IN THE COMPETITION APPEAL TRIBUNAL

Case No.: 1404/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Thursday 6th – 7th February 2025

Before:
The Honourable Mr Justice Miles
Eamonn Doran
Anthony Neuberger
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Class Representative

David Courtney Boyle

v

Defendants

Govia Thameslink Railway Limited
The Go-Ahead Group Limited;
Keolis (UK) Limited

Intervener

Secretary of State for Transport

A P P E A R AN C E S

Charles Hollander KC, David Went & David Illingworth (Instructed by Maitland Walker) On behalf of David Courtney Boyle
Paul Harris KC, Anneliese Blackwood & Clíodhna Kelleher (Instructed by Freshfields LLP) On behalf of Govia Thameslink Railway Limited, The Go-Ahead Group Limited, Keolis (UK) Limited)
Laurence Page (Instructed by Linklaters LLP) On behalf of the Secretary of State for Transport
George Hilton (Instructed by Fenchurch Law) On behalf of Mr James Harvey

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Thursday, 6 February 2025

(10.30 am)

(Proceedings delayed)

(10.39 am)

MR JUSTICE MILES: Just before we start, there is a remote link for this case, and I'd just like to remind anybody who's using the remote link that there must be no recording taken of it and no broadcasting of it and just to remind people that doing either of those things is a criminal offence. Thank you. Yes.

MR HOLLANDER: Good morning, sir. Welcome to the trains case. I hope that this will -- there hasn't been a CMC for this case for a while. I'm hoping this is going to be the opportunity to move this case forward towards trial.

Now, in terms of order of dealing with matters, I'm very much in your hands. I know Mr Harvey has asked to address the court. I mean, it may be sensible for that to be dealt with first simply on the basis that his (audio distortion) the court afterwards, if that --

MR JUSTICE MILES: Yes.

MR HOLLANDER: -- a little bit to say about that.

MR JUSTICE MILES: Yes. Well, we thought that that might be a sensible way of dealing with things.

May I just ask, I understand there's a transcript being prepared of this?

MR HOLLANDER: I assume so. There certainly has been in (overspeaking) --

MR JUSTICE MILES: Can we check that, that it's being transcribed?

MR HOLLANDER: I'm seeing nods from beneath you.

MR JUSTICE MILES: Is the transcript going to be available to members of the tribunal

at the end of each day?

MR HOLLANDER: It will be, yes. Yes. Thank you.

MR JUSTICE MILES: Yes, thank you. Well, let's deal with the position of Mr Harvey. Thank you, Mr Hilton.

Application on behalf of MR HARVEY

Submissions by MR HILTON

MR HILTON: I'm grateful, sir. The tribunal kindly permitted us the opportunity to file a skeleton yesterday. Has the tribunal had the opportunity to consider that? That was accompanied by one article and also an authority. Has the tribunal had the opportunity to read the authority?

Mr Harvey's points are peripheral, obviously, to the main business of the CMC. His position is that adverse comments were made both in the judgment at paragraph 8, I believe, and also in the transcript which reflected what the president on 17 March said; in particular, the word "unprofessional" or "unprofessionally".

From his perspective, this was without obviously his presence on that occasion or any understanding on the part of the tribunal, then, of the more nuanced factual position which underlay, probably, some of those comments. But also with comments made by -- the submissions made by the class representatives' leading counsel on that occasion, which Mr Harvey believes didn't fairly characterise his position.

And those comments, he says, have had significant consequences to his professional standing and reputation. The tangible examples of this are the GCR article, which picked up on the tribunal's reference, which features in the transcript, to “unprofessional”, a view that he acted unprofessionally in the circumstances or behaved unprofessionally in circumstances. But also paragraphs, I think, 7 and 8 of the judgment.

In particular, [it was said] there was a failure to make his associate, Ms Mantri, available to the new expert so as to explain the acquired understanding of the team. He disputes that.

His evidence, in short, is that there was no basis on which he was required to agree to a proposal made by the class representative, which was not even understood to be necessarily a proposal. It was something, an idea, canvased that there were two options that the class representative was exploring.

One was employing a new expert who would take hold of the proceedings entirely on their own and wouldn't require any assistance, and the other would potentially require some transitional assistance.

But there was a hardball negotiation, we would say, which was that "you would accept, Mr Harvey, that your team would operate on reduced hourly rate basis. And these conditions were both unreasonable, but also impractical, for reasons that he has outlined in his witness statement.

Namely, that there was no way in which he could understand to what extent his employees or his firm's employees would be required to be, continue to be, made available as necessary. No reason to know the length of the proceedings that would follow, which, as has transpired, these proceedings have gone on for a number of years and likely, obviously, to continue.

Secondly, there was an understanding on his part that he would make his team available. I'm summarising the evidence which has been set out in his witness statement for brevity, because I appreciate this is a bit of a sideshow, but I can obviously take the tribunal to the material parts of that witness statement if needed.

But there was an understanding that Ms Mantri and Mr Harvey's wider team would be made available in the transition. And indeed, that is what in fact eventuated because

in February 2023, a request was made by the class representative that Mr Harvey's team provide data and information to the new expert, Dr Davis, on that occasion.

And that was complied with in a timely fashion, within just over a week of that request having been made, notwithstanding that the request was made of Ms Mantri, who was at that time away on vacation.

So, that first criticism in the judgment -- I do say this respectfully, but I have to be forceful because this is the strength of feeling that Mr Harvey has -- was the failure to make his associate, Ms Mantri, available to the new expert and, Sir, just to explain the acquired understanding of the team, that is definitely not correct.

As a matter of fact, Ms Mantri did, in fact, provide information and there was a discussion, a suggestion that she would be available -- Mr Harvey and his team would be available -- for a brief conversation with the expert and an email exchange to provide information.

The second aspect of the tribunal's finding, then, was that Dr Davis's approach to the case was from a standing start, as a result of the way in which he had been left in the lurch. And that is not true, because Dr Davis had the benefit of all of Mr Harvey's reports.

In my skeleton at paragraph 23, I say that Mr Harvey “provided” Dr Davis with his report data and coding files. In fact, I have been corrected. It wasn't that he provided those reports, but those reports were obviously made available to Dr Davis. But the rest is true. So he, Mr Harvey, did provide data and coding files at Dr Davis's request. So, we say that that reference to there being a standing start by Dr Davis is factually incorrect and was a comment that ought not to have been made.

Thirdly, the tribunal says that Dr Davis, in a very similar point, was without the benefit of any assistance from Mr Harvey's team. It was essentially the same point

I addressed earlier.

That's not true. As a matter of fact, there was a transitional process. There was information provided by Mr Harvey to Dr Davis's team. And there was -- that was annotations to coding files and it was an offer to explain things. And there was only one request ever made and that was complied with in a timely fashion.

Fourthly, in relation to the comments in the transcript; this is the “unprofessionally in the circumstances” point.

Mr Harvey says that this really follows on from submissions made, likely by the leading counsel for the class representative, and this is a comment at lines 19 to 23 of the transcript on page 1443, tab 35, but is also something that features at paragraph 7 of my skeleton. And it is that Mr Harvey:

"... appears to have acted ... somewhat unprofessionally in leaving the Class Representative in the lurch in the way that he has done so."

Now, our position is that the tribunal doesn't really need to be troubled with making findings of fact. Because there is obviously a factual, potentially at least, a factual dispute between the class representative and Mr Harvey, something that in the ninth witness statement of Mr Maitland-Walker becomes apparent -- they're criticisms of the evidence Mr Harvey has made in his witness statement.

Mr Harvey is not a party to these proceedings and there is no pleaded live issue between him and the class representative in the context of these proceedings. And therefore we don't seek any finding or resolution of these factual matters and, potentially, it would also be inappropriate for the tribunal, on this occasion, to do that because not all of the evidence has necessarily been presented to the tribunal. One might expect some sort of oral examination would be necessary as well.

Now, where this goes, however, is that, as a consequence of the unfair damage to

reputation that Mr Harvey says he has suffered, he wanted to be here to ensure, via what is commonly known as a watching brief, that the same situation doesn't repeat itself. So, I will remain after these submissions and hope to say nothing.

But the second thing or remedy that he is seeking is to implore the tribunal to say something in their judgment, which they can do. They can say something about this situation.

And the basis on which we would ask that the tribunal do that is by reference to the principles that are discussed in the case that I appended or sent with my skeleton: the W (A Child) Court of Appeal decision from 2017. If I may ask the tribunal to turn that up; unless I can just summarise what it says and that is sufficient? I was proposing to take you briefly through the relevant bits of it to explain why there are conceptual similarities, albeit factually very distinct opaque positions, and where the tribunal should end up, we say --

MR JUSTICE MILES: Why don't you deal with it reasonably briefly?

MR HILTON: Yes. In that case, I'm afraid I don't know the -- I'm not sure I have an authorities bundle. So, it may be that there is a case reference to this.

MR JUSTICE MILES: It's actually -- if my learned friend does not refer to it, it's actually the fact that the supplemental volume, page (inaudible) 76.

MR HILTON: Yes, I have an index but not the actual bundle itself, but it's at tab 26 of the supplementary bundle. (Pause)

MR JUSTICE MILES: Yes.

MR HILTON: Just to explain the background. At 2421 of this authority, paragraph 8. "The central point raised by each of the three appellants is that the prospect of them being the subject of adverse findings…" in a judgment at the -- so there were two appellants who, as I understand it, were mere witnesses in a family case which

concerns some pretty serious allegations about sexual abuse. And if you go down to the bottom of paragraph 8:

"The findings, both in nature and substance, have the potential to impact adversely upon the standing of SW and PO [these two witnesses]". [as read]

And they hadn't “been given the opportunity to know of or meet the allegations procedurally during the course of the trial process and they therefore seek a remedy from the court to prevent the inclusion of these adverse and extraneous findings in the final judgment that has yet to be handed down..."

If you go to the very bottom of that page, paragraph 10:

There is no challenge, it's apparent, “to the judge's determination below of the sexual abuse allegations." [as read]

But it also says:

"A significant difficulty for the appellants [SW and PO, this is] that they face [is that] they were no more than mere witnesses to those proceedings." [as read]

And over the page, paragraph 8; so, to summarise, there had been extraneous comments adverse to two professionals, one police officer and one social worker, in the context of this family case, neither of whom were parties to proceedings, neither of whom had been challenged in any way in cross-examination or had had any ability to respond. But then they were then subject to adverse comments in the judgment.

So the parallels are, I say, obvious to our case, I won't flesh them out, but there are conceptual parallels.

What they did is they relied upon section 61 of the 1998 Act, which -- and -- they argued that a court and successfully argued that a court is a public authority and therefore bound by the Human Rights Act, section 6, to ensure that there is no incompatibility with the Convention, the European Convention of Human Rights and

the relevant human rights -- European -- convention rights that were engaged were in respect of the right to private life under article 8. And I also believe that it was the right to a fair trial under article 7.

It was said that the right to a private life encompasses the substantial and procedural elements, you can see in paragraph 15, and the -- yes, and that these comments were adverse, these comments had been adverse to those.

Moving to page 21 -- sorry, 2435 of this judgment, paragraph 67. You can see there was some argument about whether the rights to private life involved rights to professional lives of SW and PO.

So, that is the same here. We say Mr Harvey has a right to professional life and that is the relevant right being infringed. But it's the private aspects, the private right, which encompasses that which is relevant.

Over the page at 2436, 71:

It was accepted that “the ability of SW and/or PO to continue in their chosen careers will be adversely affected by the terms of the judge's judgment, if allowed to stand." [as read]

So, that point, that private life includes professional life rights, was accepted and there was some authority to support that as well, which I won't take the tribunal to.

And then at -- sorry, my device has seized temporarily. Here we go.

At paragraph 101 on page 2444. There is a discussion about how these principles would be widened, potentially, to criticisms of expert witnesses and around (c) on that page:

"Although what I have said with regard to the right to fair process under Article 8 may in principle apply to expert witnesses, it will, I would suggest, be very rare that such a witness' fair trial rights will be in danger of breach to the extent that he or she would

be entitled to some form of additional process, such as legal advice or representation during the hearing." [as read]

"However, [he says, below sort of just before (e)] if criticism is to be made, it is likely that the critical matters will have been fully canvassed by one or more of the parties in cross-examination." [as read]

So, I take from that firstly, that this principle, that a non-party witness's rights to private life can be infringed and that can give rise to the remedy which I will address to the tribunal with,

also, in principle, can apply to expert witnesses. Often it doesn't, because they will have been cross-examined. But in this case, in our case, that hasn't obviously happened; Mr Harvey wasn't present when these submissions were made.

Then over the page, they get into the discussion of what remedy should ensue. In that case, the remedy fashioned by the court, they conclude that there was an infringement by these adverse comments where the tribunal hadn't allowed an opportunity -- or the judge at first instance had allowed the opportunity -- for there to have been fair challenge and riposte by the various witnesses. And that required some remedy to have been fashioned; paragraph 104.

And over the page, we see that -- in conclusion, I'll just take the court to 120. What happened was, in that context, there was a reduction and removal and a making plain the content of the judge's judgment and putting it in context.

What we say here is, obviously, a slightly procedurally different situation and factually different but this is one of those cases where there has been damage to reputation and it's quite obvious to members of the competition legal community that these comments have been picked up and will affect the potential business of Mr Harvey in the future.

And the way we ask the tribunal to address that on this occasion is simply to say, and I'm not dictating what should be said, but the key messages are that on the previous occasion there was inadequate evidence to have made these adverse comments, both in the transcript and also in the judgment. Those comments weren't necessary to determine -- to reach the orders that were arrived at on that occasion -- the procedural orders.

And, although the tribunal need not determine what the position is, we would implore it to at least make it clear that it isn't, as might have been the impression a reader would gain from reading the transcript or the judgment on the last occasion; and that it casts no doubt, in this context, over Mr Harvey's professionalism or the way in which he handled matters following his departure. That is all I have to say.

Submissions by MR HOLLANDER

MR HOLLANDER: I'm going to deal with it very briefly. We didn't ask Mr Harvey to be here; obviously it's a matter for him. I appreciate he wanted to address the Tribunal. However, I have to say we entirely disagree with what he says, and we think he did behave unprofessionally and inappropriately. And frankly, his sudden departure has caused the management of this case huge problems and grief.

As you know, sir, an expert who verifies that the claim as it were has a special role in CPOs. The basis of the certification is the methodology of the chosen expert. Mr Harvey is well aware of that; he's an experienced expert who has been involved in many other similar cases.

In July 2022, the certification was granted based on a series of reports by Mr Harvey. That was the evidence in support of the certification.

In October 2022, there was a CMC where the tribunal put forward a route map towards the trial, which involved very significant participation from him and he was well aware

of it.

On 28 November, a day or so after he had been discussing updated budgets, he told my solicitor that morning that he was taking a sabbatical in the second half of 2023 which, given what he knew about the timetable, obviously made it impossible for him to continue.

Now, it's his privilege as to whether he gives an explanation about the reasons for that, but he has never done so, never explained why, because it's a matter for him, because it makes it a lot harder to explain and justify.

He then lobbied for making my solicitors use his assistant, who had been working on the case, as a replacement expert: fair enough, he's entitled to do that. That was rejected on the grounds of lack of experience.

And if you then look at what happened then, which is supplemental bundle page 30, just turn to that, you can see what happened. 20 December, so supplemental bundle page 30, please. And you can see at the bottom of the page. My solicitor writes to him immediately afterwards. The tribunal and the parties to advise on 1 December about Mr Harvey's withdrawal, and that led to some correspondence.

"I'm writing in relation to potential for [Mr Harvey's company], and in particular [his two assistants] to continue to be involved ... Having spoken to a number of economists, we have narrowed the option ... to two firms. One insists that they take over the case in its entirety, but the other is prepared to use [firm's] institutional knowledge, and to work with [his assistants] on the condition that they ... operate under his supervision.

"You have previously expressed that you would like [your assistants] to continue [their] involvement in the case, so, assuming that this is still the case, we should give consideration to the terms of that involvement.

"[Need to be] that the joint venture [with a] new expert would need to be seamless with

the new expert taking the lead on the case as expert with [your assistants] assisting. ... They would need to be available for the GTR matter as and when needed such that, to all intents and purposes, they were still following your direction."

There was discussion about fees:

"The current situation has already resulted in substantially increased fees (management time, discussion with the client and funder, ... multiple correspondence with Freshfields and Linklaters) and when the new expert is appointed, [two] will need to spend a substantial amount of time reading into the case. ... There will be inevitable inefficiencies and management time involved in two firms of economists. [We're suggesting a 25 per cent reduction in your assistant's rates.]"

Then there's a reference to budgets, about whether the budget included dominance and market definition, an ancillary matter.

"Given the extreme urgency of this matter, I would be grateful for your agreement on the above by return."

And then on top of page 30, Mr Harvey writes back:

"Thank you for your email. I understand that you have decided not to pursue the option I offered, ie [my assistant] as expert. I considered your terms and I cannot accept that -- neither the proposed working model nor the reduction in fee rates work. [There's a bit about the budget.] Therefore, I cannot see a way forward that works for both of us and so I think that we are parting company. I wish you all the best with the case."

Now, in response to what was a general email inviting a discussion, that is, we would suggest, a very clear closing down. And that's exactly what happened. Mr Harvey did not provide assistance.

Dr Davis, the new expert, produced an initial report in the beginning of February, and

in December, January and February, there was no assistance from Mr Harvey or his team. It is true, as Mr Hilton mentioned, that at the beginning of March, at the end of February, that Dr Davis had specifically requested those instructing me to contact Mr Harvey asking for some assistance in some data coding files; that's referred to, perhaps you want to turn it up, at page 886 of the bundle, paragraph 61 of the ninth statement of Mr Maitland-Walker. And 21 February, they asked for certain data coding files, and the files were received two weeks later after a chaser. There's some correspondence there referred to where Mr Harvey says:

"To date, I have assumed that your new expert may require the analysis files and, having received them, a member of his/her team may benefit from a brief discussion/email exchange with my team to help answer any questions, et cetera."

So, that was two and a half months after the 20 December email in circumstances where there had been no communication with Mr Harvey in the meantime and therefore the important handover period had been dealt with without any assistance from Mr Harvey.

Now, there it is, that's the position --

MR JUSTICE MILES: Well, the complaint really is that you and your team said to the tribunal that he was refusing to provide any assistance, whether permanent or temporary.

MR HOLLANDER: Yes.

MR JUSTICE MILES: The documents we've seen don't, at first blush, justify such a strong statement.

MR HOLLANDER: Well, so far as -- you've seen the 20 December, and I would suggest that is a strong statement. It is right, as Mr Maitland-Walker has referred to, that there was an exchange in the beginning of March. That --

MR JUSTICE MILES: The concern of the tribunal seemed to be not so much as to whether there was going to be a permanent assistance, but in relation to the handover process.

MR HOLLANDER: Yes.

MR JUSTICE MILES: And the way that it was put to the tribunal, this is the complaint against you, was that you and your team gave the impression to the tribunal that Mr Harvey was refusing to co-operate at all. And the evidence of Mr Harvey is that there wasn't such a refusal; there was the provision of the data coding files and also Mr Davis had the advantage of the earlier reports and the data backing that up and, as I understand it, some notes in relation to that.

MR HOLLANDER: So, my understanding is that there was no assistance provided until the beginning of March, by which time Dr Davis had done --

MR JUSTICE MILES: Sorry, there's a difference between no assistance actually being provided and a refusal to provide assistance.

MR HOLLANDER: Well, I think that depends on how you treat that S30 document we just looked at. We would suggest that pretty clearly is drawing a line. That is how it was understood, it's how Maitland Walker says it was understood, and that is how -- and I would suggest that, given the rather general and discursive terms of the email to Mr Harvey, that was seen and read, I would suggest rightly, as a shutting down.

Now, you're absolutely right, there was some assistance provided in March, and I showed you that, referred to that, but that was months later.

MR JUSTICE MILES: It was before the CMC, I think.

MR HOLLANDER: Before the CMC, after the first report.

MR JUSTICE MILES: Right.

MR HOLLANDER: I think that's all I wanted to say. I don't want to address you on the law or anything.

MR JUSTICE MILES: Yes. Is there anything more you'd like to say briefly in reply?

