



Neutral citation [2024] CAT 13

Case No: 1527/7/7/22

**IN THE COMPETITION APPEAL TRIBUNAL**

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

23 February 2024

Before:  
BEN TIDSWELL  
(Chair)  
THE HONOURABLE LORD RICHARDSON  
DEREK RIDYARD

Sitting as a Tribunal in England and Wales

BETWEEN:

**ALEX NEILL CLASS REPRESENTATIVE LIMITED**

Class Representative

- v -

**(1) SONY INTERACTIVE ENTERTAINMENT EUROPE LIMITED  
(2) SONY INTERACTIVE ENTERTAINMENT NETWORK EUROPE LIMITED**

Defendants

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**RULING (COSTS)**

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## **A. INTRODUCTION**

1. On 21 November 2023, the Tribunal handed down a judgment<sup>1</sup> in these collective proceedings (the “Judgment”) in which we (1) granted the application by the Class Representative for a Collective Proceedings Order and (2) refused the Defendants’ (“Sony”) applications for strike out/summary judgment in respect of aspects of the claim.
2. This Ruling deals with the consequential applications by the parties in relation to the costs of the proceedings. By agreement with the parties, we are deciding these applications on the papers,<sup>2</sup> without an oral hearing.

## **B. THE POSITIONS OF THE PARTIES**

### **(1) The Class Representative**

3. The Class Representative submits that it has been the successful party in both the CPO application and the failed strike out/summary judgment applications. It seeks an order for costs on the following basis:
  - (1) Sony should pay 90% of the Class Representative’s Costs in Issue (being the Class Representative’s incurred costs less Excluded Costs<sup>3</sup> and Out of Scope Costs).<sup>4</sup>
  - (2) 10% of the Costs in Issue and the Excluded Costs are costs in the case.
  - (3) The Costs in Issue are to be subject to detailed assessment on the standard basis forthwith, if not agreed.

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<sup>1</sup> [2023] CAT 73.

<sup>2</sup> The Class Representative and Sony filed costs submissions on 19 December 2023. The Class Representative filed further responsive submissions on 5 January 2024.

<sup>3</sup> Certain costs that did not flow from Sony’s opposition to the CPO application or from Sony’s strike out application. This includes class administration costs as well as some costs relating to the Class Representative evidence in reply to issues raised by Sony.

<sup>4</sup> Certain procedural costs and the costs relating to funding matters up until 30 May 2023.

- (4) Unless subject to a previous order of the Tribunal or agreement between the parties, the costs incurred by the Class Representative prior to 1 March 2023<sup>5</sup> are costs in the case.
  - (5) Sony should make a payment on account of the costs referred to in paragraph 3(1) to the Class Representative in the sum of £676,364.
4. The Class Representative’s reasoning in offering a variety of deductions is that there will be an amount of costs which would have been incurred in any event, in order to satisfy the Tribunal that the CPO should be granted. The costs prior to Sony’s opposition to the CPO, the Excluded Costs and the Out of Scope Costs, all fall into that category and a further deduction of 10% reflects a reasonable assessment of additional costs which would have been incurred anyway (for example, assuming some form of hearing was required for the CPO application, even if uncontested).
  5. The sum sought by way of payment on account of costs is 80% of the amount remaining after all the deductions noted above.<sup>6</sup>

**(2) Sony**

6. Sony submits that this is not a case where the Class Representative was a “clear winner” and as a consequence costs should be in the case. This is said to be because:
  - (1) The Class Representative’s funding arrangements were unlawful until revised on 30 October 2023 (after the main CPO hearing and a further hearing about the funding arrangements which took place remotely on 9 October 2023).
  - (2) There were significant deficiencies in the Class Representative’s expert evidence, which were only remedied after Sony put in its response to the CPO applications and filed its own applications for strike out/summary judgment.

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<sup>5</sup> The day after Sony filed its response to the CPO applications and its strike out/summary judgment applications.

