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4 record.

5 **IN THE COMPETITION**
6 **APPEAL TRIBUNAL**

Cases: 1304/7/7/19 1305/7/7/19, 1425/7/7/21

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9 Salisbury Square House
10 8 Salisbury Square
11 London EC4Y 8AP

Thursday 9th May 2024

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14 Before:
15 The Honourable Mr. Justice Roth
16 Robin Mason
17 Simon Holmes
18
19 (Sitting as a Tribunal in England and Wales)

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21
22 **BETWEEN:**

23
24 **JUSTIN GUTMANN**

Class Representatives

25
26
27 v

28
29 **GOVIA THAMESLINK RAILWAY LIMITED & OTHERS**

Class Respondents

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31
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33 **A P P E A R A N C E S**

34
35 Philip Moser KC, Stefan Kuppen & Alexandra Littlewood (instructed by Charles Lyndon) on
36 behalf of Justin Gutmann

37
38 Paul Harris KC & Clodhna Kelleher (Instructed by Freshfields Bruckhaus Deringer) on
39 behalf of LSER, GTR & Parent companies.

40
41 James Bourke (Instructed by Slaughter and May) on behalf of First MTR

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47 Digital Transcription by Epiq Europe Ltd
48 Lower Ground, 46 Chancery Lane, London, WC2A 1JE

Tel No: 020 7404 1400

Email:

ukclient@epiqglobal.co.uk

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52 **Thursday, 9 May 2024**

1 (10.30 am)

2 **Pre-Trial Review**

3 **THE CHAIR:** Good morning. We start, as always, with the warning that the
4 proceedings are being live-streamed and an official recording is being made and
5 a transcript will be produced and placed on the tribunal's website. It is strictly
6 prohibited for anyone to make any unauthorised recording or take any visual image of
7 the proceedings, and that is punishable as a contempt of court.

8 Thank you all for your skeleton arguments and the measure of agreement that we see
9 has helpfully been reached between the parties on various matters, which we
10 appreciate. We know quite a lot of discussion tends to precede such agreements.
11 They greatly simplify hearings, in everyone's interest.

12 We have an agenda that has been proposed: we think it's helpful if we propose to
13 follow it. There may be one or two additional items, we know. But if we start with the
14 first point, namely the question about the Secretary of State's statement of
15 intervention.

16 We indicated to the Secretary of State, following both the class representative and the
17 Secretary of State agreeing that this can be resolved on the papers, that we will resolve
18 it on the papers, therefore there is no need for the Secretary of State to be represented
19 today. It wouldn't be appropriate, therefore, to have a discussion about it in the
20 absence of their being present. We will give our ruling by next Monday.

21 On that, we do bear in mind that this could perhaps have been made earlier and that
22 you have had this for some time, but we will clearly nonetheless consider it.

23 **MR MOSER:** We are grateful. We will say nothing more than that, other than you will
24 have seen that we did raise it in our response last year, and we will do so -- but again,
25 we are not here to debate it.

26 I am grateful for that indication, which takes us on to --

1 **THE CHAIR:** Mr Harris, yes.

2 **MR HARRIS:** Would you please take into account, when you consider the matter on
3 the papers, the point that we raised at paragraph 4 of our skeleton argument. If you
4 want it, it's at tab 5 of the core bundle. It's about the prejudice that we suffer as the
5 defendants if parts of the SOI are struck out, which practically disables us from filling
6 that gap now with evidence.

7 **THE CHAIR:** Yes. Well, the sort of factual content is of less concern than it seems.
8 There are certain passages that might be thought to be expressing certain arguments
9 which --

10 **MR HARRIS:** I leave it at that. Simply --

11 **THE CHAIR:** Yes.

12 **MR MOSER:** Indeed. And having said I would say only one thing, I will say a second
13 thing then in response to my learned friend Mr Harris quite properly pointing out his
14 skeleton.
15 That is, in a sense, the issue, because it is not evidence that has been put in. The
16 Secretary of State isn't going to give evidence. So it's a document that just stands
17 there.

18 **THE CHAIR:** Yes.

19 **MR MOSER:** It's not evidence that they need to supplement with other evidence; it's
20 just a question of how the tribunal plans to treat it.

21 **THE CHAIR:** Yes.
22 Right, so then we come to amendments to the class definition.

23 **MR MOSER:** Yes.

24 **THE CHAIR:** There seems to be significant agreement; is that right?

25 **MR MOSER:** There seems to be significant agreement. I am told this morning that
26 certainly LSER, under whether it should be 9 May, I had understood it to be agreed,

1 but nothing turns on what I understood. It seems to us that that's what was done in
2 Le Patourel. It's convenient, it's today. An expansive and pragmatic interpretation of
3 how to get round the Sony problem. And we're content for today (inaudible) or another
4 day. I think we wrote earlier this year and said: around about now. Now it's the PTR.
5 So it's when the order is made, we say, is the best time to do it. As I say, we thought
6 there had been an outbreak of unanimity around 9 May. If there is an un-outbreak,
7 I will leave it for my learned friends to explain.

8 **THE CHAIR:** Yes.

9 Mr Harris?

10 **MR HARRIS:** Sir, this is not a big point, I don't want to take up too much time on it.
11 It's simply this.

12 As you know, strictly speaking, the position is that you can't have claims that go
13 beyond the date of your claim form. Therefore, the tribunal in other cases has very
14 sensibly said, "Why don't the parties just reach a pragmatic compromise?"

15 What had happened was, for what it's worth, in a letter of 26 January the parties had
16 reached a pragmatic compromise and we had said, "Fine, you can have some more
17 time", and the wording used in the letter was "as at today's date or imminently". That
18 was back in January and here we are on 9 May.

19 The way I put it is this: if the tribunal is content with 9 May for the extension and the
20 pragmatic compromise, I say no more. We would invite the tribunal to just reflect and
21 perhaps put it earlier in time, bearing in mind that the pragmatic compromise was in
22 fact reached.

23 I have nothing to add, unless you have any questions.

24 **THE CHAIR:** Yes, thank you.

25 For MTR, is there anything?

26 **MR BOURKE:** James Bourke. I have nothing to add. Thank you, sir.

1 **THE CHAIR:** Do I understand from that that you are neutral as between those
2 particular positions?

3 **MR BOURKE:** Thank you, sir.

4 **THE CHAIR:** Could we just look at the actual amendment. It's in the claim form, is it?
5 Is it bundle B or bundle A?

6 **MR MOSER:** May I hand up the amendment?

7 **THE CHAIR:** Yes, because it would be helpful to actually see it.

8 **MR MOSER:** Yes, it would. **(Handed)**
9 I think everybody has had copies. One tries to strike a balance between inundating
10 the tribunal with things and then of course the one thing that is relevant doesn't make
11 it.

12 **THE CHAIR:** Yes. E is paragraph 88, the actual definition?

13 **MR MOSER:** Yes, and it's in bold.

14 **THE CHAIR:** So instead of date of final judgment, whenever the settlement is --

15 **MR MOSER:** Yes, or such other date as the tribunal finds convenient. We simply
16 submitted, as you saw in our skeleton argument, that the sort of gymnastics that the
17 tribunal has held in other authorities are going to be necessary, what my learned friend
18 Mr Harris calls a pragmatic approach --

19 **THE CHAIR:** Yes.

20 **MR MOSER:** -- they did inevitably in the PTR as in Le Patourel. There's no more
21 logic to that. It is, as it were, a pragmatic sanction, with apologies for choosing the
22 second.

23 **THE CHAIR:** Yes. Well, give us just a moment. **(Pause)**
24 Yes, thank you. We think 9 May is sensible. We don't think in practical terms it's going
25 to make a huge difference to the plan. But we'll make it 9 May and then we'll allow
26 those amendments. You'll presumably serve the amended claim form.

1 **MR MOSER:** We will.

2 **THE CHAIR:** It doesn't need any consequential amendments, does it, to defences,
3 I don't think?

4 There is some suggestion in your skeleton that there has to be a further opt-out period.

5 **MR MOSER:** Yes.

6 **THE PRESIDENT:** I didn't quite follow that, because it's being, in a sense, cut, it's
7 being reduced, the period, isn't it?

8 **MR MOSER:** It's simply what was done in one of the other cases. So what we
9 proposed at paragraph 12, I think it is --

10 **THE CHAIR:** Yes, it is.

11 **MR MOSER:** -- is a further opt-out period to end on 14 June.

12 **THE CHAIR:** But what's the logic of that? I haven't read the judgment, so if it's
13 explained in the other cases -- if people had the chance to opt out when it was a period
14 until judgment --

15 **MR MOSER:** I know, but what we have to do is we have to give notice again, to give
16 notice of the new period. So it seems fair. There might be people out there who think,
17 "Oh, well, I don't fancy it, if it's only until 9 May" to opt out, but they have the opportunity
18 to do so.

19 **THE CHAIR:** Yes.