Reply submissions by MR HILTON

MR HILTON: I think the tribunal has the point. I mean, I was never asking for a determination of the factual issue. My learned friend has said that he has behaved unprofessionally and inappropriately, that was what he said. I specifically said we're not getting into that and the tribunal need not determine that. Obviously, there's a difference in position between us.

The tribunal also has the point that there was, as a matter of fact, assistance prior to the CMC, so what was said there was incomplete. I'm not suggesting that it was necessarily misleading or whatever, but it was incomplete. And that factual point relates to what was said in the judgment, and that is the point I'm making which was not engaged in by my learned friend.

As to his criticism of the lack of reason or explanation for the sabbatical, that is not something that is before the court. It was dealt with by the tribunal on the last occasion. They refer to there being personal reasons and they didn't specifically pry into those. So, it's improper, we might say, to suddenly suggest that that is a relevant issue today, because that is not the substance of our criticism. Obviously there were reasons, there were personal reasons, which were undisclosed.

I just want to add that Dr Davis was not retained until 22 January, we understand, and so the suggestion that many months elapsed without any assistance is not right. The first request was made in late February for assistance and it was complied with in a matter of just over a week, not two weeks as my learned friend would suggest.

The nuance of this is dealt with in my skeleton. Unfortunately, there isn't evidence

before the court, but we can provide it if the court needs to see this or if my learned friend contests this, but the timeline is -- this is at 18 to 20 of my skeleton -- that on 1 March, Mr Harvey responded to the request for assistance, saying, "We'll very happily provide it; there was no deadline imposed; Ms Mantri, who this request was addressed to, is absent."

The next day, and this is something that's notably not included in Maitland-Walker's ninth witness statement, on 2 March, Ms Mantri emailed saying, "We're ready to upload the evidence you've requested." That's just over a week, not two weeks.

As it happened, on Friday 3 March, so the day after that, at 8 pm, 8.22 pm, Maitland-Walker got back and said, "Here's the details for uploading", and on the Monday, 6 March at 9.08, the information was uploaded.

So, to the extent that there was two weeks, at least four or five days of that was as a result of the way in which Maitland-Walker dealt with this. And, as I've said, this is based on instructions, not evidence, but we can provide the evidence should that prove to be controversial.

Submissions by MR HARRIS

MR HARRIS: So, very briefly -- just for the transcript, Mr Harris, for the defendants -- I only have two things to say. We're obviously neutral as to the remedy sought on behalf of Mr Harvey, but the two things are as follows.

We do share the concerns that have been expressed by Mr Harvey's counsel about the manner in which things are portrayed on behalf of the class representative to this tribunal. We see the same point that was raised with Mr Hollander in argument: doesn't look like what was said on behalf of the CR was completely accurate. Most unfortunately, that has now been repeated in multiple places in Mr Boyle's skeleton argument for today: multiple inaccuracies and unfair portrayals. That's the first point.

The second point is I shall.

MR JUSTICE MILES: On that point, when you say multiple?

MR HARRIS: Not limited to that point. No, no, no, far more than that. Lots of other points.

MR JUSTICE MILES: Well, no doubt you will draw our attention to those when you wish to.

MR HARRIS: Yes. But that -- sorry to interrupt. Yes, exactly, sir, I will do. But that's why we have this concern. This is not the first time there's been unfortunate representations made to the tribunal by Mr Boyle, or on his behalf, and it's repeated today.

The second point: it won't surprise you that I shall be coming back to none other than this email on page 30, because, as you know, one of my live applications is the costs that have been thrown away by the change of experts. And it won't surprise you that, here is one of my learned friend's instructing partners recognising that there have been increased costs, notwithstanding that at one point in my learned friend's skeleton, to give you another example of an unfortunate portrayal to the tribunal, it is said that there were no additional costs. Here, they are recognising themselves that there are.

Unless I can assist further, those are the two points.

MR JUSTICE MILES: Any other contributions on this point? Mr Hollander, did you want to say anything about Mr Harris's submissions?

MR HOLLANDER: Yes, the tribunal (inaudible) on our side. We will no doubt get to the costs later on.

MR JUSTICE MILES: Right. Very good. Right, thank you very much. We will consider that, and we'll deal with it as part of an overall ruling. Thank you.

Application to amend claim form

MR HOLLANDER: So I think the next item on the agenda, if it's convenient for the tribunal, is the amendments to the pleading. The amendments before the tribunal now were in substance before the tribunal in 2023. There were a number of applications on both sides which were the subject of full scale arguments, which were not decided by the tribunal that hearing for reasons not entirely clear. The loss of flexibility application, probably easiest to take it up at page 672. (Pause)

MR JUSTICE MILES: This is in the core bundle, is it?

MR HOLLANDER: Yes, 672 in the core bundle.

MR JUSTICE MILES: And which volume?

MR HOLLANDER: 672 -- you're looking at a hard copy?

MR JUSTICE MILES: I've got some hard copies.

MR HOLLANDER: If you've got the same hard copies as I have, which are double sided.

MR JUSTICE MILES: Yes.

MR HOLLANDER: It's 672 in volume 1. Might be easier to go to tab 10. Paragraph 21, the application.

MR JUSTICE MILES: 672.

MR HOLLANDER: "The Application comprises the witness statement and the following documents" and there is a copy of the proposed re-re-amended collective claim form; at page 685, we'll look at the moment; the order which is being sought, which is at page 733, at tab 12; and "A variation notice explaining to existing class members the inclusion of the Loss of Flexibility Claim" which is at 736 in tab 13.

Now, if we look at the proposed amendments on loss of flexibility, if we could do that first, they'll follow paragraphs 2.11 on 689, so this is tab 11. The last sentence of 2.11,

this is on. Then 37.4, which is on page 708. 64.6, which is at 727. 65.3, which is also on 727, and paragraph 68, which is on page 728.

So this doesn't involve any new class members. The intention is that the class members who purchased tickets that were brand-restricted suffered a loss of flexibility. Right.

So the tribunal has a history of this, a form of the loss of flexibility claim was raised at the certification hearing in 2022. At Harvey 4, the president said -- if you look at 1423 --

MR JUSTICE MILES: Sorry, just give me that date again.

MR HOLLANDER: So in July 2022, there was the certification hearing.

MR JUSTICE MILES: Yes.

MR HOLLANDER: So Harvey 4 -- I'll explain to you in a moment what happened before --

MR JUSTICE MILES: Yes.

MR HOLLANDER: -- was before the tribunal. If you then look at the tribunal's ruling in respect of that, which you will find as 1423, which is bundle 3, tab 32.

MR HARRIS: Judge, can I just clarify? I'm so sorry to interrupt this. Mr Hollander has read out and referred to paragraph 65.3 as being a loss of flexibility amendment. That's not right.

MR JUSTICE MILES: 60 ...

MR HARRIS: It's on page 727 of the bundle. We agree that all the other ones are, but just so that the tribunal isn't confused and further, Mr Hollander doesn't have to address it, 65.3 is a different amendment, and we don't object to that.

MR JUSTICE MILES: 65.3.

MR HARRIS: 65.3 on page 727 is nothing to do with loss of flexibility. It's to do with --

MR JUSTICE MILES: Is that one of the ones you said, Mr Hollander?

MR HOLLANDER: Yes, let's ignore 65.3 on the basis of that.

MR JUSTICE MILES: Right, thank you.

MR HOLLANDER: Thank you.

So if you look at 1423 at tab 32, which is the tribunal certification judgment of 25 July 2022. The tribunal start dealing with pass on at paragraph 32, and then there is an issue about set off at 33, where the tribunal says:

"(1) In his other reports, Mr Harvey accepted the possibility that, in the counterfactual world, the price of Single-Brand Tickets might rise as a result of the downward adjustment of Multi-Brand Tickets.

"(2) The Respondents, in consequence, contend that any member of the claimant class claiming for over-priced Multi-Brand Tickets would have to give credit for the increased cost in the counterfactual world of any Single-Brand Tickets purchased by them. Any failure to do so, pace the Respondents, would result in over-compensation, [plus] it would mean, for this reason alone, the Application ought be rejected.

"(3) Harvey 4 [over the page] sought to set out how the Applicants would deal with this point. We consider in rising to the point, the Applicants have confused what they should plead and what the Respondent should be. [...] No means clear that even if the price of Single-Brand Tickets rose in the counter-factual world, credit would have to give for the 'saving' occurring in the real world."

There's quite a discussion about that, but we'll get to that.

"(3) Whilst we don't decide the point:

"(i) The Applicant's claim is properly framed by reference to the loss arising in relation to Multi-Brand Tickets, leaving out of [account] any saving.

"(ii) [And if there is a loss it is] for the Respondents to plead.

"(4) [So for that reason], we decline to allow the Amendments in relation to this point, and to admit Harvey 4 on this point."

Now, Harvey 4 was served a relatively short period of time before the certification hearing, and the respondents objected to it. Let me see, 34; they objected to it and they said they hadn't got time to deal with it. This is really where the loss of flexibility arises.

"34. Harvey 4 also raised the spectre of a new claim, accruing to the benefit of those class members pursuing overpriced Multi-Brand Tickets, but also purchasing (under-priced) Single-Brand Tickets? In such a case, Harvey 4 contends for damages assessed by reference to 'loss of flexibility' arising out of a Single-Brand Ticket purchase, the loss existing because the ticket purchased for the counter-factual world would have been more 'flexible'. Given that we accept that Respondents have not had sufficient time to consider and respond, we are not going to give permission to take the claim forward at this stage. Should the Applicants (or, rather, Mr Boyle) wish to apply to amend, we will hear and consider an application. It may be that the point was only raised in response to the 'set off' point ..."

That's why I read to you what was the paragraph 33.

"Which (for reasons given above) does not, at least at present, arise. In these circumstances, it may the claim will not be pressed further.

"35. However, in the event the application to amend is made [along those lines], we do have difficulties with this claim, which we would want to have addressed on an amendment application:

"(1) Given that - by definition - the purchaser of a (cheaper) Single-Brand Ticket will have eschewed the availability of a (more expensive) Multi-Brand Ticket, it is unclear whether there is an arguable claim for a loss (of 'flexibility') at all. The method

mentioned by Mr Harvey would not work. The claimant will have chosen not to pay the higher price, and will have consciously selected the lower priced Single-Brand Ticket.

"(2) Even if passed the eligibility threshold, it is difficult to see how -- methodologically -- the claim could be made good. We have some doubts as to whether the Microsoft test is passed in this case. The most that could be said on the data we have seen is that those buying (cheaper) Single-Brand Tickets didn't value flexibility enough to buy (more expensive) Multi-Brand Tickets. The data held by the Respondents will provide no indication of what value such purchasers did attribute to flexibility, and Harvey 4 provides no concrete indication as to how such loss of flexibility might methodologically be ascertained.

"36. For all these reasons, apart from the Amendment (which are not -- at least for the present -- allowed and should not proceed), the Eligibility Condition is satisfied."

So that's, that's what the tribunal said at the hearing. Now, these comments were dealt with by Mr Davis, I'll deal with that in a moment. There was then an application at the hearing in October 2023, the last CMC, the amendments were before the court -- the current amendments in relation to the loss of flexibility -- and were based on what Dr Davis had said about them.

Can I just show you what happened in relation to those at the hearing in October. So we have made those up in May. The respondents said they objected to them, and the tribunal heard the discussion about it. If we can turn to tab 37, which is the 12 October 2023 transcripts. We will show the passages from the transcript of the October 2023 hearing, the fourth trial.

So this and a whole variety of points then raised by the defendants were reported. Tab 37 on page 1551. If you look at 1551, line 5. Sorry, page 1551, tab 37 in

bundle 3.

So at 1551, line 5:

"The reason we put this hearing into the diary was because it seems to us, given the understandable and inevitable transition to Dr Davis, it was only right for the Defendants to have their day in court to register any issues they might have. That's why we're here. [We've] done it, we've looked at the list of points with great care, grateful to Mr Harris.

"The question is how do we deal with them? There is no application to strike out before us. We can understand that, [it doesn't] appear to be a failure to articulate a blueprint to trial point before us. If there is, then it's a nuanced one, because I don't think -- and, Mr Harris, you might want to correct us on this -- I don't think the Defendants are contending for wholesale decertification.

"[There's] a series of points, whilst clearly significant in a micro context, seem to us to be less material in the macro context of decertification. In an ordinary case -- and I appreciate this is not an ordinary case -- amendments pre-defence would be allowed without much issue.

"Now the approach in Merricks would suggest the same approach, [although] subject to the certification process, amendments ought to be permitted unless there is prejudice to the Defendants that cannot be addressed by way of a costs order."

And then over the page, line 2:

"It seems to us that there's a risk that the Microsoft Pro-Sys approach, as articulated by the Tribunal, is causing additional cost to no real benefit.

"So, looking where we stand, we have no less than six expert reports from Class [Rep]. Now it may be that we can discount three, the earlier three, but they are [still] relied on by Dr Davis and we can't discount them completely. They are still being used even if

the expert has changed. We have no expert response from the Defendants. Not a criticism. They are entitled to do that, but we are only hearing from one side. We have a series of points, which may or may not be significant to the conduct of these proceedings, but no real way of assessing their significance, which means we are either dismissing points that are material or of allowing them when they should be dismissed, and neither of those courses is particularly satisfactory.

"[The most enormous] cost build-up and we are not progressing to trial. Now that's not satisfactory and we blame no party do we think the Tribunal is particular to blame. We are feeling our way in what is a new jurisdiction."

On line 19:

"So we are where we are, but it would be I think irresponsible for us not to consider the broader picture. We've got a proposal, which we would be grateful if both sides would consider, and we think there are serious matters of disadvantage to both sides, which they do we need to consider, and we are anticipating objections rather than immediate harmony saying what a good idea this is. So we are expecting debate, but here, for what it is worth, is our proposal.

"We continue the certification of this case and we permit the amendments that have been framed by the Class [Rep] and the adduction of the expert reports, undeleted, of Dr Davis.

"However, instead of obliging the [respondents'] case in any way ..."

Then the president goes on to consider that the ultimate directive was that the class rep file all evidence by a specified date, and then goes on to discuss that.

Then in 1609, lines 3 to 9, I simply invite the tribunal "to hear the matters in issue with the parties party today", and suggest that the tribunal does not, as it were, "side step those [matters] today", which is often suggested.

Line 24:

"MR JUSTICE MARCUS SMITH: it is, therefore, much more important that we get the shape of the trial process right. I think you should proceed on the basis we will not be hearing either today or tomorrow Mr Harris's points about the amendments that he objects to and the parts of the reports of Dr Davis that he objects to, because we want to work out what we can avoid that debate altogether and we want that resolved [promptly]."

MR JUSTICE MILES: "Properly."

MR HOLLANDER: Yes. 1619, line five, just very briefly, I invite the tribunal again to decide the applications and amendments that are being suggested.

If you then looked at 1643, which is the ruling that comes afterwards, tab 38, where the tribunal says how the proceedings should proceed.

"6. It is clear law that if collective proceedings are (i) arguable and (ii) triable they should proceed to trial. There is no elevated 'merits' threshold [see] Mastercard. The question of whether proceedings are arguable is one well-known in civil procedure law, and the 'remedy' of strike-out is a well-known tool enabling a court to avoid an expensive and unnecessary trial by killing proceedings off at an interlocutory stage.

"7. The question of triability is much more nuanced. [It's] all about case management and not killing off proceedings. Because competition claims are difficult to try, a body of case law has evolved [involving] management."

Then paragraph 8:

"8. It arose at this case management conference, even though proceedings have already been certified. [It is right that it did: the] necessary substitution of Dr Davis for Mr Harvey so early on made this inevitable. Before we turn to the specifics of this case, we make the following points ..."

They then make a number of points about the test. Then paragraph 9 at 1646, at (2), after referring in 9(1) to the change of expert, 9(2):

"It was, we consider, appropriate to permit the Defendants to take what points they wished in relation to the Revised Claim Form and the post-certification reports of Dr Davis. Otherwise, there was an inevitable risk of the case proceeding without further scrutiny, having been certified on the basis of superseded evidence, namely the reports of Mr Harvey.

"(3) In a document entitled 'Defendants' Applications" the Defendants articulated a number of issues in relation to the Revised Claim Form. None of these -- as Mr Harris accepted -- amounted to a barrier to the case proceeding, either in terms of a strike out or a comprehensive failure of the Microsoft Pro-Sys test. In these circumstances -- whatever the merit of these points (and we say nothing on this score) -- the focus needed to be on driving the action forward, rather than spending [at least] two days resolving a series of points having little (if anything) to do with triability."

And then it says that they have suggested the intention as to how to proceed to manage the case forward, making the point that were all raised at that hearing by the defendant -- perhaps I should just read it. Line 5:

"It seemed to us pointless to consider matters not going to case management unless they were so fundamental to the case as to preclude an effective trial. Since not even the parties articulating these points suggested [they] were so fundamental, and since this represented our view also, it is self-evident that managing the case to trial had to be the first order of business.

"(5) The question, then, was how to take the case on to trial. [Well, I suggested] a 'traditional' procedure [involving] disclosure, factual witness statements, expert

reports, trial."

And that was rejected in favour of a different process as it happened. Then he goes on to deal with disclosure, and then finally at 1658 on this, which was the order. The order just recites the fact that various applications have been made and makes an order in terms of:

"1. The Class Representatives shall submit his case in full."

And the tribunal doesn't actually decide the issues that are before them, notwithstanding the passages that are shown. So that's where we were (audio distortion) before the tribunal. You can see how they --

MR JUSTICE MILES: Sorry, what was before the tribunal?

MR HOLLANDER: Well, the application that's now been made in terms of amendment of the claim form, essentially the forms now being put forward. This document was produced in May 2023, came before the tribunal in October, and the tribunal did not decide the point of the amendments. You can see the passage where they consider that -- they make the proposal that everything is allowed, then in the event do not actually decide the matter.

So that's where we are in terms of that. Now the next matter --

MR JUSTICE MILES: Just so I understand, were the amendments that are now sought -- they're the same as those that were before the tribunal at that hearing?

MR HOLLANDER: There are one or two additional ones in terms of, for example, updating the class, as far as flexibility, and also in terms of the next point, which is all about effect. Those were before the tribunal in October 2023.

So the next passage to go to is just to see where it's dealt with in Maitland-Walker 8, which starts at 672, which is at the end of bundle 1, is that right? 672.

I showed you this a moment ago under 672, this is tab 10, end of bundle 1. If I can

just go through the references there. I've shown you paragraph 21 already. If we can look at the -- it's quite a convenient place to take essentially the basis of the points raised in relation to this claim.

At paragraph 24 on 673, he refers to the bit of the CPO judgment that I've shown you, and what Dr Davis then did in his third expert report. He sets out the basis for the loss of flexibility application. Again, this was before the tribunal last time, at 585. If you wouldn't mind keeping a finger in 674, if that's convenient.

Sorry, it's supplemental. Sorry, keep open 674. I think in the supplemental bundle, 585. Yes. It's supplemental, sorry. 585.

Now, so what he does is he addresses the point raised by the tribunal that I've shown you, from the certification judgment. And he starts doing that at 585, which is his third expert report. And this was before the tribunal in October 2023. And that was one of those issues. Do you remember that passage where the tribunal proposed to allow everything in?

MR JUSTICE MILES: Sorry, you say this was before the tribunal?

MR HOLLANDER: Yes. October, this is his third. So what he did, just so you're aware --

MR JUSTICE MILES: So that was --

MR HOLLANDER: So what -- let me just --

MR JUSTICE MILES: Oh, I see, so there was an application made in May 2023, is that right?

MR HOLLANDER: Should I just go back a little bit and just give you the chronology of Dr Davis's reports? So when he was first instructed in January 2023. First week of February 2023, he put in his first report, which essentially said, "It's early days yet, but I'm comfortable in principle with Mr Harvey's approach".

There was then a hearing in March where the tribunal said, "Well, that's not good enough in terms of the way forward". As a result of that, he put in a second report.

MR JUSTICE MILES: Yes.

MR HOLLANDER: A third report was put in specifically for the hearing in October 2023 in order to respond to the applications that were then being made by the defendants. You can see that from 561 in paragraph 2. What he says is:

"I previously submitted two reports Davis 1 on 2 February, and Davis 2 of 19 May. In this third report, I'm instructed to provide a response to the points of economics raised in the defendants' applications on 28 July about the proposed economic methodology I outlined in Davis 2."

