Neutral citation [2021] CAT 36

IN THE COMPETITION APPEAL TRIBUNAL

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

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

3 December 2021

Before:

THE HONOURABLE MR JUSTICE ROTH
(Chairman)
SIMON HOLMES
PROFESSOR ROBIN MASON

Sitting as a Tribunal in England and Wales

BETWEEN

JUSTIN GUTMANN

Applicant / Class Representative

-and-

(1) FIRST MTR SOUTH WESTERN TRAINS LIMITED
(2) STAGECOACH SOUTH WESTERN TRAINS LIMITED

Respondents / Defendants

AND BETWEEN

JUSTIN GUTMANN

Applicant / Class Representative

-and-

LONDON & SOUTH EASTERN RAILWAY LIMITED

Respondent / Defendant

Heard remotely on 18 November 2021

RULING (PERMISSION TO APPEAL AND COSTS)

APPEARANCES

Mr Philip Moser QC, Mr Stefan Kuppen, and Ms Alexandra Littlewood (instructed by Hausfeld & Co. LLP and Charles Lyndon Ltd) appeared on behalf of Mr Gutmann.

Mr Tim Ward QC and Mr James Bourke (instructed by Slaughter and May) appeared on behalf of First MTR South Western Trains Limited.

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

Mr Paul Harris QC, Ms Annaliese Blackwood and Ms Cliodhna Kelleher (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of London & South Eastern Railway Limited.

A. INTRODUCTION

1. On 19 October 2021, the Tribunal issued its judgment dismissing the Respondents' applications for summary judgment/strike-out and granting the two applications for a Collective Proceedings Order ("CPO"), subject only to determination of whether the class should include passengers who purchased season tickets: [2021] CAT 31 ("the Judgment").

2. Following helpful written submissions from all parties and a further hearing on 18 November 2021, we determined that season tickets should not be within the scope of journeys covered by the class definition, which was finalised at that hearing. The Applicant has the option to apply under rule 85 of the Competition Appeal Tribunal Rules 2015 ("the CAT Rules") to vary the CPOs to bring season tickets within the scope of the class definition.

3. All three Respondents applied for permission to appeal against the Judgment on various grounds. At the hearing, we announced that permission would be refused for reasons to follow. This ruling sets out our reasons.

4. The Applicant applied for his costs of the summary judgment applications and the CPO applications, and for a payment on account of those costs. This ruling also deals with the costs applications, which are being determined on the papers.

5. This ruling uses the same abbreviations as the Judgment. All statutory references are to the CA 1998 and all references to rules are to the CAT Rules.

B. JURISDICTION TO APPEAL

6. Insofar as the Respondents seek to appeal against the dismissal of their summary judgment applications, it is established that there is jurisdiction to appeal under s 49(1A) on a point of law against the dismissal of a summary judgment application: *Enron Coal Services Ltd v English Welsh & Scottish Railway Ltd* [2009] EWCA Civ 647.

7. Insofar as the Respondents seek to appeal against the grant of the CPOs, the Court of Appeal held in *Merricks v Mastercard Inc* that there is jurisdiction to appeal against the *refusal* of a CPO: [2018] EWCA Civ 2527. By contrast, the Court of Appeal held in *Paccar Inc v Road Haulage Association* [2021] EWCA Civ 299 that no appeal lies under s. 49(1A) against a decision authorising a person to act as class representative under s. 49B(8), which forms part of the determination to grant a CPO, since that is not a decision "as to the award of damages". A challenge to such a decision must therefore be brought by way of an application for judicial review.

8. Here, the Applicant did not contest the Respondents' submissions that there is jurisdiction to appeal against a decision granting a CPO on the grounds that the claims should not have been certified as eligible for collective proceedings under s. 47B(6). However, since this is a question of jurisdiction it is not a matter that can be determined by consent. In our judgment, there is jurisdiction to appeal. If the proposed class representative can appeal where the Tribunal refuses a CPO on the basis that the conditions of s. 47B(6) are not met, it seems to us that there should equally be a right for the respondents to a CPO application to appeal against a decision of the Tribunal the other way. As Patten LJ (with whose judgment Jacob and Carnwath LJJ agreed) observed in *Enron* at [24], once it is established that an appeal would lie under what was then s. 49(1) against a decision dismissing a claim, "it is hard to identify any linguistic or policy barrier to the inclusion of a decision to the opposite effect".

