1 (Friel 2).

G. ISSUES TO BE DETERMINED

61. The issues that fall to be determined in relation to distribution of the undistributed damages to the Stakeholders can be summarised as follows:

[10] Antzoulatos 1, paragraph 11.
[11] WGL letter of 30 October 2025 to Tribunal.

(1) Whether the Payment to Charity should be permitted and how such a payment should be made.

(2) Whether the Tribunal has jurisdiction at the end of the proceedings and after the class members have come forward and made their claims, to decide how the undistributed damages should be allocated to the Stakeholders. If there is jurisdiction, do the private dispute mechanisms agreed by the Stakeholders displace that function?

(3) If the Tribunal does have jurisdiction and this is not displaced by agreement between the Stakeholders, the following disputes between Woodsford and CL fall to be determined as to the parties' contractual entitlements:

(a) Whether Woodsford is entitled to an Adverse Costs Indemnity Fee and an Adverse Costs Exit Fee pursuant to Clauses 8.4 and 8.6 of the Trains 1 LFA.

(b) Whether Woodsford is entitled recover its Funder's Fee pursuant to Clauses 10.1 to 10.3 of the Trains 1 LFA.

(c) Whether the Tribunal should intervene in relation to how the Stakeholder costs have been allocated between the Trains 1 and Trains 2 proceedings.

(4) What sums should be allocated to each of the Stakeholders out of the balance of the Non-Ringfenced Costs?

(1) The Payment to Charity

62. The proposed Payment to Charity should be looked at in the context of whether, in the absence of, or even with, such a payment, the proceedings against SSWT and the Settlement can be seen as a success overall as already explained above (at para 21).

63. The CR submits that the settlement he reached with SSWT was a significant success. As recorded in the CSAO Judgment at [74], prior to the settlement the CR's economic expert, Mr Holt, had estimated the value of the claim at £38.99 million, or £49.5 million including interest. The settlement therefore recovered around 50% of the claimed sum, even when taking interest into account. The Tribunal notes that the £25 million figure is an 'up-to' figure, dependent upon the amount of valid claims from Class Members, so in the event of claims not reaching that sum, the real paid figure would be less. In view of the low take up, the paid figure will be very significantly less.

64. Woodsford also submits that the proceedings have been a success, especially when compared to the settlement in *Merricks*. The Tribunal notes that, whilst *Merricks* has not been a success in terms of the amount of the settlement relative to the size of the claim, it is still not known what the outcome will be in terms of take up by class members seeking payments from the sums made available out of the settlement.

65. The CR says that the poor level of uptake was despite considerable efforts made throughout the claim processing period to improve the claims process and maximise publicity of the settlement, as explained in the second witness statement of Mr Rodger Burnett. These efforts included re-launching the claim website with a more user-friendly interface, removing the proof of residency documentation requirement, and an extensive out-of-home advertising campaign on the London Underground.

66. The CR is disappointed by that outcome but states that there are a number of reasons which likely explain the low uptake. The settlement was the first of its kind to go to distribution. This meant that members of the class were unfamiliar with the process. They may also have been more reluctant, than may be the case in the future, to share bank details on an unfamiliar website, especially given the frequent and prominent public warnings about the risk of financial scams. In addition to the general delay in the claims, the settlement also concerned the most historic part of the overall Boundary Fare claims pursued by the CR. SSWT operated the South Western franchise until August 2017, when First MTR took over its operation. This means that the claims related to a period now

eight or more years in the past, which may have made it difficult for many potential claimants to recall even the limited necessary detail required under Pot 3 and to truthfully affirm claims they may rightfully have had.

67. It is important to note, at the outset, that in the Tribunal's view this case cannot be considered a success overall. Although the Settlement was positive, in that some recovery was made in a case where the merits did not appear to be strongly in favour of the CR, and it avoided an expensive trial for SSWT, in particular, the way things have unfolded since then undermines the positives. The level of uptake by the class of the settlement has been extremely disappointing. The CR has incurred costs of £18,788,166 and only 7,290 valid claims were made by class members, amounting to £216,724.91. This level of uptake falls significantly short of the hoped-for 10% to 20% of Represented Persons, which on Mr Holt's estimate of the class size would have amounted to c.140,000 to 280,000 claims (*CSAO Judgment* at [76]). In future, far more work needs to be done on the likely level of uptake at the stage of settlement approval, and in appropriate cases at the earlier certification stage. This was not done in this case, because the settlement needed to be approved shortly before trial and, had the CSAO been refused, the CR would have been, in effect, compelled to forgo the sums SSWT was willing to pay by way of settlement and proceed to trial, which, at best, had an uncertain prospect of winning. The Tribunal fully appreciated that this was not a follow-on damages case with strong prospects of succeeding on liability and causation. At that stage the Tribunal was reticent in expressing a view on the merits and potential weaknesses in the CR's case as it was conscious that claims continued to be made against the non-settling defendants which were to be determined by a separate panel of the Tribunal.

68. At the CSAO application hearing, the Tribunal expressed scepticism at whether even a 10% uptake would be achieved. It recorded in the CSAO Judgment at [100]: "*the Tribunal doubts that the figure of £10.2 million is at all likely to be exceeded and the actual class member claims may well be significantly lower than a 10 per cent take up.*" In the end, only £216,724.91 was distributed, representing c.0.9% of the settlement sum – being c.11.5 times less than the lower range estimate of 10%. The figure of £216,724.91 can be contrasted with

the £9,983,515 unclaimed sums, and the £5,848,996 already paid to Woodsford from sums paid to the CR in these proceedings to date.

69. Not only are the proceedings not a success in relation to the very poor level of uptake by class members and the high level of costs in relation to the take up, the Stakeholders are, also, all claiming significant sums for themselves, over and above those already recovered in terms of costs, fees and disbursements, and they are each claiming sums which, in total, are simply not available from the remaining £6.2 million, once the payments to class members and charity are factored in. The Tribunal is most disappointed that the Stakeholders have been unable to agree on the distribution of the remaining £6.2 million, especially after the fall-out between the CR and funder in *Merricks*. The one redeeming feature is the agreement between the CR and the Stakeholders that a substantial payment to charity should be made. The beneficiaries of these proceedings and the Settlement are not the class members, given the level of take-up. In noting this, however, the Tribunal does not intend to be critical of the CR and any of the Stakeholders, who each has their own interests and no one has behaved badly or improperly. The Stakeholders should, however, look to be realistic as to what they ought to obtain from what remains of the Settlement Sum. None of them has any entitlement to be awarded by the Tribunal the sums that they are claiming. That said, they are to be commended for appreciating that a substantial payment to charity should be made.

70. As already noted, whilst the Settlement Agreement did not provide for the Payment to Charity, it was agreed by the CR, CL, Hausfeld, the CR's Counsel, Woodsford and the ATE Insurers prior to the SEH that the AtJF should receive a payment of £4 million, less the amount distributed to class members (£216,725). The effect of the agreed Payment to Charity would therefore be that the class members and the AtJF, together, would receive a combined total of £4 million.

71. However, Woodsford and the ATE Insurers argued that at least half of the Payment to Charity should be funded from the part of the Damages Sum which would otherwise revert to SSWT under Clause 2.6 of the Settlement Agreement (see paras 17 and 41 above). The issue, therefore, is whether the sum should be

paid exclusively from the costs, fees and disbursements which are within the Non-Ringfenced Costs, or whether, as suggested by Woodsford and the ATE Insurers, £2 million should be paid from the amount that falls outside the Non-Ringfenced Costs that would otherwise revert to SSWT.

72. It was agreed between the CR, CL, Woodsford and ATE Insurers that the balance of the undistributed damages (following the Payment to Charity), up to the Non-Ringfenced Costs Limit, should be allocated for payment to the CR of his costs, fees and disbursements, including sums due to Woodsford and the ATE Insurers.