That was the purpose of Davis 3.

Now, he has already dealt with this question of loss of flexibility in his second report. The way he does so, it starts at page 453 of the supplementary bundle, so there is a section starting at 453 where he explains the service quality issue and why -- and the methodology he proposes to use, between there and paragraph 289.

It's possibly more helpful to take it from Davis 3 because there, he explains it in rather more detail, at page 585 of that supplementary bundle. So, what he's doing is, first of all, in paragraph 35, page 585 supplemental, he refers to the argument based on what the president had said in the ruling at the certification hearings. He then goes on --

MR JUSTICE MILES: Sorry, I'm looking at number two at the moment?

MR HOLLANDER: Yes. 453. Yes.

But he explains in paragraph --

MR JUSTICE MILES: That doesn't seem on first blush to be advancing a case. It seems to be responding to a point.

MR HOLLANDER: I think it's a much more helpful summary at --

MR JUSTICE MILES: No, I just want to get a proper feel for this. It does not appear to me that that is in support of a damages claim. That seems to be responding, anticipating the point made by the defendants. You can correct me if I'm wrong on that, but it doesn't seem to be saying that this is then going to be a part of the CR's case.

MR HOLLANDER: If you look at 281(b):

"The CR [has] argued that passengers who purchased restricted fares were harmed ... due to ... reduced flexibility ... which could result in longer waiting times [and that] I am instructed that the ... claim does not include a claim for damages due to a loss of flexibility in the actual [ie as opposed to the counterfactual] by purchasers [et cetera]. ... The economic blueprint will need to nonetheless be able to accommodate such an evaluation because the CR believes it's relevant to, in a particular, the set-off defence."

And I think at that stage --

MR JUSTICE MILES: Well, that seems to bear out what I've just said --

MR HOLLANDER: Yes, it's set off.

MR JUSTICE MILES: -- that this is an anticipatory point rather than a positive case.

MR HOLLANDER: Yes. I think he's doing that at this stage. But then if you look at 286, I think that's also on 454, I think he's also looking at that proposal, including the methodology, a way to value quality. I think he's also at this stage looking at the set-off point. I think we're doing that at this stage.

MR JUSTICE MILES: Yes. All right. So that seems to be, as I say, anticipating part of an answer to part of the anticipated defence rather than a positive claim for damages.

MR HOLLANDER: Yes, although I think by the time the claim for the loss of flexibility had been put forward in the May 2023 version, and he then deals with that in

considerably greater detail at 585, which is in the supplemental bundle.

MR JUSTICE MILES: That's the third?

MR HOLLANDER: That's the third, yes.

So, he first of all deals with the analytical economic basis of the loss of flexibility. 36(a): he agrees with Harvey and he says -- and I think the point he's making at 36(a)(i):

"The Tribunal is making a standard economic assumption that [they] did not value flexibility enough to buy (more expensive) Multi-Brand Tickets. This is typically the assumption made by economists when observing choices actually made (we sometimes say consumers reveal their preference through their choices).

"[But] it is crucial to be clear that the Tribunal's revealed preference argument relates only to customers' choices in the factual. It does not relate to customers' choices in the counterfactual; and the fact that 'the purchaser of a (cheaper) Single-Brand Ticket will have eschewed the availability of a (more expensive) Multi-Brand Ticket in the factual would not change the position that the purchaser of a Single-Brand Ticket may, as the [class rep] alleges, have had less flexibility in the factual than they would have done in the counterfactual -- and have been worse off as a result.

"Second, as I indicated in Davis 2, I was ... instructed that 'the [class rep's] claim does not include a claim for damages specifically due to a loss of flexibility in the actual, although the [class rep] asserts that it is appropriate to take into account loss of flexibility and other differences in service levels between actual and counterfactual in relation to any assessment of the Defendants' arguments.'

"... My proposed methodology involves comparing the prices and service levels available in the factual with those available in the counterfactual. In my view, this is the correct approach, as a matter of economics, both for purposes of assessing

potential pro- and anti-competitive effects of the conduct at issue in this case and taking into account loss of flexibility when assessing the ... arguments regarding objective justification."

Then a little further:

"In my opinion, it is not correct as a matter of economics to use a revealed preference comparison in the factual to assess the effects of the conduct."

He then considers:

"The consumer who, as a matter of fact, must decide whether or not to pay a monopoly price of £10 for a product. Whatever their preferences [in the factual], economics would consider such a consumer would be worse off if their prices were, counterfactually, at competitive levels ... unless the consumer's willingness to pay is at or below £5.

"Specifically, a consumer who decided to buy from the monopolist would have revealed ... that they were willing to pay at least £10 but they were certainly hurt by the monopolist's high prices [and] a consumer who decided not to buy from the monopolist would have revealed only that they were not willing to pay £10, ... nonetheless been hurt by the ... pricing (if prices were at competitive levels, they would have bought and gained consumer surplus [of £5]).

"Rather, economics says that, irrespective of the consumer's revealed preference in the factual, they would have been harmed by monopoly pricing relative to a competitive counterfactual as long as they [purchased] at the competitive price."

And then he really continues to explain that point. And he then goes on, he knocks down a point on the Gibb Report in relation to that in paragraph 38 onwards.

So, he's dealing with it at these paragraphs as a third point in his position in relation to economics and essentially making clear, as a matter of economics, that the tentative

view expressed by the tribunal in the CPO certification judgment is incorrect in the reasons it had given.

So, then we're picking it up again --

MR JUSTICE MILES: At this stage he hasn't done anything to show, even explain, how he would calculate the loss of flexibility.

MR HOLLANDER: He hasn't calculated it at this stage.

MR JUSTICE MILES: Or even explained how he would do it.

MR HOLLANDER: He does that in detail in Davis 4.

MR JUSTICE MILES: I know, but I'm saying at this stage, so by the time of the hearing in October 2023, he hadn't given even a methodology, as I understand it, for calculating this alleged head of loss.

MR HOLLANDER: No, he hadn't.

MR JUSTICE MILES: And nor did the draft pleading that was before the tribunal.

MR HOLLANDER: That's right. That was -- it was a claim that --

MR JUSTICE MILES: That's all come out in Davis 4.

MR HOLLANDER: That has all come out in Davis 4. We now get to Davis 4, which is referred to in paragraph 28 of Maitland-Walker, which if we could go to that, which is the basis of the calculation, and that is 282 in bundle 1.

In paragraph 26 on page 282, he estimates that "passengers who purchased Brand Restricted Tickets [and this is referred to] are harmed due to the cost of increased waiting time and would require approximately £84 million to compensate them."

I think part of the reason we couldn't actually do this is because actually you need to do a survey in order to do the calculation part of what you've done. Let's just look at that. So that's 26(a) on page 282. And as Mr Maitland-Walker, this is the fact, an estimate of loss of passengers who purchased single-brand tickets. Perhaps we can

just pick that up at 674 to 675, which was Mr Maitland-Walker at paragraph 28.

"This is [in fact] an estimate of loss to passengers who purchased Single-Brand tickets and does not include Dual-Brand tickets."

He then looks at --

MR JUSTICE MILES: Sorry, let me get this.

MR HOLLANDER: Sorry. 674 to 675.

MR JUSTICE MILES: So when he's talking in 26(a), he's actually talking --

MR HOLLANDER: He's talking about single brand. Doesn't include dual, but we'll come back to that in a moment.

MR JUSTICE MILES: Yes.

MR HOLLANDER: Then there's 445, where he deals with the quality --

MR JUSTICE MILES: Sorry, where are we now?

MR HOLLANDER: We're now, still keeping a finger, if you may, at 675, we're now in Davis 4 at 445 in bundle 1, paragraph 271. So, he discusses at that stage how brand-restricted fares reduce quality of rail services available to passengers by increasing the waiting time for train relative to waiting time that passenger would have taken and would have been permitted to have. And he does that, starting at 271 in that section -- I'm not going to read it at this stage -- and explains that in some detail. That goes on to the end of that section, which is 458.

If you then, again picking it up at paragraph 30 of Mr Maitland-Walker on page 675, he then refers to the passage in 488 of Davis 4, where:

"... Davis evaluates the direct effects [of] the absence of Brand Restrictions would have on service levels experienced by customers who purchased single-brand fares in the factual but would have held Any Permitted fares in the counterfactual."

That's the section starting at 488 at section VII.D.5. In section VII.F.2 -- this is

paragraph 31 of Maitland-Walker, if you go to 492, he "estimates the average customer's willingness-to-pay in pounds to avoid an additional minute of travel time."

In this section, Mr Maitland-Walker says he "addresses the Tribunal's requirement ... at 35(2)". So, essentially what he's had to do in order to do this is actually do a survey which has taken, I think, some weeks. He's got a survey carried out, and that's what's referred to in 492, which explains in some detail the survey that was carried out at that stage.

That section, at 506, which is paragraph 32 of Mr Maitland-Walker, Dr Davis's damages estimate on the loss of flexibility aspect of the loss in respect of single-brand tickets is set out in paragraphs 348 and 349. He then sets out the methodology in respect of that and estimated damages at £84 million at the bottom of 349.

And at the bottom of 675, he relies on the following to compute the losses flowing from increased waiting times which passengers suffered: average passenger waiting time, the additional waiting time in minutes that someone buying the best single-brand tickets (paragraph 32 at 676) would have experienced relative to what they would have experienced if they had an Any Permitted ticket.

The relevant waiting times (paragraph 33) are then multiplied by the number of journeys associated with flows with both Any Permitted and Single-Brand tickets on sale to estimate the passenger losses as set out in table 36 of Davis 4, which ... table 36 was ...

MR JUSTICE MILES: 507.

MR HOLLANDER: Thank you. Yes, let me just read--

"... which concludes that the cost in pounds of increased waiting time ... for single-brand passengers is £84 million before interest."

That's the start of the class period from July 2023.

So, Mr Maitland-Walker says he does provide a concrete indication of how the losses are methodologically ascertained, and has made the calculation of these losses in Davis 4.

"It is clear the amendments in respect of the Loss of Flexibility Claim have a real prospect of success."

Now, he then points out at 35:

"If the Loss of Flexibility Application is granted, it's anticipated there will be a need for [a] further short work product from Dr Davis in relation to Loss of Flexibility. [He] estimates the total losses in respect of single-brand fare loss of flexibility so that the further short report would deal with [him] determining [by] survey evidence what portion of single-brand fares were purchased by class members to assess what portion of these damages in respect of single-brand fare loss of flexibility are attributable --"

MR JUSTICE MILES: How is that going to work? How do you do a survey? What does the survey ask and how does it work?

MR HOLLANDER: He's referred to his last survey at --

MR JUSTICE MILES: This is a different sort of survey?

MR HOLLANDER: This is a different sort of survey.

MR JUSTICE MILES: Just looking at the big picture here, you've got a class which is not a class, including single-brand ticket buyers.

MR HOLLANDER: Yes.

MR JUSTICE MILES: This head of loss as formulated is to do with people buying single-brand tickets.

MR HOLLANDER: Yes.

MR JUSTICE MILES: So how do the two -- they seem to be apples and oranges.

MR HOLLANDER: I think the problem that is dropped is that the disclosure that has

been produced doesn't give him the stamp, the ability --

MR JUSTICE MILES: No, my question isn't anything to do with disclosure or stamps. It's a fundamental question.

MR HOLLANDER: I think what he's trying to do is to break down the 84 million between, if you look --

MR JUSTICE MILES: The £84 million is, as I understand it, if you just look at the number of people who've bought single-brand tickets over the relevant period.

MR HOLLANDER: Yes.

MR JUSTICE MILES: But that's not the same as the class, because the class is not the people who bought single-brand tickets. So, how do you work out the loss of the people who are within the class, who are the people who by definition did not buy single-brand tickets?

MR HOLLANDER: Well, I think what he's doing is trying to assess the -- he's trying to get a proportion of -- and I think the survey is intended to identify that proportion of the larger class.

MR JUSTICE MILES: But different class?

MR HOLLANDER: I think --

MR JUSTICE MILES: I mean, the people in the class are the people who bought tickets which were not single-brand, as I understand it.

MR HOLLANDER: Yes.

MR JUSTICE MILES: This head of loss is all by reference to people who bought single-brand. So, how do you find out using a survey --

MR HOLLANDER: I think.

MR JUSTICE MILES: -- how many people within the class of people who did not buy single-brand tickets bought single-brand tickets?

MR HOLLANDER: You survey the class members and you ask them what their ticket buying history is.

MR JUSTICE MILES: Really? What question do you ask or series of questions do you ask?

MR HOLLANDER: I think you ask them about what brands they've purchased, how often, when. I think that's the idea, because you haven't got the data otherwise. So, you have to do it by way of a survey and you break it down in that way.

MR JUSTICE MILES: Well, it would have been helpful to see the survey. What do you propose?

MR HOLLANDER: I think the problem -- yes, I understand what you're saying, sir. I mean, he's done a huge amount of work on this already. And also, if you look at paragraphs 39 and 40, you see the problem that has arisen.

So, paragraphs 39 and 40 -- I think it's being suggested to me that there may be a time limit for the transcriber break -- but if you go to paragraph 39.

(Audio gap) The expert was only able to calculate the losses associated with loss of flexibility head, a couple of weeks ahead of the filing deadline because there's been delays in providing data and explanations to the class representative during this period, and there's been voluminous correspondence from the parties about the delays. So, that was the problem.

MR JUSTICE MILES: But there's been no explanation in the evidence, and this is evidence we're looking at, at the moment, as to why this separate survey has not already been conducted by 31 July.

MR HOLLANDER: Well --

MR JUSTICE MILES: This is a separate survey from the first or a separate set of questions that could have been asked, perhaps, in the same survey.

MR HOLLANDER: Part of the difficulty in finishing this by 31 July arose as a result of problems in getting the disclosure in time for 31 July.

MR JUSTICE MILES: But I'm asking you about the survey at the moment.

MR HOLLANDER: Yes, but --

MR JUSTICE MILES: There may be separate issues about disclosure.

MR HOLLANDER: Yes, but I think the starting point of this was the calculation, which was just done just in advance of 31 July.

MR JUSTICE MILES: Right.

MR HOLLANDER: I don't know. I mean, we haven't had a transcriber break. I think the tribunal would like to have a short break.

MR JUSTICE MILES: Yes, we should probably do that for the transcribers. We'll take a five-minute break.

(12.04 pm)

(A short break)

(12.12 pm)

MR HOLLANDER: As I understand it, the way the survey works is that this survey has not been limited to class members. The survey is a survey on and in relation to customer tastes and the like of events. And that's, for example, look at 612 of Davis 4 - 3201 fellow respondents. What has happened, as I understand it, is that they've taken 3,000-odd survey respondents, smoothed the figures, which are 459 on page 613, excluding first class -- a variety of respondents for those particular types. And then on 614, included a variety of further categories of people and use that as in order to understand the calculation starting at 616 as non-model, calculation of willingness to pay (audio distortion) businesses.

So, I think the survey is those who are travelling on GTR trains' understanding rather

than class members. And I think that enables Dr Davis to come to the 84 million. That needs to be broken down, in relation to the class -- as referred to at 6 -- where Mr Maitland-Walker deals with paragraph 35 -- is broken down as to what proportion was purchased by class members.

So, I think the survey is a more general survey and the results of that survey have been used in order to feed in the figures in relation to them. That's --

MR JUSTICE MILES: I understand that but a different exercise would need to be -- an entirely different exercise, it seems to us, would need to be taken because by definition, the purchasers of single-brand tickets are not as such. There isn't a class of purchasers of single-brand tickets alone. So you've then got to work out.

MR HOLLANDER: Breakdowns.

MR JUSTICE MILES: (Audio distortion) But you won't break down. You've got to work out how many, as I understand it, how many people within the class also bought single-brand tickets, and how many. And that hasn't been done.

MR HOLLANDER: Well, that is, I think, the survey because there isn't the statistics to do it. I think that would have to be done by a further survey. My understanding is the survey would have to be as to patterns of purchases. There would be a figure based on respect of (audio distortion). I think that's, as I understand it, how it would be dealt.

MR JUSTICE MILES: There's a separate question, isn't there, which, as I understand it, the evidence leaves open, which is also the dual-brand fares which aren't addressed at all in that process.

MR HOLLANDER: (Overspeaking) I don't think there's a calculation; I don't think there's a problem with respect to that. I think that is was just that, for the reasons that are set out, it wasn't possible to do that calculation in time for 31 July.

MR JUSTICE MILES: Has it been done since?

MR HOLLANDER: It hasn't been done since.

MR JUSTICE MILES: Why not?

MR HOLLANDER: Because I think the remainder of the calculation, I think it was thought that that needs a survey and that will need a little more time and that the --

MR JUSTICE MILES: Does that need a separate survey?

MR HOLLANDER: Well, I think that's why --

MR JUSTICE MILES: (Overspeaking)

MR HOLLANDER: I don't think that's been suggested. I think what has been suggested is that to finish the job, as it were, needs a separate survey.

MR JUSTICE MILES: To finish the job on the single brand. As I understand the evidence, it's that the further surveys needed on the single brand fare loss.

MR HOLLANDER: Yes and the calculation needs to be done on the dual brand.

MR JUSTICE MILES: And that hasn't been done?

MR HOLLANDER: That hasn't been done.

MR JUSTICE MILES: Well, I go back to my question. Is there any evidence as to why that hasn't been done?

MR HOLLANDER: Well, there's evidence as to why it hasn't been done by 31 July, which is the (overspeaking) --

MR JUSTICE MILES: Is there any evidence as to why it's not, since then?

MR HOLLANDER: There hasn't been any further evidence as regards to that.

So, that relates to -- so, just in terms of dealing with --

MR JUSTICE MILES: The loss of 84 million in relation to the single-brand (inaudible) fares, how does that tie in with the idea that this has been certified on behalf of a class which doesn't -- isn't defined by reference to the single-brand ticket buyers? Conceptually, how does it work?

You've got a claim -- the way the claim works is that you've got people who buy multi-brand or all brand, or I don't know what you call it, now, all brand or any permitted brand?

MR HOLLANDER: Yes.

MR JUSTICE MILES: And the basic idea of the claim is that they pay too much for their tickets. That's the way the claim works. By definition, in framing those classes, you've -- the class representative has not included the single-brand ticket buyers. And that's the way the case has been brought and those are the people that the case is brought on behalf of.

Essentially, how does it then work when you turn around and say, well, there's a separate class for, in respect of single-brand tickets, which is a class of people who have been deliberately excluded from the class representatives?

MR HOLLANDER: No, no, we're not, deliberately not including anybody who is -- we're deliberately not increasing or adding to the class. And we've made that very clear. So, I mean, it is perfectly possible we could have added all single-brand purchasers - we have not sought to do that. We have made it very clear we are not trying to amend the class. The way it works, for example, at 689 on 2.11, is it is specifically limited to class members who have suffered loss as a result of the brand restrictions. 2.11 and 16 (inaudible). The only class members who are saying they have suffered a loss (inaudible) because of the restrictions.

MR JUSTICE MILES: But the whole sort of case theory is that the defendants have done this branding and differentiation and pricing by reference to branding, and that's anti-competitive.

So, the idea is that by doing this, selling these more restricted -- by selling the all permitted routes and the --

MR HOLLANDER: Most expensive.

MR JUSTICE MILES: -- multi-route tickets are too expensive; there's something abusive about that. Because one version at least of the case theory is that all prices would have been, well, on any pretty much version of the case, prices would have been lower for everyone. People would have been able to travel at lower prices across the board.

But this head of loss is premised on the idea that the people who bought the single tickets, single route tickets, were not part of that class.

MR HOLLANDER: No, no.

MR JUSTICE MILES: By definition -- were not the class definition.

MR HOLLANDER: I think the reason that arose originally, and that's why I showed you in the certification judgment, the bit about potential settlement, so I think what was being said, and there was a discussion with the, then, president at the certification hearing about whether one had to give credit. So, whether if somebody bought -- had a claim based on their expensive, exceptionally expensive tickets, whether they had -- and if hypothetically, then the counterfactual, you had the price of other tickets of the single-brand tickets had gone up, then one had to give credit one against another. And it was quite a discussion about that.

And the then president said, well, I think that's debatable. He made some comments to suggest he didn't think it was right. It doesn't matter. He then said, and there's that passage we saw a moment ago where he said, "but don't worry about that, because that's a matter which comes when they give a response to it". So that's, I think, how it arose.