20 **MR MOSER:** That seems to be the logic in the other cases.

21 **THE CHAIR:** What's the process, can you remind us, whereby you give notice?

22 **MR MOSER:** We are in the course of drafting an amended notice. We send it out
23 and publish it -- I believe it's on the website -- in the same way as we published the
24 first notice.

25 **THE CHAIR:** It was only on the web; there were no further means of diffusion of the
26 notice?

1 **MR MOSER:** I don't believe so, no. It's a fairly arid matter --

2 **THE CHAIR:** Yes.

3 **MR MOSER:** -- that's why.

4 **THE CHAIR:** Has there been, in response to the first notice, any significant level of

5 opting out?

6 **MR MOSER:** No. We think none.

7 **THE CHAIR:** I see that. Very well. You are suggesting that the further period, if that

8 is put up tomorrow or today, it will then be 14 June, from what you've said?

9 **MR MOSER:** Yes.

10 **THE CHAIR:** It doesn't look as though one is anticipating any significant measure of

11 opting out. That's what you're suggesting.

12 **MR MOSER:** Yes.

13 **THE CHAIR:** Do the defendants want to say something further? Mr Bourke.

14 **MR BOURKE:** This is really just an administrative thing. May we just have a very

15 brief look at the amended notice before it's online?

16 **THE CHAIR:** Yes.

17 **MR BOURKE:** We won't need very much time; it will be very straightforward. I think

18 it's understood that we will --

19 **THE CHAIR:** I think that must be right. So you send it in drafts to the defendants.

20 And the first notice was certainly looked at by the tribunal: you probably ought to send

21 the draft to us as well.

22 **MR MOSER:** Certainly. It may not have reached my learned friend but we have

23 already told them that it's coming.

24 **THE CHAIR:** Yes.

25 **MR MOSER:** And we are happy also, of course --

26 **THE CHAIR:** When? Just to get a timing on this. Can it be done by the end of

1 tomorrow? Yes?

2 **MR MOSER:** Yes.

3 **THE CHAIR:** So if there are any comments, those can be supplied by, what, the end
4 of -- if it comes tomorrow, the end of Monday, or do you want Tuesday?

5 **MR BOURKE:** That's fine with us, sir, thank you. Monday is fine. It should be very
6 straightforward I think, if it comes tomorrow.

7 **THE CHAIR:** Any comments by the end of Monday and then to be published promptly
8 thereafter, subject to any disagreements that will have to be reflected to the tribunal.

9 Good. And the amended claim form I think to be also served by the end of tomorrow?

10 We have it here. You just have to put it into the --

11 **MR MOSER:** Yes.

12 **THE CHAIR:** Then that deals, I think, does it not, with item 2?

13 **MR MOSER:** Yes.

14 **THE CHAIR:** Very good.

15 Directions to first trial. Trial bundles.

16 So far as the dates are concerned, that's really for the convenience of the parties; it
17 doesn't particularly affect the tribunal. I think what's in various proposals, I think
18 actually, as I saw it, the class representative proposed to extend its proposed indices
19 or proposed content earlier than in fact some of the defendants were asking for. So
20 whatever date you wish to agree that suits you, we are content with.

21 What is the latest position? I think your proposal was 9 May, which is today, but you
22 seek agreement by 16 May and upload by 23 May. I think uploading by 23 May is
23 important, given the dates for skeletons. But working back from that, what's the latest?

24 **MR MOSER:** The latest is that the parties are broadly agreed on these dates, having
25 had a short word with Mr Bourke before the hearing. Again, I think it's probably
26 a pragmatic approach. Not everything might be final in the index as presented. The

1 parties would work to make it final as soon as possible.

2 There is agreement at the moment on skeletons on the 28th and the 4th.

3 **THE CHAIR:** Yes, we are content with that. That's agreed, 28 May and 4 June. So

4 working back from 28 May, it does seem to me you want the documents uploaded by

5 23 May --

6 **MR MOSER:** Yes.

7 **THE CHAIR:** -- at the latest, so people with --

8 **MR MOSER:** It did strike us, depending on when we come to the trial

9 timetable -- I don't want to start all of the parts moving. If we're going to start a little

10 later, there might be some scope for movement.

11 **THE CHAIR:** When you say start the trial, the hearing in court?

12 **MR MOSER:** The hearing in court.

13 **THE CHAIR:** No, we're not. I can tell you that.

14 **MR MOSER:** Well, let's stick --

15 **THE CHAIR:** So 28 May and 4 June.

16 **MR MOSER:** Yes.

17 **THE CHAIR:** As I say, I think the proposed date for uploading was 23 May and it's

18 just a question of working back from that: when you want to supply the draft and when

19 you get the comments and how long people need.

20 **MR MOSER:** We actually already supplied the draft yesterday. So we're well

21 underway, ahead of time.

22 **THE CHAIR:** So if it was supplied yesterday, it ought to get agreement -- is 16 May

23 a sensible date? Between you, as always, you can extend these dates. That actually

24 is a Thursday. Shall we say 17 May, the Friday? Do you want more --

25 **MR HARRIS:** We're happy with the 16th from our perspective, if the date is the 23rd,

26 absolutely no later.

1 One other point on trial bundles, with respect: if there are going to be supplemental
2 materials, please can we have them in a supplemental bundle, rather than constant
3 revisiting, particularly on the electronic form. It makes trial preparation very, very
4 difficult.

5 **MR BOURKE:** Yes, may I just add to that.

6 We're fine with those dates and we will work hard. It's in everybody's interests to get
7 these bundles up and running, I fully agree with that. The only caveat I want to just
8 mention is that we are still working through the disclosure documents. So there may
9 be some disclosure documents that will be added a bit later, and they can go into the
10 supplementary bundle. But that doesn't stop us making a lot of progress in that
11 timeframe, but the disclosure documents may be added over time.

12 **THE CHAIR:** Well, if we say that the uploading of the trial bundles, documents on to
13 the electronic bundles, is done by 23 May, and the parties use their best endeavours
14 to agree contents of trial bundles by the 16th, and leave it at that --

15 **MR MOSER:** Yes.

16 **THE CHAIR:** -- that gives you flexibility.

17 Mr Bourke isn't looking very happy.

18 **MR BOURKE:** No, just to be sure. It may mean that we are still adding some
19 disclosure documents after 23 May, even though they're up -- into Opus, but we can
20 add them into the supplementary bundle. I think that's common practice.

21 **THE CHAIR:** Yes.

22 **MR BOURKE:** Thank you, sir.

23 **THE CHAIR:** One is not precluding --

24 **MR BOURKE:** Every document in every case --

25 **THE CHAIR:** Every trial --

26 **MR BOURKE:** Exactly. Exactly.

1 **THE CHAIR:** -- you get some late documents added.

2 **MR MOSER:** Indeed. Provided it is -- and I say this not for an order but just so
3 everyone hears -- provided it is genuinely extra and supplementary documents and it
4 isn't somehow built in that it doesn't matter, we can put in any documents we like after
5 the 23rd.

6 **THE CHAIR:** No, everyone has to be sensible about these things. You're experienced
7 counsel with very experienced solicitors: I think everybody understands that. Good.
8 Skeletons. We have the dates for skeletons. The length of skeletons, we do have
9 some feelings about that.

10 Mr Moser, you proposed originally 50 pages. That seems to us reasonable when you
11 have three defendants, but we don't think any longer than 50 pages.

12 As far as the defendants are concerned, we do expect there, not only in oral
13 submissions but also in skeleton arguments, to be perhaps some coordination so there
14 is no duplication. For example, on the relevant principles of law, who is going to deal
15 with services of general economic interest, we don't need all of that twice. So please
16 allocate that between yourselves.

17 On that basis, we think that for MTR, 30 pages should be adequate; and for the joint
18 representation of the other two companies, 40 pages should be adequate, certainly
19 not 60. So that means it's 50, and then together you have 70.

20 So that's the reaction we had, having read various points made in the skeleton
21 arguments. It does mean, of course, the defendants have longer. There is no magic
22 in these numbers. But then that is almost inevitable when you have a number of
23 defendants. We don't think that's disadvantaging the class representative.

24 **MR MOSER:** No, and we wouldn't argue to the contrary.

25 **THE CHAIR:** Yes. So, Mr Bourke, 30 pages?

26 **MR BOURKE:** Sir, we would request more than 30 pages. I think 30 pages, with the

1 greatest of respect, is going to be extremely difficult for us, given the nature of our
2 case. We are a separate defendant in a separate action. We have different facts from
3 the other two defendants. We'd like to be able to have sufficient space to develop our
4 case.

5 On the facts, as I say, we are in a different position. I can give if a number of different
6 examples if it would help. We have served evidence from eight fact witnesses. We
7 have 319 pages of fact evidence.

8 **THE CHAIR:** Just a second. I haven't looked at the -- I don't think any of the tribunal
9 has looked at the witness statements. You have eight fact witnesses?