73. SSWT acknowledged that the take-up of the settlement sum was disappointingly low. However, SSWT submitted that this fact does not provide any basis for reopening the approved settlement terms and there is no reason to depart from the Settlement Agreement concluded between the Settling Parties and approved by the Tribunal.

74. As indicated at the hearing, the Tribunal is of the view that it would be unfair at this stage to, in effect, rewrite the Settlement Agreement against the interests of SSWT. This is because at the time the Settlement Agreement was approved, the understanding of the Tribunal was that the only liability of SSWT above the £10.2 million Non-Ringfenced Costs would be activated, in what the Tribunal perceived to be, the most unlikely event that the valid claims of class members would exceed £10.2 million. At the time of that hearing the Tribunal also took the view that it was very unlikely that the costs, fees and disbursements in the proceedings against SSWT would be anything less than £10.2 million, even once one divides by three the common costs run-up in relation to the three defendants to arrive at a figure for SSWT alone.

75. Accordingly, the Tribunal will not require SSWT to contribute an additional £2 million over and above what the Tribunal and the Settling Parties anticipated at the time of the Settlement Agreement.

76. In summary, the Tribunal is of the clear view that it is sensible and just, in the circumstances of this case, that the parties have agreed that the Payment to

Charity should be made. This will go some way towards mitigating the extremely disappointing distribution rates achieved in this case. Further, the payment could make a huge difference in facilitating access to justice for the needy and vulnerable.

77. At the Stakeholder Entitlement Hearing, Counsel for SSWT, Ms Abram KC, confirmed that SSWT was content with the Payment to Charity. As there is currently no provision in the Settlement Agreement for a payment to charity, the Tribunal considers that such a payment can be achieved by the Stakeholders undertaking to the Tribunal to make such a payment out of any payment of Non-Ringfenced Costs.

(2) The Tribunal's supervisory jurisdiction

Parties' submissions

78. Woodsford's primary position is that once the Tribunal has determined what sums are payable to the CR for his costs, fees and disbursements pursuant to the Stakeholder Entitlement Application, the distribution of those sums is a matter of contract between the Stakeholders. Further or alternatively, there is no proper basis in any event for the Tribunal to intervene in that allocation, and allocation in accordance with the Stakeholders' express prior agreement is both just and proper.

79. The revised Deed of Priority provides a 'waterfall' of distribution, which expressly and comprehensively determines the distribution of Stakeholder Proceeds (as defined in the Trains 1 LFA) between the Stakeholders. It does not impact the class; it concerns only the distribution of Stakeholder Proceeds between Stakeholders. Such a document is a fundamental and inherent part of any litigation funding arrangement, without which such arrangements would be very unlikely to be agreed.

80. At the Stakeholder Entitlement Hearing, Counsel for Woodsford and the ATE Insurers, Mr Mallalieu KC, accepted that the Tribunal has jurisdiction to decide what sums are to be awarded to the CR out of the pots of money that are

available for that purpose: indeed, the Tribunal confirmed at the Stakeholder Entitlement Hearing that it is content for £6.2 million (i.e. the £10.2 million Non-Ringfenced Costs minus the (combined) £4 million of damages and Payment to Charity) to be awarded to the CR.

81. Mr Mallalieu acknowledged the statements made by the Tribunal (in *Gutmann v Apple CAT*, the *CSAO Judgment*, *McLaren*, and the *Merricks CSAO Judgment*) and more recently by the Court of Appeal in *Gutmann v Apple CA* to the effect that a class representative's proposed distribution of damages is always subject to the control of the Tribunal under its supervisory jurisdiction: see para 30 above. He submitted, however, that these observations were made in circumstances where the Tribunal was required to protect the interests of the class members i.e. the intended beneficiaries of the opt-out collective actions, and ensure that their interests were not disadvantaged by the interests of the other stakeholders. The circumstances of the present case are different because the class members have been afforded a reasonable opportunity to submit their claims in priority of the other Stakeholders, and 7,290 claims have been validly submitted. Accordingly, and despite the poor level of uptake, the interests of the class members have already been considered and safeguarded. The Tribunal is no longer concerned with the sums which are going to the class (or charity), but rather with the allocation of residual damages to the CR for use to pay his costs, fees and expenses.

82. CL, for its part, submits that for seven years it has driven the proceedings forward, notwithstanding periods when the promised external finance failed to materialise, effectively underwriting its own fees so that the class was always represented and their interests progressed to the best of CL's ability. It is against this history of compelled self-funding that the Tribunal is asked to apportion the undistributed Non-Ringfenced Costs.

83. Further, Woodsford overstates the role of private bargains and understates the Tribunal's supervisory jurisdiction at the distribution stage.

84. CL accepts that sophisticated parties may allocate risk *inter se*. But Parliament has conferred a public supervisory jurisdiction on the Tribunal at the point of

distribution (section 47C(3) CA 1998 and Rules 93 and 94 of the Tribunal Rules). The Court of Appeal has confirmed that the Tribunal may order payment of a funder's return from damages "*subject always*" to the Tribunal's control and to an end stage assessment of reasonableness, concluding that "*any issue as to the reasonableness of the funder's return is to be addressed at the time of distribution*" (*Gutmann v Apple CA* at [78]-[82], [90]-[93], [97]-[99]).

85. As a matter of contractual interpretation, CL submits that the Trains 1 LFA and the Revised Deed of Priority preserve, rather than oust, the Tribunal's end-stage supervision (see paras 42 and 44 above).

Tribunal's analysis

86. It is clear from a consistent line of recent appellate and Tribunal authority that (i) funding arrangements set parameters, not outcomes; and (ii) at the end of the proceedings the Tribunal must determine costs, fees and disbursements "*fairly and proportionately and in accordance with the principles of justice*" (*Gutmann v Apple CA* at [82] and [99]).

87. In *Gutmann v Apple CA*, the Court of Appeal established that upon completion of collective proceedings, the Tribunal retains the power to order payment of a funder's return from damages, with the important qualification that any such decision remains "*subject always to the control of the CAT under its supervisory jurisdiction*". The Court explained that any issue as to the reasonableness of the funder's return is to be addressed at the time of distribution ([99]).

88. The Tribunal itself stated as much in *Gutmann v Apple CAT*, explaining that "*the Tribunal has a supervisory role in determining how proceeds are to be distributed at the end of the proceedings*", which "*means the Tribunal can, at the end of proceedings, revisit whether it is prepared to endorse the payment of the agreed sums to the Funder*" ([12]). At the end of the proceedings the Tribunal "*may have better visibility as to the proportionality of the Funder's fee in relation to the damages awarded and the complexity of the proceedings*" ([12]). The Tribunal also noted that in cases involving modest recoveries, it "*may well refuse to give absolute priority to the Funder*" ([38]).

89. It is axiomatic that the Tribunal must have due regard to the legitimate interests of all stakeholders in maintaining a viable collective proceedings regime. Class representatives cannot bring collective proceedings without lawyers, funders and insurers and they all need to make adequate returns overall. Funders, for example, operate on a portfolio basis and aim to make a good rate of return across their portfolio over time. This means that they recognise that there are cases where they make no return at all at one end and a very good rate of return on others, where the case is a success overall. Although invited by the Tribunal to provide evidence as to its rates of return, Woodsford took a decision not to provide such information to the Tribunal.

90. The importance of funders to collective proceedings has been repeatedly remarked upon by the Tribunal. In *Road Haulage Association Ltd v Traton SE and others (Trucks: CPO)* [2024] CAT 51, the Tribunal said at [87]: "*third party funding from commercial funders provides the fuel which enables the vehicle of collective proceedings to operate*". Similarly, in the *CSAO Judgment* (cited by the Court of Appeal in *Gutmann v Apple CA* at [87]), the Tribunal explained at [47] that it "*recognises that funders and funding are integral to the viability of the three claims being brought by the CR.*"

91. However, the importance and value of solicitors and counsel cannot be underestimated. Frequently it is the law firm that conceives of the claim and, with the assistance of counsel and economists, develops the case to the point where it can be presented to the funding market. It is the law firm that typically brings together all elements of the claim. ATE Insurers also have an important role which should not be ignored.

