Neutral citation [2026] CAT 21

Case Nos: 1304/7/7/19
1305/7/7/19
1425/7/7/21

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

13 March 2026

Before:

SIR PETER ROTH
(Chair)
PROFESSOR SIMON HOLMES
PROFESSOR ROBIN MASON

Sitting as a Tribunal in England and Wales

BETWEEN

JUSTIN GUTMANN

Class Representative

-and-

FIRST MTR SOUTH WESTERN TRAINS LIMITED

Defendant

SECRETARY OF STATE FOR TRANSPORT

Intervener

-and-

WOODSFORD GROUP LIMITED

"the Funder"

AND BETWEEN

JUSTIN GUTMANN

Class Representative

-and-

(1) LONDON & SOUTH EASTERN RAILWAY LIMITED

(2) GOVIA LIMITED

(3) THE GO-AHEAD GROUP PLC

(4) KEOLIS (UK) LIMITED

Defendants

SECRETARY OF STATE FOR TRANSPORT

Intervener

-and-

WOODSFORD GROUP LIMITED

"the Funder"

AND BETWEEN

JUSTIN GUTMANN

Class Representative

-and-

(1) GOVIA THAMESLINK RAILWAY LIMITED

(2) GOVIA LIMITED

(3) THE GO-AHEAD GROUP PLC

(4) KEOLIS (UK) LIMITED

Defendants

SECRETARY OF STATE FOR TRANSPORT

Intervener

-and-

WOODSFORD GROUP LIMITED

“the Funder”

Determined on the papers

JUDGMENT (COSTS)

A. INTRODUCTION

1. This judgment concerns the costs of three parallel collective proceedings, each brought by Mr Gutmann as the class representative ("the CR"). The Tribunal had directed, with the consent of all parties, that they be heard together and directed that they proceed by a series of split trials. Following the first trial ("Trial 1"), the Tribunal handed down its judgment on 17 October 2025; [2025] CAT 64 ("the Judgment"). The Tribunal found that, on the assumption that the Defendants held a dominant position, they had not abused that position. The CR is not seeking to appeal and as a result the second trial (to address causation and quantum) ("Trial 2") and the third trial (to address market definition and dominance ("Trial 3") will not take place and each of the actions falls to be dismissed. This costs judgment uses the same abbreviations as the Judgment.

2. The Defendants unsurprisingly applied for their costs as against the CR, and the CR very properly accepts that he is in principle liable to pay their reasonable and proportionate costs.

3. With their applications, the Defendants put forward detailed costs estimates since, although they said that the costs should be subject to detailed assessment they sought interim payments on account of their costs. The total costs estimates put forward for each of the three Defendant groups (as revised) are as follows:

GTR:	£ 5,666,797.67
LSER:	£ 6,620,283
SWR:	£16,292,301.70

4. The CR has agreed to make interim payments in the sums of £7.5 million to SWR and a further £7.5 million to GTR and LSER jointly (to be divided between them as they shall agree). These agreements are embodied in consent orders made by the Tribunal on 19 January 2026. However, the CR contends strongly that he should have no costs liability above the total of £15 million, which is the limit of his indemnity under his litigation funding agreements ("LFAs") with his funder, Woodsford Group Ltd ("Woodsford"). The CR submits that the Tribunal should summarily assess the costs in the amount of

£15 million and that the level of costs set out by the Defendants are wholly disproportionate and unreasonable; or alternatively the Tribunal should decline to order costs above that amount as a matter of principle.

5. The Defendants responded that summary assessment is altogether inappropriate. However, since it is clear that the CR, who is a private individual, is in no position to pay costs above £15 million (i.e. the limit of the indemnity provided by Woodsford), on 19 December 2025 the Defendants issued a Non-Party Costs Application as against Woodsford, relying on the approach to funders adopted in the High Court.

6. Woodsford (which had been joined as a party to the proceedings only for this purpose) provided detailed submissions in response on 23 January 2026, accompanied by a witness statement from its CEO, Mr Steven Friel, and the Defendants in turn submitted a joint written reply on 30 January 2026. By its submissions, Woodsford argued strongly that, having regard to the structure of the collective proceedings regime, and in the particular circumstances of the present cases, no costs should be ordered above the limit of the CR's adverse costs cover which had been disclosed to the Defendant. But Woodsford went on to say that if the Defendants were held to be entitled to recover in excess of that amount, any excess should here properly be the liability of the CR's lead solicitors, Charles Lyndon Ltd ("Charles Lyndon").[1] Various statements made in that regard in Woodsford's submissions and Mr Friel's witness statement led Charles Lyndon and two of its directors to write to the Tribunal on 20 February 2026 seeking to rebut what was said.

