



Neutral citation [2022] CAT 38

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1403/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

30 August 2022

Before:

BEN TIDSWELL
Chair

Sitting as a Tribunal in England and Wales

BETWEEN:

DR RACHAEL KENT

Class Representative

- v -

(1) APPLE INC.

(2) (2) APPLE DISTRIBUTION INTERNATIONAL LTD

Defendants

RULING (COSTS)

A. INTRODUCTION

1. The Class Representative seeks an interim payment on account of her costs, following the Tribunal's decision ([2022] CAT 28) to deny the Defendants' applications for summary judgment/strike out. The Defendants accept that they are liable for the costs of the applications and also accept the principle of an interim payment, but contest the amount sought by the Class Representative.
2. The quantum of costs put forward by the Class Representative is £799,487.82, together with VAT of £158,927.56, making a total of £958,415.38. The Class Representative seeks an interim payment of 75% of this amount, or £718,811.54.
3. Both parties agree that the test for assessing the interim payment is the Tribunal's estimate of the likely costs to be recovered on assessment: see *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm).
4. The Defendants raise a number of points which they say affect the Class Representative's likely recovery on assessment:
 - (1) The proper attribution of costs associated with the uncontested Collective Proceedings Order ("CPO"), which was granted at the same hearing as the applications.
 - (2) The rates of the Class Representative's solicitors, which are significantly higher than the guideline hourly rates set out in Appendix 2 to the "Summary Assessment of Costs Guide" (the "Guide" and the "Guideline Rates"), issued in November 2021.
 - (3) The amount of time spent by those solicitors on documents, amounting to time of £264,808.50, given the limited extent of the documents in question.

- (4) The time spent by those solicitors attending on third parties and at the hearing, which is said to be excessive.
 - (5) The costs of the Class Representative's expert, which are said to be excessive.
 - (6) The absolute level of costs, which is said to be excessive.
5. There is also a point raised by the Defendants about the entitlement of the Class Representative to recover VAT. The Class Representative has confirmed that she is not entitled to recover VAT, so this amount appears to be properly chargeable.

B. ATTRIBUTION OF THE CPO COSTS

6. The Class Representative maintains that she has only claimed costs after 12 January 2022, by which time the vast majority of work required for the CPO hearing had been carried out. A deduction has already been made for costs which were directly referable to the CPO hearing (for example, questions about the funding of the Class Representative's claim, which were dealt with by specialist costs counsel and not the counsel team who argued the applications).
7. The Defendants dispute this, pointing to the approach taken in *Merricks v Mastercard* [2022] CAT 27 ('*Merricks*') and *Le Patourel v BT* [2021] CAT 32 ('*Le Patourel*'), where a blanket reduction in the region of 20-25% was made to reflect the weight of costs which should be apportioned to the CPO application (it should be noted that in both *Merricks* and *Le Patourel* the CPO was opposed as well as the defendants bringing applications for summary judgment/strike out).
8. It is not possible, on the information before me, to be definitive about the extent to which there may be time incurred by the Class Representative's team in preparing for the CPO hearing which is not already compensated for in the reductions offered by her. It does seem likely that there was a degree of preparation for the hearing which should be allocated to that exercise and has

not been – for example, the time undoubtedly spent by counsel immediately prior to the CPO hearing refreshing their recollections of that application from the documents. However, I anticipate that this will not be a significant amount and I make an allowance of 10% against the solicitor and counsel fees (which I calculate to be £67,873.57) in order to reflect the potential impact on the Class Representative’s likely recovery.

C. THE GUIDELINE RATES

9. The issue between the parties here is whether the Guideline Rates ought to apply or whether an exception should be made, through the application of factors such as those listed in paragraph 29 of the Guide, which provides as follows:

“29. In substantial and complex litigation an hourly rate in excess of the guideline figures may be appropriate for grade A, B and C fee earners where other factors, for example the value of the litigation, the level of the complexity, the urgency or importance of the matter, as well as any international element, would justify a significantly higher rate. It is important to note (a) that these are only examples and (b) they are not restricted to high level commercial work, but may apply, for example, to large and complex personal injury work. Further, London 1 is defined in Appendix 2 as ‘very heavy commercial and corporate work by centrally based London firms’. Within that pool of work there will be degrees of complexity and this paragraph will still be relevant.”

10. The hourly rates claimed by the Class Representative include a partner (A) rate of £700, compared with the Guideline Rate of £512, senior associate (B) rates between £480 and £530, compared with the Guideline Rate of £348, and associate (C) rates between £375 and £445, compared with the Guideline Rate of £270.
11. The Defendants note that a clear and compelling justification for rates above the Guideline Rates must be provided (see *Samsung Electronics Co. Ltd v LG Display Co. Ltd* [2022] EWCA Civ 466) and notes that was the approach taken in *Merricks*.
12. The Class Representative maintains that the value of the litigation, level of complexity, urgency and importance of the matter and the international nature of the case all justify rates above the Guideline Rates, and she provides some examples of recent cases where rates were awarded at the level she claims.