10 **MR BOURKE:** Eight fact witnesses, one of whom is shared, because he's from RDG.
11 And we have 319 pages of witness statements.

12 **THE CHAIR:** Yes.

13 **MR BOURKE:** We want to do our best -- we will do our best: we will be concise, we
14 will be careful. The 50 pages that we're requesting would be certainly a ceiling rather
15 than a floor. We would use every effort to be shorter and briefer than that; it's in our
16 interests. We want to be as helpful as we can. We don't want to be verbose, we don't
17 want to be too long, but we do feel we do need to set out our specific factual position.
18 On the law, we hear what you are saying, in terms of that there can be potential
19 overlaps. But in the July CMC you mentioned that the law is probably the most
20 complex part of the three trials that we have. There are a number of tricky issues of
21 law that come up and we do need to set out our case properly on that.

22 Just a further point I'd make is that we will also have limited opportunities to put
23 documents to factual witnesses during cross-examination in this case in the usual way,
24 just because of the asymmetric way this is working. The class representative only has
25 one witness, Mr Bellenger, and he's going to be going ahead with six days of
26 cross-examination of our witnesses, as it stands. So we would like to open the

1 documents and refer to the documents in our trial skeleton and, by the way, in oral
2 openings, but we'll come back to that.

3 I can accept that there is a degree of overlap between the defendants, but we are in
4 a different factual position and we do really need to set out our own factual case. So
5 I would respectfully urge the tribunal that if we could have 50 pages as well.

6 **THE CHAIR:** We don't need long quotes from documents.

7 **MR BOURKE:** No, no.

8 **THE CHAIR:** You say you want to refer to documents, but we will have the
9 documents.

10 **MR BOURKE:** Absolutely. Absolutely. We're conscious of that. We will be as concise
11 as possible.

12 **THE CHAIR:** And we will have the witness statements. So you don't again need to --

13 **MR BOURKE:** No, the intention is not to quote at length. Our aim is to be -- my leader
14 tells me that all the time: we should be as concise as possible, and we do our best.
15 Our skeleton, for example, for this hearing is very short.

16 **THE CHAIR:** No, that's --

17 **MR BOURKE:** We try and act responsibly all the time, and we will do so. We're very
18 conscious of the need to be responsible about this and the need to be concise, but we
19 also need to set out our own case in our own way, and Mr Harris will want to do the
20 same thing for his different clients.

21 We're not co-defendants with them; we're the only defendants in our own action. We
22 have our own facts and need to be able to set out our own case, and with the greatest
23 of respect, 30 pages is really too little for us if I may say so.

24 **THE CHAIR:** Mr Harris?

25 **MR HARRIS:** Sir, I can add to that in this way. For reasons that may become relevant
26 later in the hearing, we've already drafted substantially our skeleton argument. That's

1 why in our skeleton for today we put in a request for 60 pages. The reason is the
2 same reasons as Mr Bourke. But when we were explaining -- we think as concisely
3 as possible -- for the tribunal the relevant differences between the LSER evidence on
4 the one hand and the GTR evidence on the other hand, it became clear that that would
5 take some more space.

6 So that's why we think responsibly, having largely drafted the skeleton argument, that's
7 why we ask for 60 pages, based on experience.

8 I accept, of course, that if you were to order nevertheless 50 pages, something like
9 that, then it would be trimmed down. But what we thought was the way we'd done it
10 would actually assist the tribunal to draw out the salient points of difference between
11 the witnesses on the main points. That's the first point.

12 The second point is: we have, you will be pleased to hear, already liaised substantially
13 with Mr Bourke's client on non-duplication. Although I won't go into the detail now,
14 that has already been agreed between us, at least in outline. Therefore our skeleton,
15 the one that is already largely drafted, doesn't deal with certain issues precisely
16 because they are going to be dealt with by Mr Bourke and his team on behalf of both.
17 So I can already give that assurance.

18 But speaking from experience and having largely drafted it, 40 pages is not going to
19 be, with great respect, doable. We have asked for 60 because that's our genuine
20 estimate. Plainly, if you order 50, then we will trim our cloth accordingly.

21 The draft that currently exists does not cite extensively either from case law or from
22 documents or witness statements, but it does draw out relevant points and we think
23 that will assist the tribunal.

24 **THE CHAIR:** Yes, thank you. **(Pause)**

25 We see that there is some force in what is said for the defendants. The fact that there
26 are extensive witness statements, however, means that some of the material will be

1 in the witness statements, which we shall also read. But we think therefore Mr Harris's
2 clients -- the two separate operators -- 50 pages; and Mr Bourke, for your client,
3 40 pages.

4 Mr Moser?

5 **MR MOSER:** There we are.

6 **THE CHAIR:** Yes.

7 Can I just ask one other thing regarding first trial directions: are we going to have
8 LiveNote or not? Has that been considered? I imagine it has been.

9 **MR MOSER:** Yes. Yes, everyone nods. Yes, that has been considered.

10 **THE CHAIR:** Thank you. So there will be screens for the tribunal.

11 **MR MOSER:** Yes.

12 **MR HARRIS:** Before we leave this item, if we were about to --

13 **THE CHAIR:** No, we are not.

14 Bundles, hard copy and electronic. Please can we have hard-copy bundles
15 of -- obviously we want the skeletons as hard copy, but we can print them out; really
16 they needn't be in a bundle as such. But one bundle for pleadings and orders, one
17 bundle for witness statements and expert reports. So that may be a two-part bundle.
18 Then probably a further hard-copy bundle if there are any core documents, in
19 particular long agreements like the TfL agreement, and if there are any others; we
20 don't know. But that would be helpful, to have a core bundle. Everything else will be
21 purely electronic.

22 **MR MOSER:** Yes, sir.

23 **THE CHAIR:** The tribunal will communicate with the parties' representatives about
24 the number of copies that are needed.

25 **MR MOSER:** Yes.

26 **THE CHAIR:** We're trying to reduce the number of copies altogether of hard-copy

1 bundles, for obvious reasons.

2 **MR MOSER:** We shall seek to ensure -- I don't know why it's happened: in two
3 separate matters recently, the electronic version and the hard-copy version have
4 exactly the same referencing.

5 **THE CHAIR:** That is obviously desirable.

6 **MR MOSER:** Indeed.

7 **THE CHAIR:** The contrary is equally obviously very confusing.

8 **MR MOSER:** Yes.

9 **THE CHAIR:** Can I also say: with electronic bundles, some thought is given to the
10 way in which documents are put in the electronic bundles. Just because they're
11 electronic, and therefore you can provide a reference and put it up on screen, but still
12 it's much more convenient if there is some logical sequence in which they are uploaded
13 electronically.

14 We've had experience where you get a letter and the reply is somewhere completely
15 different. It doesn't assist, either during the trial or still less when having to write
16 a judgment.

17 **MR MOSER:** Yes.

18 **THE CHAIR:** I won't say any more about that.

19 Anything else now, Mr Harris? We have finished.

20 **MR HARRIS:** Sir, yes. Not by way of direction, but we certainly proposed a carefully
21 considered pre-reading list -- this may come back when we talk about trial timetable,
22 but certainly that's our proposal.

23 **THE CHAIR:** Yes. Well, that's extremely helpful. We would assume that, in the usual
24 way, the skeletons will say, "The tribunal is invited to read ..."

25 **MR HARRIS:** Yes. That's what we intend to put on the first page of the skeleton.

26 **THE CHAIR:** Yes.

1 The next point --

2 **MR HOLMES:** Sorry, can I just ask: do you envisage that being an agreed list of
3 pre-reading?

4 **MR HARRIS:** We will certainly endeavour, sir, to make it. But the reason I raise it
5 separately is because I anticipate it being important in this trial, for reasons that I can
6 develop later. And I take in mind, Mr Holmes, your point --

7 **MR HOLMES:** Thank you.

8 **THE CHAIR:** The next item is cross-examination.

9 We haven't, I should say, read the witness statements yet, so we don't know what's in
10 them. I think the general working approach is: first, each defendant must be clear on
11 the case that the class representative is advancing as against that defendant and
12 where its factual statements are being challenged. So they must understand that.

13 The challenge does not have to be put to every witness from that defendant. So we
14 just heard that MTR has eight factual witnesses. But if, say, five of those factual
15 witnesses say, "It just wasn't possible to configure" -- I'm just plucking an example out
16 of the air -- "ticket vending machines to include an option to purchase a boundary fare",
17 if that's said by five witnesses, you don't have to cross-examine all five of them about
18 how the ticket vending machine could be configured or arranged or provided. You can
19 say, "I'm going to deal with that with one of them", even if they all make that statement.
20 And obviously we expect you to choose the one who appears to deal with it most fully
21 or be the appropriate person to do that.

