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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Friday, 7 February 2025

(10.30 am)

Application to amend claim form

Submissions by MR HARRIS

MR HARRIS: Good morning, Mr Chairman, members of the tribunal.

There are just a few matters held over from yesterday. If I could just begin with some housekeeping.

Two new cases have been added to the supplementary authorities bundle that I'll deal with very briefly.

The first is the final tab, tab 12, which is the ABP Technology case that you, Mr Chairman, mentioned yesterday, and just prior to that at tab 11 is the Gutmann amendment ruling that I said I would put in the bundle. If I could just very briefly make some submissions on those.

MR JUSTICE MILES: So this is a --

MR HARRIS: You should have a bundle called supplementary authorities bundle.

MR JUSTICE MILES: I seem to have a --

MR HOLLANDER: I think you've got two authorities bundles which say the same thing, which have the same title. That may have caused the problem.

MR HARRIS: You have one where --

MR JUSTICE MILES: This must be the supplementary bundle.

MR HARRIS: The first tab in what I call the supplementary one is JJB Sports.

MR JUSTICE MILES: Yes.

MR HARRIS: Yes. So I hope now at the back you have tab 11, the Gutmann amendment ruling.

MR JUSTICE MILES: Yes.

MR HARRIS: Good.

So briefly then taking them in reverse order, tab 12, ABP Technology. It won't surprise the tribunal to learn that I do seek to pray this in aid, and I'm grateful to the tribunal for bringing it to my attention. Plainly, the case was about late amendments, although the facts were very different, and of course, both of the sets of amendments that are proposed in this case are not just late, but extremely late. Of course, one of the sets of amendments, loss of flexibility, was already too late when it was introduced back in May or June 2022.

As to the passages from the judgments to which I specifically draw the tribunal's attention, the first is at paragraph 24 of the report. In the first sentence, the simple point, says the Court of Appeal, about lateness is that it calls for an explanation justifying the lateness, and of course, what we have in this case is the silence as to why this loss of flexibility application is only made for this hearing but not before the 31 July 2024 deadline.

Insofar as there is a purported explanation, namely allegations of blame directed at everybody but the CR, and in particular directed toward the defendants and/or the intervener for allegedly having failed to provide materials in sufficient time before that deadline, it's a hopeless point. First of all, it's disputed on the facts -- I won't take you to the evidence -- but much more importantly than that, is that it was a generous deadline, 31 July, it was set in or around October 2023, so it gave another nine months, and the learned then chairman of the tribunal expressly said, "We are here to afford you every assistance and, of course, if you need to even apply to extend the deadline, so be it". But, of course, the CR didn't do any of those things. Of course, that would have been the time at which the CR, if the points had any faults, could have sought to persuade a tribunal in the weeds of the details that it was our fault or somebody else's fault but the CR. But the CR never had the courage of its convictions and never even made the application.

MR JUSTICE MILES: Do you have a reference for that statement by the chairman?

MR HARRIS: About, "you can apply for more time"? I think I might have it already if you just bear with me, and if not those assisting me will provide it.

I have one reference that is related, that's in 19 October 2023 judgment at tab 38, and you'll find that at page 16.

MR JUSTICE MILES: Sorry, just give me a --

MR HARRIS: Yes.

MR JUSTICE MILES: Tab 38?

MR HARRIS: Tab 38 of the core bundle. The 19 October 2023 judgment called, "Modality to Trial". You'll find it at page 1650. Whilst those assisting me will try to find the reference to where Mr Justice Marcus Smith said, "You can apply for more time if you want it", or words to that effect, what I have to hand is paragraph 9, subparagraph 9 on page 1650, (ii), at the end. So it's just at the top of page 1650.

Yes, well, it may even be this passage. Do you see at the bottom of 1649 -- it's certainly related -- the sentence beginning:

"If this process does not work, the Tribunal's Chair will make himself available on short notice by way of remote hearing to deal with any disagreements. This offer is made in the expectation that it can and will be used. Given that these proceedings have already been certified as collective proceedings, the Tribunal will not be sympathetic to requests for more time in the summer of 2024 if requests for data or information could and should have been made sooner."

So that's not the precise passage, but it's closely related and I'll get you the reference to the other one.

Whilst that's located, going back to the ABP case, it calls for an explanation when there is lateness, as there is in this case. Any explanation that is sought to be put forward in this case is factually disputed, hasn't been tried out before, and is irrelevant in any

event, because it's far too late to be making these sorts of excuses.

At paragraph 25, examples are given of the types of prejudice a late amendment might cause, and the indented citation I rely upon -- I appreciate they are only examples, but I rely on two of them. There's "the simple fact of being 'mucked around'". Well, that goes without saying in this case. I plainly don't place too much weight merely on being mucked around. I can't rely on disruption and additional pressure in the run-up to trial, so I don't rely on that one. But I do rely upon the duplication of cost and effort, and that's said to be at the other end of the spectrum, and as will become clearer later today when I make the cost application, there has been massive duplication of cost and effort, largely or in many cases wasted. So I rely upon that.

Then over the page, what the Court of Appeal says, picking it up again at paragraph 32 in particular, is that it was said that you, sir, Mr Chairman, had had a concern that you might be applying blinkers to the legal realities, and the Court of Appeal's pronouncement was that:

"However, it's not as simple as that. Civil trials are decided based on the issues properly before the court. Once proceedings have begun, the court has the power to refuse to permit a party to raise new issues particularly ..."

And I rely on this:

"... particularly issues which could have been included at the outset."

And, of course, the loss of flexibility amendment application is par excellence, an example of an issue that could have been raised at the outset. It could have been in the original claim form. But Mr Harvey and his team, on behalf of the CR, hadn't thought about it at that point it seems, and that's why just before the certification hearing they put in the proposed loss of flexibility amendment application that was far too late to be dealt with at that hearing. It is completely clear that if there were anything in this point, it could have been made right at the very outset, or it could have been

done in the alternative, at least if done properly and in good time, with proper supporting material, prior to certification. So I do particularly rely upon that.

Then the last point I rely on is in paragraph 38, where the Court of Appeal says:

"... the question of what justification if any Voyetra were advancing for the timing of the amendments was a question which required an answer, and none was given."

Well, that's the same in our case, I respectfully say. We haven't had a proper explanation for why these amendments weren't put forward at the time and why they are not still properly supported by expert materials and quantification.

This sentence, I respectfully say, is revealing -- the second sentence of paragraph 38 of the Court of Appeal:

"Its absence ought to have been fatal to this application."

And I rely upon.

So, that's all I have to say about ABP, unless there are any questions.

Much more briefly is the reference to the previous tab of the supplementary bundle, the Gutmann ruling. I only need to take you to one short passage. This was a late amendment in another case in which I appeared on behalf of the defendants, and the details don't really matter, but the key paragraph is 24, on internal page 9 of the report:

"We accept, as the Defendants effectively contend, that if the inclusion of season tickets within the claims would not have passed the test for certification that result cannot be achieved by subsequent amendment. The test is therefore the same."

There's obviously good sense there, because otherwise what would happen is there's a clear risk of PCRs gaming the system by not putting in the more difficult things, waiting for certification on the less controversial things, and then adding in, using an easier test after certification, controversial amendments. In any event, that's what that says.

The reference that I wanted to give you before has been located, and you'll find it in

tab 41, and in particular, page 1724 and 1725. This is a transcript of a hearing in March 2024. It was dealt with by my learned friend to my right. And it's at 1725 at the top, what you'll see is the then president saying:

"We will see. The fact is you have, I think, an end July hard date. You can obviously apply to extend it, at the moment you had better be working to that date. If you can't put together a coherent case by then, the question then will be why?"

Well, of course, exactly. This is what I've been submitting. The president squarely said you'll have to explain why, and the CR hasn't done so, even today. That's not, in my submission, acceptable. (Pause)

Yes. Thank you. Can I just, whilst we're in the supplementary authorities, draw your attention to tab 3, which is the case of Mitchell, to which I adverted yesterday. I'm not going to spend any real time on it, because as I said yesterday I'm sure the tribunal is familiar, but the key passages are really in the judgment at tab 3, page 39, and 40, 41. Lord Dyson, then Master of the Rolls, says in paragraph 38, at the bottom of page 38, he refers back to a lecture that he had given previously on the Jackson reforms, and just picking that up on the next page 39, at the indented paragraph 27 at letter D:

"27. The tougher, more robust approach to rule-compliance and relief from sanctions is intended to ensure that justice can be done in the majority of cases this requires an acknowledgement that the achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations. Those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure that own costs within proportional bounds. But more importantly they serve the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and the court enables them to do so."

39, the Court of Appeal in Mitchell:

"39. We endorse this approach."

It goes on to say -- on the facts of that case in 39, if you just cast your eye over it -- that because the claimant hadn't complied with an obligation -- picking it up just below F: "Instead, an adjournment was necessary and the hearing was abortive. In order to accommodate the adjourned hearing within a reasonable time, the master vacated a half day appointment which had been allocated to deal with claims by persons who had been affected by asbestos-related diseases."

So that's just an illustration on that case of how you can't just come to this court, or this tribunal, in the modern era and say, "Oh, well, it's not that big a deal. I'm not really going to explain it. Here's a token effort", well after the event and then say, "Oh, there doesn't seem to be much prejudice to the other side". Well, I've identified what the prejudice is to us -- not that this is determinative -- it is massive extra claim, massive extra cost, further delay. But in any event, what my learned friend has signally not dealt with at all is what the explanation is and how it impacts upon other court users.

Then in 40, and over the page -- I'm not going to read it all out, but in 45 on page 40 --

MR JUSTICE MILES: It was never really much of an answer to an application to amend, to say, "Well, if the amendments are allowed in, there'll be extra cost to us", because that's the nature of the beast.

MR HARRIS: Well, sometimes.

MR JUSTICE MILES: It may be said here, "Well, if it had all been done ages ago then we could have got on for trial", I think.

MR HARRIS: Can I say both of those things?

MR JUSTICE MILES: The mere fact that in meeting the case, which is put in by amendment, there are costs involved, as I say, that just seems to be the consequence of the amendment being allowed, as it were.

MR HARRIS: I entirely accept that if it were the mere fact, but it's not. In this case

what would have happened and should have happened, had the CR managed his affairs properly, is this loss of flexibility application, if it were coherent and had a proper methodology, would have been right at the beginning or at the bare minimum pre-certification, and then we would have proceeded to the trial that had been set down in Michaelmas term 2023, or bearing in mind that Mr Harvey withdrew and was replaced, and if that had necessitated a small degree of leeway -- of course there were powerful reasons why, had it been handled better by the CR, we wouldn't have even needed the adjournment to the trial. That's a debate that we had on a previous occasion.

Then I do very much rely upon the point that you've just made, sir, that it's the fact that we're now years after that and the costs have spiralled and they're still spiralling. We've got Davis 4, hundreds and hundreds of pages and thousands of pages of exhibits, and we're still not there because he says, "It's not finished, and I want to do this", and now there's a 32-page set of so-called corrections, but in reality amendments. You've seen some of them. They're not just corrections, they're not typos and mistakes; they are changes to the substance of the case, and that's what I rely on. You've seen the scale of the increased costs from these experts. So I take those points.

Then finishing off on Mitchell, just one line from the beginning of paragraph 46 on page 41:

"46. The new more robust approach that we have outlined above will mean that from now on relief from sanctions should be granted more sparingly than previously."

Now, obviously, I accept that some cases are technically relief from sanctions cases, and some are technically not, but it's the thrust of the substance that I rely on. Technically this is not a relief from sanctions case, in that formal sense, but it is a case where my learned friend has to satisfy the court as to why his client has failed to

comply with the order.

So that's what I have to say about those two new cases and quick reference back to Mitchell.

Then picking up on the points that were raised at the very end of yesterday, the only other one that I want to say a very quick word about now is the question of set-off, which was raised at the very end yesterday. Here, to be fair to my learned friend, there is a judgment, indeed it is the CPO certification judgment, in which the tribunal said, "Well, the way we conceive of this is that if you, the defendants, are going to run the defence of set off, then you should do so, and then you, the CR, you should plead back". That's the logical order, because it's a defence and you respond to it. Of course, you now know that that's been done.

For your note, the defence that wasn't present in court yesterday is now at tab 27 of the supplemental core bundle. We don't need to turn it up, I read out the provisions. But that's now, of course, happened. So there is the defence of set-off, which hadn't happened at the certification stage, and there is now the response that we looked at in detail yesterday, it doesn't say what Mr Hollander said at 2.09 pm yesterday. So that's the first part of answering your query: what are we doing about this? It's now pleaded.

But, more importantly, we find it difficult to determine exactly what Dr Davis has done about this since he was told he had to put in his full case on these pleaded issues by 31 July 2024. We do see that there are some parts of the voluminous Davis 4 that, at least on its face, purport to deal with quantification of the set-off defence. They don't, so far as we can ascertain, deal in any way, shape or form with what Mr Hollander was newly describing yesterday, or I was characterising as the set-off of the set-off. We can't see that at all.

But I leave it there because, of course, Mr Hollander must be in a position to explain

to the tribunal in detail, if necessary, precisely what Dr Davis has done in Davis 4 on this topic. All I can say is we perceive that there is some attempt to deal with some aspects of offsetting in that evidence, but we can't really get our mind around them.

MR JUSTICE MILES: I mean, the question we had was a different one, I think, which is not the question of your client's case on set-off, it was that as we see it at the moment within the flexibility claim. There must arise a question -- not of set-off, but as it were, of offsetting in this way -- that the idea behind the flexibility claim is that people who bore, say, single-brand tickets took longer on their journeys than they should have done in a properly competitive world, that's the fundamental idea. However, in at least some of the counterfactual scenarios which Dr Davis has talked about, the prices of single tickets would have been higher than they were in the actual world. If you're looking at, as it were, the harm suffered by the single-brand ticket purchaser (several inaudible words). Query, does there need to be an adjustment for the fact that, at least in some of the scenarios, the amount they would have had to pay for their ticket being would have been higher?