B. SUMMARY ASSESSMENT

7. We are clear that summary assessment is here inappropriate. That would be the position in any event for a case where there had been a trial stretching over three weeks. Moreover, here the Defendants' costs include not only the costs up to the conclusion of Trial 1 but further costs incurred on preliminary work for Trial

[1] During most of the proceedings, the CR was jointly represented by Charles Lyndon and Hausfeld & Co LLP.

2, since it was only on 16 October 2024, some three months after the conclusion of Trial 1, that, by consent, the Tribunal ordered that all further steps pursuant to the earlier directions for Trial 2 should be stayed pending delivery of the judgment following Trial 1.

8. This should not be taken as any indication that we consider that the Defendants' costs set out above are reasonable. On the contrary, a combined sum of over £28 million in costs is an eye-watering amount for these cases which had not even approached trial on the question of causation. We have little doubt that the costs claimed by each of the Defendants would be significantly reduced on detailed assessment, not least because the hourly rates charged were markedly above the Guideline Rates (as increased from time to time) for "very heavy commercial and corporate work by centrally based London firms", even with an uplift: cp *Merricks v Mastercard* [2023] CAT 53, following the Court of Appeal judgment in *Samsung Electronics Co Ltd v LG Display Co Ltd* [2022] EWCA Civ 466. See also the observations of Leggat J (as he then was) in *Kazakhstan Kagazy PLC v Baglan Abdullayevich Zhunus* [2015] EWHC 404 (Comm) at [13]. Nonetheless, we are not in a position to determine that on detailed assessment the costs will definitely not exceed £15 million.

C. NON-PARTY COSTS AND FUNDERS

9. The Tribunal's jurisdiction as to costs is determined by rule 104 of the Competition Appeal Tribunal Rules 2015 ("the CAT Rules"). This provides, insofar as relevant:

> "(2) The Tribunal may at its discretion, subject to rules 48 and 49, at any stage of the proceedings make any order it thinks fit in relation to the payment of costs in respect of the whole or part of the proceedings.
>
> …
>
> (4) In making an order under paragraph (2) and determining the amount of costs, the Tribunal may take account of –
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> (a) the conduct of all parties in relation to the proceedings;
>
> (b) any schedule of incurred or estimated costs filed by the parties;

(c) whether a party has succeeded on part of its case, even if that party has not been wholly successful;…"

This gives the Tribunal a wide discretion as regards costs. It is not in dispute that it gives the Tribunal the power to make a non-party costs order, if appropriate.

10. The leading authority on non-party costs orders is the decision of the Privy Council in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39, [2004] 1 WLR 2807.[2] Giving the opinion of the Board, Lord Brown said, at [25]:

> "A number of the decided cases have sought to catalogue the main principles governing the proper exercise of this discretion and their Lordships, rather than undertake an exhaustive further survey of the many relevant cases, would seek to summarise the position as follows. (1) Although costs orders against non-parties are to be regarded as "exceptional", exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against. (2) Generally speaking the discretion will not be exercised against "pure funders", described in para 40 *of Hamilton v Al Fayed (No 2)* [2003] QB 1175, 1194 as "those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course". In their case the court's usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights. (3) Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is "the real party" to the litigation, a concept repeatedly invoked throughout the jurisprudence - see, for example, the judgments of the High Court of Australia in the *Knight* case 174 CLR 178 and Millett LJ's judgment in *Metalloy Supplies Ltd v MA (UK) Ltd* [1997] 1 WLR 1613. Consistently with this approach, Phillips LJ described the non-party underwriters in *TGA Chapman Ltd v Christopher* [1998] 1 WLR 12 as "the defendants in all but name". Nor, indeed, is it necessary that the non-party be "the only real party" to the litigation in the sense explained in *Knight*, provided that he is "a real party in ... very important and critical respects" - see *Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation* (2001) 179 ALR 406, referred to in *Kebaro* at pp 32-3, 35 and 37. Some reflection of this concept of "the real party" is to be found in CPR 25.13 (1) (f)

[2] Approved as an authoritative statement of English law by the Court of Appeal in *Deutsche Bank AG v Sebastian Holdings Inc* [2016] EWCA Civ 23, [2017] 1 WLR 17 at [62].

