



Neutral citation [2026] CAT 45

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

Case No: 1404/7/7/21

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

12 May 2026

Before:

THE HONOURABLE MR JUSTICE BUTCHER  
(Chair)  
PROFESSOR ANTHONY NEUBERGER  
PROFESSOR RACHAEL MULHERON KC (HON)

Sitting as a Tribunal in England and Wales

BETWEEN:

**DAVID COURTNEY BOYLE**

Late Class Representative

– and –

**(1) GOVIA THAMESLINK RAILWAY LIMITED**  
**(2) THE GO AHEAD GROUP LIMITED**  
**(3) KEOLIS (UK) LIMITED**

Defendants

– and –

**SECRETARY OF STATE FOR TRANSPORT**

Intervener

– and –

**WALTER HUGH MERRICKS CBE**

Third Party

Heard at Salisbury Square House on 15 April 2026

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**JUDGMENT (COSTS)**

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## **APPEARANCES**

Mr George McDonald (instructed by Maitland Walker LLP) appeared on behalf of the Late Class Representative.

Mr Paul Harris KC and Ms Cliodhna Kelleher (instructed by Freshfields LLP) appeared on behalf of the Defendants.

Mr Laurence Page (instructed by Linklaters LLP) appeared on behalf of the Intervener.

Mr Alexander Hutton KC (instructed by Willkie Farr & Gallagher (UK) LLP) appeared on behalf of Mr Merricks.

## A. INTRODUCTION

1. This judgment deals with applications for costs made by the Defendants and by the Estate of Mr David Courtney Boyle (the **Estate**) against the Third Party, Mr Walter Merricks CBE (**Mr Merricks**).
2. To understand the nature of the costs involved, and why the application is made against Mr Merricks, it is necessary to explain what has happened in these proceedings since June 2025 in some detail. A summary of what had occurred in these proceedings before then is set out in the Tribunal's Ruling on Amendment dated 6 March 2025 ([2025] CAT 16), at §§7-45.
3. Mr Boyle was, by order of the then President of the Tribunal dated 5 October 2022 (the **CPO**), authorised to act as class representative on an opt out basis, in respect of collective proceedings by a class for loss and damage allegedly sustained by reason of pricing and other practices of the Defendants on the London-Brighton mainline. On 19 June 2025, Mr Boyle sadly died. On 23 July 2025, the Tribunal made an Order staying the proceedings for a three-month period to allow the identification and application for approval of a suitable alternative class representative (the **Stay Order**).
4. On 12 August 2025, pursuant to paragraph 2 of the Stay Order, Maitland Walker LLP (**Maitland Walker**) provided an update to the Tribunal and the other parties on their progress in identifying a suitable replacement class representative. Maitland Walker identified three individuals who had signed Non-Disclosure Agreements and had received non-confidential versions of the relevant papers.
5. On 11 September 2025, Maitland Walker wrote to the Tribunal to provide a further update on their progress in identifying a suitable replacement class representative. It was said that there were three short-listed candidates who, following their own due diligence on the case, had confirmed that they would be willing to act as the replacement class representative. They were to be interviewed on 22 and 29 September 2025 by the partners of Maitland Walker who were acting in the proceedings and the three members of the Consultative

Committee, with LCM Funding UK Ltd (**LCM**) (the funder) and Exton Advisors (insurance brokers who would report back to the ATE insurers) in attendance.

6. On 10 October 2025, Maitland Walker wrote to the Tribunal to inform it that Mr Merricks had been identified as the proposed replacement class representative. On 14 October 2025, Mr Merricks personally wrote to the Tribunal seeking an extension of four weeks to the time by which he was required to file his application to be substituted as the class representative. Mr Merricks said that he wished to study further the case record to familiarise himself in greater detail with the history of the proceedings, consider the strategic decisions taken in the proceedings up to then, hold discussions with the Consultative Committee, and so on.
7. On 16 October 2025, the Tribunal made an Order extending the stay until 20 November 2025, save in respect of any work that was necessary for the authorisation application.
8. On 23 October 2025, Mr Merricks instructed Willkie Farr & Gallagher (UK) LLP (**WFG**) to act for him in the proceedings, and informed Maitland Walker that they would not be instructed. On 27 October 2025, WFG wrote to the Tribunal stating that they, and not Maitland Walker, had been instructed to act for Mr Merricks in the proceedings, and that, going forward, all correspondence and communications relating to the proceedings should be addressed to WFG.
9. Also on 27 October 2025, WFG wrote to Maitland Walker requesting access to documents in the proceedings, including all documents filed with the Tribunal, in order to allow Mr Merricks to make an authorisation application. WFG asked for these documents to be provided by the close of business on 28 October 2025. Maitland Walker responded to WFG's request by stating that they would not be able to release any files, documents or materials relating to this matter until all of the fees and disbursements owed by LCM under its litigation funding agreement with the late class representative were paid in full.