I'm going to just pause my own question.

There's a certain amount of interference from at least one microphone in court at the moment. Can we just check that everyone's mics are -- and I don't know if we can turn them off actually. I'm just looking at one. I'm not sure whether it's possible to sort it out, but it's slightly irritating. There is a certain amount of noise coming from --

MR HARRIS: I think we've identified the culprit.

MR JUSTICE MILES: So my question is really this: Dr Davis, as we understand it, put a monetary value on the extra journey time for, say, a single-brand ticket traveller. But if it's right that, at least in some of the scenarios, the ticket would have cost more in the counterfactual, how is that taken into account in the calculations?

MR HARRIS: Well, exactly so. We agree, sir, completely. That does need to be dealt

with in a coherent manner. We've not been able to perceive how that is done. All we've been able to perceive so far, is that Dr Davis spends some time in Davis 4 giving various supposed quantification of offsetting in various different scenarios.

MR JUSTICE MILES: But has he done it in relation to this part of the claim, this head of loss, if I can call it that?

MR HARRIS: Well, not clear to us. It must be clear to Mr Hollander, because it's his report.

MR JUSTICE MILES: I'll ask him about this in due course.

MR HARRIS: Yes, but we certainly do share the concern that as we see it -- though I anticipate that this is resisted -- one does have to give proper credit for offsetting for the reasons that you've given, or in the circumstances that you've identified; and secondly, there must be an issue about how if some -- for all we know -- material proportion of the class end up having no loss at all, then how is it that they are members of the class? How is it going to be dealt with at trial, that there may well be supposedly people in the class who aren't, in fact, members of the class, because you can't be in the class unless you've got an actual loss by definition. So that has to be dealt with as well, and we don't see how that's been done properly and we share those concerns.

So, sir, unless I can assist further, the final issue was about possible preliminary issues and I'm apprehending that that will be dealt with much later on today after the costs.

MR JUSTICE MILES: Yes. Before you sit down, we are interested in this point which goes back to some of the debate around what the parties have called the "effects amendments", whether that's the right definition or not, I don't know and we've understood your submissions about that.

But one question we have is this. Supposing that in relation to the case advanced by the claimant, which is that the differential pricing was a breach of regulation and was

anti-competitive, supposing that you say, as I think you do, well, actually, differential pricing first, you say, was within the regulations; that's point one. But secondly, you say, well, anyway, it was justified for various reasons.

Now at that point, is it open to the claimants to say, well, it's not justified because in fact, the things that you did, the differential pricing, the brand restrictions, had anti-competitive effects in the sense that they, take an example, that doing it that way caused, say, overcrowding. Now, it's then not -- this isn't then part of their positive case on it being an abuse, assuming that the court doesn't accept their amendments. But, nonetheless, they're trying to rely on it to rebut your case of justification.

Now, we just want to be clear as to whether how far you're going with your submission, whether it's just in relation to the positive case, which they're trying to bring, or whether you're trying to shut things down more generally.

MR HARRIS: I have two answers to that, sir, and they are as follows. There is a difference in kind between running a response to a defence along the generic lines of there are supposedly some anti-competitive effects that defeat a justification defence, and they do not involve millions of pounds-worth of purported quantification in a new expert report with lots of numbers, which is what Davis 4 does. That would be a very material decision for this court to make and I would invite that. So, I don't say that that would be illegitimate in principle, but it's a material difference in kind. Point one.

And then point two is we, again, have to be very careful. You've posited in your question to me the example of overcrowding, but overcrowding is emphatically not -- I appreciate you were using that just as an example. But just on that point, overcrowding is emphatically not any longer part of the CR's case. And what we would have to do is be very precise now that we've reached --

MR JUSTICE MILES: You say not part of their positive case, but could they use it as

a rebuttal or an answer to your case on justification?

MR HARRIS: The reason I put it like that, sir, is they could, if, at least in principle they could, if they had done that by 31 July 2024.

MR JUSTICE MILES: But why do they have to say it -- surely, the order was to do with their positive case? In other words, it's their case because we haven't had any expert evidence from your side at all. Surely, what the court, what the tribunal was doing, was saying to the class representative, you've got to bring the whole of your case forward. That means your positive case, including how much you're claiming, everything. Full case; your case in full.

You then say, well, okay, supposing you're right that this was a breach of regulation. Anyway, we were justified in doing it because, (overspeaking) you say it improved some of our services or allowed more people to travel or something like that.

They then say, well, that's all very well but actually the way you deal with it was bad for (inaudible). It would be anti-competitive if it wasn't, in fact, justified.

Now, I don't think that the tribunal was ordering them to put in everything which anticipated your defences, but you can try and persuade us of something different.

MR HARRIS: Just going back on the first point, we do accept that, in principle, you can seek to run in response to a justification defence, "it's not justified because…". And in principle, one of those 'it's not justified because' might include a properly pleaded case of because a, because b, because c. But we don't have that in this case. And that had to have been done by 31 July. Now, as regards --

MR JUSTICE MILES: Well, are you right about that? I mean that would come in a --

MR HARRIS: On the pleadings, yes.

MR JUSTICE MILES: That would come in a reply, wouldn't it?

MR HARRIS: Yes. But we have a reply. So the --

MR JUSTICE MILES: I know but there may be -- I mean there may be questions

around whether it's within their reply or not and there may, I suppose, be questions about amending the reply and so on, which we haven't got before us. But surely the order was to do with they're really putting in shape their, what I call, their positive case.

MR HARRIS: Well, in my respectful submission, given the history of the case, and we'll try to find some references here in transcripts but what had to have been done was, certainly from the perspective of the CR by 31 July 2024, have finalised completely their pleadings and at least, then, the positive case that they have wanted to advance on those pleadings, and taking into account that, post-certification, we were then, in the usual way, asked to put in our defence and we did. That's now -- you've got it, tab 27 of the supp -- anyway, the date is October 7 2022. And then --

MR JUSTICE MILES: Are you saying that your defence is complete?

MR HARRIS: Well, subject to the question of amendments, yes. We've pleaded, for example, the set off point that you saw. But more importantly than that, there's then -- I'll find the dates if somebody will help me -- in the bundle, is the reply.

MR JUSTICE MILES: (Inaudible) you plead specific grounds for saying that what you've done was justified?

MR HARRIS: I would have to look that up. Perhaps I could come back on that. I'm anxious not to spend more time because it's not, obviously for today's purposes, that's not right at my fingertips. We did plead justification. And then it was said, no, no, justification doesn't work.

But my broader point, I hope trying to respond as best I can to your question, is that the nature of the history of the proceedings were that the CR and his new expert had to put forward their full case by 31 July 2024, and that must have included a finalised set of pleadings. As a bare minimum, this was the debate we had yesterday, if they hadn't actually obtained amendments by that date, as a bare minimum, they must have

applied properly and fully by that date. And we had that debate yesterday. They didn't. And what I say, the thrust of the order was that you then have to put forward your positive evidence in support of that case. By that stage, those pleadings having crystallised, including on any points that you run in your reply about how objective justification is said not to work because: it doesn't work because of a, because of b, because of c, whatever they may be. If those cases --

MR JUSTICE MILES: They can't answer the justification case because you haven't put in your evidence about that.

MR HARRIS: No, but it's --

MR JUSTICE MILES: It can't be, can it, sensible to say that the evidence of Mr Davis had to anticipate the things that your expert might say about justification?

MR HARRIS: No. So, in that sense, and I accept this, the logic of this point that you're putting to me is impeccable. It couldn't have been the full, all bells, all whistles, all singing, all dancing trial case. But what had to be demonstrated to the satisfaction of the tribunal, bearing in mind the history, was that this CR was now finally in control of his own case, and could demonstrate to the tribunal that despite all the previous messing around, and despite all of the adjournments of the trial and the disappearance of the expert and the failure to do this and to do that, he was finally on top of it, such that shortly after 31 July, this tribunal could even grasp the question of decertification. So, in order to ascertain whether that case is something that should properly go to trial or should be decertified, in my submission, the tribunal would have to have been satisfied that there was a coherent case on what was in the pleadings that would include, as best could then be done, the responses to the objective justification defence.

MR JUSTICE MILES: I find that difficult.

MR HARRIS: Well, even if not complete.

MR JUSTICE MILES: I find that very difficult to accept. I mean, surely what the tribunal was doing was saying, you must bring forward the whole of your case because, that's to say, the whole of your positive case. The court, the tribunal, would then be able to say at the hearing whether it should be decertified. But when you're looking at decertification, you don't surely go into lots of questions about whether it might have been justified, whether they've got an answer to a justification case. That really does -- that turns it into a sort of mini trial.

MR HARRIS: Again, inherent in your question, there is a logic that I cannot refute, in part, but everything in this case has to be viewed against the background of all the effluxion of time and the huge expansion in costs and the mistake after mistake after poor management that had gone on before. So, in a normal case, I think your logic would be completely impeccable. That's how I put it.

In this case, this case is different because this was, as I said yesterday, 31 July was very much last chance saloon. We were out of the back door of the saloon and into the trash cans in the backyard. I mean, this was, come on, come and demonstrate to me now, after all of these myriad reports and all of these problems that actually are really on top of it, and I can take it to trial. And I say inherent in that must have been more than merely a, "Oh well, in the reply, I'm going to run some vague points about anti-competitive effects". As a bare minimum, it would have had to have been a properly pleaded out reply of, "This is specifically what I'm going to say", and bearing in mind the problems with the experts that have taken place hitherto, it ought to have gone on to say, "And this is how I'm going to do it". And that would have been -- the absence of that would have been relevant and may still yet be relevant to the question of decertification, if and when that arises.

MR JUSTICE MILES: You haven't put, going round in circles, but you haven't put any expert evidence in.

MR HARRIS: No, I accept that. So, it wouldn't have been --

MR JUSTICE MILES: (Overspeaking) what we did was justified.

MR HARRIS: It wouldn't have been the complete story, I accept, on that point.

MR JUSTICE MILES: Right. It seems to me that possibly where this goes to, at least this is something for you to aim at, is that it's unnecessary for the tribunal to say anything more than that the question of what points are in issue are governed by the pleadings. All that we have before us is (overspeaking) application to amend the claim form. Whether the kind of issues that I've been talking about are in play depends on also the defence and the reply, and there isn't any application to amend those. So, either they're within the scope of the pleadings or they're not.

MR HARRIS: I do accept that, sir, yes. And there is no coherent clearly pleaded articulation in the reply that you are wrong to run objective justification because and then a specific identification, whether it be overcrowding, whether it be journey times, whether it be waiting times, whether it be whatever it may be. There isn't and it's too late. And I do just draw your attention, please, because I knew this existed, but I didn't know quite where. It's at tab 37 in the October 2023 hearing, and I hope, reflecting how I've described the context of this case and last chance saloon, if you pick it up at tab 37, page 1553 at the top, 1553 in tab 37.

What was said, again, bearing in mind the background, don't -- let's not forget that this CMC was taking place in October 2023, when originally the trial was supposed to be taking place; but it hadn't, through no fault of the defendants and yet the costs carry on mounting. The case is said to be further attempts to expand it, left, right and centre. And what the tribunal said via the president on that occasion was at line 2:

"However, instead of obliging the Defendants to respond to this case in any way, shape or form, we direct that the Class Representative file by no later than 29th February 2024, all evidence in final form that the Class Representative proposes

to rely upon at trial. That must include a final report ... and any other material ... The Tribunal will, [and here's another reference to what I was saying before] in the period up to 29th February ... afford every assistance to the Class Representative ... [et cetera, et cetera]."

Now, I don't want to mistake this. Strictly speaking, although he says "we direct that", this was part of the proposal that is referred to on the previous page in lines 22/23.

But that was the thinking of the tribunal. And we've seen the order; the order is not as expansive as the text, obviously, in the transcript. But the thinking behind it was, look, enough is enough, you've never come and done this properly. By this stage, what we had was, already, three reports from Dr Davis.

MR JUSTICE MILES: A few lines below that it says:

"Now at that stage we will have the Class Representative's case and in late March or early April 2024, we would propose to have what we would call an interim trial review or a pre-pre-trial review. The main purpose of this hearing would be to calibrate precisely what the Defendants need to rebut the Class Representative's case. There might need to be reply evidence after that, but this would be the time at which Defendants would have their go at saying 'Well, we now know exactly what the Class Representative is saying. We have seen their case. It is the case they are going to put at trial'."

And that seems to me to accord with the way I've been putting it to them. But what the tribunal was proposing was that the class representative had to come up with its full positive case. There was then going to be a chance to work out what the defendants wanted to say in answer to that, and then there might need to be reply submissions. And that's the way that cases normally work.

MR HARRIS: Sir, so, yes. But, I'm sorry if it sounds like I'm repeating myself, this is not a normal case. And what --

MR JUSTICE MILES: How do you deal with that passage, which is what the chairman, then, seemed to be saying?

MR HARRIS: Because as I go back to it, it might need to be reply evidence after that, but that doesn't obviate -- and that's true, and I accept that, because I've accepted that what -- the CR couldn't be in a position where it only sees our defence to put in the full, all singing, all dancing expert case on the response to objective justification when he hasn't seen our expert report about why it's justified.

But what I am saying is, bearing in mind where we were in October 2023, when we should have been at trial, the tribunal was saying, "You've got to come here and do a proper job so as to satisfy us by a very generous end date -- became even more generous because that passage was talking about the end of February, but it became the end of July -- that you know what you're doing. We're not happy with how you've mismanaged this case. Come and show us that you're doing a proper job."