92. The Tribunal must ensure that collective settlements and distribution plans are fair and reasonable for class members, but the Tribunal must also consider and balance the interests of the other stakeholders and ensure that the collective actions regime operates effectively as a whole. As the Tribunal explained in the *CSAO Judgment* at [17] (cited by the Court of Appeal in *Gutmann v Apple CA* at [88]) "*[w]e will not ignore the interests of others such as the lawyers, the experts and the funders, because we have an interest not just in this case but in*

future cases. If the lawyers and the funders are not going to get a return in this case, then they may be deterred from acting in further cases".

93. In the Tribunal's view, both the Revised Deed of Priority and the Trains 1 LFA expressly confer power on the Tribunal to intervene in this case and ensure that the costs, fees and disbursements claimed by all Stakeholders are determined fairly and proportionately and in accordance with the principles of justice. The Revised Deed of Priority and the Trains 1 LFA both make payment obligations subject to any Order of the Court. Clause 3 of the Revised Deed of Priority provides that "*[i]t is agreed that, subject to any Order of the Court to the contrary, all sums due to any of the Parties pursuant to the Agreements shall be paid out of any Stakeholder Proceeds in accordance with the terms of this agreement …in accordance with and subject to the following order of priorities*" (emphasis added). The Trains 1 LFA has a similar term, as clause 3.1.8 states that "*the Class Representative's obligation to pay the Funder's Fee is reduced to the extent that the amount which the CAT orders and/or approves should be paid to the Class Representative in respect of this obligation falls below the amount of the Funder's Fee*" (emphasis added).

94. The funding agreements, therefore, expressly provide for the Tribunal's discretionary oversight. Accordingly, the Tribunal's task is to strike the right balance between all the interests involved and reach an outcome that is fair to all Stakeholders: see the *Intervention I and II Rulings*.

95. In addition, in dealing with what sums each Stakeholder is to be allocated from a limited pot in a case with a far from successful outcome, the Tribunal will want to look at the position and claim of each Stakeholder, to determine what sum that it would be fair, reasonable and proportionate to receive. Here the Tribunal is satisfied that, in all the circumstances, WGL and the ATE Insurers should not be awarded more than, at most, a modest rate of return and that it should be calculated by reference to an allocation of costs specifically in relation to the claim against SSWT in Trial 1. Common costs should be allocated equally between the 3 defendants given that the funds available come out of a settlement with SSWT alone.

96. The Tribunal wishes to make clear that it is not seeking to rewrite the contracts agreed by the parties and the Tribunal will naturally attach substantial weight to any prior agreement reached by sophisticated parties. If the Tribunal decides that a particular sum for funders is, in fact, reasonable and proportionate and should be no higher, it is open to the Tribunal to award the balance to other stakeholders. In doing so, the Tribunal would be mindful not to award other stakeholders sums over and above what it considers reasonable and proportionate in all the circumstances.

(3) The Parties' contractual entitlements

(a) Is Woodsford entitled to an Adverse Costs Indemnity Fee and an Adverse Costs Exit Fee pursuant to Clauses 8.4 and 8.6 of the Trains 1 LFA?

97. At the start of Trains 1, WGL provided an Adverse Costs Deed of Indemnity which ensured that if an adverse cost award was made against the CR, WGL would indemnify him in respect of any such adverse costs up to a limit of £10 million. For Trains 1, WGL and the CR executed the Adverse Costs Deed of Indemnity on 17 September 2018. The £10 million limit remained unchanged despite a variation deed dated 31 October 2019.

98. On 29 March 2023, WGL took £10 million of insurance cover in respect of adverse costs to trial for Trains 1, with an inception date of 7 November 2022. Under clause 8.5 of the Trains 1 LFA, once full insurance was in place, WGL was no longer entitled to an Adverse Costs Indemnity Fee, and the upfront ATE premia instead became part of the Funder's Outlay.

99. On 3 July 2023, the Tribunal certified the Trains 2 Proceedings. At the start of Trains 2, WGL provided the CR with a Deed of Indemnity of £5,000,000. In return for providing this, in the event of a successful outcome in the Trains 2 Proceedings, WGL would be entitled to an Adverse Costs Indemnity Fee under the Trains 2 LFA equal to 150% of the total limit of indemnity (i.e., £7,500,000). The CR understood that this figure was significantly higher than the average

ATE premia in the UK, which typically range from 55% to 70% of the limit of indemnity.

100. Under clause 3.1.10.1 of the Trains 1 LFA and the Trains 2 LFA, the CR has an obligation to *"take all reasonable steps to minimise and control the quantum of the Action Costs and the Additional Action Costs"*. Clause 8.2 of the Trains 2 LFA provides that WGL *"shall use its best endeavours, until the date falling three months after the date of a CPO in the Action, to obtain ATE insurance to cover its potential liability for Adverse Costs under the Adverse Costs Deed of Indemnity"*. This provision was intended to facilitate a transfer of the adverse cost risk from WGL to an ATE insurer shortly after the CPO in the Trains 2 Proceedings was made on 3 July 2023, which would have provided the CR (and therefore the Class) with much more competitive pricing for that indemnification.

101. The Trains 2 CPO triggered the three-month period during which, pursuant to clause 8.2 of the Trains 2 LFA, WGL was required to use its *"best endeavours"* to secure ATE insurance for Trains 2. At the time when the Trains 1 ATE was incepted the CR was informed by CL that the two insurers – HUL and AmTrust who had provided the ATE for Trains 1 – had indicated a willingness to provide £2.5 million each in cover, and that incepting the £5 million cover for Trains 2 should be straightforward as the policy wording and commercial terms had already been agreed during the negotiations for the Trains 1 ATE.

102. The three-month deadline of 3 October 2023 during which WGL had to use *"best endeavours"* to incept ATE passed without WGL having incepted any. Subsequent requests for disclosure of WGL's communications with the ATE insurers and brokers were declined, and CL disputes that WGL indeed used *"best endeavours"* to obtain the requisite cover. In response, WGL acknowledged that it had not progressed matters with the insurers since October 2023.

103. On 22 March 2024, the Trains 1 Post CPO ATE Insurance Policy was amended to: (a) expand the definition of the "Case" to include Trains 2; and (b) cover any

adverse costs payable to GTR, the sole defendant in Trains 2, previously not named as an opponent under the policy.

104. The Adverse Costs Indemnity Fee and Adverse Costs Exit Fee are calculated in the same way, against the same percentages (i.e. 150% of the uninsured part of the limit of indemnity under the Adverse Costs Deed of Indemnity and 6.25% of the insured part of the limit of indemnity under the Adverse Costs Deed of Indemnity) in the Trains 2 LFA. As the Trains 1 Post CPO ATE Insurance Policy covers both Trains 1 and Trains 2, and the Adverse Costs Indemnity Fee and Adverse Costs Exit Fee are calculated in the same way across the Trains 1 and Trains 2 LFAs, the Adverse Costs Indemnity Fee and Adverse Costs Exit Fee were calculated jointly across the two proceedings, and these costs were apportioned appropriately between Trains 1 and Trains 2.

105. Therefore, across both Trains 1 and Trains 2, Woodsford is said to have committed to indemnities to the CR totalling £15 million (£10 million for Trains 1 and £5 million for Trains 2). The combined ATE insurance cover is £11.5 million – comprised of £10 million under the Trains 1 Post CPO ATE Insurance Policy (which now covers both Trains 1 and Trains 2) and £1.5 million under the Trains 1 Pre-CPO ATE Insurance Policy.