So, there is an issue about whether there needed to be a concession. And that's where we came in and said, but look, what has actually happened here is that it's not

that there's a set off because the person who had bought -- a class member who also had -- this is a suggestion that you take into account the set off non-class member -- class member who bought on a different day, a single-brand ticket, has suffered a loss of flexibility. That's, I think, where it came in. And that's why it arose. So, there is a case -- if you start off on the basis that the brand restrictions are abusive, unlawful, and therefore you have to pay more to obtain the travel rights. Also, if you buy a restricted ticket, then you suffer from your restricted travel rights, that's the point about the person who buys the single-brand ticket who has suffered that loss of flexibility. So, that's how it arises, and that's why it's limited.

I mean, I think, you know, we could have expanded the class, but we haven't done that. But we are limiting this to class members who, on the one hand, they go within the class if they purchase a single brand -- they purchase the expensive tickets, if you like. But there's also a potential loss in circumstances where they purchase, if you like, the cheaper tickets because they've lost the flexibility.

MR JUSTICE MILES: So, you could have a case, just taking quite an extreme case, where a person has bought one Gatwick Express ticket. So, he or she falls within the class and then they bought 100 single tickets. And you're saying that their loss is all within the class definition? They might have lost £3 on the Gatwick or £10 on the Gatwick Express one.

MR HOLLANDER: They'd also have potential loss on the other tickets they bought – the cheaper tickets they bought.

MR JUSTICE MILES: The loss of flexibility.

MR HOLLANDER: That's the –

MR JUSTICE MILES: It's very hard to see that that could ever have been the basis on which the certification took place.

MR HOLLANDER: Well, it was discussed, the certification, in the circumstances that I indicated, and certainly, you see that the former president, in his comments in the transcript, where he certainly suggested it – all out, all in. That stage, of course. No judgment but that – so, we have Dr Davis who's saying, and who has been saying throughout, that is a matter of economics; perfectly legitimate. That's a legitimate claim, that loss of flexibility.

MR JUSTICE MILES: Well, in the end, this is not a matter of economics, whether something is a legitimate claim or not.

MR HOLLANDER: Well, it has an economic element.

MR JUSTICE MILES: It's a question at all (overspeaking) –

MR HOLLANDER: Of course, but it has a significant – if in circumstances where the economist is actually saying – the economics expert, Dr Davis, is saying this is a legitimate basis and this is how we calculate it, that's the circumstance that was coming before you.

So, I think that is how it works and in our submission, and really this is a matter of time because on the basis of the detailed explanation analysis by Dr Davis in relation to that, as to the legitimacy of the principle of the claim, our submission is that this is – in the absence of the tribunal having a contrary expert report which says, no, this is a wrong – that is the starting point.

MR JUSTICE MILES: Can you just remind me, I know you took us to this before – can you just remind us where the main point in the pleading is of this new --

MR HOLLANDER: Yes, sure. So, 2.11 is the first one, 689.

MR JUSTICE MILES: Is there a --

MR HOLLANDER: Thirty-six.

MR JUSTICE MILES: The bit at the end of 2.11.

MR HOLLANDER: Yes. So, I mean, you'll see it's expressed in terms of class members.

37.4 is at page 708.

MR JUSTICE MILES: So, the first one is just this reference to loss of flexibility.

MR HOLLANDER: Yes.

MR JUSTICE MILES: And then the next one --

MR HOLLANDER: 37.4. 64.6. And the other one is 68. (Pause) Those are the passages.

So, if we look at just the objections which have been put forward.

I think the first objection is that, well, this was not accepted by the tribunal in July 2022, the certification hearing, to which our response to that is perfectly correct, that there was a tentative view expressed by the tribunal against this on the basis of Harvey 4, which was not allowed in circumstances where the then president said unnecessary to deal with this.

But since then we have Dr Davis's analysis and explanation as to why, as a matter of economics, that the -- if you compare the factual and the counterfactual that this is an appropriate claim to be made, this is a claim that has economic justification.

The second point is that it's too late, but in fact, this has actually been before the tribunal, as to this claim, since summer 2023. And as I've shown the tribunal before, in the hearing in October 2023, this paragraph, the pleading before the tribunal.

The next point is that "hasn't been done by 31 July" -- explained why there is bits of the calculation have not been done by then, although, the answer to the point, in a sense, wasn't part of the case for which we had permission. In terms of the information justified in such a claim, in our submission, it is -- I mean, I've shown you passages in the documentation, which are -- where he explains the methodology, the

basis, because there is a very considerable detail.

There are points to be made in relation to its calculation, perfectly small amount of work which needs to be done to complete the calculation that does involve a further survey.

In terms -- and you have the point that at this stage, in terms of prejudice, the defendants had not actually put in any report or any complaints before the courts. All the evidence comes from the class representative or reports from Mr Harvey or from Dr Davis.

So, I think those are the points I raised in respect of this.

Now, the question, I think is whether it is more convenient next, just to deal with probably rather more briefly, with the other objections to the amendment, before you hear from my learned friend's perspective.

Shall I deal with the next point, which is the effects point, if that's convenient.

Our case has always been, first of all, that it has always been founded on there being a regulatory breach. In other words, we've always been clear no regulatory breach, no case. That is the starting point. We have always said --

MR JUSTICE MILES: To put it in slightly different language, just so we're all clear, regulatory breach is a necessary condition.

MR HOLLANDER: Absolutely. Absolutely. We submit that differential fares in breach of the regulatory regime is ipso facto abuse. Alternatively, we say that differential fares here had anti-competitive effect, and there had been a claim earlier by the defendants that we had not properly pleaded that alternative case on effect.

Now, that was, I would suggest, wrong for two reasons. First of all, it was wrong in the sense that we had pleaded it, and secondly, it was wrong because we had made clear at every stage it was our case. Their case -- the other side of the coin -- was that

differential fares are pro-competitive. So actually it's the other side of the coin.

Now, let us show you, first of all, the pleading from page708 is the first one. 37.4. Which refers you -- you've seen 37.4 before, but it relates to it refers to the anti-competitive effects arising from the abuse of dominance.

64.6. (Pause)

On page 727 seven.

MR JUSTICE MILES: I'm so sorry, give me that again?

MR HOLLANDER: Yes, 727. Paragraph 64.6.

MR JUSTICE MILES: 65.3 also perhaps deals with this, though I don't think (inaudible) my learned friend if there's an issue about (inaudible).

MR HOLLANDER: 64.6 makes the position absolutely clear. This is all dealt with in 46 of our skeleton, it might be a convenient place to show you that. Page 11 of our skeleton argument. I'm unaware of whether the tribunal has it.

MR JUSTICE MILES: Can I just check something with you before you do that.

MR HOLLANDER: Of course.

MR JUSTICE MILES: You've accepted the regulatory breaches are a necessary condition.

MR HOLLANDER: Yes.

MR JUSTICE MILES: The effects that you're referring to are essentially the same effects as give rise to your damages claims.

MR HOLLANDER: Yes.

MR JUSTICE MILES: So the first is differential pricing. The second -- at least in the draft amendments, because we've got to decide about flexibility -- is flexibility.

MR HOLLANDER: Yes.

MR JUSTICE MILES: And that's it?

MR HOLLANDER: Well, it creates inefficiencies.

MR JUSTICE MILES: Yes, but sorry, are those two things the two effects that you're referring to?

MR HOLLANDER: Yes.

MR JUSTICE MILES: So it's pricing and increasing journey times, essentially?

MR HOLLANDER: Yes, so it's service inefficiencies.

MR JUSTICE MILES: But is there anything else meant by "service inefficiencies", in fact, in this case, or is that it?

MR HOLLANDER: Overcrowding, for example. We haven't got a separate claim (overspeaking).

MR JUSTICE MILES: So overcrowding is not something which Mr Davis has said has given rise to any losses, but is it going to be part of the case? What I'm really interested in here is not knowing exactly what the case is that the defendants have to meet.

MR HOLLANDER: I understand. I think probably I'm wrong in terms of overcrowding. I don't think we actually rely upon that. I think we are relying on additional journey times. Yes, I think it's the additional journey times.

MR JUSTICE MILES: So it's pricing and additional journey times? Right.

MR HOLLANDER: So if we go to, I don't know -- the skeletons or the back of the supplemental bundle, but you may have them separately.

MR JUSTICE MILES: Yes.

MR HOLLANDER: If we just look at paragraph 46. It would be convenient if you have reference to that. I mean, our position has been -- this has always been -- there was this debate in October in the CMC. So if you look at 46(a) at ... (Pause)

2022, back of bundle 3.

MR JUSTICE MILES: Sorry, where are we looking at?

MR HOLLANDER: We are looking at our response to the 23 July applications by the defendants.

MR JUSTICE MILES: This is in --

MR HOLLANDER: And this was --

MR JUSTICE MILES: Is this the main bundle?

MR HOLLANDER: It's in the main bundle at the start of the tab 50 on page 2016. I'm just going to show you 2022.

MR JUSTICE MILES: 2 ... Just let us catch up.

MR HOLLANDER: Of course. (Pause)

I'm so sorry, 2022. So tab 50, at the back of bundle 3. It starts at 2016. This is our response to the applications that were made in July 2023 by the defendants. One of the points (inaudible).

And if you look at D1, where we just make it clear -- what I think I said to the tribunal, if you look at the reply, the draft of issues related to 82.

"The primary position is that the breach of the regulatory regimes is ipso facto an abuse of dominance. To the extent that the Tribunal does not agree this is the case, the CR further alleges the imposition of brand restrictions and differential pricing in breach of the regulatory regime gives rise to anti-competitive effects and is therefore abusive."

And Dr Davis provides a methodology to make the point over the page on 2073.

"The examination of counterfactual pricing involves essentially the same exercise that Harvey and calculated aggregate damages in these proceedings." (Several inaudible words)

And if you go, also, to 1789, please. If you now go to look at the draft list of issues that were drafted a long, long time ago I think in June 2022. So supplemental

bundle 36. (Pause)

This was done, I think, at the end of 2022. It was never finalised.

MR JUSTICE MILES: What's the reference, again?

MR HOLLANDER: Supplemental bundle, page 36, or tab 6. December 2022. This is the parties' attempt to agree, if you look at 12 and 13 on page 36.

"12. If the alleged breaches ipso facto give rise to an abuse of dominance ..."

And then the class reps' proposal:

"All the Defendants entitled to contend that there is a justification for the breaches and, if so, (2) can alleged pro-competitive benefits through allegedly offering customers different levels of quality of service at different price points either (i) mean that the Ticketing Practices are not abusive or (ii) objectively justified."

Then 13:

"Are the alleged breaches capable of giving rise to any anticompetitive effects?"

And the defendants' proposal:

"To the extent that Class Members paid less for Single-Brand Fares and Dual-Brand Fares in the factual as compared to the counterfactual, is the [class rep] as a matter of law required to give credit for any such offsetting price benefits?"

And the class rep's proposal is slightly different on that. So 13 is referring to the breaches. In December 2022, we arrive to anti-competitive effects.

If you then look at 1466, please. (Pause)

MR JUSTICE MILES: Sorry, I'm slightly (inaudible)

MR HOLLANDER: No, no.

MR JUSTICE MILES: I'm just thinking about these points. Give me that again? So sorry.

MR HOLLANDER: No, no, don't worry. This is for the March --

MR JUSTICE MILES: What's the reference?

MR HOLLANDER: I'm about to take you to bundle 3, page 1441, which is the March 2023 CMC. (Pause)

Question in terms of the nature of the case. I think the relevant part starts at 1465, where I say:

"There has been some debate about the suggestion the way the case has been framed is different."

And then first of all, making the point:

"[We are] not suggesting absent breach of the TSA and/or [the two agreements] that we're making a claim of abuse."

You we made that point already. And then over the page, on 1466, line 7:

"The one that we take issue with is the suggestion --"

Do you have that, on 1466?

"Because we do advance a positive case of the ticketing practices amounted to an abuse of dominance on the basis of their anticompetitive effect and the fact they amounted to -- and, I mean, we've pleaded that in terms."

I can just take you the reference, which is the same as I took the tribunal to then. So this is -- sorry to jump around -- 721 is at the end of bundle 1. So just picking out the pleading references I showed the tribunal there. The references are pleading to anti-competitive effect.

So just picking them up from that, the pleading, which is in essentially the same form for relevant purposes, is at tab 11 in bundle 1 at page 685. If you look at 721, paragraph 55.

Just really pick it up with reference to what was said to the tribunal in March 2023. There's a reference in paragraph 5 to the Gibb Report, which was referring to

overcrowding and delays. Paragraph 55.

Then 64, which is on 725, which is about abuse of dominance. And 64.3 and 4.

64.3 on page 726 is the allegation of unfair trading conditions, and 64.4 is about applying dissimilar conditions to what should be equivalent transactions.

Then 65, making clear, "no operational or other reasons why GTR must impose brand restrictions", or "no reasons of cost or efficiency".

So these are all effect points. And then again, you can see 1466 and 1467, it refers expressly to abusive practices not being objectively justified.

Then 68, over the page, "the prices were higher than they [would otherwise] have been". That's a core part of the effect.

Then 69, "lack of flexibility and reduces options". That's also within the anti-competitive effect.

And then -- I'm sorry again to jump around, but actually if you look at the reply that was originally put forward, which you can see in the supplemental bundle at 736. (Pause)

In our reply, it says ... Perhaps the clearest place is paragraph 18, iii and iv. (Pause)

This is in response to their saying that they pleaded the pro-competitive nature of what they're doing.

"(iii) Even if, which is denied, there are any differences is the nature and quality ..."

This is halfway down on page 76.

"... of the services across the three GTR brands, it is denied that the differential pricing is justified by differences in the costs of providing the services or gives rise to efficiencies.

"iv. Imposition of the brand restrictions and differential pricing creates inefficiencies and is anti-competitive. As explained in paragraph 55, the brand restrictions influence demand [in] a way that capacity is not optimally used, causing delays."

And then, at (c):

"It is denied that the Ticketing practices are objectively justified by reference to the alleged pro-competitive benefits referred to and the Defendants are put to strict proof providing such justification."

So what we've done is we have actually pleaded right from the outset in 2022 the anti-competitive effects case. I'm sorry to take you through that at length, but the reason I did that is because it appears to have been said throughout -- it was said in July and continues to be said now -- that we haven't pleaded this, whereas our submission is this has always been in issue.

As we've said, our primary case is the breach of the regulatory regime is ipso facto an abuse, while the alternative gives rise to anti-competitive effects and is therefore abusive. We said that in July 2023. What we have done is we've simply added those paragraphs of the claim that I've shown you, simply to make sure that there's no argument about this. It appears to have been suggested throughout that we haven't pleaded it, which in my submission is wrong for the reasons I've shown you. But in any event, we've just included those paragraphs so the position is clear beyond peradventure.

So that is the effects point. The effect case, if we look at 279 of the main bundle. (Pause)

And if you could just give reference to paragraphs 23 to 26. This is 279, first volume of the main bundle, Davis 4. Paragraph 23 summarises the various competitive effects of conduct. Table 1, and the next page really summarises:

"24. In respective of the potential gains due to the better service levels to those who purchased Brand Restricted fares in the factual."

Again, to summarise the link between paragraph 23 and 26 in terms of the effect of

conduct:

"24. In respect of the potential for gains due to better service levels to those who purchased Brand Restricted fares in the factual:

"a. Evidence of a gain due to reduced waiting and therefore journey time in the counterfactual. The essence of Brand Restricted fares is that a passenger may need to watch a train arrive and depart without getting onboard if it is the wrong brand."

Then he refers to information about the data set. I think the point before, "the possibility that services more generally could be cut back."

And 26 is his summary on page 282. That's the one we looked at earlier.

"In terms of fares," he, as an economist, is looking at the impact of brand restrictions on fares. I just give you that reference.

So in terms of effect, I've dealt with the points in respect of that.

MR JUSTICE MILES: Those bits of his report, start with the heading, well, the table says, "Theories of harm".

MR HOLLANDER: Yes.

MR JUSTICE MILES: And so you seem to be talking there about the losses suffered by class members as a result of the alleged abuse. I come back to the point, because this seems to be ultimately to do with what are you saying are the abuses of the dominant position for the purposes of Chapter II, and I think that is consistent with what you told me before, which is that the two abuses that you're referring to are pricing -- sorry, as a part of your case -- are pricing and flexibility.

MR HOLLANDER: Yes.

MR JUSTICE MILES: So that's your case both on abuse and loss.

MR HOLLANDER: Yes. So that's I think points on effects.

MR JUSTICE MILES: Yes.

MR HOLLANDER: The other points are a bit shorter. Updating the class. "Updating Class", paragraph 22 of my skeleton. On page 6, if you have that. I don't think the principle is controversial, as I understand it. Let's look at -- so the background is set out. Essentially they don't object to the updating of the class, which is what has been done in other cases.

We seek:

"To amend the class definition to capture all persons who made relevant purchases from 1 October to the date on which the amendment takes effect, [today or shortly thereafter]. This will ensure that persons who only made relevant purchases after the collective proceedings were issued fall within the class."

As, in principle, you're entitled to do. Defendants simply says, "The end date should be 31 July 24, and the amendment should be final". In our submission, there's simply no justification for that. So that's in respect of that.

Regularising the claim form amendments. I don't think any separate issue arises in respect of that, and if it does, I'll listen to what my learned friend says about it.

I think those are the amendments to the pleading. I see the time. We don't want to go beyond. Can I just reserve my position over the short adjournment on the basis that you asked me a number of very fair questions. Those are my submissions on the amendment.

MR JUSTICE MILES: Right, well, that's a convenient moment, so we will come back at 2.00 pm.

(12.58 pm)

(The short adjournment)

(2.03 pm)

MR HOLLANDER: Before my learned friend starts, I said to the tribunal before the

adjournment that loss of flexibility applications were before the tribunal in October 2023. You see Davis 2 and 3 deals with it. What was not before the tribunal on October 2023 was a damages claim based on that. The paragraphs were essentially the same but there wasn't that claim at that stage. That arises from Davis 4 and work done by Davis since.

There were also minor differences that I should have drawn your attention to between the way it was put then and now. I'll just show you. If you look at the one that was before the tribunal in 2023, which starts at bundle 1, tab 4. (Pause)

So just to look at three of the paragraphs.

MR JUSTICE MILES: Sorry, it must be -- is this in the supplemental bundle?

MR HOLLANDER: No, no, main bundle.

MR JUSTICE MILES: Oh, yes, sorry.

MR HOLLANDER: 211, page 116, so this is the 2023 version. So 211 was --

MR JUSTICE MILES: I'm just going to have to catch up with you.

MR HOLLANDER: I'm so sorry.

MR JUSTICE MILES: So two --

MR HOLLANDER: Paragraph 2.11, which is one of the paragraphs that is now the subject of the amendment. You can see the different three version.

MR JUSTICE MILES: Yes.

MR HOLLANDER: "Class members have also suffered loss and damage through worse ..."

I think it's put in terms of not loss of flexibility, but "worse service levels".

MR JUSTICE MILES: Right.

MR HOLLANDER: And that's 2.11. Then just go through the others. Page 135, 37.4. Again, a reference to -- 37.4, page 135 -- "service levels" rather than "loss of flexibility",

and the same point at page 154, at 68. Page 154, 68, it refers to "service levels". So it's referred to as service levels rather than loss of flexibility. There wasn't a damages claim at that stage, we weren't seeking that at that stage. That is the difference. And that comes from Davis 4.

MR JUSTICE MILES: So, where's the damages claim now?

MR HOLLANDER: Well, the damages claim is --

MR JUSTICE MILES: In the new version?

MR HOLLANDER: Yes, starts at the pleading, 685. Loss and damage starts at 67. 68, I can't remember what was that in the original. So, paragraph 68 and in the original, or in the 2023 version, it's -- yes, it is different in 68, you're quite right. So, 154.

MR JUSTICE MILES: Yes.

MR HOLLANDER: Make the damages claim in 728. I think also if you just go to the -- not sure if there's anything else much I need to show you. If you look at paragraph 76, so damages, page 730, first one methodology and service levels. I'm not sure I can take that particular point any further.

MR JUSTICE MILES: Yes.

MR HOLLANDER: Can I, just in summary, it may be you have the points already, but let me just make sure I've put it properly.