And that does not involve, in my submission, whilst it may in another case, a more normal case, involve doing not much and waiting for the defence and then replying, in this case, it involved doing more than that. And that's why there's a reference to putting forward in final form, what the class representative proposes to rely upon at trial.

And of course, if we were to turn up the reply, what we don't -- I mean, it's an absence here. It's tab 20, I think of the supplementary bundle. Not tab 20; tab 24. What we don't find is even a clear elucidation in that of, "You're wrong on justification because" ... and then some proper particulars that show that this case is being thought out and is capable of then being demonstrated through expert evidence, if needs be, some of it reply expert evidence at trial.

We looked at this, yesterday. This is at tab 24, supplementary bundle, page 736, 18a(iii) is just a denial of justification in 18a(iii) with no particulars. And then there's

the line that we saw that now sought to be replicated in the re-re-amendments to the claim form, "creates inefficiencies and is anti-competitive", but no particulars. And then there's the mistaken reference to paragraph 55, which is the Gibb Report point. What I'm saying is that that's not a full elucidation, even in the pleading, let alone in Davis 4 by 31 July. Anyway, you have the point. That's my response. That's the first response.

The second point -- so, the first response being then, you have to have done a proper job in your pleadings. You have to have advanced, in my submission, at least some evidence, some coherent case, including through your expert evidence by that date, and in any event, it's a completely different kind of trial that one would have on that than a fully quantified case for millions of pounds through the expert with numbers and tables and what have you. I know you have that point.

But the second point is, let's say you're against me on that and you think I'm being overly strict in my submissions about what the class representative should have done. Though of course, I hark back to the frustrations that we all felt back in the autumn of 2023, when we should have been in trial and when these hearings were being held. And I respectfully submit that certainly on behalf of my clients, we can well understand why the tribunal was not saying something limited to, oh, just put the odd line in your reply and don't do anything else.

On the contrary, the tribunal was very unhappy with where we had reached. But in any event, if you're against me on that and you think I'm being too strict, one would have to be very, very careful to say, to give very clear directions to what could then be done by way of this defence to the objective -- response to the objective justification defence.

And what cannot be allowed, in my submission, is to allow to slip in through the back door millions of pounds and a supposed quantification on an unclear case. As a bare

minimum, in my submission, if you're against me, you should, with respect, direct that there needs to be a very clear elucidation in the reply of precisely --

MR JUSTICE MILES: Have you asked for this?

MR HARRIS: Sorry?

MR JUSTICE MILES: Have you asked for it?

MR HARRIS: No, because we didn't -- we say that the effects claim amendments and the loss of flexibility claim amendment shouldn't --

MR JUSTICE MILES: This isn't an amendment, this (inaudible) there. Have you asked for further particulars of the case on this?

MR HARRIS: Well, no, because it's not appropriate for us to do so now because we say the whole sets of amendments shouldn't be allowed at all.

MR JUSTICE MILES: This isn't an amendment.

MR HARRIS: No, but what I'm getting at, sir, is that if those amendments --

MR JUSTICE MILES: With something which has been in the pleading for ages.

MR HARRIS: But what I'm getting at, I'm not expressing myself well and I apologise. If those amendments are not permitted this point in the reply is meaningless. It doesn't go anywhere. So, I don't need to ask any questions about it, in my submission.

MR JUSTICE MILES: But when you say it's "meaningless", it's not meaningless. It has some words in it which at least on their face have a meaning. But I'm not -- I raised this so that the parties are aware of it. We're not, I think, in a position to make rulings about this because there hasn't been any argument about it. If you want to say that they should produce further of their particulars of their allegation, then I'd expect there to be some sort of letter asking for that.

MR HARRIS: Well, sir, with the greatest of respect, we do push back on that, because what we say is that --

MR JUSTICE MILES: It's not being part of the applications before the court --

MR HARRIS: No.

MR JUSTICE MILES: -- the tribunal.

MR HARRIS: And the reason I push back is because we say there is a great responsibility, principally upon the CR, to manage this case properly and he demonstrably hasn't done that. But there is also, as has been made clear in this case, let alone many others, quite a responsibility, a more than normal responsibility upon the tribunal itself.

MR JUSTICE MILES: I know, but there's also a responsibility on the parties to assist the tribunal.

MR HARRIS: I completely accept that but all I'm saying is --

MR JUSTICE MILES: It's hard for the tribunal to come up with directions which, on something like this, which in a complicated matter which have not been articulated in some way or assisted in by the parties. And I'm not -- I don't think we're getting much assistance on this suggestion.

MR HARRIS: Well, sir, I apologise if you think I'm not being of sufficient assistance. May I suggest this?

MR JUSTICE MILES: It's not a criticism of you. It's that there isn't -- but it's something you've floated -- but this relates to a pleading which has been in the case for a long time. You're now, effectively, asking the tribunal to say something about it. And one of the things, as I understand it, you're saying is that it's not sufficiently particularised, but you haven't asked for particulars or suggested what they might be.

MR HARRIS: I accept that. Maybe I can make, I hope, a constructive suggestion. And it is this: one of the purposes of these case management conferences is to get a grip on the case. We've been doing that through the formal application amendments; we've now moved on to well, what do we do if that either succeeds or doesn't succeed? And we've now hit upon this reply. It seems, in our respectful submission, to be

inadequate for the reasons that we've given.

What we could do, if you agree with me that it looks inadequate, you could make that clear and then say, but obviously this tribunal needs assistance from the parties. We would gladly assist. If you're against me on my opposition to the amendments, and some parts of this case go forward, we would gladly make some suggestions to what the tribunal could do.

MR JUSTICE MILES: I keep saying this and we're going back -- we're going round in circles. This isn't an application for an amendment. In the reply, it's there. It's been there for years.

MR HARRIS: Well, okay, let me rephrase.

MR JUSTICE MILES: I completely understood the point about whether this should be introduced into the case as part of the positive case, which might, for example, have implications for quantification and all sorts of things. That's one point. But the reason we're raising this is that it is in the reply. There hasn't been any attempt to strike that out, nor has there been an application for further information about it. But we thought it right to raise with the parties this point, so that they could consider it.

It seems to me, at least, that in a case of this complexity, it would assist the tribunal if you're, as it were, on the hoof saying we want more information about this, to know what you want and spell it out.

MR HARRIS: Sir, yes, I entirely accept that. It sounds like it would be of assistance to the tribunal, come what may, for us to enunciate and articulate --

MR JUSTICE MILES: Well, I haven't heard Mr Hollander about it yet.

MR HARRIS: Subject, of course, to Mr Hollander. And we will gladly do so, and we would do so promptly if that would be of assistance to the tribunal.

MR JUSTICE MILES: All right, thank you.

MR HARRIS: Thank you.

Reply submissions by MR HOLLANDER

MR HOLLANDER: I don't know whether the Secretary of State wants to say anything at this stage? It doesn't look like it.

Right. Can I start off by dealing with the variety of comments made by my learned friend during his submissions: "the last chance saloon"; we're out of the door of the last chance saloon; enough is enough; the tribunal are not happy with how the class representative has mismanaged the case, and so forth. I think those comments were put forward really, in a variety -- they were very much a big part of my learned friend's submissions.

I think, first of all, he was trying to say that the backcloth to today is a long history of failures by the class representative, which had been really an integral part of the tribunal's thinking, and that the continued failures, he was saying, on their part in the history of the case were the background against which these applications should be judged.

You will not find in any of the judgments of the tribunal anything of the sort. We have three judgments in the bundles. I don't need to turn them up. The first one is the certification, 1429, where we actually succeeded against a large number of points. We didn't succeed on absolutely everything. We got most of our costs in respect of that.

There's March 2023, which is page 1536; there's October 2023, 1642, and you will not find in those any real criticism of what the class representative has done. My learned friend has not pointed you to even any transcript where he referred to any real criticism of what the class representative has done.

On the contrary, when the tribunal referred to the fact that the class representative has had to change expert, they fell over themselves to make it clear that they accepted that wasn't the class representative's fault.

So, notwithstanding that my learned friend has made similar points at every case

management hearing we've had in this case, putting about what he regards as the shambolic way in which the class representative has handled the case, I have to say to the tribunal that there is nothing whatsoever in what has happened in the case so far, in the judgments or even in the transcripts, to justify that it is. I know my learned friend says it with huge enthusiasm, but with great respect, we're not a jury here, and there is simply no material to justify any of those submissions. So, that's the starting point.

By contrast, if you look at bundle 3, 1996, what you see is the applications by the defendants that were before the tribunal in October 2023. And we can see the defendants made these applications in July at 1996. So can we just look at what applications were before the tribunal, because, as you know, the tribunal did not actually decide any of these interlocutory applications at the October 2023 or any time since.

So, the first one relates to the application that is now -- I appreciate there's a damages claim now, and I'll come back to that in due course. But the first, 1(i) is the re-amendments to the claim form, which is essentially where we are today because it wasn't determined; (ii) is not pursued, has never been pursued since; (iii) -- Yes?

MR JUSTICE MILES: Is that the one we were just looking at?

MR HOLLANDER: So, one is this. Two --

MR JUSTICE MILES: No, sorry, is two the paragraph we were looking at?

MR HOLLANDER: No, I don't think so. The reply is supplemental, 740-odd. Let's find it. I'm not --

MR JUSTICE MILES: It is, isn't it?

MR HOLLANDER: So 18(a)(iv). Yes, so that is the pleading in respect of the differential pricing creates inefficiencies and anti-competitive and refers to worse overcrowding and causing delays. Yes, you're quite right. And the final sentence of

20(c), which is again a matter that -- 738. Right? So, those were in relation to the plea and the reply that -- well, we've seen this before, the last bit of (c).

So, that has not been proceeded with, that application. It was before the tribunal in October, but it has for all intents and purposes been abandoned.

The next one, (iii) -- head back to 1996 -- is:

"An Order that the [class representative] shall not have permission to rely on those sections of [Davis 2] identified in Schedule 1 to these applications."

And that's not been pursued. The next one is over the page:

"An Order varying the existing Collective Proceedings Order --"

MR JUSTICE MILES: Sorry --

MR HOLLANDER: I'm so sorry. (Pause)

MR JUSTICE MILES: Yes.

MR HOLLANDER: Over the page, an order varying the CPO order to exclude from the scope of the CPO the claims regarding --

MR JUSTICE MILES: Well, I'm so sorry, I was looking at that first document which was called Applications.

MR HOLLANDER: Yes.

MR JUSTICE MILES: So, where are you now?

MR HOLLANDER: I'm over the page, so I'm now 1997. We've looked at (i), (ii) and (iii). So, if we go over the page, we see 1997. So what they were seeking to do was effectively to get decertified the claim relating to penalty -- if you just look over the top of page 1997, do you have it?

MR JUSTICE MILES: Yes.

MR HOLLANDER: They were seeking to decertify, as it were, the claims which had been certified regarding penalty and excess fares. That has been effectively abandoned. Then, there was an order sought that the collective proceedings be

stayed, pending the provision of a proper blueprint for the assessment of dominance, save that the class rep shall be permitted to comply with the orders, which essentially are costs orders. So, that has vanished as well. That was a dominance issue which has disappeared.

The rest, I think, are not problematic because one is an updated costs budget and then various orders in terms of costs.

So, if we look at those -- so, these matters were all before the tribunal, and we can see that (ii), (iii), (iv) and (v), there were full skeletons on all these matters; there was evidence put in. And indeed, one of the things that had happened, we'll see in a moment, is that Dr Davis produced a new report, Davis 3, in response to the criticisms and complaints in these applications. We'll look at it in due course. But if you look, for example, at 2000 onwards, you can see these applications there. Dr Davis produced Davis 3, which was a quite lengthy and quite expensive report in order to deal with these applications, which have effectively been abandoned. Certainly haven't been pursued.

So, when we look at what is said to be the awful behaviour, as it were, of the class rep, what in fact has happened is that in October 2023, they made a variety of applications which were, to use my learned friend's word, expensive, a lot of costs incurred, required a new expert report to deal with, and they have simply died.

So, when we're talking about behaviour, these matters are important because what has happened is that they had taken a lot of points in their hearing -- they're just gone now. So, that's the starting point.

I now need just to go back, and we've seen quite a lot of this material, but I think, in the light of the questions the tribunal has been asking -- I very much respect the tribunal's attempt to get into the detail in terms of these allegations and counter-allegations -- I think the tribunal does need to see how they have developed.

Now, the starting point, therefore, which I don't think anyone's shown you yet, is Harvey 4, which was the disallowed report. And just so you can see the context in which this first arose, Harvey 4 is in the supplemental bundle at 245. If you look at 2.11, he was seeking there to deal with the methodology -- 245, the supplemental bundle at tab 16 -- whereby class members have may have suffered through having their travel rights withheld. What he said there: he would "anticipate taking the following steps":

"(iv) Estimate any additional loss related to the value that proposed class members may place on the flexibility offered by an unrestricted fare (and, therefore, lost in the factual situation where they purchased a brand restricted fare)."

So, the reason he had done that is because -- we can leave this now -- that in their rejoinder prior to certification at bundle 3, page 1889; so, this is tab 45 and it's the proposed defendant's rejoinder in relation to the application for collective proceedings orders. And if you look at 1889, at paragraph 35 onwards, what they were saying in the rejoinder was, and stop me if I'm ahead of you, 1889:

"The Proposed Defendants noted that Mr Harvey accepts and proceeds on the basis that, in the counterfactual world of unregulated fares, the price of Any Permitted and Not Gatwick ... would go down, but ... Single Brand fares would go up. [He actually said they might.] As a consequence, whether ... has suffered a loss will depend on his/her individual ticket purchases over the claim period, compared to the services and prices that would have been available and actually purchased in the counterfactual world."

They develop that up to paragraph 38 on 1891 or 39 on 1892.

So, they had an objection to what had been up to then put forward. They say, ah, but you haven't taken into account this potential part of the counterfactual if it is right that prices will go up. That was why Mr Harvey had, in that fourth report in response to

this, put in that paragraph 211.