<sup>6</sup> The Class Representative’s Costs in Issue are £939,394. 10% of that is deducted as per [3(2)] above and 80% of that is £676,364.

- (3) The Class Representative was required to amend the class definition (Judgment, at [62] – [71]).
  - (4) A substantial discount is warranted for costs which would have been incurred in any event in securing the grant of the CPO.
7. In the alternative, Sony submitted there should be an issues based costs order in which Sony is awarded costs:
  - (1) Generally, from the first CMC (15 December 2022) up to the date on which the Class Representative remedied the defects in its expert evidence (being 21 April 2023).
  - (2) Specifically, in relation to the class definition issues.
  - (3) In relation to funding issues up until 31 October 2023 when the Class Representative served its latest updated funding documents.
8. This would result, on Sony’s calculations, in Sony being awarded costs of £730,895.53, which should be set off against the Class Representative’s costs claims.
9. As a further alternative, Sony submitted that costs should be in the case save for the class definition issue (which should result in costs in Sony’s favour) and the strike out/summary judgment applications (which should result in costs in the Class Representative’s favour, subject to deducting Excluded Costs and Out of Scope costs).

**C. LEGAL FRAMEWORK**

10. Rule 104(2) of the Competition Appeal Tribunal Rules 2015 provides: “*The Tribunal may at its discretion, ... 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.*”
11. Rule 104(4) sets out a number of factors which may be taken into account when making an order under paragraph (2), including:

- “(a) The conduct of the parties in relation to the proceedings;
- (b) Any schedule on 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.”

12. The Tribunal may make a summary assessment of costs or direct that they be dealt with by the detailed assessment of, in an English case, a costs officer of the Senior Courts of England and Wales: rule 104(5).
13. There are now a number of decisions about costs following successful CPO applications<sup>7</sup>, which establish a general approach in which:
  - (1) The applicant's costs relating to the CPO application which would be incurred in any event (that is, in the absence of opposition to the CPO) should be costs in the case.
  - (2) The applicant should be awarded its costs incurred by reason of meeting the opposition to the CPO, discounted to reflect significant or material issues on which the respondent has succeeded.
14. As a working proposition, costs prior to the date of filing of a response objecting to the CPO application will be treated as being costs in the case, although the Tribunal may order an earlier date where it is shown that material costs were incurred in dealing with objections prior to the response being filed.<sup>8</sup> We will refer to this date as the “Start Date”.

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<sup>7</sup> See for example: *Le Patourel (Consequential Matters)* [2021] CAT 32 [6]; *Gutmann (Consequential Matters)* [2021] CAT 36, [2022] BUS L.R. 108 [43], *UK Trucks Claim Limited, Stellantis N.V. (Formerly Fiat Chrysler Automobiles N.V.) and Others v DAF Trucks N.V. and Others* [2022] CAT 51 [11].

<sup>8</sup> See *Le Patourel (Consequential Matters)* [2021] CAT 32 [6]; *Gutmann (Consequential Matters)* [2021] CAT 36, [2022] BUS L.R. 108 [43]; *McLaren (Consequential Ruling)* [2022] CAT 18 at [26]-[28].

## **D. ANALYSIS**

15. We can see no sensible basis on which it can be said that the Class Representative has not been substantially successful in the CPO application and in resisting the strike out/summary judgment applications by Sony. It therefore follows that, as a starting point, the Class Representative should recover its costs of both sets of applications.
16. That is subject to a number of further considerations:
  - (1) The need to carve out costs which would have been incurred in any event, in obtaining the CPO, and the extent of that carve out.
  - (2) The proper treatment of the costs associated with funding issues.
  - (3) The significance of issues arising from the Class Representative's expert evidence and the correction of deficiencies in relation to same.
  - (4) The significance of the success of Sony in arguing that the original class definition put forward by the Class Representative was defective.