C. GROUNDS OF APPEAL

9. Each of the three Respondents filed full written submissions setting out their respective application for permission to appeal. Unsurprisingly, there is some overlap between the grounds advanced, and each Respondent further adopts the grounds put forward by the other two Respondents.

(1) Insufficient merits of the claims: Stagecoach Grounds 1-2; LSER Grounds 4-5

10. Stagecoach puts forward two proposed grounds of appeal:

(1) that the Tribunal erred in law in determining the merits threshold for opt-out collective proceedings; and

(2) that the Tribunal erred in law in its finding as to the prospect of success of the abuse allegations.

11. LSER's application at Ground 4 contends that the Tribunal failed properly to assess the merits of the claims for the purpose of concluding that the proceedings can proceed on an opt-out basis. At Ground 5, LSER challenges the refusal of summary judgment (or to strike out the claims) on two specific points.

(a) Rule 79(3)

12. As set out above, Stagecoach's Ground 1 alleges an error of law by the Tribunal in a finding "that the merits threshold for certification of opt-out proceedings is the same as the summary judgment threshold": para 10; and its Ground 2 is summarised as follows:

> "… the Tribunal erred in law in finding that the [Applicant]'s case on abuse meets the requisite merits threshold for an opt-out claim (whether this is the summary determination judgment threshold or a higher standard)."

It is not altogether clear from Stagecoach's application whether by Ground 2 it seeks to challenge the refusal to grant its application for summary judgment or only the Tribunal's decision to certify the claims for opt-out collective proceedings under rule 79(3).

13. Insofar as the proposed challenge is to certification for opt-out proceedings, the reliance on a "merits threshold" is misconceived. Rule 79(3) states:

> "(3) In determining whether collective proceedings should be opt-in or opt-out proceedings, the Tribunal may take into account all matters it thinks fit, including the following matters additional to those set out in paragraph (2)—
>
> (a) the strength of the claims; and
>
> (b) whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover."

14. Accordingly, "the strength of the claims" is not a particular *threshold* which the claims have to pass in order for certification as opt-out proceedings: it is a factor to which the Tribunal *may* take into account, along with "all matters it thinks fit" when determining whether collective proceedings should be opt-in or opt-out. The critical point of this rule is that on an application for a CPO for opt-in proceedings, the Tribunal cannot have regard to the merits, unless of course the respondent to the application applies for summary judgment. Therefore, when the application is for a CPO for opt-out proceedings, then in determining whether the proceedings justify being opt-out, the Tribunal can take into account the merits as an additional factor to the various factors set out in rule 79(2): see *Merricks SC* per Lord Briggs at [59]-[61].

15. That is exactly what was done in the present case, following the approach in the Guide at para. 6.39 (quoted in *Merricks SC* at [29]). The Judgment at [184] refers back to the analysis of the merits in the context of determination of the summary judgment applications (Judgment at [55]-[66]), and the view there reached on the merits was taken into account in the decision as to whether or not the proceedings should be opt-out proceedings. We did not for the purpose of rule 79(3) "apply" the summary judgment test; but having reached a view on the merits when refusing summary judgment and having concluded that the claims have a realistic prospect of success, there was no need to repeat the analysis of the merits all over again when taking "a high level view" of the strength of the case as a factor in deciding whether opt-out proceedings should be permitted. These were not cases where the Respondents only just failed to obtain summary judgment, and our approach is therefore consistent with that of the differently constituted tribunal in *Le Patourel v BT Group PLC* [2021] CAT 30.

16. For the same reason, the reference in Ground 1 of Stagecoach's application to the Tribunal "determining a merits threshold" for certification is misconceived. No such determination was made. The sentence on which Stagecoach seeks to place such weight at the end of [51] in the Judgment is merely the observation that, "in the present cases", given the view of the merits that we arrive at in determining the summary judgment applications, then "taking account of the

merits" when applying rule 79(3)(a) does not "in practice" involve an additional merits assessment.