Now, then we get to the hearing itself, and I showed you this passage yesterday, just to go very briefly to it if we may, where the tribunal deals with it in the certification decision at bundle 3, page 1424. I can take it quickly because I've shown it to you. That was the context in which the tribunal was saying, at 1424, and you can see, at paragraph 33 at the bottom of 1424, that the tribunal was reciting first of all, what Harvey had said initially in (i) to (iii); secondly, 33(2), what was said in the rejoinder; thirdly, what Harvey 4 was seeking to do, and that was in the context of the loss of flexibility, and essentially, as we've seen, that the tribunal was saying that actually this is not a matter for now, this is a matter for a response to the claim put forward, or it's a response to the response of the ... It therefore doesn't need to go in now.

And therefore, concerned as they were by the fact that the defendants were saying, "We haven't had time to consider Harvey 4", and also you see what is set out in 33 and 34 and I've shown you that already.

So they then pleaded, in the defence, the passages --

MR JUSTICE MILES: I know I sound a bit like a dog with a bone here, but this is making the point that there are two different ways in which some of these products can come in. Some are as part of the positive case, some are part of the defence, and some may be by way of rebuttal to what said in the defence.

MR HOLLANDER: Yes.

MR JUSTICE MILES: It's very important, I think, to keep all of these stages clear in one's mind so they don't get muddled up. But there, the tribunal deals separately with what one might call the defence point, which is paragraph 33, and then goes on to deal with the positive case point in 34. And Harvey 4, as I understand it, was being deployed in both senses.

MR HOLLANDER: At the stage when Harvey 4 appeared, I don't think there was quite

the crystallisation that you're trying to put to me now. But I understand the point. I understand the point entirely.

MR JUSTICE MILES: (Overspeaking) It's not really my point.

MR HOLLANDER: No, no, I'm not disagreeing with you, sir. I'm just trying to show you how it works, because I think, in the light of the discussion, it's quite important that the tribunal sees exactly how this has arisen and where it's gone.

Now, if you look at the -- just again in sequence, we now have the defence, which was put forward in October 2022, which I've got a stamp of eight, I think eight -- it's tab 27 of the supplemental. I hope you have it?

MR JUSTICE MILES: Yes.

MR HOLLANDER: And if you look at 828. I mean, there are other passages, but I think it's helpful to look at 30(c). So, there is some detail of the case that's been put forward by way of defence in relation to pro-competitive effects. If you look at the third line of 30(c), one of the points being made by the defendants are that you have to look at effects and not just ipso facto and abuse. It's their case.

The second line, deny they constitute an abuse of dominance. It's not ipso facto an abuse for a dominant company simply to breach a contract.

Different offering -- and then you go on to say that actually look at the effect, you've got to look at the effects, and they go and plead what they say the effects are in the rest of that subparagraph. They are relying upon, perfectly fairly, what they say the effects are even if they are in breach of the regulatory regime. Therefore, that is going to be part of their case in any event.

We then respond to that --

MR JUSTICE MILES: Let me just read that.

MR HOLLANDER: Yes, of course. (Pause)

MR JUSTICE MILES: Yes.

MR HOLLANDER: So then we respond to that, and I know you've seen this, supplemental bundle at page 736 at tab 23. I think we've seen paragraph 18 --

MR JUSTICE MILES: What page is that?

MR HOLLANDER: 18 starts at 735 and then goes on to 736. I think you've seen these paragraphs, paragraph 18, I think I showed you particularly (iii) and (iv). Well, it's these which put in issue and explain why they are anti-competitive effects, not pro-competitive. And then, I think I also showed you (c) at the bottom of 736 and also 20(c) on 738. So, that's December 2022 where we respond to their pro-competitive case as to effects by responding and saying, "No, there are anti-competitive effects". We then, in May 2023, and we're now back to core bundle 1 -- I'm taking it in the current version, but perhaps doesn't matter for present purposes, I showed you the differences -- at 680, at bundle 1. If you look at the current version of the pleading, which starts at 685, I just want to show you a couple of paragraphs, which were always in the claim.

At 2.5 at 687:

"The June 2017 Gibb Report ... found that most rail passengers prefer the flexibility of the Any Permitted fares especially when services are unreliable."

And then there's reference to overcrowding and capacity. Also, look at 69, which is on page 728. At 69:

"Brand-restricted fares unlawfully limit rail passengers' rights that the regulatory regime grants them to travel on any of GTR's trains along applicable permitted routes on the London-Brighton mainline and this reduces rail passengers' options to travel. [There's another reference to the Gibb Report, finding] that most rail passengers prefer the flexibility of the Any Permitted fares especially when services are unreliable. However, the fares that enable [them] to have more flexibility and to recover their rights in whole or in part are more expensive than the cheaper more-restrictive fares."

So, we were looking at loss of flexibility; they were already referring to that in the original claim form.

Now, then what happened, in May 2023, we sought to add in those amendments, both as to effect and to flexibility, and you've seen those. At that stage, we did not have and we were not putting forward a damages claim in terms of loss of flexibility, as I indicated earlier.

So now, if we look at their objection to what we were seeking to do in 2023, can we go back to bundle 3 please, at page 2000. So, I was showing you a moment ago their objections to the applications they were seeking to make in summer of 2023 against our 2023 applications. I've shown you those. Now, can we just look at page 2000 at paragraph 8 of their objections and the applications they were seeking to make.

MR JUSTICE MILES: Where is this?

MR HOLLANDER: Page 2000, tab 49 in bundle 3.

MR JUSTICE MILES: Yes.

MR HOLLANDER: So, paragraph 8, what they were saying at this stage:

"The Service Level Re-Re-Amendments [that's in the pleading that's then being put forward] are purportedly supported by the proposed new methodology set out in Davis 2. [But] Davis 2 is flawed and inadequate, and provides no blueprint to trial [as follows]."

And then, what they say (i), third line:

"The CR needs a methodology to assess the impact --"

MR JUSTICE MILES: What page are we on?

MR HOLLANDER: 2000, do you have it? This is the document we saw a few minutes ago. I just want to show you paragraph 8. So, they're saying that the service level re-re-amendments are purportedly supported by new methodology in Davis 2, but it's flawed and inadequate and provides no blueprint to trial for the following reasons.

"The CR has pleaded ... needs a methodology to assess the impact of the brand restrictions on the relevant markets. However, Dr Davis's analysis only assesses the impact of the brand restrictions on the class and does not assess the effects on the relevant markets. By focusing on the class rather than the market, [he] fails to take into account relevant pro-competitive effects."

That's the first one, so they say it overstates the negative effects of the pricing behaviour and is analytically flawed.

Secondly, Davis's assessment of the impact of brand restrictions is wrongly limited to train frequencies and overcrowding. Deals with delays, but doesn't set out a clear methodology. Fails to take into account other relevant aspects of service quality, Wi-Fi, modernity, cleanliness. Ignoring these, he devalues the premium service offered by the Gatwick Express and creates bias.

And then, over the page, he doesn't provide a blueprint for estimating or calculating customers' valuations of a change in service levels. So, they were saying he needs to look at a blueprint, at a methodology for estimating customer valuations of a change in service level, which of course is exactly where we are now. They're criticising him for not doing this, ie the analysis that Davis accepts he has to undertake in Davis 2, and then goes on and complains about that.

And then (iv):

"There is no adequate blueprint for estimating the extent of any change in service levels between the factual and the counterfactual (ie the analysis which [Davis] identifies that he needs to undertake ...). [He] proposes to rely upon [et cetera, et cetera]. None of these methods will credibly demonstrate the interaction between brand restrictions and service levels which is the task that faces Dr Davis."

So, what they're saying is that he's not provided a blueprint or a basis for estimating the customer valuations of a change in service levels and working out how to do it.

Well, in the light of that, I mean, we disagreed with that, but what Dr Davis then does is, first of all, if we now go back to the supplemental bundle -- I'm sorry, this is laborious, but I think that in light of the way it is put, I think this is quite important. If you look then at the supplemental bundle at 309 --

MR JUSTICE MILES: Just wondering whether there's going to be a break.

MR HOLLANDER: Perhaps we should do it now, if that's convenient.

MR JUSTICE MILES: It sounds as though there are a few more documents.

(11.55 am)

(A short break)

(12.07 pm)

(Transcription delayed)

MR HOLLANDER: So just to show you, at 309 4b of the supplementary bundle where Davis says in Davis 2 on the loss of flexibility between the counterfactual. Then in light of what was said by the defendants in their applications. We then turn to Davis 3 which is where if you look at 561 of the same bundle, he makes it clear in paragraph 2 dated 28 July about the proposed economic methodology I learned in Davis 2. He then goes on at 564 to 577 at some length to do exactly what the defendants had said he had done, although there was an issue about that, which is an effect of the conduct on the class and not the relevant market, which you will remember, of course, is the exercise he's now done in terms of quantification, or at least in part. That goes on to deal with the economic case in relation to loss of flexibility or service levels and the like. That goes on all the way to 577. So, he dealt with it because that was the point being raised by the defendants now.

So, what happens now is we made effectively the same application in October 2023, but the difference was that, rather than merely rely upon these figures defensively in response to the set-off or the set-off from the set-off, and you've seen the position in

respect of that. Having seen what those figures are looking like, what we want to do is to rely upon them proactively, if you like, or offensively. That's why we want to rely upon the -- so we're going to get them in, in terms, in any event, in response. That really arises from the tribunal's decision on certification and so forth.

Defensively, all we want to do is to rely upon the same material, having seen what Dr Davis has done in Davis 4, offensively. That was the purpose of the changes between 2023 and 2025. But otherwise, what we are simply doing is setting out the point, which one can perhaps debate whether it was otherwise a reply point or a claim point, but actually having it in, for the avoidance of doubt, is what we've sought to do and in our submission is a sensible course in any event.

So, that's how it arises; now let me move on to the effects. I'll come on to talk about amendments generally, but let me look at effects for a moment.

There are two cases, as the tribunal knows. First of all, and this is on the defendant's case as well, is it an abuse if there is a breach in itself? They say, and we have an alternative case to this effect, to the extent that it is necessary to look at anti-competitive effects, there were anti-competitive effects. That is going to come in anyway because they have pleaded pro-competitive effects; we have pleaded in the reply that there are anti-competitive. And so that is going to be an issue, whether it is an issue by way of, again, offensive or defensive. So, they have recognised from the start, we've looked at the reply, that these matters are in issue.

Now, we say there are two anti-competitive effects that we want to be able to rely upon proactively. One is price, and there's no issue about that, the fact that the prices would have been higher; and the second is flexibility in terms of waiting times. Those are the proactive matters we want to rely upon.

In answer to the question by the Chair earlier today, what is the position in terms of other matters, well, they are pleaded, of course. They are pleaded in terms of

overcrowding and the like. But we are not putting forward any positive case in respect of those in terms of the proactive case.

So, we want to do two things: first of all, we want to rely upon effects. Again, you may ultimately think this is dancing on the head of a pin, but it was said against us, "You had not pleaded that there were anti-competitive effects". Now, I think I showed you yesterday morning that is just simply wrong, but let's not get into a debate about it. We have pleaded that specifically, and indeed it must be an issue because they've pleaded that there are pro-competitive effects. So, that's one area. The second matter is --

MR JUSTICE MILES: Can I just ask you a question?

MR HOLLANDER: Yes.

MR JUSTICE MILES: You just said that there are other bids which refer to other things like overcrowding and delay.

MR HOLLANDER: Yes.

MR JUSTICE MILES: You're not advancing a case on that.

MR HOLLANDER: I'm not advancing a positive case.

MR JUSTICE MILES: Could you make it clear that that is not part of this case? That it is not going to be part of the case trial?

MR HOLLANDER: Well, they're on the pleadings.

MR JUSTICE MILES: It would be helpful to have that clarified.

MR HOLLANDER: Yes. I mean, we are certainly not making a quantified claim in respect of that. I think that's as far as I -- I mean, they are technically on the pleadings, as you saw. Now, exactly how, if at all, we rely upon those, I think is a matter for seeing what the defendants' report says when it is produced. But certainly in terms of my proactive case, we are only relying upon: (1) price; and (2) journey times, flexibility in that sense. I hope I was clear in respect of that.

So the pleading on effect, as I've said, is what our case has always been. The pleading on flexibility -- the only difference between the position in 2023, in substance, is that now we are seeking to say that what we could rely upon by way of set-off, et cetera, et cetera, we want actually to run it positively. That's the only real difference.

So I mean, I think, I suppose it would be technically possible for the tribunal to say it will allow the amendments in but not allow the damages claim, pro-actively, I mean, that's a possibility, I suppose, because that's where we were in 2023. We would say -- well, you have our submissions in respect of why, actually, these matters are going to be an issue anyway. So hypothetically, if they say the disadvantage is 100, we say it's 70, we say -- I know the figures are hypothetical and there are all sorts of permutations -- they say it's 100, we say it's 70. If it turns out, and we say it's 120, then the question is whether we should be allowed to bring that by way of a claim. Well, that's really what the issue is now. So that's the effects.

Have we put our full case? I think we've already seen what we were told to do at 1570. Perhaps we can turn it up again. We were told to put our case and I think you've had that point from my learned friend earlier. We have put our full case, on the basis of the case, subject to the amendments.

There are only two criticisms being made of Davis 4 by my learned friend. One is that he has done the single-brand market calculation -- so the market calculation -- and I've shown you how that arose in the first place, because the defendants say the methodology is flawed because he hasn't looked at the market. So he's done that; he's looked at the effect on the market. He has not done the calculation on the market on dual-brand, and he has not done the survey to reduce the calculations of those -- remember, everybody on a dual-brand is part of the class -- in relation to the members of the class. Those calculations are only required at this stage for the purposes of the damages amendment.