### **(1) Costs incurred in any event**

17. There seems to be agreement between the parties on the Out of Scope Costs. The Excluded Costs are not agreed, but the only point in issue appears to be the proper treatment of the costs associated with funding issues (as to which see below).
18. In relation to the Start Date, before which costs should be in the case, we consider the appropriate reference point to be 1 March 2023, being the date on which Sony filed its response to the CPO applications and its strike out/summary judgment applications. Sony argues for a later date on the basis that its response prompted the Class Representative to provide further evidence to deal with potential defects in the collective proceedings. We consider such an evolution of the evidence and the arguments to be part and parcel of contested applications and not to give any reason to depart from the principle that the Class Representative has been substantially successful on all applications.

19. The remaining question is whether the deduction of 10% properly reflects the level of costs that would have been incurred in any event. We note that the Class Representative has, helpfully and properly, included many of these costs in the Excluded Costs and Out of Scope Costs, submitting therefore that 10% is the appropriate figure. However, in our view this level of deduction is likely to underestimate the extent of costs which would have been incurred in any event.
20. We note that in other cases the deduction has been higher than 10%. In *Le Patourel*, it was 20%, in *Gutmann*, it was 35% and in *McLaren*, it was 15%, after other deductions to reflect recoverable costs. Of course, every case will involve different fact patterns and features and it is difficult to compare cases without a detailed understanding of the underlying circumstances (which we do not have). It is also relevant that we do not know exactly how much the Class Representative has already deducted by way of the Excluded Costs, the Out of Scope Costs and the application of the Start Date. That makes it more difficult to assess what the level of general deduction should be for other costs which would have been incurred in any event.
21. Before reaching a conclusion on this point, we will consider the other matters listed in [6] above, which are also of some relevance to any general deduction.

**(2) Costs associated with funding issues**

22. The costs of putting in place the funding arrangements would, in the ordinary course, be costs in the case, along with the other preparatory steps for issuing collective proceedings. Costs incurred in an unsuccessful challenge to those would then ordinarily be recoverable by the class representative, subject to any discount to reflect additional work required to address any shortcomings identified by the defendant or the Tribunal.<sup>9</sup>
23. In this case, there was no material challenge to the funding arrangements at the hearing of the CPO application in June 2023, and it was only following the decision of the Supreme Court in *R (PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] UKSC 28 (“*PACCAR*”), which was handed down on 26 July 2023, that

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<sup>9</sup> See for example *UK Trucks Claim Ltd v Fiat Chrysler Automobiles NV (Costs)* [2019] CAT 29 [9 - 11].

it was apparent that the Class Representative's funding arrangements were unlawful and would need to be amended.

24. That resulted in the Class Representative serving revised funding documentation on 4 September 2023, in advance of the hearing about funding issues which took place on 9 October 2023. At that hearing, the Tribunal raised an issue about the funding arrangements which resulted in further revised funding documents being served on 30 October 2023.
25. We do not agree with Sony's argument that the Class representative cannot recover its costs in relation to funding matters until 30 October 2023, when it served the final form of documents. The amendments to the funding arrangements following the 9 October 2023 hearing were largely for the purposes of clarification and were responsive to concerns on the part of the Tribunal about a particular feature of the arrangements.
26. However, we also consider that the Class Representative should not be entitled to recover its costs in relation to the funding arrangements until after 18 September 2023. That was the date on which Sony provided its observations on the revised funding documents (served on 4 September 2023) in order to address the decision in *PACCAR*. Until that date:
  - (1) Sony's position in opposition to the revised arrangements was not yet apparent.
  - (2) The Class Representative cannot be said to have been successful on the funding issues (because the decision in *PACCAR* intervened to invalidate the original arrangements) and all the costs should be assumed to have been incurred in any event.
27. Accordingly, the costs incurred prior to 18 September 2023 in relation to funding should be costs in the case. We understand that the Class Representative included costs of £45,671.50<sup>10</sup> in its schedule of Costs in Issue in relation to funding issues in the period prior to 18 September 2023. These costs should be deducted from the Costs in Issue figure and should be treated as costs in the case.