17. LSER alleges that the evaluation under rule 79(3) was flawed "in failing to take into account" all the various objections it had raised to the application. However, rule 79(3) gives the Tribunal a discretion in making an evaluative determination and it is not required to consider again all the matters that is has considered in finding that the claims are eligible for inclusion in collective proceedings on the basis of "common issues" and suitability.

(b) Summary judgment/strike-out

18. Insofar as Ground 2 of Stagecoach's application seeks to appeal against the refusal of summary judgment, the application repeats some of the arguments advanced at the hearing for the grant of summary judgment, which were rejected for the reasons set out in the Judgment at [54]-[69]. The Respondents do not now suggest that they can defeat summarily the allegation of dominance. The Applicant is here alleging a systemic abuse by companies assumed to be dominant, by their operation of an unfair selling system, with various particulars given of the alleged unfairness, leading a large proportion of a category of their customers to pay unnecessarily for a part of their travel. We do not think that an appeal contending that it is not reasonably arguable that this amounts to an abuse, in terms of the developing jurisprudence of the EU Courts, stands a real prospect of success, particularly since the categories of abuse are not closed: Judgment at [60].

19. Stagecoach raises a specific point that the Tribunal erred in equating the absence of a specific counterfactual with whether a claimant needs to state a case on what the defendants to an abuse claim are said to have done wrong: Stagecoach application at para 22. It accepts that the former is not required: e.g. to sustain a claim for long-term exclusive dealing it is not necessary to specify what shorter term would avoid an infringement of the law, on the basis that it is clear that such a practice could be said "to make it difficult for the dominant undertaking's smaller competitors to compete": Stagecoach application, para 22.2. However, it is trite law that abuse of dominance may be constituted by

exploitative conduct as well as exclusionary conduct. The abuse alleged in the present case is exploitative conduct, not exclusionary conduct. We consider it clear that a practice which leads many customers to pay again for part of their rail journey for which they already hold a valid ticket could be said to constitute exploitative conduct.

20. Ground 5(1) of LSER's application challenges the refusal of summary judgment as regards claims for fares sold by third parties, such as Trainline.com. Stagecoach raises the same point under Ground 2 of its application, at para 23. Many such third parties did not sell Boundary Fares at all. The Tribunal held that it is well arguable that such third party suppliers would have been influenced in their conduct as regards Boundary Fares if such fares had been widely available and offered from the Respondents' outlets: Judgment at [71]. LSER and Stagecoach contend that there was no evidential basis for this finding and LSER further contends that it was never pleaded by the Applicant. However, it was accepted and indeed submitted by LSER that such third party suppliers are the TOCs' competitors in selling train fares. We do not consider that, at the preliminary stage of certification of a CPO, an applicant is required to adduce evidence, whether economic or otherwise, that companies may be expected to react to the conduct of their competitors, particularly if those competitors are dominant. As to the pleading point, the Applicant did indeed raise this point in his pleading: Reply, para 38. It was repeated in the oral submissions on behalf of the Applicant.

21. Ground 5(2) of LSER's application challenges the refusal of summary judgment against the claims that Boundary Fares should have been offered for the types of ticket for which they were not available at all: Judgment at [74]. However, as Stagecoach pointed out, this aspect is of minimal significance with the exception of Advance Fares: see Judgment at [66] and Holt 2nd at paras 2.3.9-2.3.10. Although Advance Fares are more significant, we held that the argument on such promotional fares is not straightforward and that it is preferable for this matter to be investigated on the evidence at trial and not singled out for summary determination. Following the observations of the Court of Appeal in *TFL Management*, cited in Judgment at [74], that is an entirely orthodox approach.

22. Accordingly, we consider that the two grounds of Stagecoach's application and Grounds 4-5 of LSER's application do not have a real prospect of success.

(2) Common issues and causation of loss: LSER Ground 1; First MTR Ground 1

23. In essence, First MTR and LSER contend that the Tribunal was in error in determining that matters were "common" issues across the class when those issues would be decided in various and differing ways as between individual class members, and some class members will have suffered no loss. Thus First MTR challenges the finding of common issues in the Judgment at [135(2)(i)] and [135(2)(iii), (4) and (5)].