So in terms of where -- of actually, not only the full case, but also the full case, even including the matters before the tribunal in October 2023, he has done everything; there is no suggestion that he hasn't. What he hasn't done is those two calculations relating to the case by amendment. So there's no breach of the order at all. What we are now saying, we want to be able to bring a case based on the damages case on loss of flexibility. My learned friend then said, well, we should have made an application for leave to amend before 31 July. Now, let's leave aside the fact that there was no actual requirement to that effect. But you will remember --

MR JUSTICE MILES: Why's he put in the numbers in the report, why has he calculated the £84 million, say, unless that's in support of the damages claim?

MR HOLLANDER: Well, it's a market-wide effect. It derives from what -- and I showed you that passage at page 2000 -- where they had said, "You haven't done a methodology in respect of looking at the effects of the market as a whole". And he's done that and that calculation. And I mean, this --

MR JUSTICE MILES: Can you show me again what he actually says he's doing in that bit?

MR HOLLANDER: Yes. So it's in bundle 1, if I can find it. Bundle 1. So the tables; he's got some quite complicated tables 40 and 41 to look at. So in general -- perhaps this doesn't answer your question, but I'll come to that in a moment -- he has -- I'll just give you the references. The counterfactual scenarios I consider starts at 478. There is a summary of -- I'm not going to take it in detail, but let me just show you the passages.

303 on 479, he talks about the various counterfactual scenarios and harmonising up and down. And I think he looks at the total effect of the market at tables 40 and 41, which are at 515 and 518, if it will assist, but that doesn't answer your question.

I'm just trying to find -- I had the reference earlier for the table. (Pause)

The table in terms of the £84 million. Let me find it. Page 507, table 36, so I think he deals with this at paragraph 348. And I think he explains what he's doing at 348 and 349. (Pause)

Those are the sections where it is he explains what he's doing.

MR JUSTICE MILES: Yes, this is all under section which is called "Quantification of damages".

MR HOLLANDER: Yes.

MR JUSTICE MILES: So he does think that he's dealing with damages.

MR HOLLANDER: Well, if you look at VII, he's looking at counterfactuals. VII. It's section VII, which he's just finishing off at 507, it starts at 440, which is the economic effects of brand restrictions. That's what he's doing. And he says at 260 on 440 --

MR JUSTICE MILES: Wait a minute, this is part of the -- sorry. (Pause)

Looking at the contents page. So this is within --

MR HOLLANDER: Section VII.

MR JUSTICE MILES: Oh I see, okay. So it's in that section.

MR HOLLANDER: Yes, so 440, he explains what he's doing in this section. That's the introduction to section VII. This is the end of section VII, which is evaluating the effect of the conduct in this regard. So my learned friend, I think, made the point that we should have made an application for leave to amend before 31 July. There was no requirement to do so. But you will recall that we put amendments before the tribunal -- before the president in particular -- in 2023. Indeed, we invited him a number of times to in the course of that hearing to deal with them, and he declined to do so. So none of the applications before him were determined in October 2023. So one asked rhetorically, how are we --

MR JUSTICE MILES: This is quite possibly quite an important point. What's this bit of the report dealing with? Can I go back to that?

MR HOLLANDER: Well, isn't the answer -- sorry, I thought I'd answered it, maybe I hadn't.

MR JUSTICE MILES: I want to have a better understanding of it, please.

MR HOLLANDER: Yes, of course. (Pause)

I think actually VII is looking at the economic effects of brand restrictions. So I think in essence, what he's doing is dealing with the complaint that was made by the defendants where they claimed he had not previously looked at the effect on the market. (Pause)

Yes, he's looking at market effects because one's got -- I think both parties accept this -- to look at the effects of the economic effects, not just on the class, but on the market, in order to look at the effects; you can't just limit it to the class. I think that was the point the defendants had been making, so they seemed to accept that.

He is dealing with, in section VII, the economic effects. He's then dealing -- in section VIII, he looks at the quantification. (Pause)

I said, I think, tables 40 and 41 look at the various counterfactual permutations with various harmonising up and down on pricing and the like. I hope that's a response to the chair's question in respect to that. (Pause)

MR JUSTICE MILES: Yes.

MR HOLLANDER: So I was just dealing with my learned friend's point that we should have made applications before 31 July. I made the point that there was no requirement to do so. I just also make the point that having sought to make the applications in October 2023, the tribunal declined to deal with those; the chair declined to deal with them, and none of those applications were determined. So one asks rhetorically, how on earth are we going to make another application before 31 July 2023, in those circumstances, on essentially the same issues?

You might have thought that the chairman, the then-president, the answer would be,

"You should be getting on with your reports and not coming back to me at this stage until you've done them".

So that, I think, is that. Now, my learned friend referred to Mitchell and said there was a breach -- I've sought to show you why on any view there was no breach of the order, because we had put our full claim, subject to a bit -- a part of, which I'll deal with in a moment -- the quantification relating to the damages part of the amendment, which is now being made. But even including the matters that were before the tribunal in October 2023, Dr Davis's report does the entirety of that. And there's no suggestion by my learned friend that he hasn't.

Now, Mitchell, if the tribunal did think that -- and Mitchell, of course, was really clarified in Denton. My learned friend's -- I haven't heard anyone refer to Mitchell for quite a while, but Denton was itself clarified -- I don't know whether you're the tribunal has seen this -- in the case called Yesss, which is at tab 7 of our authorities. I'll just refer to it very briefly.

It's the bundle -- there are two bundles which have the same cover. This one says Maitland-Walker, if you have that? Yes. Tab 7. The relevant paragraphs are 33 to 35 on page 88 of the bundle. Lord Justice Birss.

MR JUSTICE MILES: Go again, I didn't catch that.

MR HOLLANDER: Yes. Page 88 of the bundle, 33 to 35 of the decision. I appreciate 39 doesn't apply technically to CAT anyway, but it doesn't apply in these circumstances, in any event, even if this was in the High Court, because, as Lord Justice Birss points out in 33 to 35 ... I mean, can I just invite the tribunal -- to avoid me needing to read those paragraphs? (Pause)

MR JUSTICE MILES: Yes.

MR HOLLANDER: I think just also to give the reference, paragraph 25 is also of some significance. So it doesn't apply. So the amendments, they are only really new in one

respect, namely what I call the proactive damages claim, and everything else in substance was before the tribunal on October 2023.

You saw the tribunal's comments there about their proposal that everything allowed in didn't, in fact, go ahead. But the key point in terms of amendments, in any event, is this is at a time when the defendants have not submitted a single document in terms of a report, apart from pleading; there is no expert report. So in the scheme of lateness, most of this was put forward in May 2023.

Can I just deal briefly with the point about whether Pro-Sys applies to our amendment here? My learned friend, I think, first of all, accepted there wasn't any difference in the test between that and on amendments, and then I think slightly rowed back on that as the day went on. I don't think there's a real issue of substance here. Obviously, I mean, if there's an amendment which doesn't have a reasonable prospect of success, then the amendment won't be allowed. Same process in any court.

If a new claim which sufficiently lacks methodology, that it wouldn't pass the certification test, then one can say equally it doesn't have a reasonable chance of success. Now, and actually, I would suggest that my learned friend's first comment was essentially right in that there's no difference in substance for this purpose. But if one applies that in this case, Dr Davis has already set out in detail his methodology for calculating loss of flexibility in respect of single-brand tickets on a class-wide basis, and run that methodology and produced a loss figure on that basis.

All that's being proposed now is he runs essentially the same methodology for dual-brand fares to calculate the market on that loss on those tickets. In addition, he will need to run a survey to determine what proportion of that loss of flexibility is due to class members. Given the survey is only one step to determining class-wide damages, it wouldn't have been necessary to produce the design of that survey for certification; certainly not; and it wouldn't be required on an amendment.

It's perhaps worth just focusing very briefly on what the tribunal's summary on certification was on the Pro-Sys test, which you get at 1644 in tab 3. I'm trying to take this -- and you'll appreciate -- as fast as I can.

Again, I'm not going to read it, but it's summarised by the learned president at 1644. So it's tab 38, page 1644:

"Not intended as a barrier to trial, but as a case management tool."

I just simply refer the tribunal to that; it's not a high test in terms of certification, on any view. The detail that Dr Davis has gone into would have been well sufficient in his second and third report, but actually, in addition, there is the material in his fourth.

Lateness of amendment. Now, again, the tribunal and the chair are familiar with the APB case. APB was of course -- I know the chair knows this better than anyone -- was an amendment to amend the defence late to secure a tactical advantage in the proceedings. The conclusion, as I understand it -- paragraph 39.41, perhaps you need to turn it up -- was:

"... The lateness of the application had been deliberately calculated to cause prejudice to the other party and no good reason had been provided. ... The party had attempted to take advantage of the process of civil justice itself."

And what the Court of Appeal said at 41 was that "Voyetra had attempted to take advantage of the process of civil justice itself [and] to permit [that] application to amend the defence and to add the counterclaim would be to sanction an act of deliberate concealment by the party seeking to be permitted to amend."

Well, "lateness" is in the context here where the defendants have actually not had to produce any of their material. In our case, as part of the instructions for Dr Davis -- well, as you know, we sought to make the amendment on loss of flexibility after the defendants had raised their set-off defence prior to certification. But the tribunal considered the defendants hadn't had sufficient time to consider the

application.

You saw that. As part of the instructions for Dr Davis, he was asked to assess the anti-competitive effects arising from the claim, including service level issues, but wasn't asked to quantify it from a damages perspective, but for the purpose of countering the set-off. The methodology, of course, is the same.

Just in terms of reasoning, I showed you yesterday, Mr Maitland-Walker 8, paragraph 48, where Dr Davis had calculated loss of flexibility late in the day, and what was said in that paragraph was that there were delays in the defendants providing the relevant data.

Now, again, for present purposes, one doesn't need to criticise, but that was the reason why he was only able to produce the calculation he did relatively soon, before the 31 July, and hasn't yet done the survey and the further calculation which is necessary.

So that's in terms of -- one can see that in respect of that. In our submission, I do rely upon the -- in a sense, it very much is a question of who has to prove what. You have my submissions on that. But these matters are going to be an issue anyway, and it's simply a question of putting them in the claim form.

I mean, the effects points, I struggle to understand what the objection is; you have my submission with respect to them. So far as the loss of flexibility claim, it's going to be there anyway for the reasons I've given. And the only question now is whether we should be allowed to put it in by way of damages rather than rely on it by way of set-off. And that's really what that is about.

It would, as I've said, be possible theoretically to allow the amendment of the claim, but to not allow the claim for damages, but for the reasons I've given, we would submit that that was really an unsatisfactory and undesirable way forward. So that's what I wanted to say to the tribunal on the amendments.

Just very briefly, class definition. There have been a whole series of cases where the class definition has been allowed to be updated in the course of the proceedings. Again, trying to avoid having to take you to the authorities. In the Alex Neill case, which is in our authorities, paragraph 62, and in the Gormsen case, which is also in our authorities in paragraph 43, there was a suggestion in argument -- it's not before the tribunal, in Merricks, because it could theoretically be done on the eve of the trial. I think we have provided -- there's a transcript of the Qualcomm decision. Hopefully, it's been provided? No, I'm so sorry. I'm so sorry. My learned friend hadn't seen -- I thought we provided it this morning. The tribunal hasn't got it, sorry. Can I just pass it up? Sorry. (Handed) Again, I'm not going to take time and read the books, but this is -- it's just from the transcript, which is publicly available.

Just to give you the references, if you look at pages 82 to 87, you can see that what was envisaged there was that the class definition could be amended right up to the time of the PTR, the pre-trial review. So, that's the position in respect of that.

Finally, my learned friend, in terms of costs, I think there may be some quite -- I mean, there may be some --

MR JUSTICE MILES: Is there anywhere -- is there a useful case which says what the approach is to these things? Because I haven't heard any submissions on this so far --

MR HOLLANDER: No.

MR JUSTICE MILES: -- from either party.

MR HOLLANDER: It's done --

MR JUSTICE MILES: You've said you want it until the date of the amendment now; they say no, but I haven't seen any (overspeaking).

MR HOLLANDER: Well, that's why -- I mean, it's done as a matter of course, as I understand it in these cases. I mean, those of the -- I mean, I don't think there is a statement of principle, but I mean, in Qualcomm, that transcript envisages that it

could be done up to the pre-trial review.

I think -- I mean, we can look if necessary at Alex Neill and Gormsen. But I'm not sure they stated this in principle in that way. As I understand it is done in most of these cases and there is no objection in principle. I mean, we can go to Alex Neill and Gormsen. I'm not sure I can --

MR JUSTICE MILES: Only if someone can point us to some statement of principle.

MR HOLLANDER: I don't think there's a statement of principle. We haven't seen a statement of principle.

PROFESSOR NEUBERGER: Can I ask as a matter of practicality, how one actually deals with the quantum, for example, if you don't have data beyond a certain point? Does this mean one is continually reworking quantum.

MR HOLLANDER: To extrapolate.

PROFESSOR NEUBERGER: You extrapolate ... That's not a --

MR HOLLANDER: I mean, you know, you may find that the defendant's figures of customers have gone up or down 5 per cent or something or their ticket (inaudible). He's already done it for July 2024. It's just a question of extrapolating beyond that. My understanding is this is done in most of these cases, and I appreciate there may be some little glitches in exactly how it's done, but I'm told that it is, by people who have better understanding than I do of these things, but it's done as a matter of regularity.

I think that was all I wanted to say, save that we can deal with the question of the preliminary issue, that helpful suggestion this afternoon.

