MERRICKS' COLLECTIVE SETTLEMENT PROCEEDINGS

CASE NOTE

1. On 10 June 2026, the Divisional Court (Males LJ and Morris J) dismissed Innsworth's claim for judicial review of the CAT's decision as to how a £200 million collective settlement sum should be distributed. The Court upheld the CAT's judgment that a 50% net profit on the funder's investment of £45.5 million amounting to a total return of £68 million (34% of the settlement sum) was fair and reasonable. This paves the way for class members to receive a payment of up to £70.

CAT's CSAO Application judgment [2025] CAT 28

2. By a settlement agreement dated 3 December 2024, Mastercard agreed to pay the class representative, Mr Merricks, £200 million to settle the collective proceedings commenced in September 2016 which alleged that 44 million people in the UK had paid higher retail prices because of inflated interchange fees. Accordingly, both parties made a joint application to the CAT for a Collective Settlement Approval Order ("**CSAO**") pursuant to Rule 94 of the CAT Rules 2015. On 23 January 2025, the CAT granted permission to Innsworth to intervene in the CSAO Application, as the funder objected both to the amount of the settlement, and to the proposed method of distribution. By judgment dated 20 May 2025, the CAT in **Merricks (CSAO Application)** approved the settlement as just and reasonable, this being the statutory test pursuant to section 49A(5) Competition Act 1998.

3. On the reasonableness of the settlement sum the CAT rejected Innsworth's contention that the sum was insufficient. The CAT stated at [97] that "*the likelihood of judgment being obtained for an amount significantly in excess of £200 million was low"* because the claim value of £14 billion had been reduced by 95% due to various preliminary issues having been determined adversely to Mr Merricks. Moreover, the CAT considered that the £200 million was at risk of being reduced further, and even completely lost, because Mr Merricks' claim was dependent on showing that retailers had passed on the overcharge to consumers (i.e.to the class). The CAT considered at [87] that the rate "*used to arrive at the settlement sum reflects a number of possible scenarios, each of which corresponds in our view to a reasonable compromise*." Indeed, as matters developed the CAT in the *Umbrella Interchange Fee Proceedings* ([2026] CAT 11: [2026] CAT 42), determined that passing on had not been established in respect of most

merchants. Mr Merricks settled before this judgment and, thus, the settlement turned out to be favourable to the class and, indeed, to the funder. Had Mr Merricks not settled with Mastercard, Innsworth could have lost the entirety of its investment and would have made zero profit.

4. On the reasonableness of the distribution, the CAT at [207] approved the settlement "*with provisions for payment and distribution incorporating the three pots as set out in this judgment*." The three-pot package was the following:

- Pot 1 ring-fenced a minimum amount of £100 million for the class. Although £200 million is a significant sum, the expert evidence indicated that if it were divided equally between 44 million class members on a per capita basis, the take-up of a payment of £4.50 would be extremely low. The CAT accepted Mr Merricks' proposal that each class member be offered a minimum payment of £45 (up to £70). Expert evidence suggested that on this basis a take-up by 5% of the 44 million members was possible and thus pot1 ringfenced the £100 million to account for this scenario. The CAT at [121] considered it "*fundamental that the collective proceedings regime should operate for the benefit of CMs*" (class members) and pot 1 was designed to pursue that objective by giving the class at least half of the settlement sum.

- Pot 2 ring-fenced at least £45.5 million for the funder, Innsworth, to reimburse it for the investment made (including all adverse costs it had paid to Mastercard). The CAT recognised that if 10% of the class submitted claims the whole £200 million would be required leaving Innsworth with nothing (Innsworth having agreed to be paid out of undistributed damages). Accordingly, pot 2 protected Innsworth's investment.

- Pot 3 ring-fenced in order of priority: (i) a sum to cover certain ancillary costs; (ii) the sum of £22.5 million to be paid to Innsworth as profit on its investment (i.e. 50% profit on its investment); and (iii) further payment to the class to *"top-up*" pot 1 should take-up be higher than 5%. The CAT also ordered that after these sums had been expended, any residue should be paid to the Access to Justice Foundation (the "**AtJF**"), consistent with what is provided by section 47C(5) of the Competition Act 1998.

5. In deciding upon a profit of £22.5 million in pot 2, the CAT undertook at [166] - [188] a multi-factorial analysis based on several factors.

- First, the CAT recognised the importance of the litigation funding that Innsworth had provided to Mr Merricks, noting that the value of Innsworth's funding commitment involved a significant sum.