10. On 28 October 2025, Maitland Walker wrote to the Tribunal stating that, while they did not object to WFG's being copied into all correspondence and communications relating to the proceedings, it was premature for Maitland Walker to be excluded from such communications. On the same date, WFG wrote to Maitland Walker stating that insofar as any of the documents contained confidential information, Mr Merricks was content to receive non-confidential copies of such documents.
11. On 29 October 2025, Maitland Walker stated in a letter to WFG that, once their outstanding fees were settled, they would transfer all confidential materials to individuals who had been admitted into the confidentiality ring which had been established pursuant to the Tribunal's Order dated 16 December 2021. On the same day, WFG requested of Maitland Walker that they should be provided with all core documents, all documents that had been filed with the Tribunal, and a full set of correspondence. WFG's request was that non-confidential versions should be provided.
12. On 30 October 2025, Maitland Walker stated in a letter to WFG that WFG had not explained what 'core documents' meant; and that the correspondence ran to hundreds of letters, each of which would need to be reviewed by Maitland Walker for confidentiality ring materials, client confidentiality and privilege. Maitland Walker stated, however, that they would be willing to provide copies of all documents filed by them with the Tribunal up to 31 December 2024.
13. On 3 November 2025, WFG received certain documents from Maitland Walker. Also on 3 November 2025, WFG wrote to the Tribunal requesting that it exercise its powers under r.53 of the Competition Appeal Tribunal Rules 2015 (the **Tribunal Rules**) to direct Maitland Walker to provide Mr Merricks with non-confidential versions of: (i) all the documents filed with the Tribunal which were in their possession, (ii) all correspondence with the Tribunal, and (iii) all *inter partes* correspondence.
14. On 6 November 2025, Maitland Walker wrote to the Tribunal proposing various deadlines by which they should provide the documents sought in WFG's 3 November 2025 letter.

15. On 7 November 2025, WFG wrote to Freshfields LLP (**Freshfields**), solicitors for the Defendants, and Linklaters LLP (**Linklaters**), solicitors for the Intervener, to request their consent to the admission of the relevant individuals at WFG to the confidentiality ring.
16. On 10 November 2025, Freshfields responded and rejected WFG's request, on the basis that WFG and Mr Merricks did not require access to confidential material for the purpose of preparation of his authorisation application. It was said that it was unclear why the Defendants' confidential material was required in order to prepare an application to act as the replacement class representative; and that unless and until Mr Merricks became a party to the proceedings, there was no basis for granting his representatives access to confidential materials.
17. On 11 November 2025 Linklaters wrote to WFG indicating that the Intervener took a neutral position in relation to Mr Merricks' representatives' admission to the confidentiality ring, but expressed an eagerness to see the efficient resolution of the proceedings.
18. On 11 November 2025, Mr Merricks made an application to the Tribunal to be admitted to the confidentiality ring (the **CRO Application**). In response to Freshfields' 10 November 2025 letter, WFG said that it would not be the case that Mr Merricks should proceed with and prepare his authorisation application as though the proceedings were yet to be commenced, and without regard to the reality of the stage which had been reached in the proceedings. On the same date, Freshfields repeated the Defendants' concerns that Mr Merricks was not, at that stage, a party to the proceedings, and accordingly that there remained no basis for granting his representatives access to confidential materials. Further, it was said that there was still no clarity as to which categories of documents Mr Merricks sought, nor any substantive explanation of the need for such access for the purposes of Mr Merricks' authorisation application.
19. On 12 November 2025, Maitland Walker wrote to the Tribunal stating that, as the information in the confidentiality ring related to the Defendants' and the Intervener's confidential information, they took no position as to whether WFG and/or Mr Merricks should be admitted to the confidentiality ring at that stage,

except to make the point that Maitland Walker's costs of providing the documents that Mr Merricks / WFG had requested would be much greater if Maitland Walker were required to review those documents for confidentiality ring material and to make necessary redactions.