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<sup>10</sup> See Milberg London LLP letter to Linklaters LLP dated 11 January 2024 at [4].



**(3) Remediating deficiencies in the Class Representative’s expert evidence**

28. As recorded in the Judgment,<sup>11</sup> the expert for the Class Representative, Mr Harman, did not, in his first report, deal with a particular issue, as part of his proposed methodology, as we would have expected. This was remedied in Mr Harman’s second report filed on 21 April 2023.
29. The Class Representative has already allocated to Excluded Costs the costs of Mr Harman’s second report. We do not consider it necessary to make an additional allowance for costs that would have been incurred in any event in relation to this or other issues which were addressed in the Class Representative’s Reply. To the extent there were further costs incurred in relation to these matters, they were, in our view, the consequence of Sony resisting the CPO application and making its own applications, in respect of which Sony was largely unsuccessful.

**(4) Remediating deficiencies in the class definition**

30. It is correct that Sony was successful in its challenge to the class definition put forward by the Class Representative, which challenge was advanced by Sony both as a matter of scope of the collective proceedings regime and as a basis for strike out. However, it was a narrow issue, which was not seriously contested by the Class Representative at the CPO hearing. We do not consider the issue to be of sufficient significance (in terms of costs) to warrant an award on an issues based approach. It can and should be sufficiently dealt with by the general deduction from the Costs in Issue figure.

**(5) Conclusion on costs in issue**

31. In this case, taking into account the proposed deductions as best we can assess them (noting a measure of agreement by Sony with the Excluded Costs and Out of Scope Costs), as well as the further matters discussed above, we consider that a general deduction of 15% would be appropriate to reflect further costs which would have been incurred in any event. This amounts to approximately £140,000, which we think is likely to correspond closely with the work required after the Start Date which would

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<sup>11</sup> See for example Judgment at [47].

have been required in any event (including a hearing on an uncontested basis), together with any incidental costs which the Class Representative should not recover at this stage (for example, those relating to the class definition issue).

32. The further sum of £45,671.50 relating to work on funding documents should also be deducted from the Class Representative's schedule of Costs in Issue and should instead be treated as costs in the case.
33. As a result, the reduced Costs in Issue figure is £893,723.10 (including VAT). We order that Sony should pay 85% of that figure, subject to a detailed assessment on the standard basis forthwith, if not agreed. The remaining 15% of the reduced Costs in Issue figure is to be costs in the case.

**E. PAYMENT ON ACCOUNT**

34. The Class Representative seeks a payment on account of its costs, at a level of 80% of the Costs in Issue. We agree that the Class Representative should receive a payment on account, given the size of the costs to be subject to detailed assessment and the time it will inevitably take to carry out that assessment.
35. The test for assessing the amount of an interim payment was set out in *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm), being to “*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*”.
36. We note that, apart from the usual considerations about the recoverability of costs in litigation of this nature, there is an issue between the parties as to whether the conditional fee arrangements (“CFAs”) entered into by the Class Representative have been triggered by the Judgment and any award of costs, so as to provide for the full uplift in rates to the counterparties to those arrangements. That is not an issue which we intend to address in any detail now, other than to note that it is a reason why some additional caution is necessary in coming to a reasonable estimate of recoverable costs.

37. We would in any event have considered a payment at 80% too high as a reasonable estimate, including an appropriate margin. Taking into account the CFA issue, in our judgement the right level for a payment on account is 65%. This is to be applied to £759,664.64 (being 85% of £893,723.10) to produce a figure for payment on account of £493,782.01. This amount is to be paid by Sony to the Class Representative within 14 days of the date on which this Ruling is handed down.
38. The Class Representative is also entitled to be paid the costs of its costs application, in which it has been substantially successful. Those costs are to be included in the detailed assessment referred to above, if not agreed.

Ben Tidswell  
Chair

Lord Richardson

Derek Ridyard

Charles Dhanowa O.B.E., K.C. (*Hon*)  
Registrar

Date: 23 February 2024