Neutral citation [2025] CAT 22

<u>IN THE COMPETITION APPEAL TRIBUNAL</u>

Case No: 1266/7/7/16

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

<u>28 March 2025</u>

Before:

THE HONOURABLE MR JUSTICE ROTH
(Acting President)

Sitting as a Tribunal in England and Wales

BETWEEN:

WALTER HUGH MERRICKS CBE

<u>Class Representative</u>

\- and -

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE S.P.R.L.

<u>Defendants</u>

\- and -

INNSWORTH CAPITAL LIMITED

<u>First Intervener</u>

\- and -

THE ACCESS TO JUSTICE FOUNDATION

<u>Second Intervener</u>

RULING (COSTS)

A. INTRODUCTION

1. On 16 January 2025, the Class Representative ("CR") and the Defendants ("Mastercard") jointly issued an application for approval of a collective settlement of these proceedings pursuant to s. 94A Competition Act 1998 ("the CSAO Application"). The CSAO Application and accompanying documents contain confidential and privileged material. Pursuant to his obligations under his litigation funding agreement with Innsworth Capital Ltd ("Innsworth"), the confidential version of those documents was provided by the CR to Innsworth.

2. On 16 December 2024 Innsworth applied to intervene in the proceedings, in order to oppose the CSAO Application.

3. By letter dated 21 January 2025 from his solicitors, the Class Representative ("CR") applied for an order preventing Innsworth from using any of the above confidential and privileged documents in support of its application to intervene or for the purpose of opposing the CSAO Application, or from disclosing them to third parties ("the Documents Application"). The letter made clear that by third parties the CR included Innsworth's solicitors and counsel.

4. By order of 23 January 2025, I allowed Innsworth's application to intervene, limited to the determination of the CSAO Application.

5. By reasoned order of 29 January 2025 ("the 29 January Order"), I refused the Documents Application and ordered that the CR shall pay Innsworth's costs, those costs to be summarily assessed.

6. Innsworth filed under cover of its solicitors' letter of 17 February 2025 a Form N260 schedule of its costs of the Documents Application, showing total costs of £52,722.17 with no VAT claimed.

7. The CR made submissions regarding Innsworth's application for those costs at paras 15 and 30-31 of the 9th witness statement of Mr Boris Bronfentrinker served in the substantive CSAO Application. Innsworth has replied in its

Further Written Submissions on Costs, dated 28 February 2025 at paras 28-32. The CR responded to this aspect of Innsworth's Further Submissions in his Response dated 7 March 2025 at paras 10-11. Innsworth replied to that Response in a yet further written submission dated 11 March 2025, at paras 10.1-10.4. This plethora of written submissions is remarkable for such a limited exercise as an assessment of the costs of a paper application, but is unfortunately in character for the way these parties, through their solicitors, have recently conducted these proceedings.

8. As stated at para 3 of the 29 January Order, Innsworth's recoverable costs are to be summarily assessed by me; they are not a matter for the full panel of the Tribunal determining the CSAO Application. This is my ruling accordingly, for which I have taken into account all the parties' written submissions.

B. THE CR'S LIABILITY TO PAY THE COSTS

9. The CR contends that no adverse costs should be assessed as payable by Innsworth on the basis that under the terms of the Litigation Funding Agreement made between them ("the LFA") Innsworth itself would be obliged to discharge any such liability. An order that the CR should pay Innsworth's costs and assessment of Innsworth's costs therefore would serve no purpose.

10. The CR relies on the definition of "Adverse Costs Order" in cl. 1.1 of the LFA:

> "Any quantified costs order made in favour of the Defendant(s) and/or any other party and/or non-party in connection with the Proceedings in respect of costs of the Defendants and/or any other party and/or non-party incurred following the Commencement Date (the Funder having no liability under this Agreement for any such costs preceding that date, and such liability in respect of the Appeals being governed by the Appeals Funding Agreement)."

11. The LFA then provides, at cl. 3.1(iii):

> "The Funder agrees that: …
>
> (iii) it will pay any Adverse Cost Order(s) paid after the Commencement Date…"

12. The CR submits that an order whereby the CR is to pay costs to Innsworth is a costs order "in favour of …any other party and/or non-party in connection with"

these proceedings, and therefore constitutes an "Adverse Costs Order" which Innsworth is bound to pay pursuant to cl. 3.1(iii).

13. As a matter of principle, this objection does not relate to the assessment of costs but to the terms of para 3 of the 29 January Order itself, and the CR has made no application to vary that order. But in any event, I regard the submission as misconceived. Like any commercial agreement, the LFA has to be interpreted in its context and against the surrounding circumstances at the time it was entered into. The general principles of contractual construction have been authoritatively stated by the Supreme Court in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173. In his judgment, with which all the members of the Court agreed, Lord Hodge DP stated at [10]:

> "The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning."

And he further explained, at [13]:

> "Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement."