24. It is indeed correct that if approached individually for each class member, the issues would not be resolved the same way for all class members and some individuals will not have suffered loss. This ground therefore raises the question how common issues and liability have to be established when the collective proceedings seek aggregate damages.

25. We recognise that this is an important matter of considerable significance for the collective proceedings regime but we consider that it has been resolved by the appellate courts. In *Merricks CA* (at [45] to [47]), the Court of Appeal, reversing the Tribunal, held that pass-through was a common issue, although there was clearly a wide variety of the extent to which individual class members will have experienced pass-through to them by merchants and, depending on where and/or in which sector of commerce they made purchases, some class members will have experienced minimal pass-through. (Indeed, some class members, e.g. residents of care homes, are unlikely to have made any relevant purchases at all.) Although not challenged on further appeal, the Supreme Court clearly approved the Court of Appeal's determination of common issues: *Merricks SC* at [62] and [64(a)].

26. Further, the correct approach to disparate liability questions and common issues was expressly addressed by Lords Sales and Leggatt in *Merricks SC* at [95]-[97], referring to an article by Prof Mulheron and comparison between the UK

and Canadian legislation. Although First MTR submits that the view of Lords Sales and Leggatt should not be followed (application, para 19), that view has recently been repeated and concurred in by seven members of the Supreme Court in *Lloyd v Google LLC* [2021] UKSC 50. Discussing the collective proceedings regime under the CA, the judgment states, at [31]

> "A … significant feature of the collective proceedings regime is that it enables liability to be established and damages recovered without the need to prove that members of the class have individually suffered loss: it is sufficient to show that loss has been suffered by the class viewed as a whole."

Although strictly *obiter*, the judgment was distinguishing collective proceedings in competition law under the CA in its analysis of the forms of collective redress available in English law, which provided the context for determining the correct interpretation of the requirements for a representative action under CPR rule 19.6.

27. In light of the endorsement of this interpretation of the collective proceedings regime and of s. 47C(2) at the highest level , we do not consider that an appeal has a real chance of success.

28. We should add that we consider that First MTR and LSER are mistaken in suggesting that the CPO could lead to an obligation on the Respondents to pay more damages than they have actually caused. Mr Holt's method of quantification will lead to an estimate of the difference between the amount paid for all in-scope journeys by Travelcard holders and the amount that would have been paid if they had bought Boundary Fares. But it will be for the Applicant at trial to persuade the Tribunal of the extent to which passengers taking such journeys would probably have availed themselves of the opportunity to purchase a Boundary Fare, if it had been well publicised and/or made available. If the Tribunal concludes on the evidence (whether survey evidence or otherwise), that only 85% of passengers would have done so, then an appropriate reduction will be made to Mr Holt's figures. As the Applicant points out in his response to the applications for permission to appeal, this is a question of the correct counterfactual, to be determined at trial, and does not require an individualised consideration of each one of many thousands of

claims. The same approach applies to the Respondents mitigation arguments. The suggested risk of excessive liability is therefore misplaced.

29. LSER additionally contends that the Tribunal erred in its treatment of the Canadian and US authorities: application, para 11. No error as regards the Canadian authorities is cited. Moreover, although the term "common issues" is a convenient shorthand, the statutory requirement in the UK is for the claims to "raise the same, similar or related issues" of fact or law: s. 47B(6) and see Judgment at [108(1)]. That is a distinction with the class action statutes of the Canadian common law provinces. And even for the common law provinces where "common issues" is a requirement, the Canadian courts have recognised that this does not preclude there being a significant level of difference between class members: Judgment at [107(3)]. As regards the US authorities, the US regime has much less relevance to the UK regime: see the Judgment at [118]-[120].

(3) Suitability: First MTR Ground 2 and LSER Ground 3

30. In part, these grounds as articulated in the applications reflect the alleged errors made regarding common issues put forward in the previous grounds and take the matter no further.

31. However, LSER further contends that in the balancing exercise under rule 79(2), the Tribunal "failed to give adequate weight" to the conclusion as to the cost-benefit analysis set out in the Judgment at [165]-[178].

32. In *Merricks SC*, the Supreme Court explained at [61] that under rule 79(2):

> "… the CAT is expected to conduct a value judgment about suitability in which the listed and other factors are weighed in the balance. The listed factors are not separate suitability hurdles, each of which the applicant for a CPO must surmount."