which allows a security for costs order to be made where "the claimant is acting as a nominal claimant". (4) Perhaps the most difficult cases are those in which non-parties fund receivers or liquidators (or, indeed, financially insecure companies generally) in litigation designed to advance the funder's own financial interests. Since this particular difficulty may be thought to lie at the heart of the present case, it would be helpful to examine it in the light of a number of statements taken from the authorities. First, Tompkins J's judgment in the *Carborundum* case [1992] 3 NZLR 757, 765:

> "Where proceedings are initiated by and controlled by a person who, although not a party to the proceedings, has a direct personal financial interest in their result, such as a receiver or manager appointed by a secure creditor, a substantial unsecured creditor or a substantial shareholder, it would rarely be just for such a person pursuing his own interests, to be able to do so with no risk to himself should the proceedings fail or be discontinued. That will be so whether or not the person is acting improperly or fraudulently. In many cases a major consideration will be the reason for the non-party causing a party, normally but not always an insolvent company, to bring or defend the proceedings. If a non-party does so for his own financial benefit, either to gain the fruits of the litigation or to preserve assets in which the person has an interest, it may, depending upon the circumstances, be appropriate to make an order for costs against that person. The relevant factors will include the financial position of the party through whom these proceedings are brought or defended and the likelihood of it being able to meet any order of costs, the degree of possible benefit to the non-party and whether, in all the circumstances, the bringing or defending of the claim - although in the end unsuccessful - was a reasonable course to adopt. The directors of a company may frequently be in a position different from other non-parties with a direct financial interest in promoting or defending proceedings. Even where a company is in receivership, directors may have a duty to prosecute or defend a claim through the company in the interests of creditors other than the creditor that had appointed the receiver, or in the interests of the shareholders. Other creditors and shareholders are entitled to expect that those responsible for the management of the company will use all proper endeavours to ensure that their financial interests are protected or that there is a fund out of which such creditors can be paid ...""

11. For some time, it was generally considered that the liability for adverse costs of a company which had provided funding on a commercial basis for litigation which proved unsuccessful should be subject to a limit corresponding to the amount of funding it had provided. This was referred to as the "*Arkin* cap", derived from the decision of the Court of Appeal in *Arkin v Borchard Lines Ltd (Nos 2 and 3)* [2005] EWCA Civ 655, [2005] 1 WLR 3055. In that case, Lord Philips of Worth Matravers MR, giving the judgment of the court, said at [38]:

> "Somehow or other a just solution must be devised whereby on the one hand a successful opponent is not denied all his costs while on the other hand commercial funders who provide help to those seeking access to justice which they could not otherwise afford are not deterred by the fear of disproportionate costs consequences if the litigation they are supporting does not succeed."

12. However, more recently, in *ChapelGate Credit Opportunity Master Fund Ltd v Money* [2020] EWCA Civ 246, the Court of Appeal upheld the decision of the trial judge to decline to apply the *Arkin* cap and order the funder to pay the full costs. In his judgment, Newey LJ (with whom Patten and Moylan LJJ agreed) noted that litigation funding had developed significantly since *Arkin*, and that the *Arkin* cap had been criticised by Sir Rupert Jackson in his report on civil litigation costs. Nonetheless, the Court of Appeal held that the approach in *Arkin* had not become redundant and would continue to be relevant in some cases, e.g. where the funder had funded only a limited part of the litigation. Newey LJ said this, at [38]:

> "…, I do not consider that the *Arkin* approach represents a binding rule. Judges, as it seems to me, retain a discretion and, depending on the facts, may consider it appropriate to take into account matters other than the extent of the funder's funding and not to limit the funder's liability to the amount of that funding. In the case of a funder who funded only a distinct part of a claimant's costs, a judge might well decide that it should pay no larger sum towards the defendant's costs. A judge could also, however, consider the funder's potential return significant. The more a funder had stood to gain, the closer he might be thought to be to the "real party" ordinarily ordered to pay the successful party's costs in accordance with the guidance given in paragraph 25(3) of the *Dymocks* judgment …. In the case of a funder who had funded the lion's share of a claimant's costs in return for the lion's share of the potential fruits of litigation against multiple parties, it would not be surprising if the judge ordered the funder to bear at least the lion's share of the winners' costs, regardless of whether the funder's outlay on the claimant's costs had been a lesser figure."

