



Neutral citation [2023] CAT 18

Case Nos: 1425/7/7/21

IN THE COMPETITION
APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

24 March 2023

Before:

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

Sitting as a Tribunal in England and Wales

BETWEEN

JUSTIN GUTMANN

Applicant / Proposed Class Representative

-and-

(1) GOVIA THAMESLINK RAILWAY LIMITED

(2) GOVIA LIMITED

(3) THE GO-AHEAD GROUP PLC

(4) KEOLIS (UK) LIMITED

Respondents / Proposed Defendants

Heard at Salisbury Square House on 22 March 2023

JUDGMENT (CERTIFICATION)

APPEARANCES

Mr Philip Moser KC, Mr Stefan Kuppen, and Ms Alexandra Littlewood (instructed by Hausfeld & Co. LLP and Charles Lyndon Ltd) appeared on behalf of the Applicant / Proposed Class Representative.

Mr Paul Harris KC, Ms Annaliese Blackwood and Ms Clodhna Kelleher (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Respondents / Proposed Defendants.

1. On 22 March 2023, at the hearing of the application by the proposed class representative (“PCR”), Mr Gutmann, the Tribunal made a collective proceedings order (“CPO”) in these proceedings. This brief judgment sets out our reasons for that decision.
2. On 18 January 2022, the Tribunal with the same constitution made a CPO in two sets of proceedings commenced by Mr Gutmann against train operating companies (“TOCs”) who hold or held, respectively, the south-western (“SW”) rail franchise and the south-eastern (“SE”) rail franchise. The reasons for concluding that a CPO should be made in those cases is fully set out in the judgment of the Tribunal: *Gutmann v First MTR South Western Trains Ltd and ors* [2021] CAT 31 (“*Gutmann I*”). An appeal against that judgment was dismissed by the Court of Appeal: *London & South Eastern Railway Ltd and ors v Gutmann* [2022] EWCA Civ 1077 (“*Gutmann CA*”). The claims in those proceedings were subsequently amended to add as defendants the parent companies of the TOCs, and the Tribunal directed that those two proceedings should be case managed and heard together.
3. The present proceedings are brought against Govia Thameslink Railway Ltd, the TOC operating the Thameslink, Southern and Great Northern (“TSGN”) franchise, and its parent companies. The nature of the claims is essentially the same, mutatis mutandis, as the claims in *Gutmann I* and this judgment will use the same abbreviations as in that earlier judgment. Reference should be made to *Gutmann I* and *Gutmann CA* for an account of the factual background and a description of the alleged abuse and resulting claims. Here, the class essentially comprises holders of TfL travelcards who made rail journeys out of London on the TSGN network and did not purchase a point-to-point ticket from the portion of travel from the outer boundary covered by their TfL travelcard. The claims accordingly concern the availability of Boundary Fares.
4. Given the close similarity of the present proceedings with the previous proceedings, the Respondents, while making clear that they would strongly contest the substantive proceedings, very properly did not seek to oppose the making of a CPO. Nonetheless, it is necessary for the Tribunal to be satisfied

that the conditions in s. 47B(5) of the Competition Act 1998 (“CA”) are fulfilled.

5. As regards what is now generally referred to as the “authorisation condition” set out in s. 47B(5)(a) and (8) CA, the statutory requirements are amplified in r. 78 of the Competition Appeal Tribunal Rules 2015 (“CAT Rules”). Although there is a range of circumstances which the Tribunal must and may take into account, in the present case the relevant considerations essentially come under two heads:

- (1) the character and experience of the PCR; and
- (2) the litigation and funding arrangements made by the PCR, including the resources available to cover his own costs and to fund any liability to pay the costs of the proposed defendants.

6. The character and experience of Mr Gutmann and the basis on which he seeks to act as class representative were fully addressed in *Gutmann 1* at [45]-[47] (and that part of the judgment was not appealed). Nothing has happened in the interim to change the positive assessment which we there made.

7. As regards funding, the PCR has submitted a litigation budget showing estimated costs to the conclusion of trial at a little over £8 million. He will be funding the litigation by way of third party funding from Woodsford Litigation Funding Ltd (“Woodsford”), the same funder that is funding the first two sets of proceedings referred to above. Under that arrangement, Woodsford has currently agreed to provide funding up to just over £5 million. We questioned Mr Moser KC, appearing for the PCR, about this apparent shortfall, and he explained that both solicitors and counsel are working under conditional fee agreements whereby (as in the other proceedings) a significant portion of the lawyers’ fees are deferred so that the costs to be paid through to the end of trial should not exceed the available funding. Moreover, the budget was prepared on the basis that these proceedings would be heard separately, and since the Tribunal directed at the hearing that the proceedings will be case managed and heard together with the first two proceedings concerning the SW and SE

franchises, there should be some resulting efficiencies that will reduce the overall cost.

8. As regards potential liability for adverse costs, that is of direct concern to the Respondents and they did not suggest that the PCR has inadequate cover for their costs.

9. We also considered the terms of the litigation funding agreement (“LFA”) with Woodsford. As the Tribunal explained in *Merricks v Mastercard Inc (Further Judgment)* [2021] CAT 28 at [24], a concern of the Tribunal where collective proceedings are to be funded by a commercial funder is the potential for a conflict of interest between the funder and the class members, in particular as regards settlement and termination of the funding agreement. In the PCR’s agreement with Woodsford dated 30 September 2021, the termination provisions state, in clause 24.3:

“24.3 The Funder may terminate this Agreement, at any time by giving the Class Representative 5 Business Days prior written notice that the Funder reasonably:

24.3.1 ceases to be satisfied about the merits of the Action;

24.3.2 believes that the Action is no longer commercially viable; ...”

10. Notwithstanding the word “reasonably”, we were concerned that this might give Woodsford effectively an unqualified right to terminate the agreement when that was in its commercial interests. Having drawn this to the attention of the PCR in advance of the hearing, so that he could raise this with Woodsford, Mr Moser was able at the hearing to give an undertaking that clause 24 of the LFA would be amended to provide the equivalent provision to the amended clause 12 of the LFA in *Merricks*: see that judgment at [26]-[27].

11. We have also reviewed the litigation plan submitted by the PCR, which we regard as satisfactory.

12. On that basis, we are satisfied that the authorisation condition is fulfilled.

13. As regards what is generally referred to as the “eligibility condition” set out in s. 47B(5)(b) and (6) CA, as amplified by r. 79 of the CAT Rules, the nature of the alleged abuse is effectively the same as in *Gutmann I*. Further, the method of computation of aggregate damages is set out in a full expert’s report from Mr Holt, who is also the expert who provided reports for the purpose of certification of the two earlier proceedings. Unsurprisingly, Mr Holt here uses the same methodology, which the Tribunal in *Gutmann I* found satisfied the so-called *Microsoft* test, a conclusion upheld in *Gutmann CA*. The other considerations relevant to the eligibility condition, including the question whether these should be opt-in or opt-out proceedings, are materially the same as in *Gutmann I* and we see no basis to change the view which we there reached that the eligibility condition is fulfilled.
14. This judgment is unanimous.

The Hon. Mr Justice Roth
Chair

Simon Holmes

Prof. Robin Mason

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

Date: 24 March 2023