106. Accordingly, the Adverse Costs Indemnity Fee in respect of Trains 1 is £1,500,000 and the Adverse Costs Exit Fee is £562,500.

107. On 15 March 2025, in the context of preparing for the Application for Costs, WGL declared that adding GTR had created a shortfall in the ATE cover for Trains 1. Because of that shortfall, WGL claimed to be entitled to resurrect a proportion of the Adverse Costs Indemnity Fee.

108. In the same email, Mr Morris stated that *"[b]ased on the number of defendants in T1/T2, we consider that an appropriate apportionment of the insurance cover is <u>two thirds T1 and one third T2</u> (i.e. £6.6667m of cover on T1 and £3.3333m of cover on T2)"* and that, *"[e]ven if one were to take the approach that £10m constitutes two thirds of £15m, such that one should take the approach that two thirds of the Adverse Costs Exit Fee (in each LFA) and one third of the Adverse*

Costs Indemnity Fee (in each LFA) should apply, one arrives at the same result (i.e. £6.6667m of cover on T1 and £3.3333m of cover on T2)" (emphasis added). Mr Friel, however, stated *"[d]ue to the Trains 1 Post CPO ATE Insurance Policy covering both Trains 1 and Trains 2 …I have apportioned both the paid premiums (as explained above) and contingent premium payable as at 10 May 2024 in accordance with the methodology for Period 3 above (i.e 3/4 to Trains 1 and 1/4 to Trains 2)"* (emphasis added).

109. Under clause 4.1.1 of the Trains 1 and the Trains 2 LFAs, WGL has an obligation to *"act in good faith in all its dealings with the Class Representative and in its dealings with the Class Representative's advisors, including the Solicitors and Counsel"*.

Parties' submissions

110. CL submits that the Adverse Costs Indemnity Fee was designed to bite only until WGL obtained an ATE policy, because before an ATE policy was obtained, WGL was providing its own deed of indemnity, and so the Adverse Costs Indemnity Fee was essentially to reward WGL for the fact that it was self-insuring. But what it proposed was, if WGL then obtained an ATE policy, only an Adverse Costs Exit Fee was payable to WGL because, then, there would also be the sums payable to the ATE provider.

111. Under clause 8.2 of the Trains 2 LFA, WGL had an obligation to "*use its best endeavours, until the date falling three months after the date of a CPO in the Action, to obtain ATE insurance to cover its potential liability for Adverse Costs under the Adverse Costs Deed of Indemnity*". The CR negotiated this provision to facilitate a transfer of the adverse cost risk from WGL to an ATE insurer shortly after the CPO in the Trains 2 Proceedings was made on 3 July 2023, so as to provide him with far more competitive pricing for that indemnification. The CR and CL's concerns about WGL's failure to use best endeavours to secure ATE funding for Trains 2 were repeatedly expressed in correspondence between CL and WGL.

112. CL alleges that at no point did WGL disclose to the CR, CL, or the ATE insurers themselves, the potential implications of adding GTR to the existing Trains 1 cover. The lack of transparency is said to be evidenced by the fact that the ATE insurers continued to claim their full premia, apparently unaware that WGL would argue that the endorsement had created a coverage shortfall justifying resurrection of the Adverse Costs Indemnity Fee.

113. The CR submits that proper sequencing was simple, and CL repeatedly raised this on the CR's behalf with WGL, asking it to incept the £5 million cover for Trains 2 first, and then layer the policies. Yet, WGL never incepted the additional cover. Rather, it layered the policies and created the shortfall in ATE cover, thus manufacturing an artificial entitlement to the Adverse Costs Indemnity Fee. In an email to Crescient dated 7 April 2025, Mr Morris stated that WGL had *"complied with its obligations under the LFAs to use best endeavours to seek ATE at the relevant time"*. This assertion is difficult to reconcile with Mr Friel's witness statement, in which he states that the decision of when and how much ATE insurance cover to purchase involved a *"careful balancing exercise"*. He argues that, while purchasing more ATE insurance earlier would have reduced WGL entitlement to the Adverse Costs Indemnity Fee, it would also have increased WGL's outlay, leading to higher funder returns and triggering deferred premium entitlements payable from any case proceeds.

114. WGL's obligation under the agreement was to use its best endeavours to incept such ATE cover, not to conduct a *"careful balancing exercise"* which suggests weighing WGL's own commercial interests against its contractual obligations. The CR had understood and had proceeded on the basis that *"best endeavours"* require WGL to take all reasonable steps to secure ATE funding, even if that meant subordinating its own commercial interests.

115. The term "*best endeavours*" under English law has been defined by the courts as requiring the obligor to do all it reasonably can to produce the desired result (*Jet2.com Ltd v Blackpool Airport Ltd* [2012] EWCA Civ 417 *("Jet2.com")* at [31]). A best endeavours obligation may require the obligor to subordinate its own commercial interests to achieve the contractual objective (*Jet2.com*). This

standard is fundamentally different from the "*careful balancing exercise*" between competing commercial considerations suggested by WGL, which would instead be characteristic of, at most, a reasonable endeavours obligation (*Rhodia International Holdings Ltd and another v Huntsman International LLC* [2007] EWHC 292 (Comm) at [33]; *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch) at [250]–[253]). Given its *"best endeavours"* obligation, WGL did not have the latitude to run a "*careful balancing exercise*" that prioritised its own profits over promptly procuring ATE cover for Trains 2.

116. Clause 4.1.1 of the Trains 1 and Trains 2 LFAs required WGL to act "*in good faith in all its dealings with the Class Representative and …the Solicitors*". A party acting in good faith would have immediately disclosed the consequences of diluting the Trains 1 coverage by adding GTR and sought consent.

117. WGL's position is, in summary, that they complied with the contractual provisions in the Trains 1 and Trains 2 LFAs and they have not breached the *"best endeavours"* or *"good faith"* obligations. The Trains 1 Post CPO ATE Insurance Policy provided in Trains 1 was amended to add GTR with the express knowledge of CL and the CR. WGL attempted to obtain separate cover in relation to Trains 2 but this was not possible, as discussed below.

Tribunal's analysis

118. The effect of what happened by virtue of the endorsement to the Trains 1 ATE policy is that WGL was put back on risk for an element of that indemnity. We can see that very clearly because the effect of the endorsement was to add a fourth defendant. Essentially that fourth defendant, being a Trains 2 defendant, reduced the level of cover that was available for Trains 1. There was no other insurance cover for Trains 1, and there was a £10 million adverse cost indemnity provided, and WGL, therefore, has a contractual entitlement to the fee to reflect that it was exposed to the provision of that indemnity.

119. As is clear from the correspondence, the CR and his legal advisers proposed to add the proceedings against GTR to the current £10 million, what we can

describe as the, Trains 1 policy, and then incept further cover to go on risk after trial 1.

120. Adding GTR to the Trains 1 policy was not done without the CR's and the legal team's agreement and consent. It was in fact done, albeit following a discussion, at their express request. This is clear from the emails exchanges between Mr Luke Streatfeild (Hausfeld) and Mr Charlie Morris (WGL) dated 2 and 16 October 2023 and handed up to the Tribunal at the Stakeholder Entitlement Hearing.

121. Mr Morris from WGL contacted Hausfeld and CL i.e. the "Trains team", and referred to the fact that GTR proceedings (the Trains 2 defendant), are now being case managed with the Trains 1 defendants. A three-trial structure had been ordered, and the effect of that three-trial structure was that the first trial was going to involve all of those defendants:

> "…both Woodsford and the class rep and its legal team have a preference to:
>
> "(a) add the proceeding against Govia to the current (£10m) ATE policy given that it is now being case managed alongside the proceedings against SW and SE; and
>
> (b) incept a further policy with a £5 million which 'goes on risk' after trial 1 (for which premia will only start to be incurred at a certain point following a successful judgment in relation to trial 1)."