13. In that case, among the factors which the Court of Appeal held justified the judge's exercise of his discretion to award costs against the funder (Chapelgate) were (i) that under the LFA the funder stood to recover not only its disbursements but a substantial profit return in priority to the claimant it was funding (Ms Davey), such that "[i]n fact, Ms Davey had to recover from the respondents more than five times ChapelGate's expenditure to have any prospect of keeping anything for herself"; (ii) Chapelgate would therefore have derived far more than Ms Davey from an award of £10 million, which was the estimate of damages provided in the opinion from her Counsel; and (iii) the litigation facilitated by ChapelGate involved very serious allegations of breach of fiduciary duty by administrators and conspiracy to injure by an established financial services plc, such that "it was inevitable that the respondents would incur costs greatly in excess of the funding which ChapelGate provided to Ms

Davey, yet the respondents were not to have the protection of any ATE cover": see the judgment at [44]. Nonetheless, Newey LJ acknowledged that another judge might have arrived at a different conclusion as regards the funder's liability: judgment at [45].

14. Although the Tribunal generally follows the approach of the High Court as regards costs,[3] it must be emphasised that collective proceedings, which are unique to the Tribunal, are subject to a very different regime from an ordinary civil action, including a private action before the Tribunal. Unlike an ordinary action, collective proceedings cannot proceed before the Tribunal without certification. Pursuant to the statutory regime, in order to certify such proceedings the Tribunal has to be satisfied as to two conditions, known as the authorisation condition and the eligibility condition. The criteria for the authorisation condition, concerning authorisation of the CR, are set out in rule 78 of the CAT Rules, which provides insofar as relevant:

> "(1) The Tribunal may authorise an applicant to act as the class representative—
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> > …
> >
> > (b) only if the Tribunal considers that it is just and reasonable for the applicant to act as a class representative in the collective proceedings.
>
> (2) In determining whether it is just and reasonable for the applicant to act as the class representative, the Tribunal shall consider whether that person—
>
> > (a) would fairly and adequately act in the interests of the class members;
> >
> > …
> >
> > (d) will be able to pay the defendant's recoverable costs if ordered to do so;…
>
> (3) In determining whether the proposed class representative would act fairly and adequately in the interests of the class members for the purposes of paragraph (2)(a), the Tribunal shall take into account all the circumstances, including—
>
> > …

[3] In a case for which the forum under rule 18 of the CAT Rules is England and Wales. The Tribunal may look to the practice of the Court of Session in a case for which the forum is Scotland.

> (c) whether the proposed class representative has prepared a plan for the collective proceedings that satisfactorily includes—
>
> > (iii) any estimate of and details of arrangements as to costs, fees or disbursements which the Tribunal orders that the proposed class representative shall provide."

15. Accordingly, the question of the ability of the CR to pay adverse costs is a consideration that must be addressed by the Tribunal at the outset. Where the proposed CR ("PCR") provides for potential adverse costs liability through ATE insurance, the ATE policy, including the level of cover, is disclosed (subject to redactions for necessary confidentiality). Where instead (or in addition) the PCR's cover for potential adverse costs liability is through an indemnity from the funder under the LFA, that will similarly be disclosed. Indeed, the practice is for the LFA to be disclosed in all cases so that the Tribunal can assess under rule 78(3)(c)(iii) the PCR's ability to fund its own costs of pursuing the proceedings for the benefit of the class.

16. As a result, the proposed defendants are able to object to the nature of the ATE insurance arrangements, which can lead the PCR to obtain an amendment to the policy: see e.g. *Roberts v Severn Trent Water Limited and Ors* [2025] CAT 17 at [98]; and in an appropriate case the Tribunal may require the PCR to make amendments to the policy for the authorisation condition to be satisfied: see e.g. *UKTC v Stellantis NV, RHA v MAN SE* (the *Trucks (Funding)* judgment),[4] [2019] CAT 26 at [79]-[102]. More significantly for present purposes, the proposed defendants can oppose certification on the basis that the level of adverse costs protection held by the PCR, whether through an ATE policy or under its LFA, is inadequate for the purpose of rule 78(2)(d). It will be obvious that this is in sharp contrast to the position for an ordinary (i.e. non-collective) civil action, where this matter will not be considered at all unless the defendants should issue an application for security for costs; and if they do, the burden falls on them to satisfy the court or Tribunal that security is appropriate.[5]

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[4] Reversed on other grounds regarding the terms of the LFA.

[5] See rule 59 of the CAT Rules. Indeed, defendants may also apply for security under this provision in collective proceedings: rule 74.