20. On 13 November 2025, the Tribunal wrote to the parties, saying that it was not prepared to make the orders sought by Mr Merricks without at least providing the interested parties with an opportunity to make representations at an oral hearing. The Tribunal directed Maitland Walker and WFG to provide to the Defendants and the Intervener non-confidential versions of the recent correspondence in relation to Mr Merricks' anticipated authorisation application.
21. On 14 November 2025, WFG wrote to Freshfields and Linklaters requesting that the Defendants and the Intervener should provide Mr Merricks with non-confidential versions of all documents which they, respectively, had filed in the proceedings. On the same day, Freshfields wrote to WFG requesting that Mr Merricks should promptly confirm the details of his funding arrangements.
22. On 17 November 2025, WFG provided the Defendants and the Intervener with non-confidential versions of the recent correspondence in relation to Mr Merricks' authorisation application. On the same date, the solicitors for the Defendants and the Intervener wrote to the Tribunal stating, in response to Mr Merricks' application to be admitted to the confidentiality ring, that this was unnecessary due to the limited scope of confidential material in these proceedings. Also on 17 November 2025, Maitland Walker wrote to the Tribunal explaining that they had agreed with Mr Merricks / WFG, in principle, that they would provide the documents Mr Merricks / WFG were seeking once WFG had been admitted to the confidentiality ring, and that Mr Merricks would be responsible for Maitland Walker's reasonable costs of collating and supplying those materials.
23. On 18 November 2025, WFG sent a letter to Freshfields stating that Mr Merricks had no obligation to provide any of the information requested in Freshfields' letter of 14 November 2025.

24. On 20 November 2025, WFG, on behalf of Mr Merricks, wrote to the Tribunal: (i) confirming that he would not proceed with his request to be admitted to the confidentiality ring on the basis that the Defendants and Intervener had explained the limited scope of confidential material in the proceedings; (ii) alleging that Maitland Walker had disclosed confidential information; (iii) denying that Mr Merricks, as a third party, should be liable for costs incurred by the Defendants or the Intervener as a result of his confidentiality ring application; and (iv) seeking a further extension of time for his authorisation application until 16 December 2025.
25. On 24 November 2025, Maitland Walker wrote to the Tribunal stating that Mr Merricks' conduct had caused significant costs to be incurred. It was said that he had begun by unreasonably seeking a wide range of documents from Maitland Walker; and that it was only when he had applied to the Tribunal on 3 November 2025 that he had properly narrowed his request. On the same date, Freshfields wrote to the Tribunal expressing the Defendants' concern at the costs which had already been incurred in the proposed transfer of these proceedings to a new class representative.
26. On 25 November 2025, the Tribunal made an order further staying the proceedings until 16 December 2025, save in relation to work necessary for the authorisation application. It was ordered that Maitland Walker should provide to Mr Merricks all non-confidential documents filed with the Tribunal by the Defendants and/or the Intervener, all non-confidential correspondence sent by the parties to the Tribunal or vice versa, and all non-confidential *inter partes* correspondence by set dates. It was ordered that Mr Merricks should pay reasonable costs incurred in providing those documents up to a maximum of £15,000 plus VAT. It was provided that there should be no order as to Mr Merricks' costs of dealing with the CRO Application; and that the costs of the Defendants of dealing with Mr Merricks' request to be admitted to the Confidentiality Ring or the request for an extension of the stay should be reserved.
27. On the same date, Hogan Lovells LLP (**Hogan Lovells**), on behalf of LCM, wrote to Freshfields, stating that Maitland Walker had disclosed confidential

information to the Defendants, and said that they would seek to prevent the use of information relating to the funding of the proceedings and the process of replacing the class representative, by way of injunction if necessary. On 27 November 2025, Freshfields wrote to the Tribunal in response to Hogan Lovells' letter stating that its implications were that the Defendants would be inhibited in their rights of defence.

28. On 8 December 2025, Freshfields wrote to WFG saying that the Defendants had a legitimate interest in understanding whether Mr Merricks and his funder currently had appropriate funding and insurance arrangements in place to cover the Defendants' costs that were being and had already been incurred. WFG replied to Freshfields' letter on 9 December 2025, stating that all matters relevant to authorisation, including funding and adverse costs cover, would be addressed in the application when filed.
29. On 10 December 2025, Mr Merricks applied to the Tribunal for a further stay of the proceedings until 30 January 2026, save in relation to work necessary for the authorisation application.
30. On 12 December 2025, the Defendants and the Intervener wrote letters expressing concerns as to the costs and ongoing delay to the proceedings; but neither opposed the most recent request for an extension of the stay.
31. By its order dated 15 December 2025, the Tribunal granted a further extension of the stay until 30 January 2026, save in relation to any work that was necessary for the authorisation application.
32. On 19 December 2025, Hogan Lovells wrote to Freshfields stating, *inter alia*, that: 'Insofar as [Mr Merricks] could bear any adverse costs should [any application by him for authorisation] fail, and as a third party the stating (sic) position is that he would not ordinarily be liable to adverse costs, then LCM will in the first instance bear any such liability (pending getting an ATE insurance policy in place).'