122. The idea was to avoid a pause or gap in cover for GTR given that GTR had been added in to the joint case management and Trains 2 was going to be part of the Trains 1 trial. Cover needed to be in place for that.

123. Then there is the email from Mr Streatfeild, which copied in both teams. This set out the request, the formal request on behalf of the CR, through his legal teams: "*We have been reviewing the ATE position in light of the Tribunal's recent order that the SW/SE and GTR proceedings be jointly case managed and tried together at three separate hearings*."

124. The email sets out the trials and then sets out the adverse costs cover:

> "In terms of adverse costs for the above, class representative currently has the benefit of:

- a £10m adverse costs indemnity from Woodsford for the SW/SE proceedings, which is backed by an ATE policy against three Defendants (Stagecoach, First MTR and LSER).

- a £5m adverse costs indemnity from Woodsford for the GTR proceedings (against one Defendant, namely Govia), which is not yet backed by ATE insurance."

125. The email then notes that the position has changed in light of the joint case management. The adverse costs risk is then discussed:

> "However, this ignores the cost that the Class Representative and the Defendants have incurred to date. While there are now 4 Defendants, the Tribunal has made it clear it expects their Counsel to divide up submissions, and it is therefore unlikely that their aggregate costs would exceed £10 million for Trains 1. It is also relevant that LSER and Govia are represented by the same legal team ... In light of this, we believe that the £10m for Trial 1. It is also relevant that LSER and Govia are represented by the same legal team, and so, although there is an additional defendant, the incremental costs are likely to be limited principally to the costs of disclosure for that Defendant.
>
> In light of this, we believe that the £10m cover will be adequate for all 4 Defendants for Trial 1, however, we believe that it would be prudent for Govia to be added to the SW/SE policy and for the additional £5m to be incepted now, but to only go on risk after Trial 1."

126. This proposal is summarised in the email as follows: "*The Class Representative and his legal advisors therefore propose to…[a]dd the proceedings against GTR to the current (£10m) ATE policy in SW/SE*".

127. Accordingly, there was no failure of WGL's obligations and WGL had acted in good faith.

128. In relation to WGL's obligation to use *"best endeavours"* to obtain the relevant ATE cover in relation to Trains 2, Clause 8.2.2 of the Trains 2 LFA states that it should do so *"on terms which are satisfactory to the Funder and in the best interests of the Class Members"*. Mr Mallalieu submitted on behalf of WGL that two insurers were identified. However, one insurer was not in a position to underwrite and the other, who offered £2.5 million of ATE cover, was only willing to give cover on the basis that there was a priorities agreement with the CR as to how they would be paid in the event of a success, which could not be agreed on behalf of the CR.

129. Despite WGL being entitled to the Adverse Costs Indemnity Fee, this is not conclusive in determining how much is to be paid out of the £6.2 million, as the Tribunal has a supervisory role in determining how proceeds are to be distributed at the end of the proceedings: see paras 86 to 88 above. The Tribunal will bear in mind, in particular, the level of contractual entitlement, the limited sums available to cover all stakeholders, the extent to which the funder has borne any actual costs in providing the ATE cover, and the fact that the funder was never called to pay any sum to cover adverse costs of SSWT once the settlement was approved in April 2024.

130. The allegations, effectively, of breaching the best endeavours obligation and breaching a duty of good faith, are serious allegations to make. From the evidence, the Tribunal does not regard Woodsford as a fly-by-night operation; they know what they are doing, and they know what the market is. On this basis, the thought that they would have only gone out and made two enquiries with respect to something like this, where they have got a best endeavours obligation, a duty of good faith, is most improbable. The Tribunal is, thus, of the view that Woodsford know the market, and they got what was available.

131. There were constraints being imposed by the CR, which made one option not viable. There may have been other constraints on the availability of acceptable alternative cover. At the end of the day, although it is a best endeavours obligation, the Tribunal does not consider that Woodsford was out to put its own interests first, rather than just obtaining reasonable and appropriate cover from whatever was available.

132. In these circumstances, the Tribunal accepts that there is a contractual entitlement to the Adverse Costs Indemnity Fee. However, it should be noted that the actual figure of £1.5 million is across all three defendants in the proceedings. The sums being made available by SSWT are by reference to the costs, fees and disbursements as against it, rather than all three defendants. Irrespective of the contractual entitlement as between the CR and Woodsford, and given the limited funds available and also given that the Ringfenced Costs amount agreed to be paid by SSWT is by reference to costs, fees and disbursements against SSWT alone, when it comes to allocation out of the sums

paid and payable by SSWT, the base figure in deciding the amount to distribute for the benefit of Woodsford is £500,000.

133. As regards the Adverse Costs Exit Fee, the figure of £562,500 should similarly be reduced to a third i.e. £187,500.

(b) Is Woodsford entitled to recover its Funder's Fee pursuant to Clauses 10.1 to 10.3 of the Trains 1 LFA?

134. There are differences in the way costs have been allocated between Trains 1 and Trains 2. In summary, Woodsford considers that 75% of any common costs across the two proceedings should be allocated to Trains 1, in line with the respective number of Train Operating Company ("**TOCs**") Defendants in the two sets of proceedings. In contrast, the CR has followed a 50/50 allocation.

135. If Woodsford's approach is taken, this would have the effect of <u>increasing</u> the amount of costs attributable to the proceedings against SSWT.

136. The calculation of the Funder's Fee under the LFA depends in part on whether it is recovered from undistributed damages or otherwise. To the extent that the fee is recovered from undistributed damages, a higher level of the Funder's Fee applies. Whether the fee is entirely recovered from undistributed damages depends on the Funder's Outlay to date and whether recoveries to date exceed that outlay.

137. The CR's costs assume that the highest level of the Funder's Fee of £21 million applies, of which £7 million are attributable to SSWT (i.e. the level payable under clause 10.2 of the LFA if the Funder's Fee is fully recovered from undistributed damages). However, the CR estimates that this reduces to c.£5.7 million if all recoveries made to date in respect of the proceedings against SSWT (c.£5 million when excluding Distribution Costs and the costs of the appeal) are set off against the outlay in respect of SSWT only (c.£2 million, or a third of the £6 million total available funding for Trains 1, which the CR understands has been exhausted). In that case, recoveries exceed outlay, and some of the Funder's Fee falls to be calculated by reference to the lower level

of £15 million, or £5 million attributable to SSWT, which applies (under clause 10.1 of the LFA) if the Funder's Fee is recovered other than from undistributed damages.

138. Woodsford disagrees with this and contends that it is not correct to offset recoveries against outlay on a SSWT-only basis, given that the LFA and Deed of Priorities do not distinguish between recoveries made from different Defendants when distributing proceeds to Stakeholders but instead distribute any recoveries made, irrespective from which Defendant, against all outlay and costs incurred across all of the Trains 1 proceedings.

139. However, clauses 10.1 to 10.3 of the Trains 1 LFA, which determine the calculation of the Funder's Fee, are concerned with payments received by the CR in the case of a settlement and not with the waterfall of distributions to Stakeholders as governed by the Deed of Priorities, and the CR considers that it would therefore be more appropriate to offset the payments received against the costs to which they relate for the purposes of calculating the Funder's Fee attributable to SSWT.

Tribunal's analysis

140. Essentially for the reasons given by Woodsford, it is entitled to claim as a matter of contract the sum of £7 million, being one third of £21 million as Funder's Fee, and this is not to be reduced by allocating sums recovered by way of set-off as against SSWT, as suggested by the CR. However, although Woodsford may be entitled to allocate costs as a matter of contract, it is important to note that the settlement sum is coming from only one defendant and that £4.5 million was earmarked and used to meet those costs. The Tribunal must determine how the additional £6.2 million is to be allocated. As set out in paras 62 and 68 above, the Settlement in these proceedings cannot be considered a success in light of the disappointingly low uptake and the spiralling level of costs incurred by the CR. In cases with disappointing outcomes funders and ATE insurers should not expect to recover their full contractual entitlements. The guiding principle is what is fair, just and reasonable in all the circumstances of the case, having

regard to the particular outcome and whether and, if so, the extent to which, class members have obtained redress.