Costs -- I think there's some quite I think it very much depends on where the tribunal gets to in these. Can I suggest we deal with costs when the tribunal rules a decision? I think it's quite difficult otherwise. I mean, just to give you a hint of it, when I think the defendants appear to be claiming the costs of all these abandoned applications along

the way, which I thought should be our costs and exactly what costs arise. It's one thing having costs occasioned by the amendment or if, for example, you were to refuse a draw, then no doubt we bear the costs of the application. But exactly what costs are within that, I think, might be quite complicated.

Unless there's something else -- I tried to go as quickly as I can -- those are my submissions.

MR JUSTICE MILES: Yes. I'm just reminded that I raised the question with the defendants about this business of whether there's some sort of offsetting required within the £84 million figure for Dr Davis's report. Can you explain that?

MR HOLLANDER: I think it depends on exactly what -- I mean, the trouble is with this is there are a number of permutations. The tribunal will, at trial, have to work out what the counterfactual which is on any view pretty complicated. It has a whole bunch of permutations, different permutations. Dr Davis has done a number of them in his fourth report, in general, in terms of the damages but no doubt there are more one can think of. And I think there comes a stage -- I mean, he's done what he can in terms of, particularly in the absence of an engagement by the defendants, in terms of a report. I think there will come a stage where one has to see exactly -- I mean, there will have to be a meeting between the experts to provide a joint report to try and work out a way for the tribunal, sensibly, to try these issues.

But it does seem to me -- sorry, I'm rather ducking the question rather than answering it, but I think, I mean, one can simply say, yes, there is, on the one hand I assume which is not clear cut at all, that the price of the single brand goes up. Then one should take into account the loss of flexibility.

I think Professor Neuberger would say, well, you might have to take into account of the fact that people would make different choices in those circumstances. Or, I mean, I can see all sorts of possible permutations in respect of that, but they get very

complicated, and I'm not sure there's a simple way of doing it.

MR JUSTICE MILES: There's also the rather simpler point that the price would go up.

MR HOLLANDER: Yes.

MR JUSTICE MILES: And therefore those people, if you're saying that those people have suffered a quantifiable loss by reference to extra minutes spent travelling, which is how Dr Davis has done it, if they would actually have had to pay more anyway for their ticket, it's hard to see how that's a loss, to put it very simply.

MR HOLLANDER: Yes, but --

MR JUSTICE MILES: There's some sort of offsetting -- what I've called offsetting to --

MR HOLLANDER: I think he has done.

MR JUSTICE MILES: -- (overspeaking) set off.

MR HOLLANDER: He's done offsetting on the -- there's this harmonising up and harmonising down.

MR JUSTICE MILES: But he's done that on the other bit.

MR HOLLANDER: Yes. No, I agree.

MR JUSTICE MILES: I don't think he's done it on the issue of (inaudible).

MR HOLLANDER: But he hasn't done it yet. I think he's got to do that -- that's -- I mean he's done it -- that's why his market (inaudible) he's done. And he's sought to -- there's, I think, some offsets in respect of those. But I mean he hasn't done it. And I can see debates about --

I mean, in the simple example, I always think about the Heathrow Express. You can either go from Heathrow and take the Heathrow Express, which comes every 15 minutes, or you can pay less money and take the Elizabethan line, which comes every half an hour probably, and goes the same route. And, you know, which one do you do? And there's a whole -- I mean, debating exactly how one calculates it, I don't think it's straightforward.

MR JUSTICE MILES: No, but I think the point which is being made is actually a comparatively simple one which is not to do with -- it's not even to do with behaviour at this very simple stage. It's just to do with money; that your theory for this part of the proposed case is that single-brand ticket buyers lose financially because of the extra time it takes to get from A to B.

The point that's being made is that in most of the scenarios, the single, in the counterfactual, the single fares, single train fares actually cost more. So, surely you'd have to knock off that amount against any supposed loss and it may be actually, it wipes it out, right?

MR HOLLANDER: Yes. Well, that can be done by a calculation because one's got to find out what proportion of class members purchase single-brand fares.

MR JUSTICE MILES: And what the counterfactual world is.

MR HOLLANDER: Yes. And I mean it is possible that in respect of those class members who purchase books, I mean, it's theoretically possible at least that if one takes that into account, it could wipe out the loss, if that is the right approach.

Sorry, can you bear with me one moment? I'm being -- (Pause) I think he's -- I'm so sorry. He's done it, I think in relation to the market as a whole. And I think he's looked at it in his tables 40 and 41. What he hasn't done is done it in respect of the class.

MR JUSTICE MILES: But he hasn't taken into account the offsetting effect of the --

MR HOLLANDER: He hasn't done the calculations, I think.

MR JUSTICE MILES: -- of the increased prices in the counterfactual.

MR HOLLANDER: It's out on a market basis, he's taking them -- I'm so sorry. He's done it on a market basis, he's taken that into account. And I think he's --

MR JUSTICE MILES: How's he done that? Maybe you'd better show us that.

MR HOLLANDER: That's table 41 on page 518, for example.

MR JUSTICE MILES: Okay, let's have a look.

MR HOLLANDER: I think he's done this on -- I think the methodology is tables 40 and 41. If you look at table 41 on 518 of bundle 1 and you look at the harmonising -- he's done a whole variety of different models or permutations in the counterfactual. But look at the bottom bit where he's harmonising up. I think he's taking that into account there. And also on table --

MR JUSTICE MILES: I don't think he's -- I mean, I didn't read this as being concerned with the --

MR HOLLANDER: So he --

MR JUSTICE MILES: -- flexibility changes at all. But I may have misunderstood it. Where are they brought in?

MR HOLLANDER: The flex damages, we looked at, at page 507. (Pause) I mean, can I just ask -- I'm sorry, I'm floundering slightly on the detail of this. Can I just ask Mr Went to explain it to you because I suspect he'll do it rather better than I will.

MR WENT: Just on table 42, for example, at the moment, this is looking at market-wide effects which is taking into account pricing at that point. And then there's a separate analysis for loss of flexibility on a market-wide basis relating to loss of flexibility and that's the £84 million-figure that you've seen. So, in principle, if you're looking at market-wide effects, not class-wide effects, you could also add in the loss of flexibility calculation to this table 41, for example.

So, he's not done that in table 41 but you could simply add that effect into table 41. So, it would be a net gain for the market. But to be able to dole out --

MR JUSTICE MILES: That doesn't tell you how much the damages are for the --

MR WENT: -- no, but that's the missing piece at the moment and, for the reasons explained, he hasn't done that calculation yet. But in the same way that Dr Davis would calculate the class-wide loss of flexibility damages that requires knowing the portion of single-brand tickets that have been purchased by the class. That's the

additional survey that's been talked about. That would also give the answer to any offsetting that has to apply in relation to that loss of flexibility damages calculation. So, it's just the flip side of that. (Pause) We might add that --

MR JUSTICE MILES: Well, a bit further work needs to be done (overspeaking).

MR WENT: Well, I was just going to add that for the defendants to make good their defence that one has to offset any increase in prices of single-brand fares in the counterfactual, they will need to calculate what portion of class members have purchased single-brand fares or what portion of that offsetting relates to the class as opposed to the market. So, it's something that the defendants will have to do in any event as well. (Pause)

MR JUSTICE MILES: Yes.

MR HOLLANDER: Unless there's anything else arising from that, all I was going to say finally was just to give you one reference which you may have seen, I think I may have given to you already, but let me just remind you. We perhaps don't even need to turn it up. It's in the core -- it's in the transcript of the October 2023 hearing where there's an exchange between me and Mr Justice Marcus Smith where he says -- this is bundle 3, page 1570, line 13:

"Now if there are points that are not for you to prove but are for the Defendants to prove, well, then they don't go in your case."

Page 1570, line 13, October transcript.

Unless there's anything else I can assist the tribunal with. (Pause)

MR JUSTICE MILES: No. But I think I want to come back to Mr Harris.

Mr Harris, I think that you'll appreciate this is a very -- this is quite a complicated situation, trying to work out what is and is not the case, as it were.

Point one is this. Under your settled case, the point is taken that there's going to have to be calculation of the proportion of -- sorry, of those class members who also had

single fares, if you're relying on that point. So, that point is going to come up.

Point two is that the -- it appears that you're taking the point that, even supposing there to have been a breach of the regulation, the conduct of your clients in having different branding of different fares was justified and the claimant then says, "Well, no, it wasn't". Including because of this impact on flexibility.

Now, what the claimants are saying is that what Dr Davis was doing in that section, that long section, about how much people value getting to their destination on time, was actually dealing with the part of their, sort of, responsive case and that what they're trying to do is bring in the -- also rely on it now for damages and they're very candid that that's what they're trying to do.

Now, obviously one possible response, which Mr Hollander candidly accepted, was that the tribunal might say, "No, you can't rely on that damages claim". But he obviously argues that they (inaudible).

The concern that the tribunal has at the moment is the extent to which this material is going to be traversed in any event, at the trial. And that is not an entirely straightforward question to reach a view on, on the pleadings.

Now, what I suggest is that we will rise now, and we'll come back at 1.50 pm. But I would invite further submissions on that broad question.

Further submissions by MR HARRIS

MR HARRIS: Sir, yes. It may be that in the three minutes remaining, I could assist you on a different point but you asked for the approach of principle to the tribunal on the class definition amendment point. And it's set out in the Alex Neill case, which is tab 3 of the original authorities bundle, and in particular, at pages 156 and 157. You may wish to read that over the short adjournment.

The gist of it is that under the legislation and the guidance, you can only have existing claims in the CPO but there is then a tension in a normal case where the claim is for

an ongoing alleged infringement, that if you only allow in the claims as at the date of the original CPO claim form, you're going to either deny a claim to other ongoing people who are victims or, because they're not in the class definition, or you're going to have some other set of proceedings, and that all seems a bit duplicative and disproportionate.

So, the compromise, and I hasten to add, in a normal case, is that the tribunal, often without opposition from the defendants, has allowed an amendment at a stage pre-trial so as to add in some extra class ongoing victims, but up to a certain date, because plainly, quite a way before trial, you need to have the certainty.

The difference in our case, as I was submitting yesterday, is that we don't object to allowing some more claimants in, well beyond the date of the original claim form, which is absolutely standard in these cases to resolve the tension.

But we do draw a line and we draw the same line that was, we say, hitherto drawn by this tribunal, namely 31 July 2024, which is already well past the date of what was envisaged to be the original trial. So, even as at that date, there were going to be more people than we should have ever faced as claimants. So, we say it's being generous and it recognises the line in the sand already drawn by this tribunal. So, that's the point. Those are the points of principle.

You need certainty. There's a tension with the fact that it's an ongoing infringement and therefore you should arguably let some more people in. That's the normal equation. But in this case, there's that extra third element.

So, I hope that that answers your -- and ultimately it is a matter for your discretion.

And as to your other two questions, yes. At a time that suits the tribunal, 1.50 pm, I can address you briefly on them. You will, of course, recognise that there are three applications that I have, one of which is all but conceded, as regards costs. And then there's my learned friend, Mr Page.

MR HOLLANDER: No, it's not, certainly not. I've not conceded any application.

MR HARRIS: Yes, the third application for a cost budget has been all but conceded.

MR JUSTICE MILES: I'm going to let you talk offline about that. Thank you very much, we'll come back at 1.50 pm.

(1.00 pm)

(The short adjournment)

(1.51 pm)

MR HARRIS: Sir, the two questions that you raised for me, our responses are as follows. The first one was about offsets, and a very last minute suggestion was made by a new advocate, Mr Went, in reply for the first time that I'm going to, it was said: "You're going to have to do this calculation of the overlap, yourselves, in any event." And you asked me, "Is that right?" And the answer is, no, that's not necessarily right and may well not be right. And I'll develop that briefly in just a moment.

But before I turn to that, with great respect, we say it's not even the right question and, just briefly, I say that because it's my learned friend's team that was ordered to provide its full case by 31 July 2024, not me.

So, the real question is, why haven't they done it? But you've heard me on that, so I'll leave that behind.

So, the premise seems to be that because the CR has gone about it in, we say, a misconceived and incomplete manner, namely by looking at the wrong group of people, namely all purchasers of single-brand fares, and then they want to then pass down to the correct focal group by way of some survey that they haven't done, that somehow, even though they haven't done it, we will inevitably do it in any event. That seems to be the brand new point; that just doesn't follow.

We haven't put forward a methodology. We're not obliged to have put forward a methodology, but there's absolutely no guarantee, it's not a safe assumption for

today that when we do have to do this, if -- I'm going to come back to the "if" in just a moment -- but if and when we do have to do it, it's absolutely not a safe assumption that we will also focus upon the wrong group and then try to pass it down to the right group. Why, I ask rhetorically, would we do that?

But most importantly, you can't proceed today as if it's definitely the case that we will look at the wrong group and then try to pass it down to the right group, because we haven't put in our methodology and we're not obliged to have done so. So that's one of the key answers.

MR JUSTICE MILES: I'm not sure I've understood that. If we can get down to brass tacks, the -- there's a claim brought by the claimants in the existing claim that, essentially, people were overcharged. That's the existing claim. That's to do with prices being too high.

Part of your defence is that there needs to be some set-off and as I've understood the defence, that includes the fact that single-brand people would have had to pay more in the counterfactual.

MR HARRIS: People within the class who brought single -- yes.

MR JUSTICE MILES: So you need them to know which people within the class bought single-brand tickets.

MR HARRIS: Yes, and all I'm saying --

MR JUSTICE MILES: You have to do that.

MR HARRIS: Yes. All I'm saying is they have begun the methodology by looking at the wrong group of people, namely people who aren't in the class necessarily, because they've just looked at all purchasers of single-brand fares, and then they have to try to narrow that down. That's their nonexistence --

MR JUSTICE MILES: That's just describing doing something in two steps rather than one. I mean.

MR HARRIS: Well --

MR JUSTICE MILES: You've still got to work out the right target, ie those people who had single-brand tickets who are also members of the class. So you've got to find some way of doing it.