As you know, Dr Davis has done a market-wide calculation of single-brand purchaser loss of flexibility. He needed to do that in any event to see the effect on the market of brand restriction.

Two things you need to do now, if applications allow. First of all, the same calculation for dual-brand purchasers, ie market-wide, same basis. And secondly, needs to do a survey. So if you want the portion of the market involves claims by class members.

The defendants say, the defendants' argument on set-off is this: assume that too much was paid by the customers in the factual multi-brand tickets. In the counterfactual, they say, single-brand tickets would have been more expensive. Therefore, they say, on the counterfactual, class members have to give credit for separate transactions they entered into with what would have been cheaper tickets, ie cheaper single -- sorry. They have to give credit for the more expensive tickets they would have bought from the single brand. Sorry, was that reasonably clear on the second iteration of that?

MR JUSTICE MILES: Yes.

MR HOLLANDER: It wasn't expressed very well.

We say that, as a matter of law and analysis, that is not -- there is no set off involved there. If they are right, then they have to give credit on that sale for loss of flexibility. Therefore, the calculation and the issue is going to be in issue anyway on that basis. Therefore, all we are seeking to do is not merely to rely upon it by way of a response as a set-off, if we need to, but also as a separate claim, and that's what Davis 4 does. Was that -- I'm not sure I expressed it that well, but has the tribunal understood what I'm saying?

MR JUSTICE MILES: I think I understood it. Just go through the stages again.

MR HOLLANDER: Yes, of course.

MR JUSTICE MILES: I mean, I understand your point, as a matter of law, no such ops, so leave that to one side.

MR HOLLANDER: That's an issue. That's an issue. Right.

MR JUSTICE MILES: So, the amounts that you say the defendants would be saying should be set off, based on the fact that the single-brand tickets would have been more --

MR HOLLANDER: In the hypothetical. In the counterfactual.

MR JUSTICE MILES: In the counterfactual. Right.

MR HOLLANDER: So the effect, they say you've got to set off one against the other. So, the calculation has got to be done anyway on that basis.

So, all we are seeking to do is to bring in, not just as a response, but --

MR JUSTICE MILES: I'm sorry, going that far in the analysis is just a question of pricing.

MR HOLLANDER: Well, you've got to do the calculations as to how much.

MR JUSTICE MILES: Well, yes, but that's still just a pricing point, isn't it, that they say, "Well, in the counterfactual, single-brand tickets would have been more than in the factual", and that in some way or another that has to be reported. You say, no, you can't do that as a matter of law?

MR HOLLANDER: I don't see where I'm wrong on that.

MR JUSTICE MILES: It's still comparing the price with price.

MR HOLLANDER: That's comparing price with price, but we say that's not a fair comparison because you are ignoring the loss of flexibility and you have to take that into account in the hypothetical setting. That was the point that arose in 2022 on the certification, I showed you that point about set-up, where the then-president said that this is at the later stage.

So, what we are seeking to do, on a calculation that is going to have to arise anyway in answer to their set-off because we say otherwise you're not comparing like with like. It's not just a question whether the cheaper tickets would rise in price, but the cheaper tickets inevitably involve that loss of flexibility. So, we would say you could obviously take it into account at that stage.

What we're seeking to do now, by the amendment, is bringing it in, not just there, but

also as a damages claim. It's a calculation that's going to have to be done anyway. (Pause)

PROFESSOR NEUBERGER: So, the 84 million is the loss is the estimate of the loss of flexibility?

MR HOLLANDER: Well, so the --

PROFESSOR NEUBERGER: By people who bought single-brand tickets?

MR HOLLANDER: No, the £84 million is a bigger figure. The £84 million is a market-wide -- sorry, I mean, maybe you're saying something, I'm not sure. Let me clarify. It's a market-wide figure, not just class members --

PROFESSOR NEUBERGER: Sure.

MR HOLLANDER: -- for the single-brand loss of flexibility. So, you have to add to that the dual-brand, the market-wide. You've then got to do the survey which Dr Davis is contemplating whereby you work out from those categories what proportion of those or how they relate to class members. And I think it's envisaged that we look at historic patterns in the market. That's what is envisaged. Sorry.

PROFESSOR NEUBERGER: If I focus just on deeply bought single-brand tickets, some people of whom will be members of the class, the 84 million is a figure just for the loss of flexibility. It doesn't take any account of the increased price they might have paid in the counterfactual?

MR HOLLANDER: That's right. That's right.

PROFESSOR NEUBERGER: So it's kind of gross, it's not really a net figure.

MR HOLLANDER: And as far as those two pieces of work that Dr Davis needs to do that (audio distortion) this stage depends on is a matter for the tribunal's permission. Anyway, sorry, I thought I should clarify that. I hope that, unless there's anything further, the tribunal needsl.

PROFESSOR NEUBERGER: No, that's fine. Thank you.

MR JUSTICE MILES: Yes, right, thank you.

Submissions by MR HARRIS

MR HARRIS: Chairman, members of the tribunal, I'm going to, with your permission, deal with the amendment applications in the order in which Mr Hollander raised them, that is to say, loss of flexibility, then the effects claim, and then a much more minor issue on the class definition amendment date.

In that order, then, loss of flexibility. Can I give you at the outset the three headline reasons why, in our submission, you should deny the application to amend so as to add the loss of flexibility claim. Then, I'm going to raise two preliminary issues before I develop the three main points. They are very simple.

The first point is, and we say dispositive of the entire application, that the application is far, far too late and is made in breach of an existing tribunal order. So, that's point number 1.

The second reason is, in any event, the loss of flexibility claim as now partially articulated doesn't satisfy the *Pro-Sys* test because it's not coherent: not plausible, realistic or coherent, doesn't even match up with the class. That's the second point.

The third point is it should be denied in any event because it self-evidently gives rise to massive extra cost well after the date upon which this case was supposed to have been final as regards the class representative.

So, those are the three headline points. I'm going to come to that. But there are two preliminary points that have arisen as a result of my learned friend's submissions this morning. They pick up on a point that I adverted to earlier on, namely, submissions by or on behalf of the class representative that are apt to be or are misleading.

Again, the first one of them is that my learned friend, in the course of the loss of

flexibility application, took you to several passages in Davis 4, the voluminous expert report at tab 9 of volume 1. We don't need to turn it up.

But, inter alia, he showed you paragraphs 26(a), 348 and 49 and table 36, and he read them out and he pointed to them. He gave you figures. But what he didn't do was explain to you that even Dr Davis doesn't stand by those paragraphs that he read out. Those paragraphs have been substantively amended, or at least are the subject of an attempt to amend or correct in the so-called table of corrections or the errata sheet. Every single one of those paragraphs: table 36, can I show you this? This is at tab 24 of bundle 1, the errata sheets. No mention was made by this.

MR JUSTICE MILES: Tab 24? Of bundle 1?

MR HARRIS: Bundle 1.

MR JUSTICE MILES: It can't be bundle 1.

MR HARRIS: Well, it is in my case, but -- tab 24, beginning at page 824.

MR JUSTICE MILES: My bundle 1 ends at tab 14, so.

MR HARRIS: Well, okay, so let's --

MR JUSTICE MILES: Core bundle, this is part of the core bundle?

MR HARRIS: Core bundle; I have it at tab 24 and it begins at page 824. It sounds like we have slightly different tabs.

MR HOLLANDER: Right, so ... okay. Right. We've got it.

MR HARRIS: So, just take the very first page. You will recall that Mr Hollander took you to paragraph 26(a) and read it out. But in fact, 26(a) has been substantively and indeed materially, significantly in terms of what's been added, amended, or at least is the subject of an attempt to amend or correct. You can see the original wording in the middle column, under the heading "original text", and then the "update", which is self-evidently not the same.

I don't take a particular point about the change, but what I do say is it's not satisfactory for my learned friend, again, to be presenting to this court submissions which are inaccurate on his own case, and for him not even to have mentioned to you that those paragraphs that he read out from his own expert report are not stood by, by his own expert.

That's just one example. The same is true if one were to scroll through --

MR HOLLANDER: He tells is that they're brand-restricted, which should read single brand, which I think is a sort of summary way of saying what's in the update.

MR HARRIS: So the point -- as I say, I don't take a point on the specifics, it's more the general gist. One can see that the same point can be made by reference to paragraphs 348, which has been the subject of a proposal to correct; that's to be found on page 838, and the same point as regards paragraph 349, which is to be found on page 839. Again, I don't take a point on the specifics, it's just the general lack of accuracy and keeping the tribunal fully informed.

The same point about table 36, which is to be found at the back. My learned friend referred, if you look at page 851, indeed, to a particular figure in table 36. But you can see that almost every figure -- well, many of the key figures in table 36 have now been what Dr Davis calls corrected. So, that's a preliminary point.

The second preliminary point would have been the one that Mr Hollander and his clients thought better about over the short adjournment then in fact corrected themselves. You asked Mr Hollander in terms before the lunch adjournment whether the amendments on the loss of flexibility claim that had been presented in May 2023 and were then before the tribunal in October 2023 were the same as the ones in tab 11. And he said yes, but of course, that's just simply not right, he gave you the wrong information. To his credit, he has now corrected that mistaken submission that

was made before lunch, though that in itself has now given rise to a further difficulty because, for the first time ever -- this is not in any hearing we've ever had, not in any part of the applications that my friend has presented before today, and not in his skeleton argument -- as part of his corrections to his former submissions after lunch, he made a brand new point by reference to -- if we could please turn it up, core bundle, tab 11, paragraph 76, which is on page 730. He drew your attention to some wording at the bottom of that in blue. Do you have the wordings "Davis 2 also provides"?

MR JUSTICE MILES: Yes.

MR HARRIS: Well, first of all, based upon what he said after lunch, that must just be wrong. It must be Davis 4. But in any event, that's relatively minor, but it doesn't seem to be accurate on what he just told you only a matter of moments ago.

More importantly, we know, and I shall be developing this on under my *Pro-Sys* head, it's not accurate to say that, whether it be Davis 2 or Davis 4 provides a common methodology for determining the extent of loss suffered by class members -- that's a point that you've already debated with Mr Hollander and I shall come back to -- it doesn't calculate the loss suffered by class members, at least as regards those who bought single-brand fares. I'll come back to that, but you're alert to that point. So that's just wrong. So, that would be two reasons to deny the amendment, even if you were against me on everything else.

But much more importantly, at 2.09 pm, my learned friend then said, very much to my surprise, that you're going to have to grapple with this issue in any event, because the defendants plead set-off and, this was his submission, you will have to assess when you determine the pleaded defence of set-off, giving credit for -- those were his words -- giving credit for the alleged loss of flexibility. So, that was his new point. Brand new point. You're going to have to do this anyway.

Well, with respect, no, it's far too late to say that now for the first time ever. It's almost like an afterthought, and it doesn't stack up on the pleadings.

Can I show you the reply, which is where this would have to be pleaded were it a point instead of just emerging after lunch today. That's in supplementary bundle --

MR JUSTICE MILES: Can you show us the defence first, where the --

MR HARRIS: I wish I could, but that doesn't appear. I can read out the relevant passage, and I can get you a hard copy, but because this only arose after lunch, nothing had ever arisen in the defence before.

MR JUSTICE MILES: Why don't you reach out? We'll see if we can take it on board.

MR HARRIS: Yes. So this is paragraph 34(c) of the defence, and I will make copies available. And we've said:

"Alternatively, in a counterfactual in which GTR did not offer differentiated prices for travel on its various services on the London-Brighton mainline, it would, as the CR's expert economist has conceded, where it had previously offered different fare options on a given flow for a particular ticket type, have offered a single price that was higher than the Single-Brand prices."

So, just pausing there, that's clear so far. Single-brand prices, we say, go up. You have to give credit for that. So, next sentence reads:

"Accordingly, depending on the level of the resulting single price, at least those Class Members who (in the 'actual world') purchased Single-Brand Fares, and potentially also Class Members who purchased Dual-Brand Fares are benefited (to that extent) as a consequence of GTR's alleged abuse of dominance."

So, that's that next sentence. So we say, prices would have gone up for some of these people; therefore you have to give credit for that. And we say, last sentence:

"As a matter of law, the CR is required to give credit for such offsetting benefits, which

must be reflected by way of a reduction to any aggregate damages award made in the CR's favour."

So, that's our defence of set-off.

MR JUSTICE MILES: Yes.

MR HARRIS: We say very clear. Now, fortunately, in the supplementary bundle for today, supplementary bundle at tab 24, you can see the reply to that defence. It's at paragraph 20(c), which is on page 738.

MR JUSTICE MILES: Yes.

MR HARRIS: It may be quicker -- I'll happily read it out, it may be quicker for the tribunal members to just read it.

MR JUSTICE MILES: Let's just read that, 20?

MR HARRIS: 20(c) on page 738. (Pause)

So, I make three points by reference to this. What Mr Hollander said at 2.09 pm amounts to, "You have to give some offsetting against your offsetting defence". That's essentially his new point. You have to offset against your offset because I say there was a loss of flexibility.

That does not appear in paragraph 20(c). There's no reference to offsetting or any analogue against the offset; there's no reference to the loss of flexibility claim, whether, as apparently has been contended before, is in this case or indeed to the proposed amendments. What it does say instead, which is different, is in the final line, "but any permitted travel are not a valid comparison for". That's not the same point. That may or may not be a good point, but that is not saying, "You're going to have to do this calculation anyway on loss of flexibility because it amounts to an offset against the offset". That's a brand new point and is not pleaded.

Secondly --

MR JUSTICE MILES: I think that -- I'm sorry, I'm just trying to make sense of that sentence. I think there's an error, isn't there? Shouldn't there -- I might be wrong about this, but shouldn't the word "but" in the penultimate line say "that"? I'm finding it difficult to follow at the moment. It's a matter of ... (Pause)

"That" or ... Yes, sorry, I think it is right. I think I've misread it.

MR HARRIS: Yes. I don't --

MR JUSTICE MILES: That's dealing with the counterfactual.

MR HARRIS: Yes.

MR JUSTICE MILES: Yes. Okay.

MR HARRIS: So, just to be quite clear, the new case from 2.09 pm is you should offset against the offset. That's why Mr Hollander went on to say, at 2.12 pm, "You're going to have to perform this calculation anyway". But that is not a pleaded point. There's no reference to reducing the size of the offset by reference to anything, let alone reducing it by reference to the size of the loss of flexibility claim. So, the new point doesn't appear.

You can tell that because there would have to be a cross-reference, as a minimum, to where the loss of flexibility claim either appeared or appears, but there isn't.

You can tell it, and this is my second reason, by another way. You would have thought, as appears elsewhere in the pleadings, certainly the claim form as re-re-amended, that there would then be a reference to the relevant expert evidence that shows how you offset against the offset or you reduce it, but there isn't. That's because it hadn't happened at the date of this reply, which of course is 1 December 2022. And I must be right on that point, because even Mr Hollander's case is that apparently this offset against the offset somehow emerges, as I understand it, in Davis 4. But of course, Davis 4 didn't exist until years after this pleading.

And so this is a non-point; it's bad in principle and in any event it would have had to have been pleaded as a bare minimum today by way of yet further proposed amendments, but it isn't. In my respectful submission, it cannot be pursued, and it's unfortunate that it should have been referred to, this claim as existing, this offset against the offset, without taking you to the pleadings, but I hope to have regularised that position by what I've just done.

So, those are the two preliminary points. In due course, including when I respond to these amendment applications, I shall be drawing your attention to several other places in which the way in which matters have been presented to this tribunal, again, not for the first time, are seriously deficient by the class representative. I shall come to them in due course.

So, unless you have any questions about those two preliminary points, I'm going to take the first issue, the first main reason why, in my respectful contention, you should deny the loss of flexibility application. And as I say again, that is because it is far, far too late and is made in breach of a tribunal order.

As to the first point -- Professor?

PROFESSOR NEUBERGER: Just while we're on that, can I just understand, are you saying that the travel rights to which they were entitled, the phrase, is different from the loss of flexibility?

MR HARRIS: Who knows? Who knows, Professor? It's not at all clear, doesn't use the phrase loss of flexibility in that, doesn't cross-refer to anything. There's no reference to expert evidence. Even if it were right, and even if you were to give the benefit of the doubt to a class representative that has had literally years to put forward all of the case that it wants, including any amendments, even if you were to give them the credit there, it would have to at least say, in my respectful submission, "and this

results in a reduction of your offsetting claim". We deny it in principle, but even if you're right, you [defendants], it reduces it. You have to set off against the offsets. What Mr Hollander said at 2.09 pm just doesn't say that. So, that's my point.

So, my main reason, my main submission: too late, in breach of the order. The first point, too late, we've already dealt with. You have seen that this, almost the same but obviously not exactly the same, amendment for loss of flexibility was put forward some years ago. It was put forward at the 11.5th hour before the certification hearing, and it was denied on that occasion because of course, it was put forward even then far too late.

That was the Harvey 4 report, and you've seen the references to this. The tribunal as then constituted said, "Well, hang on a minute, what are you doing? This is far too late. The defendants haven't had a chance to get on top of it, so you can't have your amendment. It's not introduced. Oh, and by the way, we've got problems with the way in which you formulated the case." Mr Hollander has attempted to deal with that latter point.

So the first is very simple. This is far too late even back then, and it's obviously much, much later now and therefore by definition far, far too late.

But it gets worse because as you have seen -- I don't propose to recite all the history -- but this tribunal, for very good reason, finally said in October 2023, enough's enough. You really do have to now finish your entire case, lock, stock and barrel by 31 June 2024. Just in parentheses, originally the learned then-president of the tribunal.

MR JUSTICE MILES: 31 July.

MR HARRIS: Sorry, what did I say?

MS BLACKWOOD: June.

MR HARRIS: I beg your pardon. Yes, you're quite right. I beg your pardon.

Originally the proposal was end of February 2024 but then that became even more generous so as to become 31 July 2024. Can I just show you two passages.

One is at core bundle, volume 1, tab 2. This is in a judgment of the tribunal on the 19th of -- I beg your pardon. It must be volume 2 -- misreading my own numbers -- of tab 38. So, sorry. It's a judgment of 19 October 2023. My note says paragraph 9, sub 9 on page 1649. Yes, that's right.

MR JUSTICE MILES: If you'd like -- we have three.

MR HARRIS: Yes. I'm so sorry. We seem to have the same tabs but different volume numbers. Yes. So, it's tab 38. It's page 1649, subparagraph 9.

And having essentially recited the unfortunate history of the case, the tribunal said, picking it up three lines down:

"We consider that Dr Davis should, in these circumstances --"

MR JUSTICE MILES: I'm so sorry. We're going to have to just find it.

MR HARRIS: Sorry.

MR JUSTICE MILES: Where are we?

MR HARRIS: 1649, at the top. Subparagraph 9.

MR JUSTICE MILES: Yes.

MR HARRIS: Beginning, "Given that" and picking it up three lines down:

"We consider that Dr Davis should, in these circumstances, [that's to say, the unfortunate background history] articulate in full the Class Representative's case, and that he should do so by no later than 31 July 2024. We regard this as a generous date, and ideally the job can be done well before then."

And then that was picked up in an order of this tribunal at the next tab. I'd like to show you this because, of course, my learned friend has made not a single reference --

MR JUSTICE MILES: Just looking at what was said in -- what the tribunal was envisaging in one. The section one, it seems that the tribunal was saying that that report must have everything in the sense of including as to quantum, so that the tribunal could make a final order in a given ascertainable quantum.

MR HARRIS: Precisely so, Mr Chairman, precisely so. Whatever else one says, the CR plainly hasn't done that. It's coming to you today and asking for permission to add in well, a completely uncertain number, but one figure that's been mentioned is 84 million. Of course, that's the wrong figure; I shall come back to that.

But this is in clear breach --

MR JUSTICE MILES: Sorry, you were about to show something else.

MR HARRIS: Yes. So, this was the remark in the reasons, if you like, ruling, but then that translated into a formal order of the tribunal, which is the next tab 39, begins on page 1657. But the relevant paragraph is, "It is ordered that:" on page 1658:

"It is ordered that:

"1. By no later than 31 July 2024, the Class Representative shall submit his case in full. ... has liberty to provide [an] expert report."