(c) Should the Tribunal intervene in relation to how the Stakeholder costs have been allocated between the Trains 1 and Trains 2 proceedings?

Parties' submissions

141. WGL's argument for determining the distribution based on the total Trains 1 costs is that this is what was envisaged in the Revised Deed of Priority.

142. CL's proposed distribution on Non-Ringfenced Costs is based on an allocation of one-third of the costs common to all defendants plus costs specific to SSWT after the settlement.

143. CL disagrees with WGL's proposed approach on the basis that:

(1) "by using the Non-Ringfenced Costs to recoup not only the outlay and success fees attributable to SSWT, but also the whole of its outlay and a percentage of the success fees referable to the non-settling defendants, WGL is attempting to use the settlement as a cross-subsidy for the ongoing proceedings", and

(2) "WGL's position represents a complete subversion of the risk allocation principles that underpin litigation finance. …WGL seeks to escape any meaningful risk by recovering its full outlay for the whole of the Trains 1 proceedings and part of its success fee also for the whole of the proceedings, even though the proceedings against the other defendants are still ongoing and their outcome remains uncertain" (Antzoulatos 2).

144. WGL's approach, as set out in Friel 2, is to allocate common costs across the two cases based on the number of defendants, and whether or not Trains 1 and Trains 2 were being managed together. WGL consider costs in four periods as shown in Table 9.

Table 9: WGL Trains 1 Allocation Approach

	Period	WGL's basis of apportionment
Period 1	17/9/2018 - 30/4/2021	3 defendants managed together as Trains1
Period 2	1/4/2021 - 4/4/2023	Trains 1 and Trains 2 managed separately – no common costs
Period 3	5/4/2023 - 10/5/2024	Trains 1 and Trains 2 managed together. Costs allocated 75% to Trains 1 (3 defendants) and 25% to Trains 2 (1 defendant)
Post Period 3	11/5/24 - to date	No further costs incurred relating to SSWT as they either related to other defendants or were funded from the £750,000 Distribution Costs contributed by SSWT.

145. CL says that since 24 November 2021 when Trains 2 was filed until settlement talks began with SSWT, *"the vast majority of the CR's costs have been incurred collectively across both Trains 1 and Trains 2"* (Antzoulatos 1) and accordingly costs were apportioned equally between Trains 1 and Trains 2 and that the CR requested payment from the separate budgets on a 50:50 basis.

146. CL argues that an allocation of common costs across Trains 1 and Trains 2 on the basis of the number of defendants was problematic because *"by March 2021, the CR had exhausted the entire budget for solicitors in Trains 1"* (Antzoulatos 1).

Tribunal's analysis

147. In principle, WGL's approach would allocate a higher proportion of costs to Trains 1 than CL's approach. However, the calculations submitted by WGL for CL's fees incurred in relation to Trains 1 are significantly lower than those submitted by CL. Neither of the approaches to allocating the costs across Trains 1 and Trains 2 is entirely unreasonable. WGL's approach could provide a more accurate cost apportionment, but WGL has not provided a calculation of costs attributable to SSWT or included the recovery of Distribution Costs or any costs associated with distribution. For the purposes of assessing overall returns to the Stakeholders, the Tribunal has therefore considered the returns implied by adopting both CLs calculations and also WGL's calculations (assuming a simple allocation of one-third to SSWT).

(4) Allocation of the balance of the Non-Ringfenced Costs to Stakeholders

148. The allocation of the remaining £6.2 million out of the Non-Ringfenced Costs has to take account of the following:

(1) The contractual entitlement of each of the Stakeholders.

(2) The fact that there is clearly not enough money to cover these contractual entitlements.

(3) Each Stakeholder has played an important role in the proceedings.

(4) An outcome whereby any one of the Stakeholders is materially disadvantaged should be avoided if at all practicable.

(5) The proceedings should not be regarded as a success overall given the poor take up by class members.

(6) This is not a case, therefore, where Woodsford and the ATE Insurers should expect anything more than a modest return but the determination of the return they should receive ought not to be seen as a precedent for the level of return funders and ATE insurers should receive in other cases.

149. Each Stakeholder should be awarded a sum which the Tribunal considers is fair, reasonable and proportionate in all the circumstances. The Tribunal's approach is to consider what is reasonable for WGL and the ATE Insurers to receive, before considering what may be left for CL and the other lawyers.

150. WGL's proposed distribution of Non-Ringfenced Costs is based on applying the waterfall structure set out in the Revised Deed of Priority to the costs incurred in respect of all three Trains 1 Defendants. In contrast, CL's proposed distribution of Non-Ringfenced Costs is based on an allocation of one-third of the costs it calculated for all Trains 1 Defendants.

151. The Tribunal considers it reasonable in this case to use Multiple on Invested Capital ("**MOIC**") as a practicable measure of the overall returns earned by the Stakeholders. It is appreciated that the calculations are not likely to be entirely accurate and there is room for alternative calculations, particularly given the Stakeholders' differing views on the levels of costs incurred and received and appropriate method of cost apportionment.

(a) Funder

(i) Adverse Costs Fees

152. In calculating its outlay, WGL has included the Adverse Costs Indemnity Fee at £1.5 million and the Adverse Costs Exit Fee at £562,500. In accordance with the Tribunal's findings on Issue (3), these figures should be reduced to a third, i.e. £687,000. It is entirely reasonable and appropriate for WGL to be paid this sum given the level of risk that they accepted in providing the Adverse Costs Deed of Indemnity .

(ii) Receipts

153. CL has calculated that the CR has paid to WGL £5,819,738 in relation to the Train 1 proceedings (of which £5,098,996 is attributable to the SSWT case), as shown in Table 10. WGL has calculated its receipts in relation to the Trains 1 proceedings to be £5,315,737.[12]

[12] Joint Note to the Tribunal of 15 September 2025.

154. **Table 10: Funder's Receipts**[13]

	CL Calculation			WGL Calculation
	Total Received in respect of Trains 1 £	**Proportion allocated to SSWT %**	**Allocated to SSWT £**	**Total Received in respect of Trains 1 £**
Tribunal's CPO of 18 January 2022	780,000	33%	260,000	
Court of Appeal's Order of 28 July 2022	266,988	33%	88,996	
Tribunal CSAO of 10 May 2024 – re costs and disbursements	4,750,000	100%	4,750,000	
Amounts recovered from First MTR South Western Trains Limited (28 July 2025)	22,750	0%	-	
Total	**5,819,738**		**5,098,996**	
Less £504,000 in ATE Premium paid			-504,000	
CL as per Joint Note of 15/9/25			**4,594,996**	
WGL in Joint Note of 15/9/25				**5,315,737**

155. For the purpose of assessing the overall return to WGL, the Tribunal considers it reasonable to use CL's calculation of receipts allocated to SSWT of £5,098,996 on the basis that it excludes costs attributable to other Trains 1 defendants. The £504,000 ATE premium is excluded from Funder's Receipts on the basis it is included in WGL's calculation of Funder's Outlay.

156. For the purposes of determining a fair and reasonable distribution of the Non-Ringfenced Costs, the Tribunal considers it appropriate to base the distribution on the costs and receipts to date relating to the SSWT proceedings rather than the entire Trains 1 proceedings: see para 147 above. On that basis one-third of the Adverse Costs Indemnity Fee is attributable to this case.

[13] Joint Note to the Tribunal of 15 September 2025 (Enclosure 3 of CL's letter of 15 September 2025 to the Tribunal) and Antzoulatos 1, paragraphs 12, 13 and 14.