- Second, the claim against Mastercard was "*highly ambitious in terms of the causal link*" between the EEA MIF and the UK MIF. If (as it happened) Mr Merricks could not prove that the inflated EEA MIF caused the UK MIF to be inflated the claim was worth 95% less.

- Third, the funder had to acknowledge the low value of compensation that was being paid to the class, stating that "*the return cannot disregard the degree of success or failure of the proceedings*." The CAT acknowledged that the settlement sum was only a little over 1% of the original claim value of £14 billion.

- Fourth, Innsworth operated on a portfolio basis. Some cases will be highly profitable, some cases less so, and others will not be profitable at all. The CAT stated at [183] "[*i*]*f a case in its portfolio fails, it will receive nothing back and loses its investment on costs and fees. But if a case is largely or wholly successful, it stands to make a very significant return, as exemplified by the Return specified in Schedule 4 to the 2023 LFA... However, some cases will not fail altogether but achieve a very poor result. This case is one of them. While the outcome enables Innsworth to recover all its reasonable expenditure, that does not mean that it is reasonable for it to achieve also what Mr Garrard describes as "a minimum reasonable return*"".

- Fifth, the CAT at [185] – [187] considered that a "*relevant metric*" to determine the amount of a profit return was the ROI (return on investment). This was consistent with its judgment in **McLaren (2025)** [2025] CAT at [100] where the CAT had considered actual profit returns to be helpful. Innsworth declined to provide evidence of its internal returns and submitted that the correct approach was to value its funding services at the time the agreement was entered into. The CAT regarded a better metric to be the return that a funder obtained at the conclusion of the case. In the absence of any

evidence from Innsworth, the CAT considered the two Australian cases of **Allen** and **Street** where funders' rates of return had been considered. The CAT stated at [187]:

"Many funders operate internationally, and the evidence from Mr Garrard is that Innsworth indeed funds litigation in other jurisdictions apart from the UK, and that one of Innsworth's directors chairs the Association of Litigation Funders of Australia. In ***Street*** *(a judgment of 29 October 2024), Murphy J referred at [362] to another 2024 Australian case where the evidence showed for a substantial litigation funder that its:*

> *"ROI on all completed cases (including those on which it loses some or all of its capital) is 1.2 and approximately 1.9 on those cases which did not produce a negative return. Approximately 15% of its cases have an ROI exceeding 4.0, with some cases having an ROI exceeding 9.0."*

On that basis, in our judgment a ROI of 1.5 is here appropriate, taking account of all the above factors, and recognising the significant risk but reflecting also the poor outcome. If the reimbursement of costs and expenses (i.e. Pot 2) should amount to £45.5 million as estimated in the Application, then, applying a ROI of 1.5 will provide Innsworth with a total return of £68 million."

6. Sixth, having determined that a 50% profit on the investment and a return of 1.5 times the investment was appropriate "*taking account of all the above factors*", the CAT at [188] undertook a percentage-based cross-check and also sense checked its conclusions against the "*presumptive range of validity*" in Canadian jurisprudence.

7. In summary, the CAT rejected Innsworth's claim for £179 million (89% of the settlement sum) and approved a payment to the funder of £68 million (34% of the settlement sum) which consisted of the £45.5 million investment and the £22.5 million profit. The CAT did not accept the funder's own valuation of its funding services to be determinative because it focused on the date of the funding agreement which did not take account of the outcome of the claim. The CAT balanced the amount invested with what it considered to be "*the poor outcome.*" The CAT concluded at [208] that its approach was determined "*by the exceptional circumstances of this case*" where the settlement was at "*an extraordinarily low proportion"* of the original claim. The approach should not be regarded as a guide for more positive settlements.

CAT's CSAO costs and form of order ruling [2025] CAT 69

8. On 31 October 2025, the CAT formally made the CSAO. This was after Innsworth had on 10 June 2025 commenced judicial review proceedings to quash the CAT's judgment in respect of pots 1 and 3. In its ruling the CAT (a) approved the terms of the Collective

Settlement and ordered that the £200 million be paid and held in escrow; (b) ordered that Innsworth, as intervenor, pay a proportion of Mr Merricks costs occasioned by Innsworth's intervention; (c) refused immediate payment to Innsworth of the pot 2 investment money because the distribution involved a three pot "*package*" that was interlinked: and (d) stayed the distribution pending (i) the determination of Innsworth's judicial review proceedings and (ii) an independent assessment of the reasonableness of the solicitor-client costs that had been incurred but not paid.