MR HARRIS: I agree, but as I had apprehended the point that was put by Mr Went, and then was put to me by the tribunal, it was, this work that we haven't yet done, you, the defendants, are going to have to do it anyway. So it's not much of an objection to an amendment to say, "Oh, well, you haven't come forward with this methodology properly. It's incomplete, because you're going to have to do it anyway".

MR JUSTICE MILES: If you're going to have to do the same exercise, their expert -- you're going to put forward some expert explaining how it's done. They've got Dr Davis saying, "Well, this is how I say it's done", which is what he's done. So that's what I think they mean by saying it's going to be in there anyway, because that's how he says it should be done. I mean, admittedly, he hasn't told us how it's going to be done --

MR HARRIS: Yes.

MR JUSTICE MILES: -- which is another question, but that's what they're saying.

MR HARRIS: Well, that's correct, this far, that we would have to -- if we reach this stage, and that's a submission I'm yet to make, but if we reach the stage, we would have to present to the court those members of the class, ie people who have brought dual-brand or multi-brand fares, who have also bought single-brand fares, where we say the price would have gone up in the counterfactual, I accept that.

But what I don't accept, which is what I thought was being put to me, was that, "Don't worry, tribunal, that Dr Davis has come up today, months after the deadline, even now, with an incomplete methodology, without the survey and without the calculation, because you the defendants, they're going to do it anyway". And that's what I'm

addressing; we're not going to do the work that they haven't done that they were ordered to have done, I say, by the 31 July.

MR JUSTICE MILES: Well, you've got to do something.

MR HARRIS: We've got to do something, but the way it was put as I conceived it was, "Oh, don't worry on the question of amendment, because they're going to have to do what we haven't done". And all I'm saying to you today --

MR JUSTICE MILES: No, they're not saying you'll necessarily do it in exactly the same way.

MR HARRIS: Right.

MR JUSTICE MILES: They're saying you will have to do an exercise to identify the right group of people somehow. And they're saying, therefore, Dr Davis's evidence on that is going to come in anyway, because he says that's how it should be done.

MR HARRIS: Well, maybe, but that comes back to the point I raised before: it's not a safe basis today, where the question before you is the merits of a late amendment application, to take into account against me on all the points that I've made as to why you shouldn't do that, that hypothetically, it is conceivable that at a later stage, in response to something that we haven't done and that we've not been ordered to do, Dr Davis may or may not then put forward a complete version of that which he hasn't done for today, but which he was ordered to have done by the 31 July. So that's how I respond to that point.

But can I come back to the "if"? The "if" is this: for present purposes, we're proceeding on the premise that I will have to do this at some point, in any event, but there are two major problems with that. The first of all is nobody so far has proceeded on the basis that there would be a composite trial of all liability issues and quantum issues. Hitherto -- I appreciate this is ancient history -- all the quantum was going to be put off to another day, and we're yet to determine what directions would ever be given to us,

the defendants, to deal with the quantification of set-off, which is necessarily a quantification trial point. Right.

Think about this: if we win on liability, we'll never have to do this. We'll never have to do it. So the point, "Oh, well, they're going to do it anyway", doesn't work. And that's not the only situation in which we may never have to do it; we've yet to debate this in this CMC, and it may be a debate for another CMC, I'll come back to that point, but there's a live possibility, and there has been for a while, of potential decertification of this case.

After I've dealt with your two points to me, this being the first, I want to then deal with the costs budget application. That's the one that's all but conceded, because it gives rise to questions of where do we go with this case? Why do I want it? Answer: because it leads -- so I'm going to come back to that in a minute.

But just taking this as a matter of principle. So if there's no quantum trial because we win on liability, I'll never have to do this. If the case is decertified, I'm never going to have to do this. So again, it's an unsafe premise for today in response to an amendment application to say, "Oh, well, don't worry, we haven't properly done an amendment application because they're going to have to remedy our deficiencies". For that reason as well.

Then there's an issue of principle. We say, with great respect, these things are conceptually different. I have put forward and we have now argued, you know, if you like, an orthodox amendment application, and it didn't have as any part of it -- certainly in opening -- "Oh, well, all my deficiencies are going to be remedied by the other side". That's not normally what one would hear demerged on the hoof in reply from a new advocate. And I say they should be --

MR JUSTICE MILES: I don't think that was the submission. I don't think you need to address that.

MR HARRIS: Okay. So that's what I have to say on the first point, the set-off point. The second point that you raised with me just before the short adjournment was, as I understood it, this:

"You, the defendants, you're going to say -- or indeed you do say in your pleading -- even if there's a breach of the regulatory environment which you deny, nevertheless the conduct is justified and the claimant wants to then say in response to your defence, no, it's not justified, including because of anti-competitive effects, including flexibility."

So that was a debate we had before. Then the point that you put to me in terms was, "Isn't that what Dr Davis is dealing with, as Mr Hollander sought to suggest in Davis 4 in the sections we looked at? And is Mr. Hollander right when he says that, properly understood, what Dr Davis has done in Davis 4 is really just a response to your objective justification defence, and all he really wants by way of his amendments is to also characterise that as a damages claim, which he accepts is new?"

So the two answers to that are as follows. I'll just identify them and then I'll explain them. Firstly, on the facts, that's just not what is happening in Davis 4, and I'll show you that in a minute.

Secondly, this is a completely inconsistent submission, compared to other submissions that Mr Hollander made. Mr Hollander was at pains to seek to point out to the tribunal that, in fact, he was under no obligation, and he still is under no obligation today, to put forward any evidence in response to our objective justification defence. That was the debate that you and I had, sir, Mr Chairman, about what is the effect of the order to put in your full case by 31 July?

Mr Hollander was very much of the view, "Oh, it's only my positive case. It absolutely does not involve me putting forward evidence in response to your defensive. That's not part of my positive case". There was an interchange that you and I, sir, had on

one or two occasions about whether that was right, but it was Mr Hollander's case that it is definitely right.

So it cannot be right, conceptually, him having said that he was never under an obligation to do it -- and indeed, he's still not under an obligation to do it today -- that actually large swathes of Davis 4 that are in place today, properly understood, should be a response to a defence. So that disposes of it all, but can we just have a look -- oh yes, all right.

I think it's tab 9 of bundle 1, the Davis 4 sections that we looked at, and in particular, our attention was drawn more than once to, the end of section VII on page 506, and the beginning of section VIII on 507. But of course, the game is given away by the heading. To be fair, Mr Chairman -- if I can put it like that, that's probably not a happy way of expressing myself -- you drew Mr Hollander's attention to the heading of section VIII, "Quantification of damages and offsets".

What's going on here is in section VII, there is, as you can see on page 506, an evaluation of the effects, so that in section VIII they are then quantified qua damages. That's why it says, "Quantification of damages", and that's why over the page in 509 you get, "Damages for class categories (a) -- (c)", and et cetera, et cetera, with more and more detail.

That's not a surprise, because it links in with the submission I just made a moment ago, which is what Mr Hollander was submitting to you before was that he was obliged to put forward his positive case. He says that his positive case should include damages for loss of flexibility, ie anti-competitive effects. Of course, that's contingent on him getting permission for his amendments.

That's why he has put forward a positive case in support -- not completely, because it's flawed, as we've seen, but at least partially -- of that positive case for damages. And although this one, you know, one can't do in quite the same way by turning pages,

we have, over the short adjournment, done a word search in this very lengthy document for some separate section, or indeed any section, that deals with objective justification as distinct from damages. And there isn't one. We can't find any reference to objective justification in it at all.

So if this is now going to be sought to be characterised as, "Oh, well, this is all just a response to objective justification", then you would have thought that that would have been made clear. There would be a heading saying, "Our response to your objective justification defence". So that's my second point.

So just to be clear, the first point is he can't have his cake and eat it; he's been telling you that he isn't under an obligation to respond to objective justification defence, so no surprise that it's not in there.

The second point is when you actually open it, you can see that it's not a response to the objective justification, but it's headed damages, and that's what it's about, and that's because it's the positive case.

The third and final point echoes a submission I made to you earlier today which is, with respect, it cannot be right, even conceptually, that if there is to be a response to the objective justification defence, it should or could or would be permitted to be literally the same as a fully worked up damages claim for anti-competitive effects, with all of the numbers and all of the massive amount of work and cost associated with that.

I, for one, have never seen that in my life, and I cannot imagine, with great respect, that any tribunal, or for that matter court that is presented with a, "Please can I have permission to put in a full blown quantified damage effect case costing several million pounds in response to an objective justification defence?" I venture to suspect that the answer might well be, "Well, no, because that's completely disproportionate and not what is called for".

On top of that, one couldn't begin to assess what to put in -- if this were a response to

the objective justification defence, which it is not -- one couldn't begin to do that properly, let alone say, hand on heart, "Oh well, this is definitely what I'm going to do, and it will definitely be in this form with this number of pages and this number of tables". One couldn't begin to say that, hand on heart, until you'd actually seen the case in defence that's being run against you in detail.

So that's the proportionality point. Again, what if just for the sake of argument, our narrow objective justification defence, when set out in an expert report, consists of, I don't know, one point. One point. It's something like, "It gives rise to more efficient use of infrastructure and fixed assets", something like that. That's why it's objectively justified.

Well, plainly then, the reply to that, and any expert evidence or factual evidence or whatever to respond to that would be limited to that one point. But where's that in this document? That's not in this document. So it's simply not right; not at all safe to say that -- as I apprehend has been submitted to you today, albeit in reply:

"Don't worry. Everything that you see in Davis 4 on these points is going to be there anyway, by way of response to the objective justification defence."

It's certainly not a safe basis upon which to deny the merits of our opposition to the amendment application.

Sir, so those are the things I have to say on those two points.

MR JUSTICE MILES: Right, thank you.

MR HARRIS: Sir, I'm in your hands.

MR JUSTICE MILES: Well, can we just give Mr Hollander an opportunity --

MR HARRIS: Oh, I beg your pardon, yes.

MR JUSTICE MILES: -- because I did ask you the question (overspeaking).

MR HOLLANDER: I'm not sure I understood all of that, and I think I probably dealt with all of it. Can I just give you two references to assist you? First of all, I did show

you this document in a different context this morning, but what had originally led to this, rabbit, if you like, or how everyone puts it, hare, was the rejoinder before the certification, which is at page 1889, paragraph 35 onwards, which essentially provides a detailed analysis of what the defendant's case is in relation to this, about methodology. I think it's pretty clear from that that this has got to be an issue. Paragraphs 35 to 39. We needn't turn it up.

The other point, just to make it very briefly, is that when my learned friend talks about objective justification, I think there's two slightly separate points. One is objective justification and the other is efficiencies. Efficiencies is very much effects. I showed you paragraph 30(c) of the defence, which is at 828. Technically, I think that is dealing with "efficiencies" and therefore is all about "effects", which is the one which provides all the detail to it.

There's also 30(e) on 829, which talks about objective justification as a separate defence.

Now, so I just make those two points. Beyond that, I think the tribunal -- unless there's anything further you would like assistance on from me -- I think the tribunal has got the points that I wanted to make. Okay.

MR JUSTICE MILES: Right. thank you very much.

Costs applications

Submissions by MR HARRIS

MR HARRIS: Sir, I'm grateful. So, as you know, there are three applications made by the defendants, two for costs themselves and one for a cost budget. Unless you tell me otherwise, I propose to deal with the all but conceded cost budget point first, because it leads to possibly further enquiries. I say that because I'm conscious of the time; the cost applications, properly so-called, to do them justice will take some time and I am alert to the fact that although we would like to prosecute them today, if we

run out of time, they could be done on another occasion. Mr Page also has a cost application on behalf of his intervener client and, at the appropriate moment, you can engage with him about that. So the --

MR JUSTICE MILES: Sorry, I know I don't want to take up time talking about timing, but it's not from anyone's point of view terribly satisfactory to deal with something part-heard, because it will take a bit of time for this tribunal to reconvene, no doubt, and for all of you lot to be available.

Do you think there's a realistic chance of getting through the applications for costs this afternoon?

MR HARRIS: No, I don't think there is, sir. I regret to say I'm conscious --

MR JUSTICE MILES: What do you then say about the idea of it going part-heard? I mean, obviously we're here, so the time is -- we have got some time, but it isn't massively helpful to have a gap.

MR HARRIS: Agreed. Well, the reason I want to begin with the point about the cost budget is because it leads to the possibility for another CMC or hearing in the not-too-distant future in any event. And if the duration of that subsequent hearing were timed to be sufficiently long, then the cost applications can be dealt with then.

What I anticipate is what I'm about to say may involve engagement and then obviously other parties' involvement and I could see that taking some time and then there definitely won't be time to finish off the cost applications and certainly not all of them.

It is conceivable that we might now have a sort of wider debate prompted by my first application about where does this case go and what further hearings. If, for the sake of argument, that only took an hour -- I'm just conscious that it's got quite a few strands to it, and understandably the tribunal may want to explore with all parties what they say about where we go next, and that could take time. It's conceivable if it only took an hour, then we might be able to get through, say, the whole of one of the cost

applications.

But I've spoken to Mr Page for the intervener and, you know, he has some points that he needs to develop in his application and certainly my first application about costs thrown away or wasted costs from the change of expert, it has multiple strands and there are all kinds of -- and that's leaving out of account whether you actually want to look at the schedules because, as you know, technically I'm asking for summary assessment and technically, in opening that kind of an application, unless told otherwise, one would normally actually get out the schedule and start looking at a few of them. So, you can see the --

MR JUSTICE MILES: Right, well let's see how we go on the first one.

MR HOLLANDER: I was just going to say, I mean, I hear what my learned friend says. I'm in a slightly -- well, there is quite a lot to say about costs. But I mean, just picking up what the tribunal raised yesterday about the way forward. I mean, what I'm anxious to do is that we -- it may not be possible to have a way forward today, but of course, nothing has happened, as you know, since 31 July, we've actually lost -- and I don't need to go into it -- six months, effectively.