14. The broad definition of "Adverse Costs Orders" is in terms of any costs order in favour of "Defendants and/or any other party and/or non-party … in respect of costs of the Defendants and/or any other party and/or non-party". Literally read, this definition would therefore cover a costs order in favour of the CR. Manifestly, it cannot have been the parties' intention for Innsworth to discharge a costs order (e.g. against Mastercard) in favour of the CR. The whole purpose of the LFA is for Innsworth to provide funds to enable Mr Merricks to pursue the collective proceedings against Mastercard: it is not to enable Mr Merricks to pursue claims or make applications against Innsworth. That is why Innsworth has the obligation set out in cl. 3.1(iii).

15. Moreover, to interpret the definition as covering orders in favour of Innsworth would produce commercially nonsensical results. As Innsworth points out in its Further Written Submissions of 28 February 2025, it would mean that the CR "could bring any number of unreasonable applications against his own funder in respect of which costs could be awarded against him, but which the funder would be required to pay."

16. Accordingly, I have no doubt that, objectively viewed, the 29 January Order in favour of Innsworth does not come within the scope of cl. 3.1(iii).

C. ASSESSMENT OF COSTS

17. Innsworth's costs are to be assessed on the standard basis. Therefore those costs must be both reasonable and proportionate.

18. The letter of 21 January 2025 making the Documents Application comprised 26 numbered paragraphs. The substantive response from Innsworth's solicitors opposing the application was by letter dated 27 January 2025, which made detailed submissions over 12 pages. There were shorter supplemental submissions by way of an exchange of a further letter from each party. No evidence was filed and there was no oral hearing.

19. I accept, as urged by Innsworth in its submissions on costs, that opposing the Documents Application was, at least in some respects, critical to its ability to participate effectively in opposing the CSAO Application. I also recognise that it had to prepare its response to the Documents Application in a tight timeframe. Nonetheless, considering what was involved I regard costs claimed of over £52,000 as wholly disproportionate and unreasonable.

20. Having regard to the schedule of costs served by Innsworth's solicitors, I have no criticism of the time spent by the solicitors. The remarkably high level of costs incurred is explained by (i) the hourly rates charged, and (ii) the instruction of both leading and junior counsel to advise on the response. Somewhat remarkably, the total fees of the solicitors and for the advice of the two counsel amount to exactly the same sum: i.e. £26,355.50 in each case.

21. As regards the hourly rates, the schedule incorrectly fails to specify the grades of the solicitors involved but Mr Bronfentrinker has assumed the relevant grades at para 15 of his 9th witness statement and that has not been challenged in the subsequent submissions from Akin Gump LLP ("Akin Gump"). The rates charged by Akin Gump, compared to the published Guideline Rates for "very summary assessment (as recently updated for 2025) are as follows:

	Akin Gump	**London 1 Guideline Rates**
Grade A	£1,485	£566
Grade B	£1,120	£385
Grade C	£690	£299

22. Accordingly, Akin Gump is charging at well over double, and in the case of the Grade B solicitor almost three times, the London 1 Guideline Rates. Those rates are expressly for "very heavy commercial and corporate work by centrally based London firms". In *Samsung Electronics Co Ltd v LG Display Co Ltd* [2022] EWCA Civ 466, the Court of Appeal held that there has to be "a clear and compelling justification" for the award of costs in excess of the guideline rates.

23. I am concerned here only with the costs that are recoverable from the CR. Innsworth may choose to agree with its solicitors to pay a much higher rate of fees, and I note that the CR's solicitors also charge substantially in excess of the guideline rates. But that does not mean that costs incurred at those rates are recoverable from the other side. I recognise that these are important and complex proceedings. On that basis, but also because the then guideline rates were over a year old, in the Tribunal's previous costs ruling in these proceedings it was held that charges at about 30% over the guidelines were justified: [2023] CAT 53. However, the guideline rates above are revised and came into effect only on 1 January 2025, and the Documents Application itself was not complex. In these circumstances, I consider that no more than 20% over the guidelines can be justified. Taking a broad brush approach, I therefore summarily assess the reasonable solicitors' fees at £12,000.

24. As regards counsel, I do not accept that it was reasonable to instruct two counsel for this purpose. The Documents Application did not involve any particularly complex law, but only consideration of the well-established principles of legal professional privilege and the terms of the LFA. Counsel fees of £26,355.50 for that advice are wholly disproportionate. For that limited exercise, in my view, fees of £10,000 would be generous but I will assess them in that amount because of the urgency with which the advice was required.

25. Standing back, I regard £22,000 as a reasonable and proportionate sum for Innsworth's costs in all the circumstances of the Documents Application, and I summarily assess the costs in that amount.

26. The issue of how those costs are to be paid will be addressed in the judgment of the Tribunal on the CSAO Application.

The Hon. Mr Justice Roth
Acting President

Charles Dhanowa CBE, KC (*Hon*)
Registrar

Date: 28 March 2025