17. In *Merricks v Mastercard* [2017] CAT 16, [2017] 5 CMLR 16, one of the first cases under the collective proceedings regime, the Tribunal addressed the application of rule 78(2)(d) and considered the appropriate approach to the PCR's cover for adverse costs liability in the context of the authorisation condition. There, the PCR held ATE cover for adverse costs up to £10 million and Mastercard challenged that sum as inadequate for such substantial proceedings, arguing that the authorisation condition was therefore not satisfied. The Tribunal rejected that submission, stating at [131] [6]:

> "The present proceedings would indeed be substantial and complex, but at the same time £10 million is on any view a very large sum for the costs of a single action. Mastercard has not put forward any estimate for its own costs, let alone a proper costs budget. If it wanted to challenge the adequacy of the costs cover arranged by the Applicant, we consider that would be the first step in the process. The Tribunal has no basis at this stage to find that £10 million is likely to be inadequate for Mastercard's potential recoverable costs, which (on the standard basis) would have to be proportionate and reasonable. We would point out that the Tribunal can always subsequently vary or revoke a CPO, or stay the collective proceedings on the application of the defendant after a CPO has been granted: rule 85. If at some later stage Mastercard considered on the basis of the costs already expended and its estimated future costs that £10 million was inadequate, it could apply to the Tribunal accordingly. The Applicant and his third party funder would then have the opportunity to respond by resisting the application or increasing the cover for adverse costs liability under the Funding Agreement."

See also the *Trucks (Funding)* judgment at [109], regarding the proper approach and the opportunity for defendants to raise the adequacy of the CR's adverse costs cover in the course of the proceedings if they consider that the level of cover has become inadequate.

D. THE PRESENT CASES

18. The applications for a collective proceedings order ("CPO") in the cases concerning, respectively, the SW franchise and SE franchise were heard together. The LFA produced with the applications showed that the CR had adverse costs cover in the form of an indemnity from Woodsford up to £10 million. While the Defendants argued strenuously and on various grounds that the proceedings should not be certified, their opposition was based on the

[6] The Tribunal refused certification on the basis that the eligibility condition was not satisfied and that decision was reversed on appeal. There was no appeal as regards the authorisation of the CR.

substance of the claims (there was an application for reverse summary judgment) and the eligibility condition. Although it appears that the Defendants had previously raised concerns about the level of cover under the deed of indemnity, those were not pursued by the time the CR's application came to be heard before the Tribunal, when the Defendants raised no objection under the authorisation condition.[7] More specifically, they did not raise any issue as regards that level of adverse costs cover, as recorded in the certification judgment: [2021] CAT 31 ("the SW/SE CPO Judgment") at [48]-[49].

19. The application for a CPO in the third proceedings, as regards the GTR franchise, was made after the Court of Appeal had dismissed the appeal against the SW/SE CPO Judgment. For those proceedings, the CR had entered into a separate LFA with Woodsford, under which he had an indemnity for adverse costs liability up to £5 million. As recorded in the judgment on that application, the Defendants did not suggest that this provided inadequate cover for their costs: [2023] CAT 18 at [8].

20. We note that at the time of the applications for certification, the Tribunal had not considered whether the proceedings might be split into several trials. The level of adverse costs cover being considered at the time of certification accordingly related to the Defendants' costs of the entire proceedings through to judgment on all issues.

21. By order of 5 April 2023, it was directed that the three sets of proceedings would be jointly case managed and tried together. On 7 July 2023, the Tribunal directed that the trial would be split into three stages.

22. On 27 September 2023, the Tribunal held a CMC. in the three proceedings. A major issue was the enforceability and amendment to the two LFAs in light of the Supreme Court's judgment of 26 July 2023 in *R (PACCAR Inc v Competition Appeal Tribunal* [2023] UKSC 28, [2023] 1 WLR 2594. Woodsford also made clear that it had incepted, or was in the process of

[7] Save only that they reserved their position as to whether the LFA constituted a "damages-based agreement".

obtaining, ATE insurance to cover its two indemnities to the CR for adverse costs. Following an application made by the Defendants (by letter to the Tribunal dated 16 October 2023), the Tribunal by order of 19 October 2023 directed that the CR should provide further information of his funding arrangements and set a timetable for further submissions in the event that those were challenged.

23. On 25 October 2023, Slaughter and May on behalf of all the Defendants wrote to the Tribunal to say that they were "giving urgent consideration to a wider application to challenge the certification of the Proceedings which … encompasses concerns relating to the adequacy of the Class Representative's adverse costs protection as well as the costs/benefits of this claim."