33. On 29 January 2026, Mr Merricks informed the Tribunal and the parties that he would not pursue an application to replace the class representative. This was on the basis that, although LCM would, in principle, fund the claim, he could not obtain additional ATE insurance.
34. On 30 January 2026, the Defendants applied for the revocation of the CPO and the discontinuation of the proceedings. There followed correspondence on that.
35. On 16 February 2026, the Tribunal fixed a hearing for 15 April 2026 to address: (i) directions for the proceedings going forward; and (ii) any applications for non-party costs orders (NPCOs) against Mr Merricks.
36. On 19 March 2026, LCM confirmed that it was unwilling to fund the proceedings going forward.
37. By letter to the Tribunal of 23 March 2026, LCM stated that, given the need for Mr Merricks to prepare his application for authorisation promptly, no formal funding arrangement had been entered into with him. ‘Nonetheless’, the letter continued, ‘LCM was paying Mr Merricks’ costs in respect of these Proceedings and consistent with the confirmation LCM gave to Mr Merricks, we can confirm to the Tribunal that LCM will indemnify Mr Merricks in respect of any adverse costs liability he may be ordered to pay’. On 25 March 2026, the Tribunal directed that, in light of LCM’s letter confirming that it would indemnify Mr Merricks in respect of any costs liability he might be ordered to pay, it was not necessary or sensible for any applications for costs against LCM to be dealt with at the hearing on 15 April 2026: they could be deferred until after the determination of the application for NPCOs against Mr Merricks.
38. On 31 March 2026, Maitland Walker provided an update to the Tribunal and the Defendants. This said that, in the two months since 29 January 2026: (i) Dr Peyer had agreed in principle to act as replacement class representative; (ii) initial due diligence had been completed by Nera Capital and heads of terms issued, with detailed due diligence now taking place; (iii) the existing ATE insurers had said that they would support Dr Peyer and had agreed, in principle, that the existing ATE policy might be novated to a new SPV once probate over

the Estate was granted; and (iv) that additional ATE insurance may be available if required.

39. On 15 April 2026, a hearing took place before the Tribunal. In the morning, the Tribunal heard submissions as to the appropriate orders in relation to the future conduct of the proceedings. As a result, it made an Order staying the proceedings until 24 July 2026, save in respect of any work that was necessary for a further authorisation application. The Tribunal ordered that unless the proposed application is filed by 4 pm on 24 July, the proceedings are to be decertified and the CPO revoked.
40. In the afternoon of 15 April 2026, the Tribunal heard the applications for costs against Mr Merricks. The Tribunal reserved judgment in relation to those applications, and this Judgment now provides its decision on them.

## **B. PARTIES' SUBMISSIONS**

41. The Defendants' application is for a NPCO against LCM and/or against Mr Merricks himself in respect of the costs incurred as a result of Mr Merricks' conduct between October 2025 and 29 January 2026.
42. The Defendants refer to the letter from LCM to the Tribunal dated 23 March 2026 by which LCM accepted that it will indemnify Mr Merricks for any costs which he may be ordered to pay. This, the Defendants say, is appropriate because 'the funded Mr Merricks remains little more than the alter ego of LCM', and that 'for LCM, the episode with Mr Merricks was simply a continuation of its commercial funding business.'
43. The Defendants say that Mr Merricks' involvement has put them to costs which fall into three categories.

Category A: work arising directly from the proposed application for Mr Merricks to be authorised as replacement class representative.

Category B: correspondence generated by Mr Merricks/LCM's refusal to provide any clarity on funding and ATE insurance.

Category C: costs of the abandoned CRO Application, made on 11 November 2025.

44. The amount of the costs incurred by the Defendants in these categories is said to be £223,278.90, and an interim payment is sought in the sum of £135,000.
45. The Defendants submit that there is no answer to their claim for costs as a matter of principle. LCM was always potentially liable for costs ordered in favour of the Defendants during the period when Mr Boyle was alive. LCM accepts, and has always accepted, that it would be liable for such costs if the application by Mr Merricks had been made but had failed. There is no coherent basis for resisting liability for costs in the period when Mr Merricks was engaging with the Defendants about a contemplated authorisation application.
46. The Defendants say that the answers given by Mr Merricks to their application for costs are all unfounded.
47. Insofar as the suggestion is that the costs relate to a period during which the proceedings were stayed, this is hopeless. The work undertaken by the Defendants fell within the exception specified in the orders for the stay. And the relevant period was one of remarkable activity, ascribable to the disproportionate approach taken by Mr Merricks / LCM to the litigation. The Defendants did not choose to be active during this period; they were forced into it by the conduct of Mr Merricks / LCM.
48. Insofar as the suggestion is that Mr Merricks came forward in a public-spirited way for no substantial personal benefit or gain, this can only be partially true, and in any event cannot excuse a party that causes costs to be unnecessarily incurred by other users of the Tribunal.
49. As to the suggestion that Mr Merricks acted reasonably and appropriately, and did not put the Tribunal or other parties to unnecessary costs, this is 'far from