Accordingly, the reference to costs and benefits in rule 79(2)(b) is not a separate hurdle, and the weight to be given to the various factors cannot be precisely calibrated but is a matter for the Tribunal's judgment. Although concerned about the cost compared to the compensation individual class members may

actually receive, we also considered that this is not the only measure of benefit for a stand-alone action and that behaviour modification by potential wrongdoers is also a potential benefit: Judgment at [177]. The Respondents do not contend that this was an irrelevant consideration.

33. First MTR contends that the Tribunal erred as a matter of law in contemplating that there could be a different proposal for distribution from the Epiq Plan exhibited to the CPO application: First MTR application at paras 34-36. However, the final method adopted for distribution can be determined by the Tribunal under rule 92 after an award of aggregate damages is made. There is accordingly no requirement that the method of distribution is determined before certification so that the respondents to the CPO application can criticise it as part of their opposition to a CPO. Moreover, here the method put forward with the application was formulated following the Tribunal's judgment in *Merricks* holding that distribution must be, at least in a broad sense, compensatory. That decision was subsequently reversed on appeal.

34. Finally, LSER contends that it is more suitable for these claims to be determined on an individual basis: LSER application at para 16. We regard that contention as hopeless. The obvious reality is that if these claims cannot be pursued by way of collective proceedings they will not be brought at all. Therefore individual proceedings are clearly not "a relevant alternative": *Merricks SC* at [64(c)]. Furthermore, if they were, theoretically, brought as individual proceedings the Tribunal would be faced with tens of thousands of individual claims, a situation which (even with thorough case management) is hardly conducive of judicial economy, one of the benefits which the collective proceedings regime seeks to achieve: per McLachlin CJ in *Hollick*, quoted by Lord Briggs in *Merricks SC* at [37].

35. Accordingly, we do not consider that these grounds of appeal have a real prospect of success.

(4) The *Microsoft* test: no credible or plausible methodology: LSER Ground 2

36. LSER contends that the Tribunal erred in concluding that the Applicant has put forward a credible and plausible methodology, for which there was available evidence, to estimate aggregate damages, i.e. in application of the test in *Pro-Sys v Microsoft*.

37. It was, and remains, common ground that the Tribunal should apply the *Microsoft* test which is set out in the Judgment at [100]. It is accepted that the Tribunal sought to apply this test in the Judgment at [140]-[164] in assessing Mr Holt's proposed method of calculating aggregate damages. LSER in essence contends that the Tribunal's evaluation of Mr Holt's method under this test was wrong, in particular because we should have found that Mr Holt's methods of addressing the 'overlap' issue (Mr Holt's stage 3) were inadequate.

38. In our view, that is not a question of law and therefore does not give rise to a permissible ground of appeal.

(5) Some other compelling reason for permission to appeal

39. The Respondents all contend that the Grounds of appeal they advance (save for LSER's Ground 5: paras 20-21 above) raise issues of wide significance for collective proceedings where the regime is still novel and there are a significant number of CPO applications pending before the Tribunal. On that basis, they submit that there is some other compelling reason to grant permission to appeal under CPR 52.6(1)(b).

40. We recognise that the issue considered at (2) above is of wide significance. If, contrary to our view, an appeal against our decision on that issue has a real prospect of success then doubtless permission to appeal will be given. But if an appeal on that issue has no real prospect of success in the light of the appellate decisions in *Merricks* and *Google*, then we do not see that permission to appeal should nonetheless be granted. We would only add that with a wholly novel regime there will inevitably be novel issues of wider significance decided in the early cases, and if permission to appeal is given on that basis even when the

appeal is not considered to have a real prospect of success, all of these cases will be delayed.

D. EXPEDITION

41. We appreciate that expedition is a matter for the Court of Appeal. We only express the hope that any applications for permission to appeal might be determined swiftly and that if permission is granted, the Court would consider expediting the appeal(s). As we have just observed, there are a significant number of other CPO applications which may be affected by any substantive judgment of the Court of Appeal in the present cases.

E. COSTS

42. The Respondents accept that they should pay the costs of their unsuccessful applications for summary judgment/strike-out.

