



Neutral Citation [2022] CAT 54

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1404/7/7/21

BETWEEN:

DAVID COURTNEY BOYLE

Class Representative

- v -

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

Defendants

- and -

SECRETARY OF STATE FOR TRANSPORT

Intervener

REASONED ORDER (COSTS)

UPON the Class Representative's ("CR") application for a collective proceedings order (the "**CPO Application**") pursuant to section 47B of the Competition Act 1998 and Rule 75 of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) (the "**Tribunal Rules**")

AND UPON the Tribunal having granted the CPO Application by its judgment issued on 25 July 2022 under Neutral Citation Number [2022] CAT 35 (the "**Judgment**")

AND UPON the Tribunal having received the parties' applications for costs following the Judgment

AND UPON the Tribunal having considered the costs applications on the papers filed with the Tribunal

AND UPON the Tribunal considering it appropriate to determine the costs applications on the papers

IT IS ORDERED THAT:

1. The Defendants pay the CR's costs of, and occasioned by, and incidental to the opposition to the CPO Application, such costs to be subject to detailed assessment forthwith if not agreed.
2. The Defendants make a payment on account under Rule 104(2) of the Tribunal Rules of £250,000 within 28 days of this Order.

REASONS

1. The CR seeks his costs of, occasioned by, and incidental to the Defendants' unsuccessful opposition to the CPO Application. Specifically, the CR seeks an order that: (a) the Defendants, on a joint and several liability basis, pay the CR's costs of, occasioned by, and incidental to the opposition to the CPO Application; (b) any costs awarded are subject to detailed assessment forthwith if not agreed; and (c) the Defendants make a payment on account under Rule 104(2) of the Tribunal Rules.
2. The incidence of costs is not opposed, although the precise nature of the order was not agreed. It was common ground that a detailed assessment take place forthwith, if the costs payable cannot be agreed.
3. The point in issue, apart from the precise terms of the order, concerns the amount of any interim payment that should be made pending detailed assessment.
4. It is common ground that the Tribunal may order a payment on account of costs. The principles governing the amount of costs to be ordered on account are not in dispute: the court or tribunal should seek to order a realistic estimate of the reasonable costs likely to be determined on detailed assessment, with an appropriate margin to allow for an overestimate: *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm).
5. The CR seeks an interim payment on account of 70% of his costs which total £715,163.00 (inclusive of VAT). The Defendants submit that the appropriate order is for a payment on account of 40% of the total costs claimed in the CR's costs schedule which is approximately £286,065.

6. Whilst the CR was – in the round – successful, in that CPO Application succeeded – the CR was unsuccessful in relation to a number of subsidiary points, which took up time and (at least in one case) affected the nature of the order made. While the Tribunal granted the CPO Application, it was willing only to authorise Mr. Boyle as the CR. The Proposed Class Representatives also conceded a number of matters following the Defendants’ Response, and sought to introduce hopeless claims by way of very late amendments that the CR has now abandoned.
7. In principle, the Defendants say that they ought to recover their costs in respect of these matters. However, the Defendants suggested an order that carved up the incidence of costs in a manner reflecting the points lost and won. The Defendants suggested that the appropriate order on costs was as follows:
 - a. For the period prior to 4 February 2022 (the date of the Defendants’ Response), a considerable proportion of the CR’s costs of the CPO Application should not be recoverable in any event (reflecting the fact that a proportion of those costs were incurred in respect of arguments that did not ultimately succeed or were conceded).
 - b. The remainder of the CR’s costs for the period prior to the service of the Defendants’ Response on 4 February 2022 shall be costs in the case.
 - c. As to the period from 4 February 2022 to the date of the Judgment (25 July 2022):
 - i. 25% of the CR’s costs of the CPO Application shall be costs in the case (reflecting the fact that the CR would always have had to incur significant costs in order to satisfy the Tribunal that a CPO should be granted); and
 - ii. the CR should be awarded his remaining costs of the Application post-4 February 2022, but again subject to a considerable discount to reflect his lack of success on significant issues.
 - d. The CR should pay the Defendants’ costs of and occasioned by the various amendments that the CR was permitted to make to the Collective Proceedings Claim Form.
 - e. The costs to be paid by the Defendants are to be the subject of detailed assessment, if not agreed.

8. I am not prepared to make an order along these lines, which is over-complex and seeks to import into questions of incidence questions that are more appropriately dealt with on a detailed assessment. I consider that a costs order as set out in paragraph 1 of the order should be made, but I recognise that recovery of costs (in percentage terms) is unlikely to be as great as it normally would be. In short, I consider that the Defendants' 40% recovery rate is more realistic than the CR's 70%.
9. The Defendants submitted further that the CR's claimed costs are unreasonable and disproportionate as: (i) an excessive proportion of the work claimed for was undertaken by partner-level fee-earners; and (ii) the partner-level fee-earner rates were almost twice the relevant guideline hourly rates set out in the 2021 Guide to the Summary Assessment of Costs. There is some force in these points.
10. This is not a summary assessment of costs and I need to look at the matter in the round for the purpose of an interim payment. As set out by the Tribunal in *Gutmann v London MTR South Western Trains Limited and Others* [2021] CAT 36 at [54], it is not appropriate for me to conduct an intensive review of a costs schedule for the purpose of arriving at an interim payment. Taking a broad-brush approach, I order the Defendants to make an interim payment to the CR of £250,000 (inclusive of VAT). Subject to any application to vary the date, the interim payment is to be made within 28 days of the date of this Ruling.

Sir Marcus Smith
President of the Competition Appeal Tribunal

Made: 28 November 2022
Drawn: 28 November 2022