accurate.’ ‘Merricks/LCM engaged in a wide-ranging, disproportionate campaign, demanding increasing amounts of information from the Defendants (and then abandoning some demands) whilst simultaneously refusing to provide obviously relevant information about the extent to which the Defendants had any costs protection in respect of the work that Merricks/LCM were forcing them to incur.’

50. As to the point that the Defendants’ costs ought to be reduced because their solicitors’ rates were too high, work was not appropriately delegated, and hours incurred were excessive, these criticisms are misplaced.
51. Maitland Walker makes an application on behalf of the Estate for costs against Mr Merricks. What is said is that the Estate has incurred costs as a result of Mr Merricks’ ‘haphazard approach to the Proceedings and the disproportionate, premature and evolving requests for information and documents made of [Maitland Walker] at a time when the only matter before the Tribunal was a proposed authorisation application filing.’
52. A costs order against Mr Merricks is fully justified because he chose to become involved in the proceedings, actively seeking to take over the existing collective action. By doing so, he caused the parties to incur costs and then did not proceed with his proposed application to be a replacement class representative. During the period of his involvement, he acted as, or effectively as, a party, by making applications to the Tribunal. His conduct also exacerbated the costs incurred by the parties, not least due to his approach to confidentiality and his wide-ranging and unreasonable demands of the Estate.
53. The Estate seeks costs in the amount of £114,417, as being the costs incurred due to Mr Merricks’ actions.
54. On behalf of Mr Merricks, it was submitted that this was not a case in which a NPCO was appropriate. It was only Mr Merricks’ position (not LCM’s) which was being considered at this hearing, as the applications for NPCOs against LCM had been postponed.

55. Mr Merricks was not a ‘real party’, nor had he ‘intermeddled’ with the litigation. His decision not to make an authorisation application was not an ‘event’ which costs should follow, because a third party is not in the same position as a party. Mr Merricks had needed properly to access the existing documentation and assess that documentation with his advisers. His position was not dissimilar to a pre-action litigant who is investigating the case. Making a NPCO against Mr Merricks would be grossly unjust.
56. A NPCO should not be made on the basis of unreasonable conduct unless it was an exceptional case, surmounting a high threshold of unreasonableness. The present case was not in that category.
57. Mr Merricks also raises the question of whether the indemnity principle was satisfied in relation to Maitland Walker’s costs.
58. Further it was submitted that, if Mr Merricks was liable for any costs on these applications, the amounts claimed were greatly excessive. The sum claimed by the Defendants was, Mr Hutton KC submitted, ‘simply absurd’, in circumstances where ‘the Defendants were involved in only a small proportion of the *inter partes* correspondence and the claim was stayed’.

### **C. THE TRIBUNAL’S ANALYSIS**

59. There was and could be little argument as to the principles which should govern the Tribunal’s approach to the current applications.
60. Rule 104 of the Tribunal Rules provides that, *inter alia*:

“(1) For the purposes of these rules “costs” means costs and expenses recoverable before the Senior Courts of England and Wales...

(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—

- (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;
  - ...
  - (e) whether costs were proportionately and reasonably incurred; and
  - (f) whether costs are proportionate and reasonable in amount.
- (5) The Tribunal may assess the sum to be paid under any order under paragraph (2) or may direct that it be—
- (a) assessed by the President, a chairman or the Registrar; or
  - (b) dealt with by the detailed assessment of a costs officer of the Senior Courts of England and Wales....”

61. The Tribunal has a broad discretion as regards costs, but in exercising that discretion it should make an order that reflects the overall justice of the case. The Tribunal will in general follow the practice of the courts of England and Wales under the Civil Procedure Rules: see *Riefa v Apple* [2025] CAT 34 (*Riefa*) at §13.

62. Rule 104 does not address NPCOs specifically. That rule does, however, give the Tribunal the power to make NPCOs, as confirmed in *Gutmann v First MTR* [2026] CAT 21 at §9, [2026] Bus LR 877. The leading case on NPCOs was agreed by the parties to be the decision of the Privy Council in *Dymocks Franchise Systems v Todd (Associated Industrial Finance Pty Ltd) (No. 2)* [2004] UKPC 39, [2004] 1 WLR 2807. At §§25 and 29 the Board said this:

“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 paragraph 40 of *Hamilton v Al Fayed* 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 Knight and Millett LJ's judgment in *Metalloy Supplies Ltd (in liquidation) 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) 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...