43. As regards the costs of the CPO application, the Applicant seeks his costs insofar as they were incurred to counter the opposition to that application from the Respondents. He recognises that a part of the costs, including preparing the CPO application itself, would have been incurred in any event and therefore accepts that those costs should be costs in the case. The Applicant therefore seeks his costs as from the date of the Responses to the Application to the conclusion of the post-hearing written submissions, i.e. 1 July 2019 to 17 March 2021, with a deduction of 10% off those costs to reflect the fact that some costs incurred after 1 July 2019 would have been incurred in any event.

44. Any costs awarded would be subject to detailed assessment, but the Applicant seeks a payment on account under rule 104(2). It is common ground that the Tribunal has jurisdiction to make such an order: cp *Merricks: Costs* [2017] CAT 27 at [25].

45. The Respondents contend that all the costs of the CPO application should be costs in the case. Alternatively, if some costs are to be awarded to the Applicant they contend that those costs should properly run only from the date when they

served their amened Responses, post-*Merricks SC,* in late January 2021; and further, that the deduction to reflect work required for the CPO in any event should be very much higher than 10%.

46. The Respondents oppose any payment on account. As regards the summary judgment applications, the Applicant has not filed any statement of costs referable only to those applications. As regards the Applicant's costs more generally, the Respondents take various points which they contend show the extraordinary and excessive level of those costs, which they argue make it impossible to arrive at a fair estimate of the likely costs following detailed assessment, and point also to the variation of the proposed class definition by the Tribunal.

(1) Costs of the CPO Application

47. We consider that the Applicant should recover the great majority of the costs of the CPO application incurred by reason of the Respondents' opposition. Under the statutory collective proceedings regime, the approval of the collective proceedings and grant of a CPO is an important and significant stage of the proceedings. If a CPO is opposed and the applicant is successful in overcoming that opposition, in our judgment they should in general be able to recover the costs involved. We reject the analogy suggested by LSER to an application for permission to bring judicial review in the Administrative Court. The regimes are entirely different and once a CPO is granted, many of the issues as regards the authorisation condition and the certification condition that were addressed on the CPO application will not be considered again in the proceedings, unless there should be a subsequent application to set the CPO aside. Moreover, when a party has been successful on a discrete and substantial matter in the course of what will be lengthy proceedings, it is generally appropriate that it should recover the costs involved. We respectfully adopt the observation of Nugee J (as he then was) in *Merck KGaA v Merck Sharp & Dohme Corp & Others* [2014] EWHC 3920 (Ch) at [6]:

> "It is in general a salutary principle that those who lose discrete aspects of complex litigation should pay for the discrete applications or hearings which

> they lose, and should do so when they lose them rather than leaving the costs to be swept up at trial."

Our conclusion accords with the approach of the Tribunal in *Le Patourel v BT Group PLC* [2021] CAT 32.

48. As noted above, the Applicant accepts that a portion of his costs would have been incurred in any event and so are not now recoverable. The question is how that portion should fairly be determined. The Applicant's proposed start date related to when the Responses were served has a certain logic. It would bring into account the preparation of the Reply, which was a substantial pleading of 38 pages served in September 2019, responding to the Respondents' three separate Responses, and Mr Holt's second report which was expressly prepared to address concerns raised in those Responses and the witness statements from the Respondents' witnesses: see Holt 2nd, paras 1.1.1-1.1.3. However, as the Respondents point out, this would also mean that the period covers the Applicant's re-pleading of his case following *Merricks SC*. We agree that they should not, irrespective of the outcome of these proceedings, be responsible for those additional costs.

49. In our judgment, the appropriate and fair way to address this is for the adverse costs now ordered to start from the 1 July 2019 as the Applicant suggests, but for those costs to be subject to a significantly higher deduction than he has proposed. In arriving at the level of deduction, we bear in mind that those costs which relate to the summary judgment/strike-out applications, which form part of the Applicant's costs over this period, are being awarded against the Respondents without deduction, although distinguishing those costs from the totality may not be easy. We further take into account the matters raised in subsequent correspondence (see below) and also the revisions to the proposed class definition to exclude a category of "point-to-point" fares and season tickets, following argument at the hearing and further submissions made following the Judgment. In all the circumstances, the appropriate deduction in our view is therefore 35%.