157. WGL's view of its costs and receipts in Trains 1, and the Tribunal's calculation of the costs attributable to the SSWT proceedings (on the basis that 1/3 of the costs of Trains 1 are allocated to SSWT, and using CL's calculation of the proportion of receipts attributable to SSWT) is shown in Table 11.

Table 11: Funder's Costs and Receipts

		Trains 1		SSWT	
		Costs £	**Receipts £**	**Costs £**	**Receipts £**
Funder's Outlay	Paid	6,117,506		2,039,169	
Funder's Receipts	Paid		5,819,738		5,098,996
Funder's Fee	Not Paid	21,401,724		7,133,908	
Adverse Costs Exit Fee	Not Paid	562,500		187,500	
Adverse Costs Indemnity Fee	Not Paid	1,500,000		500,000	

(iii) Returns

158. WGL's MOIC return to date (treating Funder's Outlay and adverse costs fees as invested capital) based on the costs and receipts to date in Table 11 above is 1.87, as shown in Table 12 below.

Table 12: Funder's returns before Non-Ringfenced Costs apportionment

	Costs incurred £	**Return £**	**MOIC**
Funder's Outlay	2,039,169		
Funder's Receipts		5,098,996	
Adverse Costs Exit Fee	187,500		
Adverse Costs Indemnity Fee	500,000		
Total	**2,726,669**	**5,098,996**	**1.87**

159. The Tribunal considers it reasonable that in the circumstances of this case, the Funder should be paid in full the proportion of its Adverse Costs Indemnity Fee and Adverse Costs Exit Fee attributable to SSWT from the available Non-Ringfenced Costs (i.e. £187,500 and £500,000 respectively).

160. As discussed in para 45 above, the Stakeholders disagree on the basis of calculation of the Funder's Fee and also the basis of apportionment of the Funder's Fee to the SSWT case. However, the Tribunal considers that it would not be reasonable for the Funder to be paid the additional sum that it is claiming. It has already made a return over and above its outlay attributable to the proceedings against SSWT once one apportions an appropriate amount of the overall costs of Trains 1 and Trains 2 to SSWT alone. It should be noted that the settlement relates only to SSWT and the other defendants in Trains 1 and Trains 2 are not jointly and severally liable. The Tribunal recognises that WGL's contractual entitlement is a significant sum over and above what is available and that, under the Deed of Priority, it was to be paid out first, in priority to CL and the other lawyers. In recognition of that, the Tribunal considers that it would be reasonable for it to receive an additional sum of £602,500 (over and above the Adverse Costs Fees) to make a total of £1.29m million to be allocated to WGL. No further sums should be paid to WGL, and out of this sum it may pay any additional costs it may have incurred.

161. The additional £1.29 million allocated to WGL would give it a significantly higher MOIC than the sums paid to it to date, as shown in Table 13.

Table 13: Funder's returns after Non-Ringfenced Costs apportionment

	Costs incurred £	**Return £**	**MOIC**
Funder's Outlay	2,039,169		
Funder's Receipts		5,098,996	
Adverse Costs Exit Fee	187,500	187,500	
Adverse Costs Indemnity Fee	500,000	500,000	
Funder's Fee		602,500	
Total	**2,726,669**	**6,388,996**	**2.34**

162. The Tribunal considers that, overall, it is reasonable and proportionate for £1.29 million to be paid to WGL from Non-Ringfenced Costs and any sum over this amount would be disproportionate in all the circumstances, even in the absence of claims by other stakeholders for payments out of the Non-Ringfenced Costs. The Tribunal appreciates that WGL may have other expenditures to meet

outside those already taken into account in the calculations set out above, but the intention of the Tribunal is that, in reality, these will have to come from this additional sum being awarded. To award WGL any additional amount would be disproportionate given the very poor take-up by class members and the fact that collective proceedings should not be predominantly for the benefit of funders and other stakeholders.

(b) ATE Insurers

(i) Costs and Receipts

163. The ATE premia paid and potentially payable to the ATE insurers as submitted by WGL are shown in Table 8 above.

164. For the purposes of determining the amounts of premium attributable to the SSWT case, the Tribunal considers it reasonable to allocate the costs proportionately to the number of defendants covered by the relevant policy. The amounts attributable to the SSWT case on that basis are set out in Table 14 below.

165. **Table 14: ATE Premia**

	Paid/Unpaid	Total £	% of Costs attributable to SSWT	Costs attributable to SSWT £
Pre-CPO Deposit Premium	Paid	294,000	1/3	98,000
Pre-CPO Contingent Premium	Paid	504,000	1/3	168,000
Post-CPO Deposit Premia	Paid	1,400,000	1/4	350,000
Post-CPO Contingent Premium	Unpaid	5,040,000	1/4	1,260,000
Total		**7,238,000**		**1,876,000**

166. The contingent premia are only payable on a successful outcome of the case. Pre-CPO Contingent Premium of £504,000 was paid by WGL in accordance with the payment waterfall set out in the Revised Deed of Priority.

(ii) Returns

167. The ATE insurers have earned an MOIC return of 1.38 before any Non-Ringfenced Costs apportionment, as shown in Table 15.

Table 15: ATE Returns before Non-Ringfenced Costs Apportionment

	Costs incurred £	Return £	MOIC
Pre-CPO Deposit Premium	98,000	98,000	
Pre-CPO Contingent Premium		168,000	
Post-CPO Deposit Premia	350,000	350,000	
Total	**448,000**	**616,000**	**1.38**

168. The Tribunal considers it reasonable in the circumstances of this case to provide the ATE Insurers with an overall level of return comparable to the Funder, which would require a payment of £430,000 from the available funds, as shown in Table 16 below.

Table 16: ATE Returns after Non-Ringfenced Costs Apportionment

	Costs incurred £	Return £	MOIC
Pre-CPO Deposit Premium	98,000	98,000	
Pre-CPO Contingent Premium		168,000	
Post-CPO Deposit Premia	350,000	350,000	
Post-CPO Contingent Premium		430,000	
Total	**448,000**	**1,046,000**	**2.33**

169. The ATE Insurers, like the Funder, played a key role in enabling the proceedings to be pursued. The ATE Insurers were taking a significant risk in providing the cover given that this is not a follow-on case and the merits were not perceived by the Tribunal as being strong at the time it approved the settlement between the CR and SSWT. Whilst the claims against the remaining defendants were not brought on a joint and several liability basis, the Tribunal appreciates that the Tribunal's judgment rejecting those claims is going to lead to a significant financial loss to the ATE Insurers. ATE Insurers like funders operate on a portfolio basis and it is appropriate in all the circumstances for them to be provided a modest rate of return in relation to the claim brought against SSWT.

170. In summary, the Tribunal considers it is reasonable and proportionate for £430,000 to be paid to the ATE Insurers from the Non-Ringfenced Costs and any more would be disproportionate in all the circumstances.

(c) Solicitors and counsel

171. The collective proceedings regime stands on a three-legged stool: the CR, lawyers, and the funder/ATE insurers. If any single leg is removed or unsupported the entire structure collapses. Hence, funders and lawyers must work together in a constructive way to find and maintain equilibrium within this framework, ensuring that all stakeholders achieve a fair outcome, if at all possible, covering each party's outlay. In terms of lawyers, their costs and time should be covered, even if there is no or only a limited uplift or success fee. The Tribunal agrees with CL that, if lawyers consistently face substantial financial losses even on settlements or successful trials, they may cease to act in collective

proceedings. As set out in paras 89 to 91 above, the Tribunal must have due regard to the legitimate interests of all stakeholders in maintaining a viable collective actions regime. That said, lawyers should be realistic as to what they should expect in a case like the present, where the result in terms of benefit to class members is so poor: see para 67 above.

(i) Costs and Receipts

172. As described in paras 45 and 160 above, the Stakeholders disagree on the amount of legal fees incurred in relation to the SSWT case. The most recent calculations of the legal costs submitted by the Stakeholders for Trains 1 are shown in Table 17 below.