29. In the light of these authorities their Lordships would hold that, generally speaking, where a non-party promotes and funds proceedings by an insolvent company solely or substantially for his own financial benefit, he should be liable for the costs if his claim or defence or appeal fails. As explained in the cases, however, that is not to say that orders will invariably be made in such cases, particularly, say, where the non-party is himself a director or liquidator who can realistically be regarded as acting rather in the interests of the company (and more especially its shareholders and creditors) than in his own interests.”

63. In the case of *Turvill v Bird* [2016] EWCA Civ 703 at §§26-27 Hamblen LJ said this:

“26. Those comments were recently endorsed by the Court of Appeal in *Deutsche Bank AG v Sebastian Holdings Inc* [2016] EWCA Civ 23 [2016] 4 WLR 417 – see the judgment of Moore Bick LJ at [62]:

‘As all three members of the court observed in *Petromec*, the exercise of the discretion is in danger of becoming over-complicated by authority. The decision of the Privy Council in *Dymocks*, which contains an authoritative statement of the modern law, explains and interprets the *Symphony* guidelines in a way which reflects the variety of circumstances in which the

court is likely to be called upon to exercise the discretion. Thus, the Privy Council has explained that an order of this kind is “exceptional” only in the sense that it is outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. Similarly, it has made it clear that the absence of a warning is simply one factor which the court will take into account in an appropriate case when deciding whether, viewed overall, it would be unjust to exercise the discretion in favour of making an order for costs against the third party. We think it important to emphasise that the only immutable principle is that the discretion must be exercised justly. It should also be recognised that, since the decision involves an exercise of discretion, limited assistance is likely to be gained from the citation of other decisions at first instance in which judges have or have not granted an order of this kind.’

27. The authorities illustrate “the variety of circumstances in which the court is likely to be called upon to exercise the discretion” and “the kind of considerations upon which the court will focus”, but are not to be treated as providing “a rulebook”. The kind of considerations illustrated by the authorities include the following:

- (1) Whether the non-party funds the proceedings and substantially also controls or is to benefit from them and is the “real party” to them;
- (2) Whether the non-party promotes and funds proceedings by an insolvent company solely or substantially for his own financial benefit;
- (3) Whether there is impropriety by the non-party in the pursuit of the litigation;
- (4) Whether the non-party causes costs to be incurred.

See *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807; *Systemcare (UK) Ltd v Services Design Technology Ltd* [2011] 4 Costs LR 666.”

64. As is made clear in that passage, the governing principle and ultimate question is whether it is just in all the circumstances to make an order. The jurisdiction is a fact-specific one. Previous authorities are not a rule book.
65. To apply that approach to the present case, it is helpful to consider first the Defendants’ application and then the Estate’s application.
66. In relation to the Defendants, and in general terms, we are in no doubt that, to the extent that, as a result of Mr Merricks’ involvement, they incurred costs which were reasonable and proportionate, Mr Merricks should bear those costs. The Defendants are not parties to these proceedings by choice. Mr Merricks, by contrast, chose to become involved in them; and, moreover, as was conceded on his behalf, he would never have become involved in them at all, if he had not

been confident that he would be indemnified in respect of any costs by LCM. The result was that he caused costs to be incurred by the Defendants (cf consideration (4) identified in *Turvill v Bird* at §27). Given that the choice is effectively between the Defendants having to bear any costs occasioned by Mr Merricks' involvement themselves, and their being borne by Mr Merricks, and ultimately by LCM, it appears to us clear that the latter is the just solution.

67. We do not regard it is essential for the purposes of reaching this conclusion that Mr Merricks should be categorised as a 'real party' to the litigation, or as standing substantially to benefit from, or as controlling it. We would, nevertheless, say that, insofar as the Defendants' costs are claimed in respect of the CRO Application, there is no difficulty in regarding Mr Merricks as having been in control of the litigation, because it was his application. More generally, we consider that, in the period after 27 October 2025, when WFG wrote to the Tribunal saying that all further correspondence relating to the proceedings should be addressed to them rather than Maitland Walker, until Mr Merricks indicated that he would not pursue an application to replace the class representative, he did have a substantial degree of control over the course of the proceedings.
68. Subject to one point to which we will come, we do not consider that it is appropriate to regard Mr Merricks' conduct or interests in relation to the proceedings as being distinct from LCM's. There can be no doubt, and it was conceded on his behalf, that he would never have been involved at all if there had not been a funder, and that he had been confident that the funder would indemnify him in respect of costs. LCM has now explicitly stated that it will indemnify him in respect of any costs he may be ordered to pay. There is, therefore, no cogent argument that he should be regarded as having pursued only a public-spirited endeavour. His involvement furthered LCM's commercial purposes.
69. We now turn to the three categories of costs which the Defendants claim against Mr Merricks. In relation to Category C, the costs of the abandoned CRO Application, which have been reserved, it appears to us to be beyond argument that, as between the Defendants and Mr Merricks, any reasonable costs incurred