13. I anticipate that the Class Representative will be able to justify rates above the Guideline Rates, for the reasons she advances. The position in *Merricks* was different – the hearing referred to in [20] of the judgment, to which the Defendants refer, was a case management conference, and it is expressly noted that Mastercard (whose costs were in question) did not put forward a justification for rates in excess of the Guideline Rates. I do however make a reduction of 5% against the time spent by solicitors, recognising the significant uplift against the Guideline Rates (between 36 and 64 % for the rates described above), which makes it likely that the Class Representative will not be able to justify the full extent of the claimed rates upon assessment, This equates to £20,360.33.

D. TIME SPENT ON DOCUMENTS

14. There is a dispute about the amount of time spent by the Class Representative on documents relating to the application. The time spent is not obviously unreasonable, save that a considerable amount of time (to the value of more than £110,000) was spent in preparing for the hearing, including bundles. While the Tribunal appreciates the efforts made by the parties to prepare for hearings to run efficiently and smoothly, this does seem a disproportionate amount for a two day hearing and I will make a reduction of £20,000 for the purposes of determining the interim payment.

E. TIME SPENT ON OTHER PARTIES AND AT THE HEARING

15. I am satisfied by the Class Representative’s explanation for the attendances on third parties, which she says was time spent exclusively on attendance on her Consultative Group, which is an important exercise from the perspective of the class members, and therefore the Tribunal.
16. The Defendants note that the hearing was attended by seven fee earners at costs of over £44,000. It is difficult to see how such large teams can be justified for applications which involve legal argument only. I will make a reduction of £10,000 reduction for the purposes of determining the interim payment.

F. EXPERT COSTS

17. These amount to £102,000 and reflect the time spent by Mr Holt, the Class Representative's economic expert, in responding to the Defendants' expert, Professor Hitt. The Defendants argue that this level of fees cannot be justified. However, I agree with the Class Representative that the scope and extent of arguments put forward by Professor Hitt would have required considerable work from Mr Holt and his team, and that the relative brevity of Mr Holt's reply report should not be treated as suggesting that less, rather than more, work was carried out. I make no adjustment to these costs for the purposes of the interim assessment.

G. THE ABSOLUTE LEVEL OF COSTS

18. I have some sympathy with the Defendants' complaint that the overall level of costs, approaching £1 million, is "plainly too high". It seems a very significant amount indeed for a two day hearing, even taking into account the fact that the total without VAT is in the region of £800,000.
19. On the other hand, the applications made by the Defendants were a serious attack on a substantial part of the Class Representative's case. She was justified in treating them with considerable seriousness. I also note that the estimate of costs given by the Class Representative in her Litigation Budget, provided for the purposes of the CPO application, discloses a budgeted amount of £828,879 (or £994,654.80 with VAT included), for the CPO hearing. This is very close to what has actually been spent (even allowing for the amounts allocated to the CPO hearing).
20. I propose to deal with this issue by allowing a smaller proportion of the total costs in calculating the interim payment amount than I would otherwise have done. The Class Representative has suggested a proportion of 75%. The Defendants have suggested an interim payment of £365,000 which reflects more like 46% of the costs incurred. Recognising that this is not an exercise of detail, but rather one of broad impression, I will allow a proportion of 65% of the total

costs (after deducting the amounts which I have identified above) in calculating the interim payment.

H. CONCLUSION

21. For the purposes of calculating the interim payment, the Class Representative's costs should be reduced from £799,487.82 (before VAT) by £118,233.90 to £681,253.92, reflecting the following:
 - (1) A reduction of £67,873.57 applied to the legal team's costs to reflect uncertainty in relation to allocation of costs between the CPO and other applications.
 - (2) A reduction of £20,360.33 applied to solicitors' costs to reflect the prospect that those solicitors' rates might not be fully justified by reference to the Guide.
 - (3) A reduction of £20,000 applied to solicitors' costs to reflect the apparently disproportionate time spent on preparing for the hearing.
 - (4) A reduction of £10,000 applied to solicitors' costs to reflect the apparently excessive expenditure on attendees at the hearing.

22. I order the Defendants to make an interim payment to the Class Representative, on account of her costs for the summary judgment/strike out applications, of 65% of the reduced sum of £681,253.92, namely an interim payment of £442,815.05 (before VAT). VAT on this amount will need to be paid by the Defendants to the Class Representative. Subject to any application to vary the date, the interim payment is to be made within 21 days of the date of this Ruling.

Ben Tidswell
Chair

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

Date: 30 August 2022