24. Following this, Hausfeld & Co LLP ("Hausfeld), on behalf of the CR, wrote on 2 November 2023 to all three solicitors to the Defendants. With reference to the issue raised about the level of the CR's adverse costs cover, Hausfeld said:

> "…, we note that the Defendants have not provided details of their costs to date. Please provide details of the Defendants' collective expenditure and anticipated future expenditure so that our client can consider this. Absent further information on how those collectively incurred costs relate to either the SW/SE or GTR Proceedings and whether they are in fact recoverable from the Class Representative, we have no reason to believe that the current adverse costs cover in either of those proceedings is inadequate. Further, in order to allow the Class Representative and Woodsford to keep this under review as the Proceedings progress, we propose that each party updates the other parties on a quarterly basis (by way of a short summary letter) how much cost it has incurred in the Proceedings to date and an estimate of the amount it expects to incur through Trials 1, 2 and 3. Please confirm whether the Defendants agree to this proposal."

25. On 21 November 2023, Slaughter and May wrote again to the Tribunal on behalf of all the Defendants. By that letter, the Defendants made clear that they were not challenging the CR's amended funding arrangements on the basis of the *PACCAR* judgment. But the letter stated:

> "The Class Representative's adverse costs cover is plainly inadequate. The Defendants are continuing to pursue this matter in correspondence with the Class Representative, and will be providing estimates of their respective costs, but it is currently a point of considerable concern."

And the Defendants asked the Tribunal to schedule a "provisional" one-day hearing to address this and other issues, while expressing the hope that those issues might be resolved between the parties in correspondence. They also suggested that the Tribunal should direct that "the Defendants file their costs estimates in respect of the Proceedings as soon as practicable and in any event within two weeks".

26. A few days later, on 24 November 2023, Slaughter and May wrote in similar terms to the CR's solicitors. Much of that letter expressed concerns about the arrangements for the CR to fund his own costs of the litigation. However, on the subject of adverse costs, the letter stated:

> "As indicated in our letter to the Tribunal of 21 November 2023, the Defendants will provide estimates of their respective costs in due course."

After reiterating that the Defendants considered that the CR's adverse costs cover was inadequate, the letter continued:

> "Pending the Defendants' provision of their costs estimates, we therefore request confirmation as to whether the CR would, in principle, be willing to engage further ATE (or other) cover in respect of the Proceedings."

27. On 5 December 2023, Slaughter and May wrote a follow-up letter, stating at para 6:

> "In relation to the issue of the adequacy of the CR's adverse costs cover, we confirm that we will write as soon as practicable, and in any event by 11 December 2023, with details of the Defendants' expenditure to date and their estimated future costs which will demonstrate that the CR's adverse costs cover is wholly inadequate, likely even in relation to Trial 1 alone. We will be inviting the CR to reconsider his position on purchasing additional cover in light of this further information, failing which we reserve our right to seek an order from the Tribunal revoking the collective proceedings order."

28. However, no such estimates were provided, whether by 11 December 2023 or at all. Nor did the Defendants ever respond to the proposal from Hausfeld that each party should regularly update the others on costs incurred and estimated going forward. Instead, on 15 January 2024, Slaughter and May wrote to the CR's solicitors stating that "we remain concerned that the existing cover [for adverse costs] is wholly inadequate". Their letter stated:

> "We note that the Tribunal has postponed consideration of the timetable for Trial 2 until the Trial 1 pre-trial review. We therefore reserve our right to raise the issue of the adequacy of the CR's adverse costs cover at the pre-trial review stage and to seek a direction from the Tribunal that the Defendants are entitled

> to defer work for Trail 2 until after the CR has obtained adequate additional adverse costs cover in relation to the entirety of the Proceedings."

Their letter also raised various questions regarding the deferred and success fees payable to the CR's solicitor and counsel teams.

29. On 16 February 2024, Slaughter and May wrote again to the CR's solicitors. Their letter referred to the Defendants' concerns about the adequacy of the CR's own funding, whether the CR had the means to pay the Defendants' recoverable costs, and the costs and benefits of continuing the proceedings. The letter continued:

> "The Defendants fully reserve their rights in respect of each of these points. We note in particular that in your 28 November 2023 letter to the Tribunal you have relied on the purported adequacy of the CR's adverse costs cover for the purpose of Trial 1. This is a matter we will keep under review and, in any event, raises concerns as to the adequacy of the CR's adverse costs cover for any work in respect of Trail 2. We reiterate that we may seek to raise the adequacy of the CR's adverse costs cover at the pre-trial review."

30. The pre-trial review duly took place on 9 May 2024. The Defendants did not make any application regarding the CR's level of adverse costs cover. Indeed, although various issues were canvassed at the pre-trial review, the question of the adequacy of the CR's adverse costs cover was not raised at all.