by the Defendants should be borne by Mr Merricks. He made an application to the Tribunal, which he then abandoned. The main argument as to why Mr Merricks should not be liable for these costs is that it was Maitland Walker who had not disclosed any documents to him, and had suggested that he and his legal team should join the Confidentiality Ring on the basis that this would reduce the costs of providing the relevant material. However, this is not an answer to the Defendants' claim for costs against Mr Merricks: it was Mr Merricks who chose to make an application against the Defendants. Mr Merricks could, if he believed Maitland Walker to have been responsible for these costs, have sought them from Maitland Walker, but did not do so.

70. Category B relates to correspondence as to Mr Merricks' funding arrangements and ATE insurance. We consider that it was reasonable, and not premature or unnecessary, for the Defendants to enquire of Mr Merricks as to whether he had insurance which might cover any costs incurred by the Defendants in the period prior to his making an application to replace the class representative. These costs were always potentially distinct from costs which might be awarded by the Tribunal at the conclusion of an authorisation application, not least because (as has occurred) no authorisation application might, in the event, be made.
71. We do not accept that Mr Merricks sufficiently answered this point. The Defendants were entitled to seek clarity on whether any costs which they might incur in the period from Mr Boyle's death until the end of the stay were covered. LCM did not in fact give that clarity, in that it confirmed (by letter of 19 December 2025) only that it would be liable for such costs should an application be made and be unsuccessful.
72. Category A is other costs incurred by the Defendants during the period in which Mr Merricks was involved before he indicated that he would not seek to replace the class representative. The Defendants say that they were compelled to undertake very extensive (and intensive) correspondence in that period: as Mr Harris KC put it, the costs were incurred 'in respect of some 68 letters that were written during this three-month one-week period of interim deciding what they're going to do.' The Defendants allow 5% of the costs incurred, on the basis that that level of costs would have been incurred inevitably, had there been

a new class representative seeking to come on the scene, but the balance, they say, represents unnecessary costs incurred as a result of Mr Merricks' (and his solicitors') unreasonable approach to the litigation.

73. It is clearly right that some proportion of the costs would inevitably have been incurred. The Defendants allow 5% of a total sum of £223,278, or some £11,000. While that way of reaching a correct allowance is subject to objections, not least that the total figure is, in our view, significantly excessive, a sum of £11,000 is probably not far from a fair estimate of the costs of correspondence which there would inevitably have been and in respect of which it would not be just to grant an order against Mr Merricks. The amount of costs to which the Defendants were put went significantly beyond that amount by reason of the excessive amount and burden of correspondence from WFG, albeit, even allowing for that, the costs which the Defendants incurred were themselves excessive.
74. There is one limited category of the costs claimed by the Defendants which requires separate treatment. Thus, as already set out, there was some limited involvement of LCM itself, instructing its own solicitors, Hogan Lovells, rather than Mr Merricks, as funded by LCM, instructing WFG. In particular, Hogan Lovells wrote a letter of 25 November 2025 to Freshfields which said that steps would be taken to maintain confidence in information about the funding of the proceedings by injunction if necessary. Some costs will have been incurred in dealing with these interventions of Hogan Lovells. Mr Hutton stressed that he did not act for LCM and as to 'threats for injunctions and correspondence with Hogan Lovells ... that is nothing to do with me ... I don't have any instructions at all about that.' Given this stance, which was said to be consistent with the deferral of the NPCO application against LCM, we have not, strictly, had any representations in opposition to the application for this limited category of costs. We will, accordingly, not decide on the incidence of this category of costs at this stage. If it remains contested, then it will need to be dealt with by way of the deferred application for a NPCO against LCM. In practice we consider that this would mean that there can be written submissions, including from LCM, in relation to this category of costs.