50. We therefore award the Applicant his costs of the summary judgment/strike out applications and 65% of the costs of his CPO application incurred between 1

July 2019 and 17 March 2021, those costs to be subject to detailed assessment if not agreed. The balance of the Applicant's costs are costs in the case.

(2) Payment on account

51. The Applicant served his statement of costs only late on 10 November, the day before skeleton arguments had to be exchanged for the consequentials hearing. That was unhelpful. Further, following queries raised by the Respondents, the Applicant served a revised statement of costs on 16 November. As a result, there have been further submissions on costs by way of correspondence following the hearing. Some of the points raised by the Respondents in that correspondence relate to the question of what costs are attributable to their opposition to the CPO application as opposed to being incurred in any event. To that extent, we have taken those points (and the response made on behalf of the Applicant) into account in arriving at the proportionate deduction set out in para 49 above.

52. The total costs in the Applicant's revised statement amount to over £1.7 million (plus VAT). That is a staggering sum, especially when compared to the costs budget submitted with the CPO application which showed the costs for this stage, including a 3-4 day hearing, at some £552,000 (plus VAT). Even allowing for the facts that that budget was prepared in early 2019 whereas by reason of the appeal in *Merricks* the hearing of the CPO application was significantly delayed (with a consequent increase in the hourly rates), and that the costs include the revision to the application resulting from *Merricks SC*, this is nonetheless a striking increase.

53. The Applicant' solicitors have explained some of the increase by reference to the work occasioned by the two fixtures for hearing the application in anticipation of the Supreme Court judgment which then had to be vacated and re-listed, and in terms of the detailed opposition taken by the Respondents to virtually every aspect of the CPO application. That includes objections to the Applicant's funding arrangements which the Applicant had to address but which were not ultimately pursued before the Tribunal. Nonetheless, we note in particular that:

(1) The total fee-earners' hours spent by the solicitors amounts to 3,114 hours, which seems to us disproportionate. For example, although the Applicant has three counsel at least four fee-earners appear to have attended all the hearings (including the CMC in January 2021), leading to a charge for over 450 hours.

(2) The solicitors' hourly rates for grades A-C are all over 25% above the Guideline hourly rates for City firms recently issued with Guide to the Summary Assessment of Costs. Although an excess over those hourly rates may be reasonable for complex litigation in a specialist area, the excess here is very significant.

(3) The expert fees of just over £230,000, in respect of the 2nd report of Mr Holt (c. £127,000) and his attendance at the hearing (c. £104,000), seem remarkably high figures, which we have to say we find unreasonable. Mr Holt's supplementary report, although detailed, was 34 pages long.

(4) The case was stayed over the period 1 November 2019 to 30 November 2020 (due to the *Merricks* appeal) and although we accept that some work and correspondence took place over that period, it is striking that the Applicant's legal costs incurred in that time amount to over £150,000 (plus VAT).

54. The Applicant reminds us that an interim payment should seek to reflect an estimate of the likely costs that will be recovered, with an appropriate margin to allow for an over-estimate: *Excalibur Ventures LLC v Keystone Inc.* [2015] EWHC V566 (Comm) per Christopher Clarke LJ at [22]-[24]. However, it is not appropriate to conduct an intensive review of a costs schedule for the purpose of arriving at an interim payment, and in light of the considerations set out above we find it difficult to come to a reliable estimate of the likely recovery in this case. Accordingly, we consider that the fair approach is to apply a very substantial reduction to the total in the revised costs schedule. Taking a very broad brush approach, we therefore adopt a round figure of £1 million (plus VAT).

55. Applying 65% to that figure (since there is no attempt to split off costs for resisting the applications for summary judgment), produces £650,000 + VAT. We therefore order that the Respondents pay a total of £780,000. Subject to any application to vary the date, that sum is to be paid within 21 days.

56. This ruling is unanimous.

The Hon. Mr Justice Roth Simon Holmes Prof. Robin Mason
Chairman

Charles Dhanowa O.B.E., Q.C. (*Hon*) Date: 3 December 2021
Registrar