The King on the application of Innsworth Capital v CAT [2026] EWHC 1393 (Admin)

9. Innsworth objected to the payment to it of £22.5 million as net profit. Funders do not have a statutory right of appeal pursuant to section 49(2A) to challenge a decision of the CAT concerning collective proceedings. Accordingly, Innsworth brought a claim for judicial review. By its application dated 10 June 2025, Innsworth sought to review the CAT's judgment on distribution but not on the reasonableness of the settlement sum. By Order dated 10 November 2025, Mr Justice Sheldon directed that the application for permission be determined at an oral hearing which took place on 11 February 2026. Mr Justice Linden granted permission in part considering that some of the proposed grounds were not realistically arguable.

10. On the issue that the net profit of £22.5 was insufficient Innsworth advanced four grounds which were rejected by the Divisional Court.

Grounds upon which permission was given by Linden J

11. First, Innsworth alleged that the CAT erred in its approach to the ROI when relying on the passage in **Allen** cited in **Street** (referred to above). The Divisional Court agreed with Innsworth, holding that the term ROI had not been used consistently in the Australian cases. In **Street** the court had applied the ROI as a multiple on invested capital (i.e. how many time the invested capital had been returned) whereas in **Allen** the court had described this metric as a MOIC (multiple on invested capital) and had employed the acronym ROI to express profit alone. Thus, the CAT had erred by employing a 1.5 ROI as meaning 1.5 times the capital invested (i.e. 1.5 x £45.5 million). However, Males LJ at [57] considered that "*the CAT's misunderstanding does not come close to undermining the cogency of its conclusion that a profit of 50% of the claimant's expenditure would be just and reasonable.*" It was clear that the ROI was only one factor among several and the error was not material to the conclusion. Alliteratively, the

Divisional Court would have refused relief pursuant to section 31(2A) Senior Courts Act 1981 on the basis that it was "*almost inevitable*" that the outcome would not have been substantially different. Accordingly, the Court dismissed the claim based on this ground.

12. Second, Innsworth alleged that the CAT should have considered ring-fencing Innsworth's investment costs first and then distributing the net proceeds. The Court dismissed this claim on the basis that such a requirement would impose "*an inappropriate straitjacket on the CAT's determination of what is just and reasonable, contrary to the wide unrestricted powers …conferred on it*". Further, the Divisional Court considered that protecting the class in pot 1 was a conclusion the CAT was entitled to reach having regard to the objective of the collective proceedings regime of access to Justice (**Le Patourel v BT Group** [2022] EWCA Civ 593 at [29]).

Grounds upon which permission was refused by Linden J

13. Innsworth sought to renew two grounds of review pursuant to CPR 54.15 instead of appealing to the Cout of Appeal pursuant to CPR 52.8. The Divisional Court considered that in the unusual circumstances of the case, this procedural route was appropriate. However, the Divisional Court dismissed the grounds for the reasons given by Linden J.

14. First, Innsworth alleged that the market value of its funding services should be assessed at the time when a funder first invests in the claim. The Divisional Court considered that the CAT was correct to reject this submission. The funder's return must be viewed in the light of the degree of success or failure at the conclusion of the proceedings, as it is at this juncture that the CAT can better determine what is just and reasonable for all stakeholders and ensure that what is recovered by a funder is not excessive.

15. Second, Innsworth alleged that it was unfair that the charity, the AtJF might obtain a windfall greater than the funder's net profit. The Divisional Court rejected this submission as any payment to charity was separate from the determination of what a just and reasonable profit was for Innsworth. The charity only stood to gain if the take-up by the class was not as high as anticipated. If the take-up was higher than 5% there might be no residue and thus no payment to the AtJF. Thus, the reasonableness of the funder's net profit was separate from the amount that the charity might receive.

Comment

16. The Merricks settlement proceedings have laid down several important principles relating to settlements of collective proceedings.

Reasonableness of the settlement sum

17. The first consideration in any collective settlement is the reasonableness of the settlement sum. The statutory test which the CAT must apply is whether the terms of the settlement are just and reasonable. The CAT in **Merricks (CSAO Application)** at [81] considered that the focus of the statutory test is on the class members, and not the funder. This is because the class members are not directly involved in the proceedings and do not give instructions to the class representative or to the lawyers. The focus therefore is to determine whether the settlement agreed by the class representative is in their best interests. Rule 94(9) of the CAT Rules 2015 and the CAT's Guide at [6.123] lay down settlement approval criteria. All relevant circumstances are considered, but the list includes: (a) the amount and terms of the settlement and provision for costs: (b) the number of class members; (c) the likelihood of judgment being awarded for a higher sum; (d) the likely duration and cost of the proceedings in the absence of settlement; (e) any opinion by an independent expert and any legal representative of the applicants and (f) the provision regarding the disposition of any unclaimed balance of the settlement.