Table 17: Legal Costs – Trains 1 Proceedings

	Fees	CL's Calculation[14]	WGL Calculation[15]
CL	Paid Fees	1,022,502	781,611
	Deferred Fees	7,097,501	4,193,278
	Success Fees	5,342,154	4,193,278
Hausfeld	Paid Fees	773,784	778,185
	Deferred Fees	2,587,550	2,748,947
	Success Fees	2,587,550	2,748,947
Counsel	Paid Fees	1,258,372	1,451,341
	Deferred Fees	718,492	697,426
	Success Fees	718,492	697,426
	Total	**22,106,397**	**18,290,439**

173. As set out in paragraph 95 above, the Tribunal considers it appropriate to allocate costs in the Trains 1 proceedings across the three defendants for the purposes of determining a fair and reasonable distribution of the Non-Ringfenced Costs.

174. CL have provided their calculation of costs attributable to SSWT based on costs wholly attributable to SSWT plus an allocation of one-third of the common costs relating to all three defendants in Trains 1 to SSWT. WGL have not provided a

[14] Enclosure 2 of CL's letter to the Tribunal of 15 September 2025.
[15] WGL Letter to the Tribunal of 30 October 2025.

comparable calculation either in terms of the period of costs covered, or the methodology of apportioning costs between Trains 1 and Trains 2. For the purposes of understanding the level of difference between the Stakeholders, the Tribunal considers it reasonable to divide WGL's calculation of costs for Trains 1 by three to provide a cost for SSWT. The costs apportioned to SSWT on this basis are set out in Table 18.

Table 18: Legal Costs – SSWT Case

	Fees	CL's Calculation[16]	WGL Costs divided by 3[17]
CL	Paid Fees	500,834	260,537
	Deferred Fees	3,369,358	1,397,759
	Success Fees	1,614,010	1,397,759
Hausfeld	Paid Fees	257,928	259,395
	Deferred Fees	862,517	916,316
	Success Fees	862,517	916,316
Counsel	Paid Fees	282,830	483,780
	Deferred Fees	240,753	232,475
	Success Fees	240,753	232,475
	Total	**8,231,499**	**6,096,813**

175. As explained in section F, there are numerous reasons for the differences in legal costs using CL's and WGL's calculations shown in Table 18. The Tribunal does not consider it necessary to conclude on whether either of the Stakeholders' calculations are correct or whether one is preferable to the other, but instead has considered the returns calculated using both calculations in its consideration of a reasonable apportionment of the Non-Ringfenced Costs. The Tribunal notes that CL's detailed calculation of its deferred fees attributable to SSWT is 47% of its calculation of total Trains 1 costs, compared to the simple one-third the Tribunal has applied to WGL's calculation of Trains 1 costs.

(ii) Returns

176. The level of unpaid deferred fees for solicitors and counsel (before any apportionment of Non-Ringfenced Costs to date are set out in Table 19 below.

[16] Burnett 3 Updated Table 1 and enclosure 1 of CL's letter of 15 September 2025 to the Tribunal.
[17] WGL calculation of costs in their letter to the Tribunal of 30 October 2025, divided by three.

Table 19: Solicitors and Counsel Unpaid deferred fees before Non-Ringfenced Costs Apportionment

	CL's Cost basis £	WGL's Cost basis £
CL	3,369,358	1,397,759
Hausfeld	862,517	916,316
Counsel	240,753	232,475
Total	**4,472,628**	**2,546,550**

177. The Tribunal considers it reasonable in the circumstances of this case that the legal stakeholders receive some return on their investment. This gives them at least the deferred fees which have been charged out at relatively modest rates. The return over and above that should be limited as the outcome of this settlement has been poor in terms of the benefit to class members. It is appreciated that CL has put a lot of time and effort into the proceedings, and they have their own overheads and expenses to cover. Recognising that the Stakeholders have very different views on the level of costs incurred by CL and what proportion of those is attributable to the SSWT case, the Tribunal considers it likely that a fair apportionment of legal costs to SSWT would lie somewhere between CL's own calculations and the costs implied by WGL's total cost calculations for Trains 1.

178. For the purposes of determining a fair apportionment of the Non-Ringfenced Costs to the legal stakeholders, the Tribunal has apportioned an amount equal to CL's calculation of the unpaid legal deferred fees, plus a nominal success fee, recognising that the success fee could be significantly higher under alternative cost calculations. On that basis the Tribunal considers it reasonable to distribute the £4,480,000 of Non-Ringfenced Costs remaining after the distributions to WGL and ATE Insurers on the basis shown in Table 20.

Table 20: Solicitors and Counsel Apportionment of Non-Ringfenced Costs (based on CL's cost calculations)

	CL £	Hausfeld £	Counsel £	Total £
Deferred Fees	3,369,358	862,517	240,753	**4,231,302**
Success Fees	5,174	1,498	700	**7,372**
Total	**3,374,532**	**864,015**	**241,453**	**4,480,000**

179. The Tribunal considers it is reasonable and proportionate for £4,480,000 to be paid to legal stakeholders from the Non-Ringfenced Costs and any more would be disproportionate in all the circumstances. The Tribunal appreciates that the legal stakeholders may have other expenditures to meet outside those already taken into account in the calculations set out above, but the intention of the Tribunal is that these will have to come out in reality from this additional sum being awarded.

(d) Summary

180. The Tribunal's apportionment of the Non-Ringfenced Costs is summarised in Table 21 below.

Table 21: Apportionment of Non-Ringfenced Costs

	CL £	Hausfeld £	Counsel £	ATE Insurers £	Funder £	Total £
Allocation of Non-Ringfenced Costs	3,374,532	864,015	241,453	430,000	1,290,000	**6,200,000**

181. In awarding the sums to each of Stakeholders, it is appreciated that they have incurred costs in relation to their interventions. The Tribunal is not minded to make any specific costs order in favour of any of the interveners, who will be able to cover those costs from the sums being awarded. To the extent that there are any costs of the CR in relation to the Stakeholder Entitlement Application which have not yet been met by WGL, those costs should be provided for to the extent that they have been reasonably incurred and paid out of the £6.2 million awarded to the Stakeholders. Subject to any further arguments on behalf of the Stakeholders and the CR, those costs should in principle be met by the sum awarded to WGL.

H. CONCLUSION

182. The Tribunal has unanimously allocated the £6.2 million on what may be considered to be a rough and ready basis. The Tribunal has had to balance (i) the interests of each of the Stakeholders in this case; (ii) the need for the Stakeholders to make returns where appropriate; (iii) the interests of the collective actions regime as a whole; (iv) what sums are actually available; (v) the poor outcome in this case in terms of the disappointingly low take-up by class members; and (vi) the undesirability of outcomes whereby the beneficiaries of settlements are predominantly if not overwhelmingly the stakeholders rather than the class for whom the proceedings were brought in the first place.

183. It is appreciated that none of the Stakeholders will receive what they may have hoped for out of the Non-Ringfenced Costs and there seemed to the Tribunal to be an air of unreality in the positions taken by the Stakeholders as to what sums that would be reasonable and proportionate for each of them to be awarded out

of that sum. There are certainly lessons to be learned, if not already learned, in terms of the management and settlement of collective proceedings. At the CPO stage and certainly at the CSAO stage more work in the future needs to be done on likely take up of settlement amounts by class members and how any damages may be distributed. In LFAs and settlements placed before the Tribunal the ability to pay sums out of unclaimed damages to charity or *cy-pres* should be expressly covered. Outcomes which appear to be predominantly for the benefit of stakeholders rather than class members or charity are not in the public interest or for the benefit of the collective settlement regime which is there to make justice available for those who cannot afford to bring such claims on their own.

Hodge Malek KC
Chair

Hugh Kelly

Eamonn Doran

Charles Dhanowa CBE, KC (*Hon*)
Registrar

Date: 7 November 2025