22 But if that is also said by one of the other defendants, then you do have to
23 cross-examine that other defendant on that. You can't rely on challenging defendant 1
24 as being sufficient --

25 **MR MOSER:** That is all understood, sir.

26 **THE CHAIR:** -- across the conduct of defendant 2 or defendant 3.

1 Subject only to the fact that if -- and it may not arise in this case -- if there is actually
2 an allegation that a witness is being dishonest and lying, that has to be put to that
3 individual witness. Any express allegations --

4 **MR MOSER:** It seems unlikely we are going to get there in this case.

5 **THE CHAIR:** I would have thought it is unlikely in this case, but that is, I think, the
6 basic rule. Beyond that, you certainly don't, as I say, have to put the point about
7 configuring ticket vending machines to every one of those five witnesses, and I don't
8 think any party sensibly expects you to do so.

9 **MR MOSER:** I'm grateful. In fact, in the very helpful discussions I had with Mr Harris
10 and Mr Bourke this morning, we had reached exactly that position you describe. That
11 is helpful.

12 There is a lot of witness evidence --

13 **THE CHAIR:** Yes.

14 **MR MOSER:** -- and there is only so much you can ask in the time available. To some
15 extent, as Mr Harris rightly says, it is the law that matters. But we will do our best to
16 fit it in.

17 I should perhaps at this stage, because we dove straight in, just mention the fact that
18 of course there are now three defendants to my right, represented by two sets of
19 counsel. We are no longer in the presence of Ms Abram KC, Stagecoach --

20 **THE CHAIR:** Yes.

21 **MR MOSER:** -- for the happy reason that that case settled last week.

22 **THE CHAIR:** We are aware of that.

23 **MR MOSER:** I just wanted to check that.

24 **THE CHAIR:** Yes.

25 **MR MOSER:** That does, of course, have at least some ameliorating consequence in
26 relation to the weight of witnesses, because those witnesses who were not common

1 to Stagecoach and First MTR, which is, I think, the four of their witnesses, will now not
2 be troubling us. That helps a little.

3 **THE CHAIR:** Yes.

4 Just before we come to timetable, but following on from witnesses, we
5 understand -- and this is First MTR's skeleton argument at paragraph 30,
6 I think -- there is a point raised about some questions and information sought, raised
7 as a result of the statement of Mr Bellenger.

8 **MR MOSER:** Yes.

9 **THE CHAIR:** I don't know if any progress has been made on that. In that skeleton it
10 says that First MTR wants the tribunal to make a direction on this. Where are we on
11 that?

12 **MR MOSER:** In fact, progress --

13 **THE CHAIR:** Yes.

14 **MR MOSER:** Sorry, I will just say what I need to say and then my learned friend can
15 leap in.

16 We think progress has been made. We wrote on 7 May answering their question, and
17 now Mr Bourke is probably going to tell us whether they think that is sufficient or
18 otherwise.

19 **MR BOURKE:** Yes, thank you. Indeed, what we were trying to do was -- Mr Bellenger
20 had alluded to certain documents in his witness statement, but he hadn't provided
21 them, and we wanted to have them.

22 **THE CHAIR:** Yes.

23 **MR BOURKE:** We asked to have them. And helpfully the class representative has
24 written back and he confirms that Mr Bellenger doesn't have the documents in his
25 possession or control, and his references therefore are based on his recollection. So
26 we can't take it any further and we don't pursue that point today.

1 Thank you, sir.

2 **MR MOSER:** Indeed. For completeness, we do also say in relation to a number of
3 the documents that it is they who must have them. But that's a matter for them.

4 **THE CHAIR:** Well, we will come to that, no doubt, at trial.

5 The other point arising on witness evidence is one raised in a letter dated yesterday --

6 **MR MOSER:** Yes.

7 **THE CHAIR:** -- from Freshfields, dealing with the LSER and GTR defendants, about
8 wishing to put in some further evidence, they say in short order after today, in response
9 to Mr Bellenger's second statement.

10 Can I just be clear, Mr Harris: short order? When would you --

11 **MR HARRIS:** A week today, no later. And as presently advised, if we do anything,
12 we think it will be absolute maximum of ten pages, likely closer to five. And it may be
13 that, on further reflection, we ultimately decide to do nothing.

14 **THE CHAIR:** Yes.

15 **MR HARRIS:** But may I give you an example?

16 **THE CHAIR:** Well, possibly not for the moment. Because, Mr Moser, that does
17 seem -- without looking at the detail, and if you seek to persuade me otherwise and
18 my colleagues otherwise, we will have to look at the detail -- it doesn't seem
19 unreasonable.

20 **MR MOSER:** It may not seem unreasonable if you're not looking at the detail.

21 **THE CHAIR:** Right. Well, in that case, I think --

22 **MR MOSER:** Can I just hand up --

23 **THE CHAIR:** It is Mr Harris's application.

24 **MR MOSER:** It is.

25 **THE CHAIR:** So if it's not agreed, I think it's right that he should explain to us before
26 you address us, very briefly, as to why that is important.

1 **MR MOSER:** By all means. But may I hand up copies of the second expert report of
2 Mr Bellenger? You have copies?

3 **THE CHAIR:** Yes, I think we have it.

4 **MR MOSER:** It's a 11-page document.

5 **THE CHAIR:** Yes.

6 **MR HARRIS:** You may find it convenient to also have to hand, obviously, the first
7 statement.

8 **THE CHAIR:** Yes. **(Pause)**
9 Yes, you appreciate we have not read these.

10 **MR HARRIS:** I understand. I don't propose to go through them. I'm going to keep
11 this very brief. It's a short, simple point.
12 If you were to take up, please, the first of these expert statements and turn, please, to
13 paragraph 7 of Mr Bellenger's first statement

14 **THE CHAIR:** Yes.

15 **MR HARRIS:** -- you will see that Mr Bellenger was specifically instructed to address
16 various issues in the list of issues, including issue number 9. And if you look at his
17 paragraph 7, he extracts issue number 9 and it includes, inter alia, his addressing the
18 availability of boundary fares for sale, and then (b):
19 "... making available boundary fares for discounted and/or promotional fares, including
20 advance fares and fares from ... or otherwise."

21 **THE CHAIR:** Yes.

22 **MR HARRIS:** But in fact Mr Bellenger in his first expert statement doesn't address in
23 any detail the reasons said by the CR to support the need for their pleaded case on
24 making available those, for example, advance boundary fares. Those issues are to
25 be found behind tab 27 in the core bundle if you want them.

26 **THE CHAIR:** Yes.

1 **MR HARRIS:** We of course anticipated, given that (a) it was a pleaded issue that was
2 contested and (b) it specifically found its way into the list of issues, that the only witness
3 to be advanced on behalf of the CR, namely Mr Bellenger, would put forward CR's
4 positive case on the reasons why those types of fares should have been made
5 available as a matter of legal obligation. But in fact it didn't occur in Bellenger 1.

6 **THE CHAIR:** Yes.

7 **MR HARRIS:** We, in contrast, in our evidence -- what I shall call "primary evidence",
8 which is our first-round evidence -- we gave multiple reasons in multiple witness
9 statements as to why each of those types of proposed legally obligatory fare shouldn't
10 be legally obligatory.

11 So there was essentially nothing from the CR on this part of the case, and there was
12 a considerable body of evidence from LSER and GTR, and for that matter from
13 First MTR.

14 Then what has happened in Mr Bellenger's second expert statement is that he has
15 addressed, supposedly by way of --

16 **PROFESSOR MASON:** Mr Harris, just for clarity, this is the one that's titled "Reply
17 Expert Statement"?

18 **MR HARRIS:** That's correct. You don't need to read it, but to glance at the reply
19 expert statement, you see heading B, page 4, "Availability of boundary fares for
20 discounted and/or promotional fares", and then there are several pages of evidence
21 on those topics.

22 All of that material could -- and we respectfully say should -- have been put in the first
23 expert statement of Mr Bellenger if the CR wanted to use Mr Bellenger to seek to
24 support his pleaded case and the list of issues. And of course Mr Bellenger did say
25 that that's what he was going to do, but he didn't.

26 The reason that creates unfairness is obvious. We have now seen for the first time in

1 a supposed reply statement new points of fact, supposed fact or argumentation or
2 whatever, something in writing on those topics, and we don't agree with all of it and
3 it's the first time we've seen it. So the options, it seems to us, are either that should
4 be excluded -- and we think that's a bit draconian, and therefore we seek instead this
5 direction for a very short -- if so advised we may be able to deal with some of it with
6 permission, but we may not.

7 That is only one example; there are several others. There is new evidence in this reply
8 statement about all kinds of other things (inaudible) dealing with that and that's really
9 a simple --

10 **THE CHAIR:** Yes, I see.

11 Can you just help me -- as Mr Professor Mason has brought out, it's a reply report.
12 What was the sequence -- I cannot now recall -- of the factual witness --

13 **MR HARRIS:** Mr Bellenger came at the same time as all the factual evidence, and
14 that's of course because the CR wanted to give what he has described as a sort of
15 industry expert, rather than call (inaudible) for facts.