That was very clear and I'm not going to go into all the background history. You've seen the evidence for this case. You've seen how Mr Sansom sets out the unfortunate history of failure by the class representative to advance cases on time with proper experts' reports, experts for dropping out, new reports coming in and being superseded and effectively abandoned. I'm not going to go through all of that.

But that is the background to why this tribunal finally said enough is enough, you will put your case in, in full, including on quantum, with your expert report by that date at the latest. And that's a generous date, they said that in terms.

And what Mr Hollander signally fails to grapple with, he didn't even mention this order

to you a single time when he makes his amendment application to put forward a case that has already failed to find its way into the case once, because it was too late, and now it's even later and in breach of an order.

And what I say, with great respect, is that the starting point, Mr Hollander has missed altogether. The starting point is, Mr Hollander has to persuade you, in line with the guidance of the Court of Appeal in Mitchell v News Group newspapers in the bundle, if you'd like me to show it to you, that he has to explain to this tribunal why his client has simply ignored the clear order of the tribunal. And he doesn't even try to do that. He hasn't adduced evidence as to why there's been this non-compliance. He hasn't sought to persuade you, by reference to evidence, that there is a proper excuse. He just ignores it. And yet that is the starting point.

He shouldn't get off first base, in my respectful submission, unless he can satisfy you that there is proper justification based upon the evidence for flouting a court order that was, itself, generous and came against the background of repeated failures by this class representative to manage his own case properly.

You will recall, I'm not going to call it up, I apprehend that you're all very familiar with it. But in Mitchell, which is to be found in the supplementary authorities at tab 3 -- there's no need for you to call it up unless you're particularly interested -- but the gist of that case was in 2014, there was a widespread and pervasive culture of not complying with court orders and people coming to the High Court, notwithstanding the new, overriding objective, post the Jackson reforms, and essentially saying, oh well, it's not that big a deal. And in any event, there's no prejudice to the other litigant.

The Court of Appeal said, "No, that's absolutely not how we behave. You have to come with evidence; you have to explain why; you have to come promptly with evidence and explain why; you have to excuse it properly and then it's not a question

of absence of prejudice to the single other litigant, because the overriding objective necessarily entails looking at other litigants who have been, essentially, to use a colloquialism, bumped out of court time because you haven't complied with the order that we gave you in the first place."

And that's this case. We've already had this debate about this loss of flexibility application, and now we are taking up another half day, at least of court time, on something that's already been debated because the class representative, yet again, hasn't behaved in a manner that befits the great responsibility that lies upon the shoulders of a class representative. And with respect, under the Mitchell approach, it is just not good enough, and it is completely dispositive.

MR JUSTICE MILES: Are you saying we have already had this debate? Have you actually had this debate?

MR HARRIS: We've had several of the debates in this case, sir. This one about loss of flexibility, whether you should have it, be allowed to include this claim and that failed because it was too late, and then the second chance -- so, at least that part of the debate has already been had once.

And then the way in which the class representative could have dealt with this and should, pursuant to the order, have dealt with this, he should have got together whatever evidence he needed, got together whatever report he needed, and have put that in by 31 July 2024, at the latest.

And I go as far as to say this. It wouldn't even, on a proper understanding of the order, have been sufficient to have made the application to amend by 31 July 2024. But he didn't do that.

He should have actually prosecuted the application to a conclusion one way or the other by 31 July 2024, because otherwise what would have happened had he

bothered to even try to comply with it at all, is that one would have reached 31 July 2024 and there would have been an outstanding question about whether tens of millions of pounds of further quantum should be included in the claim, but that's not what was going on after this tribunal heard these arguments in October 2023 and gave its order, a generous order.

MR JUSTICE MILES: But it's not entirely clear to me, looking at the order, that it was envisaged that the class representative would have had to have applied for permission to amend before then.

I mean, looking at -- trying to make sense of the order in the context, there was an application for permission to amend, albeit it was not identical with the one now before the tribunal. That's referred to in the recital to this order on the top of page 1658 and then the tribunal says -- does not rule on that but it says you've got to bring your full case forward.

Now, one interpretation of that is that it was incumbent on the class representative to bring its full case forward, including anything that it was seeking to include by way of amendment. There might then have been further room for debate about whether it could rely on those bids, but that it had at least to do that, which I think is part, was the first way you put it.

I'm not at the moment convinced that the tribunal was saying, "And what's more, you actually have to have made and had have resolved an application for permission to amend". That seems a further -- that's clearly reading something into the order and at the moment, looking at it, it seems to me, that's rather a stretch.

MR HARRIS: Sir, fortunately, from the perspective of my clients, it doesn't matter either way. That's because the application, even to amend, hadn't been made by 31 July 2024 and on any view that had to have happened.

But on the former, possible interpretation, I'd invite you just to recall -- I don't have to press this point because my submission succeeds in my submission, in any event, for the reasons I've just given. But I invite you to bear in mind on the former that this loss of flexibility application by the time was first brought into being and conceived of as being part of the class representative's case, back in either May or June 2022.

So, there had been ample time for that set of amendments properly to be articulated and to be supported by evidence, expert as necessary, even if at that point, as is often the case in these class collective proceedings, the case that's presented is, this is the best that I can do at this juncture because we haven't, for example, had full disclosure. But the class representative didn't do that. So what had happened was the class representative had messed up twice on this very point about loss of flexibility; once, by putting it in far too late, and secondly, by not putting in a coherent methodology.

And it didn't do anything about that at all prior to 31 July. And bearing in mind that it had first come into existence in May or June 2022, it quite plainly, in my respectful submission, could have not only issued the application, but prosecuted it to a conclusion, one way or the other, well before 31 July 2024, though as I say, I don't need that point.

But that is the essential first reason, in my submission, to deny the application. It is obviously too late and it's in breach of a court order. No attempt even to address the Mitchell criteria. No attempt to explain to this tribunal why he, the class representative, has flouted the order. There are no good reasons. I'll take the supposed reasons that relate to aspects in due course, but absent even an attempt to address non-compliance and having bearing in mind that this tribunal has previously said, enough is enough, including on quantum, that's it. That's the end of it. So, that's very simple.

I'd just before moving on, though, like to show you two passages in my learned friend's skeleton argument. And they are -- this is still on the first reason.

In my learned friend's skeleton argument at paragraph 18, you will see -- I think you may have it separately, but --

MR JUSTICE MILES: Yes.

MR HARRIS: I'm told it's tab 20 of the supplemental, if you don't.

The CR has acknowledged, as he should, but in words of one syllable, that the loss of flexibility claim, and I'm quoting here, the second line, "did not form part of its case", I think it means his case, "as at 31 July 2024".

One could rewrite that as the CR hereby acknowledges and concedes that he has flouted the court's order, the tribunal's order. But then when one would expect to see at the end of that sentence, but the reasons and excuses are and here's the evidence, it just doesn't exist.

The second part I would like to show you is the CR skeleton at paragraph 31. And this does fall into the category of unfortunate, to say the least, submissions made again by the class representative to this tribunal.

What it says at the fourth line down of paragraph 31 is, "the case now put forward", so that's ie today, this is the class representative's submissions:

"The case now put forward is the same case as that put forward when Harvey was the CR's expert."

Just pausing there. I recognise it says, "relatively minor changes" in the next sentence; I'm going to come back to that. But just pausing there, it is demonstrably false. It's a false submission. The case now put forward by the CR today is not the same case as that put forward when Harvey was the CR's expert. The case put forward today includes this loss of flexibility claim and Davis 4 and this figure of

84 million or whatever it is. That obviously wasn't the case that was previously put forward, including when Mr Harvey was the CR's expert report.

And then the next sentence says, "To the extent that there are relatively minor changes". So, that's an attempt to wriggle out of the categoric nature of the first sentence. But whatever else one says about the loss of flexibility --

MR JUSTICE MILES: It depends what we mean by the case. You just told us that the case was put forward by Mr Harvey in his fourth statement.

MR HARRIS: But the --

MR JUSTICE MILES: Because part of your submission is it's been hanging around for years and they haven't got on with it. But that's how you put it. I mean, it's right to say that of course, there's loads more in what's said now than there was then. But I understood your submission to be that actually Harvey did raise this case and one of your complaints has been well, having raised it all that time ago, why haven't they got on and applied for permission to amend? And that's essentially the layman's point.

MR HARRIS: Sir, yes, you're quite right to make that point. But it's not the same case as it is said here, because Mr Harvey hadn't advanced --

MR JUSTICE MILES: Well, it depends on how general you take those words.

MR HARRIS: Well.

MR JUSTICE MILES: If it means a flexibility case, it's the same case. If it means the flexibility case as explained by Mr Davis and with a number on it, then obviously the answer is no. But it's a question of generality. I mean --

MR HARRIS: Maybe so.

MR JUSTICE MILES: There's much to be said for construing the skeleton.

MR HARRIS: Maybe so. But it perhaps hasn't escaped your attention that in Dr Davis's second report, so that's as long ago as -- if somebody will give me the

date -- I think it's May 2023. What he said, this is at tab 18 of the supplementary bundle, at page 453. He says in terms at line 3 of paragraph 281b:

"In this respect, I note that I am instructed that the CR's claim does not include a claim for damages due to a loss of flexibility in the actual ..."

Difficult to see how that can be the same case. But be that as it may, I don't want to overstress the point. It's just it is indicative, in my respectful submission, about how there is chopping and changing. One has to be extremely careful in taking at face value how this is being presented.

So, that's what I have to say about the first reason. And as I say again, that's dispositive, in my respectful submission: too late, in breach of a court order, no attempt to deal with how, why or Mitchell.

The second reason to deny it, again I say, would be by itself sufficient to deny these amendments. And it's that the loss of flexibility claim is, even today, even today, unfinished: unfinished and not compliant with the Pro-Sys test. So, it still, even today, does not properly quantify the loss that is said to result from loss of flexibility or apply the supposed loss to the right class.

I'm going to take this briefly because it was debated with Mr Hollander, but as regards single-brand fare purchases, of course, the way in which it's put forward in Davis 4 is, with respect, it's incoherent because he focuses on single-brand purchases, but as the Chairman rightly pointed out to Mr Hollander, the class doesn't include single-brand purchases.

There's a complete mismatch between the people on whose behalf the number is being supposedly calculated, subject, of course, to the corrections table about which we've not heard the full story yet. There's a complete mismatch between the method that's now being put forward and the actual class. No excuse, no proper or legitimate

reason. Dr Davis doesn't explain that. He's got some completely unsustainable point about alleged late receipt of information. That's denied on the evidence, not suggesting that this tribunal can make factual findings.

But you will have seen in Mr Sansom's third witness statement that that is not accepted at all, but much more importantly, much more importantly, that even if it were true, which it's not, there's no reason at all for that not to have been done well before today and present to you well after the final deadline of 31 July 2024, whatever the methodology is and whatever the number is said to be and how one arrives at it, and to have made an application for late adoption of that evidence. But none of that's happened. It's just silent.

And all we had today, with respect to Mr Hollander, was a fairly stumbling account of, well, you'd somehow have to work out by reference to some kind of survey; somehow, which of these single brand purchases that have been focused on by Dr Davis are actually within the class.

But you, sir, put to him, with respect, the key point is, well, where is the survey? How does it work? Why is it not here? Silence. Simply not good enough. So, that's one reason on my second ground, not *Pro-Sys* compliant. It's actually, with respect, incoherent to put forward the wrong number for the wrong class and then say that supports the amendment.

But it doesn't end there because we've also got the fact that it is said that the purchasers of dual-brand fares also have a loss, supposedly, from loss of flexibility, ie if you buy a dual-brand fare, but it's not in any permitted fare, and somehow you've got some damage from loss of flexibility, but that -- where's that figure? Where's that methodology? Complete silence, complete silence.

And there's no excuse. There's no even attempt to excuse why that's not here.

There's no draft report. There's no draft methodology. There's no number. There's nothing.

MR JUSTICE MILES: Is the test, the *Pro-Sys* test, which is what you've just referred to or is it just the amendment test?

MR HARRIS: I'm happy either way. You can't, in my respectful submission, sir, members of the tribunal, you can't allow in an amendment at this late stage, having in flagrant non-compliance with an order that doesn't stack up by reference to actual methodology with actual number. It's far too late to do that.

Can I just draw your attention to --

MR JUSTICE MILES: May I ask another question? Sorry to interrupt you.

MR HARRIS: Please.

MR JUSTICE MILES: When considering the approach of the tribunal to amendments, can the tribunal be guided by the approach that the courts take to amendments in civil proceedings, where there's obviously a lot of learning?

MR HARRIS: Yes, I'm happy with that, Mr Chairman. No problem at all. But what I will of course say: it's not a question of just simply focusing on is it an arguable coherent amendment in terms of the black and white letters, or in this case, blue and white letters. One has to take into account that this is well beyond the last chance saloon. So, even if you were to take the view that some of those blue and white letters are coherently grammatically written, you shouldn't allow this amendment for the reasons that I've just given.

And at this late stage, whilst I accept that you might not necessarily, and at least in any depth, have had to say in the blue and white letters, please see paragraphs 39, 57 and whatever of Davis 4 or Davis 10 or whatever. You would expect, in this case, to have seen that and a number; none of that is pleaded.

I say that because when we look at the pleading later on for other reasons, you will see that Davis 2 and Davis 4 are prayed in aid in terms in various of the amendments. So, specific parts of Davis 2 and Davis 4 are prayed in aid, and there's no accident there; that's been done precisely because of the history of this case. It's not good enough any longer to come along to this tribunal and say, "Oh, well, we've got some rather general airy-fairy wording about a new head of loss." That bus has long since left.

But can I just show you that on this point that the dual-brand silence, without any excuse, it gets even worse, the story, because it's conceded that Dr Davis could have done this, based upon, and I'm quoting here, "based on data already available to him". So, if we could turn up, please, my reference says it's Mr Maitland-Walker's eighth witness statement, which I think is tab 10 of the core bundle. In any event, it's page 676. I think it's paragraph 35.

So, if you were to look at the bottom of paragraph 35, you would see that:

"The further report would then also estimate [and these are the critical words], based upon data already available to Dr Davis, the damages in relation to Dual-Brand fare loss of flexibility."

Okay, so where is it? It's not here. And in fact, though you probably don't need the detail, I'll just give you the reference, tab 29 at page 961, my own instructing solicitor, Mr Sansom, in his third witness statement at paragraph 2.8(b), explains precisely what that data is. It's a mixture of LENNON data and some publicly available data. And he explains that that was disclosed back on 22 March last year and 14 May last year, and obviously, the publicly available data has been there the whole time.

So, that was well before even the 31 July 2024 and it wasn't done by then and it hasn't even -- I mean, I don't need to say any more. It is, with respect, shambolic and should

be denied for that reason as well.

That takes me to the third and much shorter reason. In any event, given the history of this case, and given the non-compliance with the order without attempt to deal with why, you should deny this amendment for the further reason which it plainly gives rise to massive extra cost. There's a whole new section of Davis 4. There's all kinds of further expert evidence and factual evidence. We've been told today that there has to be some kind of non-specified other survey: who knows when, who knows how much that will cost; there's no specification. It's obvious it will give rise to massive extra costs.

This case was certified back in June 2022. This is a new claim many years post-certification. It should be denied for that reason alone, especially against the background of this CR was told in words of one syllable, "Put in your full case by middle of last year", and it has failed to do so.

Though those are the three reasons, can I just address one or two other more minor points because they were raised by my learned friend?

The survey. You've got the gist of this point. Where is it? They say now, "Well, we need a new survey". Well, what survey? It's totally inadequate, with great respect, to come to this court well after the deadline and say, "Oh, well, we still haven't done the work. We don't even tell you what the work is. We don't tell you how long it would take. We don't tell you how much it would cost. We don't tell you how it would be conceived of. So we don't even know whether it's conceptually possible." We have our grave doubts; of course, we can't address you as to whether those doubts are made out, because we also haven't seen the proposed survey.

And it gets worse because this is a case in which, out of the blue, a matter of days ago, Dr Davis, whose firm would be in charge, one imagines, of this survey because

it was effectively in charge of the last survey, has put in a witness statement, uninvited, of no less than 38 pages -- that's to be found at tab 27, page 889, you don't need to turn it up -- and he deals at great length with what he says really happened during the disclosure process.

But what he doesn't say to you is, "Well, of course the new survey would do this; this is how what it looks like; here's a copy", or even, "This is why I didn't do it back in July or whenever, last year, or even before that", and/or "Please excuse the non-compliance by my team with the order because of X, Y, and Z". So, 38 pages of factual evidence on a different point, ignoring the point that has to be addressed.

And of course, one of the things that would have had to be addressed in that silent or non-existent factual evidence is the point that you essentially put, Mr Chairman, to my learned friend, which is, "Well, hang on a minute, you've already done a survey, so why weren't those questions in that survey?" Well, who knows? You don't know, I don't know, because they don't bother. They put their heads in the sand.

The obvious point is you shouldn't be allowed to do another survey because you've already gone and done a survey and on your own now case, you messed it up. Too late. You're not having another go. In my respectful submission, to allow another one, which is a necessary part of one of the missing features of this loss of flexibility claim would give rise to obvious further delay and obvious further cost, and this is a case in which they are the last things, in my respectful submission, that should be allowed yet again.

Just for the reference, please don't turn it up, but I said we do not accept any criticism on the facts, whether it be about the survey or the alleged non-provision or dilatory provision of evidence. Just so you have the reference, you may have read it already, it's my learned instructing solicitor, Mr Sansom 3, it's at tab 29, and for example, at

page 962, on this issue.

So, unless I can assist further, those are the reasons why we say the loss of flexibility amendment application should be denied for the sake of good order.

MR JUSTICE MILES: Just one point.

I would invite both parties -- we're unlikely to finish today -- to consider a Court of Appeal case called APB Technology v Voyetra Turtle Beach [2022] EWCA (Civ) 594. It's a case that I know quite well because there was a successful appeal from a decision of my own, unfortunately, but it deals with the question --

PROFESSOR NEUBERGER: I'm sure it was unique.

MR JUSTICE MILES: Not quite. But it concerns the timing of amendments and the question whether an amendment is to be considered as a late one and what that term means. I won't say anything more about it now, but the tribunal would just draw it to the parties' attention and invite submissions on it.

MR HARRIS: Thank you.

So that there's no doubt about this, if you're against me in my position, just to be clear, what we say is that if the amendments are nonetheless to be allowed, there should be a very strict costs regime. I've set it out in the skeleton. I don't propose to address you on it orally, because we say, obviously, the application should be denied, but you've seen it in writing.

We do so very deliberately. We say that if you're against me and they are to be given yet another chance, then it should be on essentially some very strict, almost --

MR JUSTICE MILES: Where is this?

MR HARRIS: If you can find the reference, I think it's in footnote two of our skeleton. No. I'll find the precise reference in a moment.

I do draw this to your attention because we would go so far as to say, in the

circumstances of this case at this juncture, were they to be allowed in, then we should have essentially all of the costs associated with all of it, irrespective of what happens at trial -- and that's an unusual submission, and that's why I specifically draw it to your attention and it's for the reasons of background that I've already given and the non-compliance with the order -- but plainly we don't reach there if my principal submission is right.

MR JUSTICE MILES: That would be not just unusual, but in my experience, unique. But ...

MR HARRIS: Yes, and that's why --

MR JUSTICE MILES: Where is it? Just so I've got a note of it?

MR HARRIS: We'll find you the reference, sir.

Again, just for the sake of completeness, and I'll make both of these points for the transcript when it comes to the effects amendments as well: wholly irrespective of anything else, were you to allow the amendments, we would respectfully say it could only ever be on at least the normal terms that we have all of the costs of and occasioned by those amendments, which in this case, we would respectfully contend, must include the responsive expert evidence. And again, I draw that to your attention specifically because the expert evidence in this case is expensive.

But in any event, neither of those points arises if my first set of submissions in opposition are accepted by the tribunal.

So, I'm in your hands. We do need to have a short break for the transcriber at your convenience. Now is as convenient a moment for me as any other, because I'm going to go on to reasons why you shouldn't allow the effects claim amendments, and I can find the reference in this --

MR JUSTICE MILES: Well, it seems to be -- I'm just looking at it, it seems to be

at skeleton paragraph 35, I think. Okay.

MR HARRIS: Yes.

MR JUSTICE MILES: Right. Well, we'll take a five-minute break now. Thank you very much.