E. DISCUSSION

31. We have set out the communications from the parties' solicitors in some detail as we regard them as very relevant to the exercise of our discretion on costs. Through their very experienced advisors, the Defendants would have been aware of the approach set out by the Tribunal in *Merricks*, decided several years before the present proceedings. The Defendants clearly considered whether to make an application to the Tribunal concerning the CR's adverse costs cover but, for whatever reason, decided not to do so. Moreover, despite the request from the CR and their own, repeated, statements that they would provide estimates of their costs, the Defendants failed to do so. Since it was the Defendants who were complaining about inadequate cover, we are not impressed by the contention, in their reply submissions to Woodsford, that Woodsford should have sought an order from the Tribunal under its case

management powers that the Defendants provide further information about their costs.

32. The structure of the collective proceedings regime requires that the CR's ability to meet potential adverse costs is addressed at the outset as a consideration on certification under rule 78; and since cost estimates may be revised as the litigation develops, rule 85 expressly provides for variation or revocation of a CPO if the criteria under rule 78 are no longer satisfied. Almost all collective proceedings are brought with litigation funding. The application of the criterion in rule 78(2)(d), with disclosure by the PCR of any indemnity against adverse costs from the funder and/or the level of ATE cover, and the opportunity for defendants to object that those are inadequate, either at the outset or subsequently if their expected costs increase, would be largely redundant if defendants could as a matter of course recover their costs over the level of such indemnity or ATE cover from the funder, either without more or simply on the basis of correspondence which had made bald assertions that the costs cover was inadequate.

33. As Woodsford points out, it would generally be inappropriate for the CR to seek additional ATE cover without an estimate from the defendants of the extent to which an increase was required over the level which had previously been accepted as adequate. Premiums for ATE cover are significant, and they are not recoverable from the defendants if the claims are successful. The result is that any premiums will come out of the damages or settlement sum (subject to the Tribunal's approval) and be at the expense of the class.

34. We of course recognise that at the time of a CPO application, defendants base their assessment of the extent of adverse costs cover required on estimates of their costs which are provisional and subject to change. However, in our view that only reinforces the approach with the Tribunal has previously set out as to how a subsequent need for increased adverse costs cover should be addressed. We do not accept the Defendants' submission that this approach is a recipe for satellite litigation. If defendants in such proceedings provide the CR with an updated estimate of their costs which is reasonable and request an increase in adverse costs cover, we would expect the CR to engage with this and the matter

to be resolved between them. Failing that, the CR would risk not only an order from the Tribunal that the CPO be revoked unless increased cover was provided but having to pay the costs of the defendants' application for such an order. On the other hand, if defendants applied for cover in respect of an unreasonable level of costs, they would bear the costs of an unsuccessful application to the Tribunal. Moreover, transparency as regards costs during the currency of the proceedings will assist the CR and the funder to consider whether the proceedings continue to be commercially viable, a matter which is in the interest of all parties.

35. We should make clear that we are not suggesting that an order for costs should never be made above the amount of the CR's adverse costs cover accepted at the time of certification, or that a non-party costs order against a funder for that excess should never be made in collective proceedings. The Tribunal has the jurisdiction to make such an order and everything will depend on the circumstances of the particular case. Hence, in *Le Patourel v BT Group PLC* [2025] CAT 10, the Tribunal ordered the CR to pay the successful defendants' costs substantially in excess of the amount of ATE insurance that had been obtained. However, there the Tribunal stressed that under the agreement between the CR and the funder, the funder had provided the CR with an unlimited indemnity in respect of adverse costs. Moreover, in correspondence several years before the trial, the CR' solicitors had written to the defendants' solicitors, giving details of the funder's capital and stating:

> "It is therefore evident that [the funder] has more than sufficient resources to meet any potential adverse costs order made against the PCR, irrespective of the ATE Policies that it has secured in relation to the proceedings."

Where a CR had effectively stated that the funder's own financial resources could be used to pay adverse costs, and the funder had given an unlimited indemnity to the CR on that basis, it is unsurprising that the Tribunal held that it should not restrict any award of costs to the level of ATE cover. Those circumstances are very different from those in the present cases. We would only add that it does not appear that the Tribunal there had sustained submissions, as we have received here, regarding the general approach in collective proceedings to a costs application against a funder.