16 So Mr Bellenger came at the same time as all of our fact evidence and then we've all
17 had reply. But when we replied, of course, we couldn't reply to this new material
18 because it wasn't there.

19 **THE CHAIR:** But after Mr Bellenger's first report, you then had further factual --

20 **MR MOSER:** We gave some fairly short reply evidence.

21 **THE CHAIR:** In reply to that. Yes, I see.

22 **PROFESSOR MASON:** Hence this second report is a reply to those replies; is that
23 the sequence?

24 **MR HARRIS:** No, Mr Bellenger's second reply statement is a reply to our primary fact
25 evidence.

26 That's why it has arisen, you see, is because in our primary fact evidence we put in

1 a lot of evidence about advance boundary fares, advance promotional fares, advance
2 season ticket fares and all these other points, because it was a pleaded case and it
3 was a listed issue, suddenly the CR has thought, "Oh, crikey, I'd better reply to that".
4 But therein lies the rub, because we hadn't seen it before.

5 **THE CHAIR:** And you have put in further factual evidence in reply to Mr Bellenger's
6 first report --

7 **MR HARRIS:** Exactly.

8 **THE CHAIR:** -- but obviously didn't deal with this because it wasn't in it?

9 **MR HARRIS:** Exactly.

10 **THE CHAIR:** Yes.

11 Yes, Mr Moser.

12 **MR MOSER:** I have three points to address really, three things that are said about
13 this. In the skeleton it was said it's not responsive. It's also, in the skeleton, only
14 talking about advance fares. And the third thing is that today Mr Harris says he would
15 like to put in a response statement of ten pages or so.

16 Our main concern is to introduce some limits to what is done. The first point is: well,
17 it clearly is responsive, as Mr Harris himself said. They put in, in multiple places, in
18 multiple witness statements, multiple reasons about advance fares, so that was a gap
19 that was plugged in reply. And Mr Bellenger, at pages 4 and following, actually gives
20 footnotes to exactly what it is he's replying to --

21 **THE CHAIR:** Yes.

22 **MR MOSER:** -- the first witness statement of A Strain, the first witness statement of
23 B Edwards, et cetera, with precision.

24 **THE CHAIR:** When you say in the skeleton it was put, I don't think -- was this in the
25 skeleton at all? I thought it came in the letter.

26 **MR MOSER:** I'm sorry, skeleton -- it came in the letter. The letter.

1 **THE CHAIR:** Yes.

2 **MR MOSER:** You're quite right. It came -- you said "yesterday"; I saw it this morning
3 actually.

4 **THE CHAIR:** Yes, I think it came probably late yesterday. For most people, it was
5 this morning.

6 **MR MOSER:** It was sometime last night.

7 Mr Bellenger has two and a half pages on advance fares. If Mr Harris's clients are
8 advised and do feel moved to produce a response, then the only item that they've
9 identified is advance fares. Right at the end of my learned friend's submissions there
10 was a vague suggestion that, "Oh, there might be other things", they would like to
11 respond, as it were. With respect, no.

12 They've had their initial statements. Between the defendants, they've served about
13 15 statements of over 500 pages. They've had another half-dozen not insubstantial
14 reply statements yesterday, I think. They cover all these points; many of them cover
15 them several times.

16 So if there's anything other than advance fares that they want, then we should know
17 before --

18 **THE CHAIR:** When you say "advance fares", do you mean, to be quite clear ...

19 (Video conference connection lost)

20 **MR MOSER:** That is unacceptable, because really we have to reach finality now of
21 their evidence.

22 **THE CHAIR:** Yes.

23 **MR MOSER:** They've had lots of evidence. They've had many days in which to
24 answer any questions. Of course we're going to ask their witnesses about this and
25 they will be able to respond.

26 So something very short in response on section B only. Ten pages, with respect, is

1 the same length as the whole statement.

2 **THE CHAIR:** One doesn't actually know -- sometimes things take -- because it may
3 be responsive, it might take longer to explain. I wouldn't normally put a page limit on
4 a witness statement. It shouldn't be prolix, but some things take longer to explain than
5 others.

6 But yes, we have your point. And Mr Harris has not asked for a long statement
7 anyway. Section B you're not resisting, but anything else you are.

8 **MR MOSER:** Yes.

9 **THE CHAIR:** At the moment we have not really been addressed on sections C and
10 D. And the letter that made the request says "e.g.", and so refers to section B.

11 **MR HARRIS:** Sir, can I --

12 **THE CHAIR:** Yes, can you assist on that?

13 **MR HARRIS:** The letter is obviously only short because it's the same point.

14 **THE CHAIR:** Yes.

15 **MR HARRIS:** But let me give you another example. If you turn to page 8, section D
16 of Mr Bellenger 2, you will see that there is new evidence, all of which could have been
17 given in the primary statement.

18 **THE CHAIR:** Well, it's a reply.

19 **MR MOSER:** Yes, but if you look at paragraph 20 ...

20 (Video conference connection lost)

21 **THE CHAIR:** Anything else?

22 **MR HARRIS:** No, but there are three examples at paragraph 20: the Bluebell Railway,
23 the Bletchley and Bedford and the Veterans Railcard. All of it could and should have
24 been given as primary evidence. And all I ask now is to have the ability, if so advised,
25 to carry short responsive evidence, for example, for those points, which we've never
26 seen before.

1 They've all been known years and years. If there's anything in them -- this is goes to
2 the heart of my learned friend's case about the degree of making "sufficiently available"
3 how much publicity of what type. He now says that these are all perfect examples of
4 how it should be done --

5 **THE CHAIR:** Yes.

6 **MR HARRIS:** -- and we've never seen them before.

7 So it's as simple as that. We may not respond: we may be able to deal with it in
8 cross-examination or in submission. I want the opportunity, with respect, to be able to
9 put something short in relation to examples like that as well. So it's mainly B and D.

10 **THE CHAIR:** Are there any other examples in -- obviously paragraphs 18/19, there's
11 nothing. The earlier part of paragraph 20, there's nothing.

12 **MR HARRIS:** It's essentially the points in section B that I've identified and it's those
13 examples in 20. The same point doesn't arise in section C. That's because
14 essentially, from our perspective, the class representative's expert has made some
15 extremely helpful concessions and we are plainly not going to challenge that.

16 **THE CHAIR:** Yes. Thank you. We will just --

17 **MR MOSER:** Sir, just if I may briefly, it is somewhat unsatisfactory. They've had this
18 since Friday. The nicheness of boundary fares is something that is very extensively
19 covered in their evidence, which you have the disadvantage of not having seen.
20 Nicheness is covered in Humphries 1, Backways 3, Morrow 1, Fayer 1, Anderson 1,
21 Williams 1, Ludlow 1, Cameron 2, Hutchinson 1 and Hill 1, very much in similar terms.
22 Obviously we had to respond to it. We've responded to it with one pragmatic
23 paragraph.

24 I don't know how much more they want to put in on this. If they're going to put in what
25 sounds like entirely new reply evidence, it may take us down a rabbit hole of us having
26 to come back and say, "We'll have to give you more about that".

1 So it sounds a sort of vanilla and non-dangerous thing to say, "Oh, well, there is also
2 this paragraph 20", but they have extensive evidence. Really there's nothing wrong
3 with us replying. That's the point of reply evidence.

4 We've seen their half-dozen or so reply statements. We could easily have come back
5 today and said, "Well, there's a lot of things in these reply statements that I'd like to
6 say a bit more about". We have to stop somewhere.

7 **THE CHAIR:** Yes, thank you. (Pause)

8 (Video conference connection lost)

9 **THE CHAIR:** ... the point. We think we will permit responsive evidence but only to
10 section B, factual matters in section B, and the examples in paragraph 20 of
11 Mr Bellenger's second report, provided that that witness statement or statements are
12 served by, say, a week today. So that's at 4.00 pm on 16 May.

13 We won't put a page limit on it. As I indicated, I don't think that's desirable with witness
14 statements. You've indicated on instructions that you don't anticipate there should be
15 any more than ten pages at most. We would only say that if it starts being a long
16 witness statement, then that will only stimulate or provoke the class representative to
17 wish to put in evidence in reply to that, and that's not an avenue anyone wishes to go
18 down. So it's strongly in your interests to keep it as brief as you have indicated.

19 So there is liberty to put in responsive evidence if so advised, provided it's served by
20 4.00 pm on 16 May, to section B and the examples in paragraph 20.

21 **MR BOURKE:** Sir, may we have the same permission, please, under the same
22 conditions and if so advised?

23 **THE CHAIR:** Yes, I think that must equally apply to you.

24 **MR BOURKE:** Thank you, sir.

25 **THE CHAIR:** Same date, obviously, the same terms.