(3.14 pm)

(A short break)

(3.24 pm)

MR HARRIS: You're quite right, paragraph 35 of our skeleton argument. Strictly speaking, that makes these points by reference to the effects claim that I'm about to turn to, but just so there's no confusion, that is the same stance that we take as regards loss of flexibility if you're against me and you do allow those amendments for the same reasons.

MR JUSTICE MILES: Yes.

MR HARRIS: Secondly, I shall come back to this, possibly overnight unless I get handed it in the next hour, but there is law that we do rely upon from the former president of this tribunal, Mr Justice Roth in the case of Gutmann in which I appeared, in which the gist of the judgment is that when assessing amendments post-certification, one shouldn't adopt simply the CPR-style approach, you should have regard to the fact that it wouldn't pass a certification test under *Pro-Sys*. So, if I don't get that this afternoon, I will make sure it's sent to the tribunal.

MR JUSTICE MILES: It may be there's no dispute about that, it's just useful to know the position about it.

MR HARRIS: Yes, I'm grateful. So that will be coming.

Then, that takes me to the reasons to oppose the effects claim amendments. The headlines are two of the same three reasons that I gave for loss of flexibility. So

number 1, which we say is dispositive, is again, it's far too late and it's in breach of the tribunal's order. The second one is that it adds massively to the cost of this claim. This one is even more massive than the loss of flexibility, and so the added, if you like, kicker to reason two for this one is that then bears upon the cost-benefit analysis that needs to be conducted when assessing certification.

Just so that you're clear, I don't take *Pro-Sys* points about this. This is two reasons rather than three, albeit the second reason about costs is rather more powerful, or of added power. I'll take this quickly because, of course, I essentially repeat the submissions on reason one, that it's far too late and that it's in breach of the court order that I made before.

What we don't understand is the reference in my learned friend's skeleton argument at paragraph 45 where he says, and I quote, "The CR is applying to regularise this amendment". I have not the faintest idea what that means. The fact is he's got an amendment application; he wants to add in lots more words in blue text into the re-re-amended claim form.

He said, three times at least, that "this effects claim is already there". I'm about to show you that that's wrong. But the obvious question, I ask rhetorically, is if he's right -- which he's not, but if he were right -- that the effects claim is already there, then what on earth are these amendments for? He has no answer to that.

Of course, the amendments are needed precisely because the effects claim that he wants to run is not in his actual pleading. Let me show you that. If we pick up volume 1 at tab 11, this is the one with the blue, re-re-amended claim form. He took you to this more than once.

MR JUSTICE MILES: Sorry, which?

MR HARRIS: Tab 11, begins at page 685, but the relevant first part is on page 708 at

37.4. That's where my learned friend began. So let's just examine this. So his first submission was my effects claim, which you clarified with him, Mr Chairman, was the loss of flexibility claim -- so there are two aspects: there's prices, which has always been part of the case, and then what he wants to add is loss of flexibility and/or effects to do with service levels. But it's the same point.

So, let's look at the unamended text that you can see in black:

"... Whether and to what extent the abuse of dominance had an impact upon the [key word is] prices of fares purchased by Class Members."

That was the unamended text. Plainly, that does not include an effects claim plea about anything, and it is devoted solely to prices. We accept that the case about prices has always been in the case and got certified. But the proof, of course, is in the pudding. Let's look at the blue words that are now sought to be added, which my learned friend's first submission was, "Well, this is already there". Plainly, they're not, they're in blue, so they weren't there.

"The anti-competitive effects" -- well, those words didn't appear in black, so that's new -- "arising from the abuse of dominance, including", and then there's the old plea of prices. Then, it adds at the end, "and service levels in particular".

So, self-evidently, "anti-competitive effects of a service-level variety, in particular journey times", it wasn't there at the date of certification. So, that's the end of that point on 37.4.

So we move to the next one. Let's see where else this claim of anti-competitive effects to do with service levels and waiting times was supposedly already in the case, including at the date of certification. The next one my learned friend turned to was paragraph 64.6, and you can see that at page 727 of the bundle. Well, res ipsa loquitur, that's a brand new pleading. It's all in blue. So, self-evidently, that didn't exist

as at the date of certification, that is sought to be added now. I'll come back to what it says in a moment.

I'm not finished with 64.6. My learned friend also, at first instance until I intervened, looked at paragraph 65.3, but that's got nothing to do with service level amendments or loss of flexibility. That's a response to our case about objective justification, which is why it says "as pleaded in paragraph 18.a.ii of the Reply". My learned friend has sought to bring in, literally cut and paste, something that was in his reply and he now wants it in his claim form. Well, we don't object -- it's totally pointless, but we don't object to it.

And then over the page at 68, my learned friend drew the tribunal's attention to 68, and the same points can be made. So, in black, this time of course under the heading "loss and damage". So, what you might just care to note is that abuse of dominance begins as a heading on 725. So that's where one would need to see a plea that there have been anti-competitive effects of a service-level variety, including increased journey times that amount to an abuse. That's where the heading is abuse.

MR JUSTICE MILES: Sorry, what was that point?

MR HARRIS: If you look at page 725 of this pleading, do you see the subheading at the first hole punch, "abuse of dominance"?

MR JUSTICE MILES: Yes.

MR HARRIS: So, that's where you would have to include, on any coherent pleading, an allegation of abuse by way of anti-competitive effects, including increased journey times or adversely affected service levels.

But I'm going to show you -- he drew your attention to the particulars of abuses, and I'm going to come back to that in the unamended text. But what you will not find under there is a plea of anti-competitive effects because of adversely affected service levels,

and that is an abuse. It just doesn't appear.

So, what my learned friend then took you to was page 728, but you see, this is a different heading. This is not under the heading "abuse"; this is under the heading loss and damage. And the two points are as follows: in the unamended text -- again, bearing in mind that my learned friend's submission was that this case on effects is already in his case, even without the amendments, so let's look at the black text.

"As a consequence of the infringement, the prices charged to Class Members for fares on the London-Brighton mainline were at all material times higher than they would otherwise have been."

And then it ended. That was it. Well, that doesn't say anything about anti-competitive effects, let alone of a service-level nature, let alone increased journey times giving rise to loss. So, the unamended case did not include this claim, under even this heading. That's why the blue text has been added, because it wasn't there before. And then it does say in terms, "and the service levels were lower than they would otherwise have been", so that's the first time we get any reference to lower service levels. Then, "In terms of service levels", and then there's a bit more detail, and it even has the phrase "longer waiting times and/or journey times", et cetera. So, quite clearly that wasn't there before and is now --

MR JUSTICE MILES: This is the flexibility point?

MR HARRIS: It is. Exactly as you debated with Mr Hollander.

MR JUSTICE MILES: And it's under the heading of loss and damage. This is a description of the difference between the factual and counterfactual. So this seems to be a point about -- this is the flexibility case, as I understand it.

MR HARRIS: Well, insofar as my learned friend also pointed to this as being a paragraph in which the effects claim already existed, and I'm just showing to you

that it didn't previously exist, but that the blue words there, principally "loss of flexibility", but because they use the word "service levels", and my learned friend's effects claim is about supposed adverse effects on service levels, then one could at least potentially say that this is part of the effects claim, but it doesn't really matter for my purposes, because plainly you can see that it didn't used to be there, and they are now applying for permission today for you to add it in. That's the key point.

So, so far, based upon the paragraphs to which my learned friend principally took you, it didn't used to exist, and it has to be added in by way of blue amendments. Now, to be fair to Mr Hollander, he also sought to draw your attention --

MR JUSTICE MILES: Sorry, I just want to follow you through with the thought I just raised. I didn't understand Mr Hollander to be saying that if he loses on the flexibility application, this should be included. Equally, if the flexibility application succeeds, then it will be included.

So in other words, is there any separate point based on this point that's been approved by the (inaudible) effects case on this paragraph? It seems to me to stand or fall with the arguments I've already heard.

MR HARRIS: Well, that's the approach that I take, sir, yes. I see 68 in blue as really being just loss of flexibility. But Mr Hollander referred to it both on loss of flexibility and on his effects case. That's the only reason I raise it again. But I would essentially agree with you, sir. Members of the tribunal, if you come to the view that the loss of flexibility amendment shouldn't be allowed, then that's the end of the blue wording in paragraph 68.

MR JUSTICE MILES: Yes, but equally the other way round. If we find that it should be allowed, then it will be allowed because it's part of the flexibility case.

MR HARRIS: Yes, but that would be key. That would be absolutely key, sir. In my

respectful submission, if you're against me and you allow the loss of flexibility claims, then it should -- it has to be -- confined to the words in 68 and clearly understood by everyone that that means --

MR JUSTICE MILES: Well, it's to do with losses, so ... I'm a bit concerned that this is getting a bit theoretical. This part of the pleading is concerned with losses. They say there are two lots of losses: one is the overpayment of the price; the other is the flexibility. This bit of the pleading is dealing with that (inaudible).

MR HARRIS: Sir, I would be very content -- because I see it, if I may put it like this, the same way as you. There's really only two points in this case. There's the case about prices, which has always been there and got certified, and now there's a new attempt to add in another part of the case. It's to do with effects, and it's to do with increased journey and waiting times. That is usually described by my learned friend's team as "loss of flexibility".

I'd be very content that if you're against him on that and he can't have those amendments, then all of these bits in blue just go. But that's because then this tribunal and everybody in this room is extremely clear that that's it; the only case is about pricing. We need not overcomplicate things by --

MR JUSTICE MILES: When you are making this point at the moment about 68. You said you were going to come back to --

MR HARRIS: Yes.

MR JUSTICE MILES: -- the other bits.

MR HARRIS: Yes, I will do. One of the reasons potentially, Mr Chairman, that this has given rise to a little more by way of written and oral submissions, is -- you will, of course, appreciate that under the act there are effects cases and object cases. And what my learned friend is trying to do is --

MR JUSTICE MILES: I thought that was a chapter 1 point.

MR HARRIS: Yes, but what it means --

MR JUSTICE MILES: This is a chapter 2 claim.

MR HARRIS: You're quite right, and I was just about to go on to say the point is that an effect analysis in these competition law cases gives rise to a great deal of additional work by the experts in terms of analysing the underlying facts and presenting the methodologies for them. So what we're just quite anxious to avoid -- and this is why there's a big battle about this -- is any suggestion that if and when, I say "when", the loss of flexibility amendments are not allowed and that cannot form part of the case, nevertheless, there is some ability on the part of my learned friend to run as part of his price case that there are some effects that need to be analysed by an expert at great length and at great cost.

So that's why where I agree with you, sir; the way this case should be characterised is exactly how you put to Mr Hollander. There are really only two points. There's the price case. That was certified, and it's in the case. Then there is anything on top of that; call it effects, call it loss of flexibility, call it service levels. That's not in the case; he's applying to amend to add it, and I'm opposing. And that's the end.

What we cannot have, in my respectful submission, is a situation where you would deny these amendments to do with loss of flexibility. But nevertheless, the class representatives still persist in saying, "Oh yes, but I've still got an effects case". That's not right.

MR JUSTICE MILES: What would be the point of it?

MR HARRIS: I don't know, but what I can say is it would give rise to --

MR JUSTICE MILES: What I mean by that is does anyone have any interest in the competition case where it's held, for example, that what has been done led to a lack

of flexibility, but no one can claim a penny of damages for it? Is that not just academic?

MR HARRIS: Sir, we would respectfully say, "Yes", but you've seen the tortured history of this case. You've seen that my learned friend's team persists in saying that they've got a case of abuse that is not just breach the regulatory conditions ipso facto abuse leading to damage. Not just that. If we look back at, for example, paragraph 64.6 on page 727 of tab 11, one of the ways in which my learned friend wants to put this, in the blue writing, is that in addition, there is a "differential pricing [that] creates inefficiencies and is anti-competitive."

MR JUSTICE MILES: What I can't discern from that is whether that is connected with the damages claim for loss of flexibility.

MR HARRIS: Well, what --

MR JUSTICE MILES: The question is whether it has any practical point if it can't be shown, also, or allege to have any effect on any monetary outcome. In other words, is it just academic if there's no damages claim attached to it?

MR HARRIS: Our perception is the same as yours, Mr Chairman. That would be, absent all of these bits that are called "loss of flexibility", that one can readily identify as being loss of flexibility, including because of the use of that term, then a mere allegation at large of anti-competitive inefficiencies is pointless, academic, shouldn't be allowed for those reasons. But what concerns me -- and the reason I'm so sorry, if you like, harp on about this -- is we have now seen page after page, after 10,000, after 20,000, after 40,000. Thousands of pounds worth of additional cost being attributed by my learned friend and his team because he says he already has a claim about anti-competitive efficiencies.

Large parts of Davis 4 seems to be devoted to that, even though it wasn't in the pleadings at the time of certification. And so what we say is you can't allow there to

be any wriggle room at the end of this. If you're with me, and the amendment should be denied, that's it, make it crystal clear, "You've got your pricing claim, which you say is an ipso facto abuse because of breach of regulatory conditions and terms, and that's it; there's nothing else."

That's what was certified. That's what you stick with. You can't have anything else. You can't have this second bite of the cherry, which was described again today as being, "Oh, well, even if it's not ipso facto an abuse for you to have breached the regulatory conditions, somehow it is an abuse for there to have been a breach of the regulatory conditions, combined with some at large inefficiencies and anti-competitive effects".

MR JUSTICE MILES: Yes, I'm looking back at these paragraphs. 37.4, I actually read, at the moment -- that Mr Hollander has made submission on -- as being about damages, in fact. If you look at the way this is set out, it says, "The common issues for certification comprise": limitation period; whether it's a dominant; whether through a certain number of things, that's to say issuing fares, et cetera, that is abuse of dominance. So we've got limitation, abuse of dominant. 4, the anti-competitive effects, ie damages, 5, interest.

It's logical; it makes sense. At the moment, as I read this, this is actually to do with damages, this paragraph. The reason for referring there to service levels, et cetera, is because they want to bring in the flexibility claim. So it's perfectly understandable why it's pleaded that way.

Then 64.6, here we do have a point about abuse of dominance, it's under the heading "Abuse of dominance". This seems to be saying that it's the imposition of the brand restrictions and differential pricing which are the abusive conduct.

I query what's meant by the words there "creates inefficiencies", but "and is

anti-competitive"; it's the imposition of the brand restrictions and differential prices which is anti-competitive.

Then 68 is to do with loss and damage. So I'm really wondering that this is all part and parcel of the points about flexibility, and whether this really is a separate point at all?

MR HARRIS: Well, at the risk of repetition, sir, we don't see that there is anything different to an effects case beyond loss of flexibility. But what concerns us is that this is now probably the fourth or fifth outing upon which the class representatives' advocate has said that -- we say that we have a case of abuse arising not just from regulatory breach, but regulatory breach combined with anti-competitive effects.

That is to be distinguished, because they don't all -- when they say that, they don't say, "And we only mean, when we say 'anti-competitive effects', the only thing we mean is our loss of flexibility claim that we're trying to introduce in blue".

They don't say that. That's what we say this tribunal shouldn't live with at this late juncture. So for instance -- where you say, sir, and you're quite right to draw our attention back to this -- on page 727 at paragraph 64.6. That's rather woolly language, which we are anxious to see not allowed in.

"Imposition of brand restrictions [...] is anti-competitive."

MR JUSTICE MILES: Quite. But it's "imposition of brand restrictions and differential pricing". So that, as I understand, it's the combination of those things.

MR HARRIS: Yes, but what it doesn't say there is, "By the way, what we mean by 'brand restrictions' here, in this 64.6, is limited exclusively to our loss of flexibility claim, such as is set out in a little bit more detail at paragraph 68 in blue and at paragraphs blah de blah de blah of Davis whatever number".

I just go back to the point, the reason this is so important is because of the cost and

the expert involvement. Any analysis of anti-competitive effects is a very significant addition to this case. Any.

What we cannot have is a situation, in my very respectful submission, in which there's a lack of clarity about what effects are to be allowed in. For the reasons I gave before, this is all new, so it shouldn't be allowed in at all, and if all of it's not allowed in, the problem disappears. You can only have your breach of regulatory conditions, ipso facto is abuse, end of story. And then we can actually move the case forward, if that's right.

But just to complete the picture, what my learned friend also sought to rely on -- when he was talking about whether or not any way of conceiving that the effects case is already in his case -- he also drew your attention to paragraphs beginning on page 725 of the pleading under the heading "Particulars of abuses".

He went through this at some pace before he reached 64.6, but just to be quite clear, let's just have a look at these other particulars. There is no claim in the original claim that got certified of anti-competitive effects as an abuse, in any one of these paragraphs. So 64.1, repeating some facts above and then it talks there about "breach of [its] regulatory obligations", including misinformation.

There's not a single reference in there to anti-competitive effects or service levels or loss of flexibility. So that's the end of that one. It didn't exist in that one.

Next one:

"64.2. In light of GTR's practice of selling train fares with brand restrictions [...], rail passengers are forced to pay higher prices."

By all means, read the remainder. (Pause)

You'll see that it ends with "imposing unfair selling prices". That, of course, is a phrase that one finds in the act. So again, this is all about paying higher prices -- said to be

unfairly abusive high prices.

Again, no mention of anti-competitive effect of another variety. No mention of service levels. No mention of loss of flexibility, no reference to any methodology. So that's the end of that one; it didn't exist there.

The same exercise can then be repeated for the next one. 64.3, you can see that that is again exclusively a reference to prices, with the prices said to be "unfair trading conditions". I've highlighted no less than four references to "prices" in that paragraph, and in the middle is "unfair trading conditions".

So again, no reference to service levels, no reference to anti-competitive effects, no reference to loss of flexibility. No cross reference to any expert report on any of this. So it didn't exist in the original claim, on there.

My learned friend then took you to 64.4, extremely briefly, but exactly the same submission applies. You will see that there are multiple references in that paragraph to different selling prices -- "prices" -- dissimilar conditions. But what is the condition that is said to be dissimilar? It's price.

Then it says, halfway down, "By charging higher prices for train fares", et cetera, et cetera, et cetera. And a reference to subsidising, because that's the price point. So again, there's no reference in this paragraph, in the original claim, to anti-competitive effects, service levels, loss of flexibility. No reference to any expert report, no methodology, no number, no nothing. It simply doesn't say, "We have a case about anti-competitive effects". It just doesn't say it.

Then we have 64.5 in the original pleading:

"In circumstances where the relevant fare practices constitute unfair selling prices, conditions, and/or discriminatory practices."

Well, we know that because those are the ones above.

"Imposition of penalty in excess fares."

So again, that's the point about fares, excess and penalty. So yet again -- sorry to labour this point -- no reference to anti-competitive effects, no reference to all the points I've just made.

It's precisely because there is no reference in any one of those subparagraphs under the heading "Particulars of abuse" to anti-competitive effects that Mr Hollander's client has sought now, several years after certification, to add in 64.6.

"Imposition of brand restrictions and differential pricing creates inefficiencies and is anti-competitive."

He's had to add it in now in blue, or try, because it didn't exist before. That's what I'm saying you should, with respect, deny.

Now there are two points left here because in this paragraph 64.6, curiously, there are three cross-references, but none of them is good. The first one you can see is para 2.5, and then the second one is 55 of this claim. I shall take you to those in just a moment. Then there's a reference to para 18(a)(iv) of the reply. What is said, and I, with respect, say this is -- a I don't mean this pejoratively at all -- a sleight of hand to say, "as pleaded in these paragraphs, there's a case of anti-competitive effects", because as we're about to see, there's not.

Let's look at 2.5. 2.5 is to be found on page 687. This is in the introduction to the claim form, there is a reference to the Gibb Report, and there's a recitation of how the class representative characterises this background report from 2017. And all that is said, in the final sentence, is:

"The Gibb Report further expressed concern that ..."

So just pausing there. It only even purports to be a recitation from my learned friend's side of what's in a report. Anyway, according to them:

"[The report] further expressed concern that the fare structure was influencing demand in such a way that train capacity was not optimally used, resulting in worse overcrowding and causing delays."

And then there's a footnote. So just pausing there, that is not an allegation that we, my clients, have committed an abuse of a dominant position contrary to section 18, because we have done something that's given rise to anti-competitive and abusive effects, let alone that those effects manifest themselves in the shape of overcrowding or journey times or waiting times. Overcrowding, of course, now having been abandoned anyway, by my learned friend.