36. Further, we note that the amount of £15 million, which the funder is providing for the Defendants' adverse costs under the two deeds of indemnity, considerably exceeds the amount of funding it has provided to the CR to pursue the claims against them. In other words, this is not a case where the funder seeks to limit liability to the *Arkin* cap. Excluding payment towards the costs incurred by the CR in the claim against Stagecoach which settled, Woodsford has funded and paid for £6,583,955 of the CR's costs associated with the proceedings, including non-deferred solicitors' and counsel fees, and other litigation related costs such as e-discovery and ATE premiums. Contrary to the assumption made in the Defendants' Non-Party Costs Application, the amount of funding provided by Woodsford did not increase as the CR's litigation budget increased: instead, the increase was funded by others, in particular by the CR's solicitors through deferred and contingent fees.

37. Moreover, we reject the Defendants' submission that, as in *ChapelGate*, the funder was the real beneficiary of the proceedings. Of course, if the proceedings had been successful Woodsford would have been paid more than any individual class member: that is inherent in all collective proceedings (at least, opt-out proceedings) brought with litigation funding. But the proceedings are seeking damages for the benefit of the class as a whole, and the CR's economic expert estimated that the aggregate damages recoverable (excluding claims by non-residents) from SWR and LSER for the period up to January 2019 alone would be c. £24 million[8] and £36.24 million, respectively; and for GTR for the period to end March 2021, £76.7 million. Those figures would obviously increase when up-dated to the time of trial.[9] Accordingly, as seen at the start of the proceedings, the projected damages would significantly exceed Woodsford's potential return under the two LFAs.

38. The Defendants also stress that given the small amount attributable to each class member, the take-up of any damages was always likely to be small. That may well be so, and the experience with the distribution under the Stagecoach settlement bears this out: *Gutmann v First MTR South Western Trains Ltd and*

[8] The total claim for the SE franchise was estimated by the CR's expert at £56.9 million but SWR only took over the franchise from Stagecoach on 20 August 2017.
[9] Since Trial 1 did not cover quantum, the CR had not yet served up-dated figures.

Stagecoach South Western Trains Ltd (Stakeholder Entitlement) [2025] CAT 72. The Tribunal indeed had some concern about this at the outset, as discussed in the SW/SE CPO Judgment. However, in contrast to the position in ordinary civil litigation, the funder's return set out in the LFA is not guaranteed as a matter of contract. It is always subject to the Tribunal's supervisory jurisdiction, and the Tribunal may determine that the return prescribed by the funding arrangements is unreasonable or excessive and reduce it accordingly: see the decisions of the Court of Appeal in *Gutmann v Apple Inc* [2025] EWCA Civ 459 at [9] and [99]; and *Stephan v Amazon Inc, Hammond v Amazon Inc* [2026] EWCA Civ 183 at [33]. The Tribunal has indeed acted accordingly as regards distribution of the Stagecoach settlement sum, significantly reducing Woodsford's return from what it would have received under the contractual arrangements: [2025] CAT 72 at [95]-[96] and [140]. This is very different from the guaranteed benefit which the funder would have received in the event of judgment for the claimant in the *ChapelGate* case: see para 13 above.

F. CONCLUSION

39. For the reasons set out above, having regard to the structure of the statutory regime for collective proceedings and in all the particular circumstances of the present cases, we consider that the Defendants' entitlement to costs should not exceed the level of adverse costs provision recorded in the two CPO judgments in these cases, i.e. the amount of £15 million covered by the two deeds of indemnity. The basis for the Non-Party Costs Application therefore falls away.

40. In the light of that, it is unnecessary to address Woodsford's alternative argument that any excess of costs over £15 million should be borne by Charles Lyndon.

41. Accordingly:

    (1) the CR shall pay the Defendants' costs, to be subject to detailed assessment if not agreed, up to the sum of 15 million;

(2) the Defendants' application for a Non-Party Costs Order against Woodsford is dismissed.

42. As regards the costs specifically of these costs applications, we order that:

(1) the Defendants shall pay 80% of the CR's costs incurred by reason of their costs applications;

(2) the Defendants shall pay Woodsford's costs of the Non-Party Costs Application; and

(3) such costs are to be assessed on a summary basis. If the parties cannot agree on these costs, the CR and/or Woodsford shall submit a schedule of costs to the Tribunal within 14 days, and the Defendants shall submit any observations on the sums claimed in respect of costs within 7 days thereafter.

43. This judgment is unanimous.

Sir Peter Roth Chair	Prof. Simon Holmes	Prof. Robin Mason

Charles Dhanowa CBE, KC (*Hon*) Registrar	Date: 13 March 2026