26 Right, the next thing that we turn to then is the trial timetable. We've had various

1 proposals and counter-proposals and revised proposals today and we've thought
2 about it, as you might expect. And there are certain limitations on the tribunal's
3 availability, different members of the tribunal.

4 We can say this: we do not need from the hearing timetable days for pre-reading. We
5 will pre-read the previous week. So the case can start on 17 June in court with
6 openings.

7 We cannot sit -- as I think the parties were told a while ago -- on the Friday of the first
8 week, that's the 21st, and there are problems on the subsequent Mondays, that's to
9 say the 24th, 1st and 8th July.

10 So what we consider and suggest is this: the Monday is for opening by the class
11 representative. We think a day's opening may be helpful. And for the defendants'
12 now two counsel, we think a day between you should be sufficient, given we have
13 extended the length of skeleton arguments. If you want to spill into Wednesday
14 morning for an hour on Wednesday, 10.30 to 11.30 -- indeed, we need to sit at 10.00
15 on Wednesday -- but no more than an hour on Wednesday. We think that works well.

16 As regards cross-examination, we assume that in due course -- we'll discuss in
17 a moment what "due course" means -- Mr Moser, you will be indicating to the
18 defendants which witnesses you wish to cross-examine and for how long, and think
19 about a timetable for those witnesses because they need to be told. But at the moment
20 we see that it's effectively six days for factual witnesses which is being asked for, and
21 one day, or possibly a bit over a day, for Mr Bellenger. Unless there's any change
22 from that, that's what it seems to me.

23 We do think that Mr Bellenger should come last. He is an expert witness. I know he
24 gives some evidence of fact, but he's doing it as an expert. He's made the expert
25 declaration. He has a duty to the court which he acknowledges, which the other
26 witnesses don't. And it's right that he should be able then to reflect in his evidence

1 | what's been said in the factual evidence, in the usual way for any expert.
2 | So he should come at the end. It's frankly not going to make a huge difference when
3 | he comes, but that is the standard procedure and we think it should follow, even though
4 | we know he's giving factual evidence, as experts generally do in cases in this tribunal.
5 | It will be the factual witnesses first. So we will have Wednesday/Thursday of week 1.
6 | We can't sit on 24 June, so we'll have Tuesday to Friday of week 2, and that will finish
7 | the factual evidence, the defendants' witnesses.
8 | As we said, we can't sit on 1 July, so Mr Bellenger will be on Tuesday, 2 July. And if
9 | he spills over a bit to Wednesday morning, we'll see how that goes: either sit a bit later
10 | on the Tuesday or there will be a bit of Mr Bellenger on Wednesday morning. But in
11 | any event, we will then adjourn for closings, and we would like the written closings by
12 | 2.00 pm on Friday. So go longer with Mr Bellenger on Wednesday morning and that
13 | cuts into your preparation time. But on any view, we think that's adequate time.
14 | Written closings by 2.00 pm on the 5th. We can't sit on Monday the 8th. So we will
15 | then have, as you all suggest, two days for oral closings on the 9th and 10th.

16 | **MR MOSER:** That's very helpful.

17 | **THE CHAIR:** Is anyone horrified, dismayed or wishes to argue against that?

18 | **MR MOSER:** Not on this side.

19 | **MR HARRIS:** I'm sorry to say, yes. It really focuses upon the very beginning. There
20 | are two reasons why I would seek to persuade the tribunal to have at least one
21 | non-sitting day, namely Monday the 17th. They are separate and distinct, but one of
22 | them is potentially a -- I don't hide from this -- it's a personal application by me, and it
23 | arises from a professional embarrassment.

24 | After this -- and I recognise that this case takes precedence and this case was put in
25 | the diary first, and I will obviously attend on Monday the 17th as ordered if that's where
26 | we end up. But what happened about two months ago was an expedited order in

1 a private commercial arbitration involving competition law with urgency was ordered
2 to be listed for two weeks beginning Monday, 10 June. The second week of that
3 matter, in which I'm instructed as leading counsel, is none other than the week
4 commencing 17 June.

5 As a result, I have endeavoured with the tribunal in the arbitration -- sitting with some
6 very eminent members: Lord Dyson, Judge Vajda and Sir Nigel Teare -- to obtain
7 extended sitting hours for that first week, beginning 10 June, but it would very
8 substantially assist both me and that other tribunal if we could have at least one
9 non-sitting day on Monday the 17th, so as to facilitate my attendance in the other
10 arbitration at least on that day.

11 Then with any luck, with a mixture of that day and some extended sitting hours in the
12 week beginning 10 June, the arbitration, at least the part in which I am principally
13 charged as leading counsel, can be dealt with and I can be excused.

14 **THE CHAIR:** And you have Friday to return that week, if you say it's a two-week
15 hearing.

16 **MR HARRIS:** That's right. But just because of the practicalities and what I will have
17 missed earlier in that week, it probably won't be meaningful to go back on that Friday.
18 Because that's likely to be closings and I would --

19 **THE CHAIR:** Yes.

20 **MR HARRIS:** I recognise, and I hold up my hand, that is very much a personal
21 application that arises out of professional embarrassment.

22 **THE CHAIR:** We understand.

23 **MR HARRIS:** It would bundle, on that reckoning, everything one day further back into
24 commencing in July.

25 There is a second reason. I would have made this submission in any event, but
26 I recognise in light of what you said about the pre-reading you may not find favour with

1 | what I am about to say.

2 | **THE CHAIR:** Yes.

3 | **MR HARRIS:** But it's this, and I alluded to it earlier and so did Mr Bourke. And it
4 | merges into the second point I want to make: to push back, if I may, about the length
5 | of the defendant's opening.

6 | We find ourselves in a slightly difficult position here. There is only one witness on the
7 | other side. In the normal way, one would write a skeleton argument, one would give
8 | a pre-reading list and one would identify some documents, but then one would have
9 | a relatively meaningful amount of airtime within court to put what we consider to be
10 | the most central documents in a meaningful, impactful way to witnesses in
11 | cross-examination. As an advocate, as the court well recognises, one relies upon that
12 | time to further reinforce the key documents and the key messaging.

13 | But that, in this case, is never going to happen for the defendants because there are
14 | no witnesses for the class representative, save only Mr Bellenger, and Mr Bellenger
15 | has a distinct status.

16 | **THE CHAIR:** Yes.

17 | **MR HARRIS:** We are not going to be spending -- leaving aside that one doesn't think
18 | that one needs more than a day in any event, but we are not going to be spending
19 | oodles of time with Mr Bellenger saying this and that.

20 | **THE CHAIR:** Yes.

21 | **MR HARRIS:** So what I was going to say in any event was that it might assist the
22 | tribunal to have that extra day and -- to pick back up on the point that I was discussing
23 | with Mr Holmes earlier on -- to have this pre-reading list. That's why I say the
24 | pre-reading list in this case is of greater importance than it would be in another case.

25 | Then that takes me on to the second point -- they are all related, these -- we
26 | respectfully contend that we do need a bit more time in opening. That's

1 notwithstanding the extra space in the skeletons and it's notwithstanding what I urge
2 upon you, which is to have Monday the 17th as a sitting day. We think that even with
3 both of those things, it would still be of assistance to the tribunal if the defendants are
4 allowed a bit more time in opening, including because they would want orally -- I want,
5 on behalf of both of my clients, to be able to orally present documents that otherwise
6 won't get airtime in the court, even though the tribunal will doubtless have read them.

7 **THE CHAIR:** They have been referred to in the extensive witness statements you put
8 in, which of course the class representative has not.

9 **MR HARRIS:** That's true. But let me give you an example.

10 Under the current practice direction -- and quite rightly so -- the witnesses do not
11 traverse, let alone set out, masses of documents, and they certainly don't purport to
12 give evidence on documents about which they have no personal knowledge. That
13 practice direction was put in place very deliberately, but it then necessitates an
14 opportunity for documents that aren't traversed by the witnesses, about which they
15 don't have personal knowledge, but which are nevertheless important, to be presented
16 orally to the court. And as I say, to some extent that would happen in
17 cross-examination, but it won't happen in this case.

18 Let me give you an example: the ticketing and settlement agreement that has
19 particular importance. For instance, there is a big dispute between the parties as to
20 whether there is in fact any double charging. As know, the CR's case is that there is
21 double remuneration by the defendants. The defendants' evidence is that that's
22 factually wrong. But it's not just the witnesses who say it's factually wrong; you need
23 to have a proper understanding of the TSA and the Travelcard agreement. They are
24 complicated documents.

25 With the best will in the world, even if I put on the pre-reading list, "Can you please
26 have regard to" -- I think it's a 90-page agreement, just the one, realistically, even to

1 assist the tribunal, I'd like a little bit more time in oral opening and, with respect, I would
2 like to have identified in my pre-reading list some specific things the tribunal could
3 usefully look at. They could do that on Monday the 17th if you decide that there is any
4 merit in what I say.