18. There is likely to be a range of settlements the reasonableness of which must be determined at the time of the hearing not as at the settlement date or the application. The CAT will not condescend to an examination of any potential negotiating tactics that might be open to the parties. In **Merricks (CSAO Application)** the CAT considered in some detail whether the settlement sum was within a reasonable range and whether a future judgment could lead to a higher sum. To assist in this determination the CAT was provided with extensive advice from the layers acting for the applicants. In a postscript at [212] the CAT indicated that it would normally expect "*a comprehensive opinion*" from the parties' leading counsel setting out the reasons why the settlement is reasonable.

Reasonableness of the distribution

19. In **Innsworth Capital** the Divisional Court agreed with the CAT that it was implicit in Rule 94(4)(d) that not only the terms of the settlement, but also the arrangements for distributing the settlement proceeds must be just and reasonable. However, here the CAT balances the interests of all stakeholders including the funders and the lawyers. This is because the CAT acknowledges that without funders and lawyers the collective

proceeds regime could not function effectively. It was for this reason that, whilst the CAT ringfenced £100 for the class, it also ringfenced Innsworth's investment and profit before any further payment to the class members.

20. The CAT set out the important approval criteria at [170] by citing from the Australian case of **Money Max.** Three criteria are worth emphasising.

- First, the CAT is likely to be guided by returns actually achieved in the market at the conclusion of proceedings rather than by the returns sought at the commencement of the proceedings.

- Second, the success or failure of the settlement sum will be an important guide as to the reasonableness of the funder's overall return but particularly the funder's net profit. The 50% net profit in **Merricks** may be a guide for poor performing cases but should not be regarded as a precedent for more positive settlements.

- Third, care must be taken concerning the metrics ROI and MOIC. The MOIC formula is typically the total amount received divided by the cost of the investment, thus $\frac{\text{Total Value}}{\text{Investment}}$. The ROI formula is typically the net profit divided by the cost of investment, thus: $\frac{\text{Net Profit}}{\text{Investment}}$. When used in this way the ROI indicates a profit percentage and a ROI of 1.5 will indicate a net profit of 1.5 times the investment. Confusion can arise (as in **Merricks**) when the ROI is also expressed as a multiple on the capital investment and not simply as a profit figure.

- Fourth, whilst percentage-based returns are not permissible (as a result of the decision of the Supreme Court in **PACCAR** [2023] UKSC 28), the CAT views the percentage as a useful cross check when determining the reasonableness of a funder's return. This means that the overall funder return as a percentage of the settlement sum will be considered. The 89% of the settlement sum claimed by Innsworth appeared to the CAT to be excessive, whereas the 34% was regarded as fair and reasonable.

Discretion and standard of review on appeal

21. The Merricks collective settlement proceedings have also confirmed the CAT's status as the supervisory judicial body with a wide discretion over collective settlements and the distribution of damages. The Divisional Court at [37] – [38] emphasized the "*wide unrestricted powers*" referenced by the Court of Appeal in **Gutmann v Apple Inc** [2025]

EWCA Civ 459 at [78]. Distribution involves an evaluative assessment, and the CAT is exercising judgment as an expert specialist body, taking account of a range of factors.

22. This means that the CAT;s decision on collective settlement proceedings will only be open to challenge on appeal if there is some identifiable material legal error in the treatment of the question to be decided: for example, a gap in logic, a lack of consistency, a failure to consider a relevant factor or a consideration of an irrelevant factor. There is very little difference. If any, between challenging the decision by of judicial review (as a funder must do) or by n appeal on a point of law to the Court of Appeal pursuant to section 49. Moreover, it is not any error that will suffice. The error must be material in the sense of undermining the cogency of the CAT's reasoning and conclusion. This requirement of materiality was referred to by Green LJ in **Flynn and Pfizer v CMA** [2020] EWCA Civ 339 at [143]. The Divisional Court applied the same criterion when dismissing Innsworth ground of appeal concerning the ROI of 1.5.

The CAT's CSAO Application judgment is **here**.

The CAT's CSAO Ruling is **here**.

The Divisional Court's judgment is **here**.

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