So 2.5 can't be cross-referred to as being an example of where this case is already pleaded, because it's not.

Essentially the same point adheres to paragraph 55, because 55 in the same document is another reference to none other than the Gibb Report. So it's essentially exactly the same point. All that happens now, now we've moved away from the introduction, and instead we're in that part of the pleading that begins on page 712.

Do you see the subheading? This is "Part 3 of the Claim Form", there's a subheading that says, "75(3)(g): A concise statement of the facts". That is one of the CAT rules for collective proceedings; that's rule 75(3)(g)., and what you're obliged to do in a CPO claim form when you're seeking certification is cover this base. That's why it's set out. But importantly, this is simply a statement of relevant facts in this pleading. There's pages and pages and pages of it, and when we finally get to paragraph 55, so in this heading of Background or concise statement of facts, pursuant to the rules, we get the words, at 55, "the Gibb Report".

And then it's the same point. If you read it, all you'll see is that this is a recitation by way of alleged background fact of what my learned friend's team says about the Gibb

Report as a matter of fact. And we end with more or less the same words. He says, on behalf of his client, that it was supposedly an expression of concern about "influencing demand", et cetera, "resulting in worse overcrowding and causing delays". But that does not include, self-evidently, with great respect, an allegation of any kind of abuse. It's not even in the heading, "Abuses", which appears much later in the pleading.

And it doesn't say, "Oh, and of course, what we mean by anti-competitive effects -- that have been caused by whatever they've been caused by -- is increased journey and waiting times. Oh, and by the way, have a look at what Dr Davis says, et cetera". It just doesn't do any of that. It's nothing but a reference to a very old report and their expression of what the facts are in that report.

So that disposes of 64.6, the first two cross-references, paragraphs 2.5 and 55 of this claim. They don't do what this paragraph purports to set out that they do. But that only then leaves us with paragraph 18(a)(iv) of their reply, which I'm about to turn up. But before I do, I preface it with this remark: "How," I ask rhetorically, "Can it possibly be right that a plea of abuse is raised for the first time in a reply?"

It can't. That's not the way pleadings work, let alone pleadings on behalf of millions of opt-out class members seeking hundreds of millions of pounds of damage. You have to be very clear what your allegations of abuse are and you have to put them up front and you have to say in terms: this is what you've done wrong, this is an abuse, this is what follows from it and here's the money we seek.

So, just conceptually, it's misconceived. It's misconceived to say that you can rely upon something in a reply, but it gets worse on the facts of this case because the reply -- if we could just turn that one up, supplementary bundle, tab 24, if you look at page 736. You will see that what is now said and at 12.48 pm today, my learned friend

nailed his colours to the mast and he said, and I quote, "This is perhaps its clearest place", unquote, ie where this alleged case of anti-competitive effects is pleaded. So, I just invite you to remark upon that. It's a tacit recognition that it doesn't appear in the claim form.

But, what was said in this reply at 18a(iii) and (iv), was what Mr Hollander read out. It goes on:

"Even if, which is denied, there are any differences in the nature and qualities ... denied that the differential pricing is justified by differences in the cost of providing the services or gives rise to efficiencies."

That one, of course, is not a plea of abuse by us, by reference to us having supposedly caused some anti-competitive effects. This is a response to our plea of objective justification. You can just read it. It says, "If, which is denied, there are any differences ..." they're not justified because we had pleaded they were.

So, that's not a case of allegations of abuse, leaving aside that you're not allowed to do it in a reply in any event. So, that's a false point.

But then it says in 18a(iv):

"Imposition of brand restrictions and differential pricing creates inefficiencies and is anti-competitive."

Well, that you will have seen is the wording that's now sought to be imported by way of blue text into 64.6 of the claim form that we were just looking at, at tab 11. And it's precisely because this is, again, a tacit recognition that you cannot make this type of new plea about alleged abuse in a reply. That's why it's had to be cut and pasted out of the reply and brought into 64.6.

But it then goes on, "As explained in paragraph 55 of the Claim Form", blah blah blah. But we've already seen that that's a bad point. 55 is just another reference to the Gibb

report.

But the reason that this is important, this particular document is, if you turn over the page to 738, I invite you, with respect, to note the date of this reply. The date is 1 December 2022 which, of course, is some six months after the case was certified.

So, even if, which I don't accept, these are clear pleas of a new type of abuse consisting of anti-competitive effects, which they're not, and even if you were allowed to do this for the first time in a reply, which you're not, they weren't before this tribunal when you certified this case, because there's six months after that date.

So, that's what I have to say about the terms of the pleading and how they were not there before. This is a new case. It's too late and it's in breach of the court order and there's no attempt even to pay lip service to the Mitchell approach, in particular, the flagrant non-compliance with the order.

But can I just show you one or two passages in the previous rulings of the tribunal and some other documents. But I preface it with this: it's quite a simple point at its heart.

It's because any type of case about alleged anti-competitive effects was not in the pleadings, for the reason that I've just given you, it's precisely because it was not in the pleadings that the expert evidence adduced before this tribunal at the date of certification in June 2022, didn't include any methodology to deal with it.

It's not an accident that Mr Harvey's reports, one, two and three, which were present before the tribunal and admitted before the tribunal before certification, didn't include anything about anti-competitive effects being an abuse, leading to damages, loss of flexibility. It just didn't include any of that. It's no accident that it didn't include any of that because it wasn't part of the pleaded case, but these things go together.

And this emerged only for the first time, this new and very expanded case into the territory of alleged anti-competitive effects when Dr Davis took over. So, what's

happened in this case is there was certification on basis A, which was narrow, namely pricing and alleged ipso facto abuses arising out of failure to adhere to regulatory conditions. And then Mr Harvey disappeared. We've heard about that and make no comment. Dr Davis took over and all of a sudden the case expands very considerably to include a proposed new case on anti-competitive effects.

Now, in a moment, I'm going to show you what that did to the budget, which is very material. It went, all of a sudden when Dr Davis took over, it went from £10 million to £16 million and no accident that it went up by that because all of a sudden there was a massive increase in the proposed scope of the case about anti-competitive effect. I'll show you --

MR JUSTICE MILES: Just looking at those things you've taken us to so far, that -- what it seems to be talking about is two things, just in the pleadings we've looked at: overcrowding and delay.

So, it's saying, as I understand it, that the anti-competitive -- sorry, when it says it "creates inefficiencies", I'm just looking at the wording in 64.6 -- it doesn't actually say what those are but what we've seen so far, would seem to be, as I say, overcrowding and delays. But those subjects that Dr Davis goes into --

MR HARRIS: Well, let's be crystal clear.

MR JUSTICE MILES: Davis 4.

MR HARRIS: Let's be crystal clear. There is now not a case on overcrowding. That's been adverted to at times, but it's been abandoned once and for all.

MR JUSTICE MILES: I'm just looking at the pleadings because the reference in 18a(iv) of the reply, we just looked at, refers to those two things.

MR HARRIS: Yes. And the answer to your question is yes. Dr Davis in Davis 4 does, now, well after the event, attempt to deal with anti-competitive effects, he says, that

take two forms. My learned friend got this wrong on his own case. He said it was only journey times. With respect to him, it's actually journey times and waiting times. So, it's delays.

MR JUSTICE MILES: Well, that's not the same thing. Delay -- I mean, as I understand delays, delays means trains being delayed.

MR HARRIS: He means delays to journey times, that's what -- he means delays to overall journey times. So, a delay could consist of you showing up at the platform, watching --

MR JUSTICE MILES: I think that's -- sorry to interrupt you, but delay here, one has to be precise about. Delay, as I read in paragraph 18a(iv) of the reply, means trains being delayed.

MR HARRIS: That's not what's meant in this case.

MR JUSTICE MILES: Well, is that right?

MR HARRIS: Yes.

MR JUSTICE MILES: Because if you look back at paragraph 55.

MR HARRIS: No, that's a very good point, sir, that --

MR JUSTICE MILES: It's overcrowding and causing delays. It's not talking about this counterfactual business about -- let's talk about the real world. And it's saying, as I understand it -- because of the way that the train company runs its service, it's actually (inaudible) branding, it actually causes delays.

So, what I mean by that is when you turn up at the station or look on your app, it says, "train delayed". There's an entirely different sense in which delay is being used in this case, which is in the counterfactual compared to the actual, because people have bought restricted tickets, it's taken them longer if they can't get on the next train.

MR HARRIS: Sir, you're quite right. This just goes to show how I've been in this case

too long. I gratefully adopt the point. It's not only that the Gibb report is irrelevant for the reasons that I've given, but it's --

MR JUSTICE MILES: (Overspeaking) the question, does Dr Davis, in his fourth report, deal with delay in that sense?

MR HARRIS: No, that's not part of the class representative's case.

The delay that is said to have caused damage to consumers is, I have to wait too long on the platform and then the train takes longer than it would do in the counterfactual. So, you're quite right.

So, that's another reason why the reference to Gibb report in 2.5 and 55 of the original claim form is neither here nor there. It uses delays in a completely different sense, namely the orthodox sense is, oh, the train's not going to get there when the timetable says it's going to get there.

MR JUSTICE MILES: In the real world.

MR HARRIS: In the real world, you're quite right. But it's just illustrative -- and I do gratefully adopt that point -- it's just illustrative of the -- even now, even now, unbelievably, there's a wholesale lack of precision in even these blue proposed amendments in what actually is said to be the CR's case. And that's another reason why they should be denied.

I mean, it beggars belief, in my respectful submission, that we could have reached that point today. But there we have it.

MR JUSTICE MILES: But maybe I'm wrong about that, but I'll hear what Mr Hollander says in due course.

MR HARRIS: Yes. Can I just show you -- perhaps don't need to turn it up, but it is accepted that Dr Davis's analysis of the examination of service levels is a new element compared to where the case was at certification.

My learned friend actually already read that out to you once. I don't propose to -- it's common ground that he's added.

But what I would like to show you is that, again, just as in loss of flexibility, do you remember that part of my learned friend's skeleton where he said it's the same, except there were some relatively minor changes? Well, of course, one can't begin to say that an effects case is a relatively minor change. It's a major change. So, it wasn't. So, that's that. But much more importantly, I can illustrate this point very well by showing you the costs budgets.

So, if you were to turn up in the core bundle, it's tab 42. I think you'll find that -- well, I have it in, I think, volume 2, but I expect you may have it in volume 3.

MR JUSTICE MILES: Volume 3, page 17.

MR HARRIS: And what you'll see is, thankfully, we don't have to look at any particular detail. You can see that there is a heading there, bottom right, for the overall amount. And it is, you know, ten-odd million. And you can see, if you trace up that right-hand-most column, the totals, you see, there's one of 1.5-odd million, which is under the "Experts/Disbursements Total".

MR JUSTICE MILES: Yes.

MR HARRIS: So, that was where matters stood pre Dr Davis's introduction as at the time of certification: approximately a £10 million budget with approximately -- the precise figures don't matter. Approximately 1.5 million for experts. That was when there was no case of loss of flexibility or anti-competitive effects or anything of that nature.

But look what happens at tab 48. So, that's page 1995 of the bundle. This is a revised cost budget, albeit this one is now several years old. I'll get you the exact dates. You can see that suddenly the cost budget post the introduction of Dr Davis and the

proposed introduction of these new parts to the claim has ballooned from 10 million-odd to nearly 17 million-odd, so 10.4 to 16.8. And the experts have gone up from 1.5-odd to nearly 4.9.

That's why there is so much riding on this, Mr Chairman, members of the tribunal. This was not a part of the case that was part of certification. It's not in the original pleadings.

MR JUSTICE MILES: Yes.

MR HARRIS: So, even that 16.8 is, now, almost two years ago. And that's why, of course, under one of our applications we've applied for, and it's been conceded, that we'll finally get a new updated budget.

But my point, obviously, it's just an illustrative point, is that's the sort of magnitude of effect that occurs when you allow an expert to come in and you allow a CR to add in massive new additional parts to the case. And we respectfully say that you shouldn't do so.

Sir, I'm conscious of the time. I have very little else to say on the claim of adding effects. And then I probably only have two minutes on the final application, which is about changing the class definition. So, I would be, probably, only five minutes from today. I'm in your hands.

MR JUSTICE MILES: Do carry on.

MR HARRIS: I'm most grateful. So finally, although for the reasons I've already given, I respectfully invite you to deny this effects claim. Insofar as they're different, you should deny them. But my learned friend took, with respect to him, a thoroughly bad point at 12.40 pm, which was by reference to the list of issues. Because he took it, and he takes it in his skeleton, I have to respond to it.

His skeleton, at paragraph 46(b). What we need for this is the supplemental bundle tab 6, which was the list of issues for the stage one trial. You also need tab 11, which

is the claim form again.

What my learned friend has sought to say in writing and orally, is, "Well, somehow the list of issues contemplates already that there is an existing case on the part of the class representative of anti-competitive effects". So do you recall, he drew your attention on page 36 of tab 6 of the supplementary bundle.

MR JUSTICE MILES: Yes.

MR HARRIS: To item 13, saying, "Are the alleged breaches capable of giving rise to any anti-competitive effects?" That was in support of his mistaken submission that there was already a case pleaded by the CR of anti-competitive effects. But with respect, that's just wrong. If you look, you'll see that the pleading reference here is to the what was then re-amended claim form. Do you see below in bold; "Pleading Ref: RACF / 68".

So are the alleged breaches capable of giving rise to any anti-competitive effects? The breaches to which reference is being made are the breaches that were in the then re-amended claim form at 68, and you'll find that, if you need to see it again, at tab 11 of the core bundle, on page 728.

You've seen this before, the words in black that had existed at the time of these lists of issues. Of course, leaving aside that a list of issues can't amend a pleading, or define how a pleading is to be interpreted, so that almost goes without saying.

But you can see in 68, in the black text, that the alleged breaches to which the cross-reference is made are the pricing allegations. Nothing to do with -- you have the picture. So that's a bad point.

So that's all I have to say, unless there are any questions on reasons why you should deny any effects claim amendments insofar as they're different from loss of flexibility. Strictly speaking, I said there were two reasons, but I really dealt with the second one

already, which is the massive additional cost if you were to allow them it.

For the sake of the transcript, technically my position is as a per 35 of my skeleton. If you're against me on that, we say it should be on stringent cost terms, and in any event, if you do allow them in, we respectfully say we should have the costs of an occasion by them.

So that you know, although I obviously won't do it now, there is a witness statement in the bundle for Mr Sansom, my instructing solicitor. It's his fourth statement. It's in the supplementary bundle, and it now contains cost schedules. So if we were to get there, we would invite summary assessment in our favour, but I plainly won't do that now.

Then that leaves only one minute on the final proposed amendments, which was to alter the date, if you like, at which the class definition should come to a temporal close. This is very simple. My learned friend says the date should be the date of today or tomorrow if he gets permission for his amendments. And we say, it's perfect. We don't object to you amending your claim so as to change the date so as to, if you like, include more class members, because the date has gone on; it's been advanced. But what we do say against the background history of this case is you can't possibly have that beyond the 31 July 2024, because that was when you were ordered to present your full case, and by definition, what you're now trying to do, under this proposed amendment, is to go well beyond that date and say, "No, no, no, my case is carried on. I want to add more people beyond that date". But you've had -- you've been in last chance saloon. You've heard these submissions and you shouldn't be allowed any further indulgence.

And then that leads to the final point, which --

MR JUSTICE MILES: That doesn't really have anything to do with the other points we've been discussing, whether they're good or bad.

MR HARRIS: No. The only cross relevance is this point about breach of the order. You were told to do this in full by the 31 July 2024. They didn't even make the application. A full case would have been finished as at that date, in my respectful submission, and it would only be by granting further indulgences in breach of -- notwithstanding the breach of the tribunal's prior order -- that you would be allowing the class representative further to expand his case.

We say enough's enough. You've already had your chances, and it's prejudicial to us in the sense that if this case had been properly managed by the CR, it would have already gone to trial and then this would never have happened. But we're exposed, at least conceptually, to more damages by adding more people in as the refluctuation of time continues, because the class representative hasn't managed his case properly. We say that's rewarding incompetence and it shouldn't be allowed in principle, leaving aside the breach of the order.

Then allied with that is that -- you may have picked up from the previous case law that this has happened; changing the class definition date temporarily, on several previous occasions. So there's nothing wrong with it in principle, but it's contingent upon you doing the case properly and with some diligence and with relative and appropriate degree of expedition. But if you allow things to drag out, you shouldn't be allowed to take advantage of that. That's why we say, added to this, you not only should limit it at 31 July, but you say, "No more". You're not coming along in a year's time and we're still not at trial in --

MR JUSTICE MILES: Are there any -- I haven't looked at these cases. Is this a matter of discretion (inaudible).

MR HARRIS: Yes, but --

MR JUSTICE MILES: Is there a rule?

MR HARRIS: No, I'm not aware of a specific rule, but of course, you've got to weigh up, in my respectful submission, the justice on both sides of the equation. You've got to weigh up, in my respectful submission, that this is being sought to be done in non-compliance with the previous order.

This is another good example of where Mr Hollander hasn't even addressed you on any of that. He hasn't even mentioned why this wasn't done by the date when it was ordered to be done. Just ignores it. So unless I can assist further, those are what I have to say about the amendment applications. (Pause)

Housekeeping

MR JUSTICE MILES: Just one point, which I don't invite any submissions on at the moment, that arises out of a discussion that my colleague had with Mr Hollander earlier about the calculation of the £84 million figure. The point, I suppose, is this: that the £84 million, as we understand it, has been calculated by reference to the so-called loss of flexibility for people who bought single-brand tickets on the basis that they couldn't go on other services and therefore were not able to get to their destination; that's essentially what it comes to.

Then there's the question of, well, how many of those people are within the class or not? That's one issue. Another possible issue which arises out of the discussion is from the fact that that's a gross figure. Something that we would welcome submissions on is this: that if you are then looking at the counterfactual world, or at least any counterfactual world in which the price of a single fare is higher than in the real world, it would appear that there would have to be some sort of netting-off process in relation to the position of those people who, in the real world, bought single tickets and are within the class.

At least on some scenarios, it may be that actually then the position of that person is, as it were, worse because they would have had to pay more for their single ticket in the counterfactual world. That has to be, as it were, netted off. Quite where that goes, I don't know, but at the moment there doesn't seem to be any analysis of that question, as far as we can see, in Davis 4.

MR HARRIS: Sir, I can assist you briefly on that.

MR JUSTICE MILES: Well, don't do it now. We're going to rise now. Everyone can think about it and come back with thoughts tomorrow. But it is another element that we would welcome submissions on.

MR HARRIS: Yes, sir.

MR JUSTICE MILES: And because I'm handing out homework, something else that we may wish to hear submissions upon -- this is down the road in this hearing -- is this: Mr Hollander has confirmed today that establishing a regulatory breach is a necessary condition of the claim. I'm not suggesting for a minute he hasn't confirmed that on previous occasions, but he's reconfirmed it today.

When looking at where this case goes, has thought been given to the possibility of some sort of preliminary issue on that question? Because if it's right that it's a precondition, on any way that they put their case, it may be that that can be dealt with in a relatively limited compass, quite possibly without any expert evidence from economists. It may be that there are regulatory experts, and then the interpretation of various instruments.

It's possible that that could be dealt with in quite a short compass. So that's another bit of homework. Again, I don't invite any submissions on the point.

MR HARRIS: Sir, can I just identify then four things. So tomorrow I'm going to address you as necessary, hopefully briefly, on ABB technology to which you draw our

attention, because that's on the question of amendments. And to take you to the Gutmann case, which was not purely CPR but certification. I'm going to address you on the 84 being gross, not taking in account of set off; that'll be brief. Then at the right point in the hearing, we will address your last question of whether there could be a preliminary issue on regulatory breach.

MR JUSTICE MILES: Probably late in the --

MR HARRIS: I accept that.

MR JUSTICE MILES: (Inaudible).

MR HARRIS: Very grateful.

MR JUSTICE MILES: And then there are essentially a number of points, I think, concerning costs.

MR HARRIS: Yes, that's right. The defendants have several costs applications, and my learned friend for the secretary of state has some cost applications. You'll be delighted to hear there are some summary assessment schedules if you really want to look at the numbers overnight.

MR JUSTICE MILES: Right, I think that's everything from us for now.

(4.30 pm)

(The court adjourned until 10.30 am on Friday, 7 February 2025)