5 Now, the parties -- and I appreciate this is entirely a matter for the tribunal -- but the
6 parties themselves were content to at least that Monday -- well, both, but certainly
7 Monday the 17th, without sitting. And if my proposal is accepted, it would mean
8 probably just moving into one of what is currently characterised as a reserve day in
9 week 3. Everything else could remain the same: we wouldn't sit on the 21st, we
10 wouldn't sit on any of the Mondays. It would just be one day non-sitting at the
11 beginning, for the two reasons that I've given, and if needs be, one extra day at the
12 end.

13 **THE CHAIR:** Yes.

14 **MR HARRIS:** The only other thing I have to say, unless there are any questions on
15 any of this, is I will do my best to persuade you that in this case, notwithstanding the
16 normal practice to have an expert at the end, this is an unusual case. The class
17 representative could have adduced evidence from non-experts, but chose not to. And
18 it is undoubtedly the case that the class representatives' expert testimony does give
19 masses of factual evidence. You've just seen some of it: Bluebell, Bedford and
20 Bletchley and Veterans' Railcard. They are just three of many, many examples.

21 What we find, and why we suggested on our case putting the CR's expert witness first,
22 is that we see that it is for the CR to set out its case, including with his witness, before
23 we respond to it. Otherwise, there's the slightly invidious -- I accept it's
24 unusual -- position that our witnesses are being invited to give evidence on topics
25 where it hasn't become clear to the tribunal, including because Mr Bellenger won't
26 have been cross-examined, exactly what the CR's case is on a particular point.

1 Let me give the two examples that arose before. Advance boundary fares: we don't
2 accept that. We will obviously be wanting to challenge Mr Bellenger on that. But on
3 this hypothesis, he won't have been challenged, so we won't even know by the time
4 our witnesses give evidence where the evidence has ended up and indeed what
5 precisely the CR's final case is on that point. And if Bluebell or Bedford arises, or
6 Veterans, if they arise as meaningful points, exactly the same points arise.

7 We've thought about this long and hard, and we think that the sensible case, because
8 this is an asymmetric aggregate class action, there aren't any witnesses for the CR,
9 that actually there's no real choice, in fairness, but to have the CR's expert.

10 There are other examples. I appreciate you understandably haven't read it yet, but
11 Mr Bellenger gives all manner of evidence about what he "understands", what he
12 "believes", and then he gives lots of generalised assertions about, "Well, in general,
13 I thought there was a problem with the ticketing machines", and, "In general, I thought
14 that these things weren't advertised".

15 But really, it's not fair to us for Mr Bellenger to be able to say that at the end. We need
16 to know what target our witnesses and our submissions are focused upon. Because
17 it may well be -- who knows? -- that after the questioning of Mr Bellenger it becomes
18 clear that actually his generalised assertions don't apply across the board. He may
19 accept that. Or that in general he's talking this, but he accepts that there's a caveat:
20 that it doesn't apply, because of the specific evidence of one of our witnesses, to one
21 of the defendants for a particular period or on a particular mode of sale. But unless
22 he goes first, we simply won't know that.

23 It also makes a difference to the cross-examination that then goes to our witnesses.
24 Let's say we make --

25 **THE CHAIR:** When you say -- I don't quite understand -- "unless he goes first, we ...
26 won't know that", unless he goes first and you know it, you're not asking then to put in

1 more witness statements after he's given his factual evidence.

2 **MR HARRIS:** No, but it makes a difference in two ways. Let's say Mr Bellenger
3 doesn't end up, at the end of his cross-examination, purporting a particular point. Then
4 at that point, it can't sensibly be put -- or one would have to adjust one's
5 cross-examination --

6 **THE CHAIR:** But it's not your cross-examination.

7 **MR HARRIS:** No, this is for Mr Moser. He would have to adjust --

8 **THE CHAIR:** Yes.

9 **MR HARRIS:** -- if his own case hasn't managed to establish a particular proposition.

10 **THE CHAIR:** So it doesn't disadvantage you. You say it wastes a bit of time for
11 Mr Moser.

12 **MR HARRIS:** Exactly, and this is why --

13 **THE CHAIR:** But it's no disadvantage to you, because your evidence stands as it is.

14 **MR HARRIS:** That's the first point.

15 **THE CHAIR:** Because you said it's not fair. That's what I don't understand.

16 **MR HARRIS:** Well, I put the fairness point this way. My witnesses are going to be
17 present, some of them, if they're available, and it's important for them to be able to
18 hear, before they give their evidence, in my respectful submission, how the case is put
19 against them.

20 If a particular point has not been substantiated even by the CR from his own so-called
21 "industry expert", then my witnesses are going to be able to say, "Well, even" -- well,
22 they probably won't put it like this, because they're not going to argue any point. But
23 they will be confident in the knowledge that something that they have said isn't even
24 supported by the other side.

25 That seems to me, with great respect, to be the right way round.

26 **THE CHAIR:** Yes.

1 **MR HARRIS:** And it may happen -- this is one of the first cases; this is only the second
2 trial on an aggregate opt-out class action. So when the point is put to me, "Oh, well,
3 one wouldn't normally do that", I, in response, respectfully say: well, one doesn't have
4 a normal practice yet for these actions because of the way that they're structured.

5 **THE CHAIR:** Yes.

6 **MR HARRIS:** As I say again, the class representative could have chosen to do this in
7 a different way. He could have taken out all factual evidence from Mr Bellenger and
8 adduced some true factual witnesses, and then there would have been no question
9 but that they should go first. And then he could have put true expert evidence,
10 independent expert evidence, in an expert statement, and there might have been an
11 argument that that should go at the end. But he hasn't done that. One understands
12 why he hasn't done that, but nevertheless he hasn't done that.

13 So I don't see, with respect, that this is a sort of traditional, orthodox situation in which
14 the so-called "expert" should go at the end.

15 **THE CHAIR:** Thank you.

16 There are a number of things raised there. It is now 11.50. We are making, I think,
17 good progress, so there is no danger, it seems to me, of spilling into the afternoon.

18 I don't think we can do much for disclosure for the second trial. We're very sympathetic
19 to what the defendants say, but that's something you should discuss between you first.

20 So I think, given the time, what we will do is we will rise for a moment for, as we
21 normally do at this point, ten minutes, and then we will consider where we are.

22 **(11.51 am)**

23 **(A short break)**

24 **(12.08 pm)**

25 **THE CHAIR:** Everybody is standing up.

26 Mr Bourke.

1 **MR BOURKE:** May I have an opportunity just to add to what Mr Harris said? We
2 certainly would gratefully adopt his submissions on the openings and the need for
3 sufficient time in opening --

4 **THE CHAIR:** Yes.

5 **MR BOURKE:** -- and also on the order when Mr Bellenger should appear. We agree
6 that he should go first.

7 The only other very brief point that I wanted to mention on the overall timetable, in
8 case it can assist, is that at the moment six days are built in for cross-examination for
9 the class representative. I've understood from his skeleton that that's a kind of
10 a maximalist approach, paragraph 20 of the skeleton, and he may now be assisted by
11 the direction the tribunal has given about not needing to put every point to every
12 witness. He does say in paragraph 22 of his skeleton that he may be able to reduce
13 the time needed for cross-examination --

14 **THE CHAIR:** Yes.

15 **MR BOURKE:** -- and that would help everything, including Mr Harris's point about
16 giving us a bit more time for opening, which we need, and everything could be
17 accommodated within the time period the tribunal envisages.

18 Just while I'm on that point and on my feet, the only other thing we would request is
19 that we would ask the class representative to let us know as soon as possible -- and
20 maybe this needs a direction -- who is he's going to cross-examine and for how long,
21 so that we can try and prepare properly, and populate the timetable properly, based
22 on that information. Because at the moment we're still in the dark, at the PTR.

23 **THE CHAIR:** Yes.

24 **MR BOURKE:** We would be really grateful for that, because we do have issues of
25 witness availability and --

26 **THE CHAIR:** Yes. Well, I think I said earlier, Mr Bourke, in due course -- and we will

1 | come back to what is "in due course" -- that has to be done, and always is done.

2 | **MR BOURKE:** Thank you.

3 | **THE CHAIR:** Mr Moser, on this last point, which indeed we were intending to raise
4 | with you, about the time. At the moment it's six days for cross-examination of the
5 | factual witnesses. As Mr Bourke has pointed out, you say that's the maximum.

6 | What is your position, and when will you be -- if not today -- clearer on the extent to
7 | which all the witnesses have to attend and how long you will be with your witnesses?

8 | **MR MOSER:** It remains our position as at today that all the witnesses are going to be
9 | cross-examined. I've slightly lost count now, 15 or --

10 | **THE CHAIR:** Yes.