75. Subject to that caveat, therefore, we will make an order that Mr Merricks pays the Defendants' costs in Categories A, B and C, bar £11,000, on the standard basis, to be assessed, if not agreed, by a Costs Judge of the Senior Courts Costs Office. We will deal with the question of a payment on account below.
76. We turn to the position of the Estate. Here again, to the extent that Mr Merricks' involvement actually caused the incurring of reasonable and proportionate costs to the Estate, we consider that Mr Merricks should bear them. Mr Merricks sought documents and information from Maitland Walker, and made an application to the Tribunal in that regard. We agree that Mr Merricks should effectively be treated as a party to the proceedings for the purpose of the application he made. More generally, we consider that the justice of the case means that it should be Mr Merricks, as funded by LCM, rather than the Estate which should bear these costs. Mr Merricks' involvement was, to a very large degree, in furtherance of LCM's commercial interests and he (and by reason of the indemnity, LCM) should bear the costs occasioned by that involvement rather than those to whom those costs were occasioned.
77. One final point needs to be referred to in relation to the claim by the Estate. This is that Mr Merricks has raised the question of whether he may not be liable for the costs claimed because of non-compliance with the indemnity principle. However, Maitland Walker has confirmed that Ms Burns, the executor of the Estate, has incurred a liability for their fees on behalf of the Estate. Maitland Walker has also certified its statements of costs as not exceeding the costs which the Estate is liable to pay. Such certification will be taken to show that the indemnity principle has not been offended unless there is evidence to the contrary. There is no evidence to the contrary here, and we consider that we should accept the certification as showing that no issue arises as to non-compliance with the indemnity principle. In his oral submissions, Mr Hutton did not press the point.
78. We will therefore order that Mr Merricks should pay the Estate's costs referable to the involvement of Mr Merricks, such costs to be assessed on the standard basis, if not agreed, by a Costs Judge of the Senior Courts Costs Office.

79. Turning to orders for payments on account, it is helpful to recap certain principles relevant to whether and in what amounts such payments should be ordered which were stated in *Riefa* at §13 as follows:

“(e) In evaluating recoverable costs, only reasonable and proportionate costs are recoverable, and the assessment of costs should pay close regard to the Guideline Rates: *Merricks*, [40]–[41]. As the Court of Appeal observed in *Samsung Electronics v LG Display* [2022] EWCA Civ 466, [6]:

“If a rate in excess of the guideline rate is to be charged to the paying party, a clear and compelling justification must be provided. It is not enough to say that the case is a commercial case, or a competition case, or that it has an international element, unless there is something about these factors in the case in question which justifies exceeding the guideline rate.”

(f) When assessing the amount of an interim payment on account of costs, the Tribunal should take a cautious approach and should seek to make a broad estimate of the reasonable and proportionate costs likely to be determined on detailed assessment, with an appropriate margin to allow for an overestimate: *Merricks*, [40] and [42].

(g) The same principles apply to costs in collective proceedings as in any other competition law claim: *Merricks*, [43].”

80. We say at once that the totals claimed, £223,278 for the Defendants and £114,417 for the Estate, in each case not including the costs of the hearing, are considerably higher than we would expect to be recoverable on an assessment on the standard basis.

81. Taking first the Defendants’ costs: the hourly rates claimed by the Defendants greatly exceed, and are more than double the Guideline Rates. Furthermore, the amount of time spent appears to us to be considerably beyond that which was necessary and proportionate. We also consider that there was too much partner-level involvement, given the nature of the matters involved.

82. We have to assess the irreducible minimum amount which we are confident will be payable to the Defendants on a detailed assessment. Taking into account both the £11,000 ‘allowance’ which we have already discussed, and the points made above, we are only sufficiently confident of recoverability up to £45,000 and we will make an interim payment order in that amount.

83. In the case of the Estate, it appears to us clear that some of the costs claimed cannot properly be said to have been referable to Mr Merricks’ involvement but

were the result of a pre-existing dispute as to unpaid fees. Further costs were incurred as a result of an unduly uncooperative attitude adopted by Maitland Walker, in particular in not identifying the documents that Mr Merricks would need in order to be authorised.

84. In addition, and importantly, the rates claimed are more than 30% above Guideline Rates, without clear justification. Further, too many Grade A/partner fee earners were involved, and the number of hours spent appears significantly excessive.

85. The irreducible minimum of which we are confident, in the case of the Estate, is £30,000, and we will make an interim payment order in that amount.

**D. CONCLUSION**

86. For the reasons and on the basis set out above we will make costs orders against Mr Merricks in favour of the Defendants and the Estate.

87. We will make an order for interim payments on account of those costs in the sum of £45,000 in favour of the Defendants and £30,000 in favour of the Estate.

88. This decision is unanimous.

The Honourable Mr Justice Butcher  
Chair

Professor Anthony  
Neuberger

Professor Rachael  
Mulheron KC (Hon)

Charles Dhanowa, CBE, KC (Hon)  
Registrar

Date: 12 May 2026