11 | **MR MOSER:** I find it impossible to imagine that it's going to take less than six days
12 | now that I've also seen the reply evidence, which I certainly hadn't taken into account
13 | when we did our skeleton argument. Six days is, on any view, a fairly squeezed
14 | timetable to do sometimes three witnesses a day, maybe.

15 | In discussion with Mr Bourke before, I indicated that we will of course liaise. It would
16 | be very interesting to know when their witnesses are available. I won't necessarily
17 | insist on cross-examining a particular witness on that particular day, if it's their wife's
18 | birthday or whatever. But that's the sort of process we envisage over the coming days,
19 | and then we can work out the order they can be called. That's all very sensible and
20 | I completely agree with Mr Bourke.

21 | I sensed before this hearing -- there has been an outbreak of a lot of common
22 | sense -- that they were asking us to give them an idea as to what the questions were
23 | going to be.

24 | **THE CHAIR:** That's not apparently being pursued, and we're --

25 | **MR MOSER:** I'm grateful.

26 | **THE CHAIR:** -- not going to be at all amenable to that without a lot of persuasion. So

1 you needn't address that.

2 **MR MOSER:** Yes, absolutely.

3 **THE CHAIR:** So just to be clear, the present position is all witnesses to attend for
4 cross-examination, six days are required and you will liaise over the coming week with
5 the respective defendant's representative as to what order.

6 **MR MOSER:** Yes.

7 **THE CHAIR:** And I imagine some witnesses will be cross-examined for significantly
8 longer than some others.

9 **MR MOSER:** Yes. For instance, Mr Cameron seems to be an important witness for
10 them. He's given two witness statements. There is a long part at the beginning of his
11 first witness statement which we are going to say has nothing to do with this trial, so
12 we are not even going to go there.

13 **THE CHAIR:** Yes, I think it is helpful if you can indicate as soon as possible the
14 approximate length of time you need or expect to wish to ask questions of identified
15 witnesses as that also then affects availability. So if you say, Mr Cameron you will
16 think you will be a whole day but the following three people will be two hours each --

17 **MR MOSER:** That's exactly what we have in mind.

18 **THE CHAIR:** So if you can do that over the following weeks -- this is not a formal
19 order but it is sensible -- then the defendants can respond saying, "Actually,
20 Mr Cameron isn't available on these days but could be on those days", and you can
21 come to a sensible timetable.

22 **MR MOSER:** I am grateful.

23 **THE CHAIR:** Yes. Now on the other matters we can say we are sympathetic to
24 Mr Harris's position. He's very frank about it, but it is a personal, professional
25 engagement. But we would wish, if possible, to accommodate him. We think that's in
26 the spirit of cooperation between the tribunal and the bar which we wish to encourage

1 and, therefore, we will find a way of not sitting on the Monday.

2 I stress, we are doing that, Mr Harris, to assist you. Not because we need it as a day
3 for pre-reading.

4 **MR HARRIS:** Thank you very much.

5 **THE CHAIR:** We have pre-reading set aside individually by members of the tribunal
6 the previous week on the basis of the date when we receive skeleton arguments.

7 We think it is possible to do this so that we don't sit on the Monday but start on the
8 Tuesday with the class representative's opening.

9 As regards the openings from the defendants' representatives, we really don't think
10 that it needs more than a day or, as I said before, it could spill into the next day by an
11 hour, to 11.30 on what is now the Thursday.

12 We have given you longer for your skeletons than we had proposed. You will give us
13 pre-reading references, including where there is an agreement no doubt to clauses
14 identified in the agreement. We will look at those clauses. You can highlight points.
15 A day is actually quite a long time for opening, and of course you have then closings,
16 both written and oral. So it will be a day plus an hour, if that hour is needed, with then
17 the first factual witnesses starting on the Thursday morning. We are not sitting that
18 Friday.

19 That means the following week we have Tuesday to Friday, and we will need another
20 day for a factual witness, which will be 2 July. Mr Bellenger will be then on the
21 Wednesday of week 3, 3 July and, if needed, can spill into the Thursday morning.

22 We then want the closings by 10 am on Monday, 8 July. Oral closings will be on 10th
23 and 11th July. That will give the tribunal two days to read and digest your written
24 closings.

25 **MR MOSER:** I am grateful, sir.

26 **THE CHAIR:** It has been evident from what I have just said that while we take the

1 points that are said about Mr Bellenger and the order, I have to say I don't think it really
2 makes so much difference that people should get very excited about when he gives
3 his evidence.

4 It is, I think, in the nature of opt-out collective proceedings that the class representative
5 generally won't have factual evidence in many cases and is relying on evidence
6 coming from the defendants. We don't think it causes any unfairness, which is the
7 most important point, so Mr Bellenger will come at the end. But we won't sit on Monday
8 17th.

9 Obviously, if there are any reductions in the length of time needed for factual
10 witnesses, the parties will liaise with each other and the tribunal, and if that enables
11 things to be done more quickly towards the end of the trials, then that will happen.

12 **MR MOSER:** Indeed.

13 **THE CHAIR:** But for the moment that's how the timetable will work.

14 **MR MOSER:** Like Mr Bourke and his written submissions, I have no desire to be any
15 longer than I need to be. If I can be less than -- fewer, less -- than six days --

16 **THE CHAIR:** Yes.

17 **MR MOSER:** -- then I will. Indeed, I may not be the only person cross-examining,
18 given the directive from on high that bid spreading about the cross-examination team.

19 **THE CHAIR:** Yes. It may not necessarily be all you personally, but it will be your
20 juniors, yes.

21 **MR MOSER:** Yes, so I am grateful for all of that. I have nothing further on the
22 timetable.

23 On directions to trial 2, I think it is fair -- before I actually finish, I should say I had
24 genuinely forgotten about Mr Harris's situation on the Monday, otherwise I would have
25 made a remark about it before letting him start. So I completely agree with what sir
26 said on that point.

1 So, leaving that aside, as far as the trial timetable for trial 2 is concerned, it is with
2 some lack of enthusiasm, I think, that any of us tried to turn to it. It is just something
3 that was mooted on the last occasion so we thought we'd better cover it. We certainly
4 have no objection to leaving that over for another day.

5 If that is so, I believe that probably concludes the business of the day, subject to any
6 other business from anyone else.

7 **THE CHAIR:** Yes. We did say, I think, at one of the early hearings on this when the
8 decision was taken to split the trial this way, that this should not hold up trial 2.

9 **MR MOSER:** No.

10 **THE CHAIR:** It would be very optimistic to expect a judgment after trial 1 before the
11 summer, and therefore that would lose a long period.

12 So we would encourage some work to be undertaken towards trial 2, even though, of
13 course, one potential benefit of splitting the trial is that there is the possibility trial 2 will
14 never take place. But one has to balance all these things, so that we would encourage
15 you to engage with one another through your solicitors as to steps which can be taken
16 in a proportionate way and what sort of timetable.

17 If then one wants to fix a CMC for trial 2 for October/November --

18 **MR MOSER:** It seems a good idea.

19 **THE CHAIR:** -- it will and it could be vacated. But to have a date, given the number
20 of parties and the constraints on the tribunal's time, it would be sensible to fix a CMC.

21 Is there anything, Mr Bourke, you want to say on that point?

22 **MR BOURKE:** Yes. Not to that point. I have just one more very brief --

23 **THE CHAIR:** Before that then, Mr Harris, anything on that point?

24 **MR HARRIS:** No, sir, thank you.

25 **THE CHAIR:** Mr Bourke, yes?

26 **MR BOURKE:** It is a very quick point. We will write to the class representative very

1 | shortly about a couple of minor points relating to our pleadings. It mainly concerns
2 | a small number of factual points arising from the witness evidence, including the
3 | responsive evidence served last Friday.

4 | We hope this will not require a formal pleading amendment, given the nature of what
5 | we are talking about, but we will check this with the class representative. We just
6 | wanted to flag that point and mention it to you. We are conscious of time and we will
7 | do this imminently.

8 | **THE CHAIR:** Yes, if you would. Then if there is any need for amendment, if it is
9 | agreed -- obviously Mr Moser can't comment until he sees what it is.

10 | **MR BOURKE:** Indeed, of course.

11 | **THE CHAIR:** If it is contested, then if necessary there can be an online hearing. I think
12 | it doesn't need a full tribunal. But there are ways of dealing with it quickly --

13 | **MR MOSER:** We will see what it holds. Any concessions gratefully received, anything
14 | else, we will wait and see.

15 | **MR BOURKE:** There won't be any concessions, thank you.

16 | **MR MOSER:** That's a pity.

17 | Thank you very much, sir, for having pre-read it all in this way.

18 | **THE CHAIR:** No, thank you, as I said at the outset, for the work that has gone in.
19 | I think with CMCs it is often the work, as it were, that is behind the scenes that leads
20 | to the efficient conduct of the CMC, and there are lots gone in preparing for this one.

21 | Thank you all.

22 | **(12.23 pm)**

23 | **(The Pre-Trial Review concluded)**

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