The suggestion of the tribunal about a preliminary issue as to -- I mean, I think that is quite important because it may need some further engagement after today, and I'm sure we can't decide it today, but I think it might be worth -- just so I tell you our position, we thought about it, it seems to us in principle that might be a good idea. We might need to -- and what I think the tribunal had in mind was avoiding any form of economic evidence in that preliminary issue, which would perhaps rather defeat the purpose.

There is the question of breach of the regulatory obligation --

MR JUSTICE MILES: Right, well, let's come back to that. It's a reason for hearing what has to be said about the cost budget --

MR HOLLANDER: That's fine. That's fine.
MR JUSTICE MILES: (Overspeaking) -- then I think we'll take stock.
MR HARRIS: Yes. I'm most grateful.
MR JUSTICE MILES: Possibly, that may lead to a discussion of the sort of points that Mr Hollander has just adverted to. But let's --
MR HARRIS: Yes, I apprehend it may, and that's why I wanted to start with it.
It's a simple point. As you know, we applied for a cost budget. At the last minute, it was conceded that they would provide one. The last one we have is nearly two years out of date. The only point of dispute about that is when should it be provided, and -- can we just turn up what they say -- they've asked, as I understand it, for 28 days from today, and we say that it should be considerably sooner than that.
We cannot understand, for our part, how a class representative and his legal team and a firm of solicitors needs 28 days to provide evidence of what their cost budget is. If they're properly managing the case, then it must be right at their fingertips. It must be an ongoing process.
It's important for this reason, rather more than just some arid debate about 14 days or 28 -- we do say it should be sooner than 28 -- but because, in our submission, the reason we want it is because we have some very profound concerns about the ongoing management of this case.
One of the key components, as you well know, of a certification or decertification debate is the cost-benefit analysis. Is it a positive outcome for the CR, which would militate in favour of allowing or continuing to allow the case to proceed, or is it negative, which would as a bare minimum militate against either certification in the first place or lead potentially to decertification?
We're in the dark and you're in the dark, but what you do know are the two schedules that I showed you before: the original one for 10 million, 10.4, I think, going up to

16. whatever it was. Big ballooning because of extra additions to the case.

What we have been told since -- this is in the skeleton argument, I don't need to turn up the detail -- is, at least from Dr Davis that, as we understand what he was saying, they may have gone beyond even that budget. We've written quite a few times to say, "Well, come on, how much have you spent? What are you spending on? What is your capital? What capital have you employed?" And up until the skeleton argument we got a few days ago, it was, "We're not telling you. We're not having any of this".

It's allied with another point that arises in many of these cases which we mention in our skeleton, which is the litigation funding agreement. A copy is in the bundle; you don't particularly need to turn it up. But what happens in many of these commercially-funded litigation agreements has happened in this one, which is the funder -- all of this is subject to orders of the tribunal, commission of the tribunal, but the way the LFA is structured is that the funder will seek to get back increasingly high multiples of the amount of capital that the funder has employed in support of the case. So, the longer that the case goes on, the more money that they will get. And of course, they can only ever, subject to the permission of the tribunal, get the money out of what would otherwise go to the class. That's the only pot of money available, because Mr Boyle obviously is not going to be paying the funder.

And so, one of the reasons we want to see the cost budget is the same as many defendants do in many of these cases: the costs are ballooning; the case should have gone to trial a long time ago and it didn't; the cost of going up; we don't know what they are; we haven't been told we're still not going to be told for a while. It affects just generally the cost-benefit analysis, and in particular, we would like to be able to, if necessary, present submissions to the tribunal that, by reference to the LFA, it looks as though this is no longer an appropriate way in which to proceed with this case, because the funder will be getting too much.

Now, these are submissions that are familiar to tribunals of this variety, to the Competition Appeal Tribunal, in these cases. But of course, I can't go any further today with those submissions because we haven't been provided with the budget.

It is at least conceivable that when I do now finally get the budget, we will want to be coming back to you in relatively short order and saying, well, okay, just as the former president of this tribunal said back in one of the CMMs in 2024, there is -- I'm paraphrasing, but the gist of it, and I can find the reference if you need it -- "This case is in intensive care; there's a remarkably high chance that it might be leading to decertification in the summer." That was back in 2024.

Now, I appreciate things can be said, but the instinct -- we share, of course, the instinct of the tribunal then via the former president sitting alone -- was this is looking like a case that's in a real mess; intensive care; it might even have to be decertified. That's what I'm saying now. We want the cost budget; we want it sooner rather than later so that we can come back to this tribunal and we can potentially say, "Look, this is not a case that should any longer be certified".

But it's not limited necessarily to the cost budget and the cost-benefit analysis. Other elements go into this equation -- and they, with great respect we say, need to be rigorously case-managed by this tribunal, given the effluxion of time and the one trial date that's already been missed and the growing budget -- and that is the ongoing suitability or otherwise of Mr Boyle himself.

Mr Boyle, so far as we're aware, is not in court today and was not in court yesterday. We have done our best -- I obviously can't give a categoric assurance and no doubt Mr Hollander will -- but we have checked, so far as we can; he wasn't online following remotely yesterday and we've checked as best we can today and my instructions are that we can't find any record of him being online today either.

Be that as it may, there are some profound questions here about ongoing suitability

which would feed into a potential decertification application. They include: why, oh why are there so many expert reports, some of which have never been admitted and some are now the subject matter of wasted cost applications? Why has the budget been allowed to balloon, and why is it now even higher than when it already ballooned? There may be other matters, and all of these things are the sorts of things that would go into a rigorous case management at a next CMC.

What we apprehend, particularly if we get this cost budget finally, say, 14 days from today instead of 28, is that within 8 to 12 weeks or thereabouts -- the numbers don't quite matter, but a shortish period from today -- we would have another CMC.

Another advantage of that is as follows. I appreciate the tribunal has got a very busy diary, but it is possible at least that the judgment on all of these amendment applications will then be known, and then we'll actually know what the case is. We'll know what's in it and we'll know what's not in it and we'll have also great clarity on what the claimant is allowed to do and what he is not allowed to do. That will be of benefit because at that CMC, we could then have a much more informed debate about things like stages to a first round trial and/or preliminary issues, potentially as well as any decertification application or something similar.

So, what we apprehend is that the way forward is to have another hearing in, say for the sake of argument, three months. We'll have had the budget in good time after today. We can all then liaise about what problems there are, if any, in the normal way, you know, one would have to set this up in interparty correspondence. And if needs be and if so directed, there could be some formal applications. Certainly if there's to be a decertification attempt, that would obviously have to be in a formal state, because that would be the first one.

But happily, whilst I don't expect Mr Hollander agrees with much of what I've just said, we do agree with him that there is some sense if, say there's another hearing in

three months, for the parties inter se to liaise on the other matter that you raise, namely a preliminary issue.

Is it right, is it proper that there should be some sort of preliminary issues on the question of whether or not there is breach, being breach as alleged, of these two agreements? Hitherto we've been using the phrase breach of regulatory environmental conditions, but just to be clear, there are two agreements specifically that are named and allegations that two of them have been breached. It's the TSA, Train Settlement Agreement and the NRC, National Rail Conditions of travel.

But we would need to liaise, not least of all to be most helpful to the tribunal, because normally you would expect if there's to be a preliminary issue that both sides support, that we put forward in good time before the hearing a draft of what we say should be done. We haven't done that yet, but we could if there's a hearing in three months' time.

But the other reason for, you know, putting that off to after interparty correspondence and say three months-ish or thereabouts is that, in our respectful submission, it is relevant to the equation of whether or not you should carve out an issue and go first on a preliminary basis to know what else there is in the case. And of course, we won't know that until you've decided on the amendment applications.

So, that's why I begin with this point. There's a few points that I've made. I'm happy to answer any questions, but I appreciate other parties have points as well about that.

MR JUSTICE MILES: This is really just to educate me, but where you have these funding agreements that are multiple of capital committed, whatever it's called, in really basic terms, does that mean the amount that the funder has actually propped up by that date?

MR HARRIS: In basic terms, yes. If you want to see it, tab 51, page 2039, the amended LFA. For me, that's volume 3. For these purposes, there are some fairly

standard-looking – I mean, obviously the precise details differ –

MR JUSTICE MILES: Yes.

MR HARRIS: -- agreement to agreement, but the conceptual approach is really rather similar to many such cases. If you pick it up at 2051, you'll see –

MR JUSTICE MILES: I think it's in bundle 4. Just give me a moment.

MR HARRIS: Yes. I'm so sorry.

MR JUSTICE MILES: Yes.

MR HARRIS: 2051 is the relevant part. It's section nine under the heading "Receipt and distribution of recoveries". And what happens – as I say, this is all fairly standard in concept: the claimant shall procure, if there's an award, directly into a bank account; hold it on trust for the class members.

"9.3: The Claimant shall seek approval from the Tribunal for the payment of the Claimant's costs, fees and disbursements (including ... Funder's Fee, [ATE, uplifts]) [because these are typically CFAs as well, as you can see] in accordance with this Clause 9."

So, the claimant has agreed, Mr Boyle has agreed with this commercial entity that he shall seek it, subject to your approval, of course. And then what shall he seek? He shall seek the details beneath, ie in accordance with clause 9.

You can see that, under the italicised subheading "Payment of the Funder's Fee [if it's] other than wholly from Undistributed Damages", then there's what, in the jargon, is called the ratchet provisions. So, you have – if the time period for the effluxion of time during the case is only under six months, then you look at "Capital Deployed" from the funder, and you double it. But as you pass more and more time in the case, the funder's fee goes up, and you can see for yourself how it goes up.

You can see that the longer the case lasts, the more the funder's fee is. The funder's fee is what the claimant has already agreed in writing to seek from you, subject your

to your approval. So our point – and this has arisen in plenty of cases to date – is it's relevant to your ongoing assessment about whether this is the type of case that should be authorised to have, at least as a relevant consideration, "Well, how much of the money that may or may not be recovered is going to go actually to the class, and how much is going to go to the funder?"

You can see that under the next subheading, "Payment of the Funder's Fee [...] from Undistributed Damages". There's a slightly different ratchet mechanism and indeed it goes to significantly higher figures.

One of the reasons that we're interested in this, as indeed any defendant would be, but particularly in this case, is because you will have seen, perhaps from Davis 4, subject to the so-called errata sheet to which no permission is even sought. Be that as it may, in Davis, for the first time, to our great shock and surprise, Dr Davis had said that his damages calculation potentially went as low as zero. Then I think it went up to ... was it 374? It was £370-odd million.

Manifestly, that is highly relevant, in our respectful submission, to the ongoing exercise of the tribunal's discretion about whether to allow this case to continue. Potentially, even the other side's expert is now on the very – I think this is the 10th report we've had, or something like that, in this case – but lo and behold, in the 10th and most bulky – supposedly the claimant's entire full case – we learned that it might be as low as zero.

Of course, although Mr Hollander only took you to the uncorrected Davis score, I should draw your attention to, if permitted, the errata sheet, which now changes this again. So this is months and months after 31 July, and I think it's now said, "if corrected", that in fact, the lowest figure – somebody will tell me exactly what the lowest figure is, but it's several tens of millions. But it's not the hundreds and hundreds of millions that was before this tribunal when certification was granted on the back of

Mr Harvey's reports back in June 2020.

So you can immediately see the problem and why I suggest that in, say, three months' time, there's potentially a very live issue here. Even Dr Davis is saying that the damages and the figures just are going to be given to me is either zero, on his actual report, or if he's allowed to correct it months after the event, it's tens of millions. Yet we know that the funding budget, the best part of two years ago, was tens of millions. And if you look at this type of LFA, you can see that -- depending on their capital of employed -- the CR is going to come to you because he's contractually committed to come to you in due course and say, "Well, actually, I want a massive amount of that to pay my funder".

Could be that the class gets nothing at all or tiny amount. It may well be that, in the exercise of your heavy burden of managing these cases, you may say, "Well, that's just not acceptable. That's not what is going to happen. You cannot continue".

So that's why these -- what's the figure in the errata sheet? So that's why I raise these points.

MR JUSTICE MILES: Is there any case where the tribunal is decertified on the basis of a cost-benefit analysis of this type?

MR HARRIS: Not yet, but equally, there's been no case where the former president of the tribunal has said, "This case is in intensive care, and there's a remarkably high chance of decertification in the summer". I'm paraphrasing, I will find you that one, but those are --

MR JUSTICE MILES: I'm asking a specific question about the prospect of that.

MR HARRIS: No, there hasn't been yet. No, there hasn't been yet, and I do accept that I think it's a rule 75 CAT Rules factor. I am not saying that the cost-benefit analysis is the only factor; I am not saying that. But I am saying it can be particularly germane in certain circumstances, and this may well be one of those circumstances.

(Pause)

So, sir, subject to any questions, I'm happy to cede the floor. I'm just looking for the "if corrected", where the lower level of the damages figure has gone to.

MR JUSTICE MILES: Right.

MR HARRIS: But I can happily provide that in due course.

MR JUSTICE MILES: Mr Hollander, do you --

MR HOLLANDER: Yes. The application. The difference between the parties is whether we should have 14 or 28 days. And that's the only issue on the skeletons. My learned friend has, I think, threatened an application for decertification at most, if not all, of the CMCs which have taken place in this case. None of the points he made were foreshadowed in his skeleton, and I don't think it's appropriate for me to respond. We'd like 28 days. (Pause)

MR JUSTICE MILES: We'll order that the cost budget be provided within 14 days. I can't see the reason why not… a proper case management (inaudible).

MR HARRIS: I'm grateful, sir. Just for the sake of completeness, and this is set out in paragraph 60 of our skeleton, which is page 19 of our skeleton, we say for the reasons that I've just given you by reference to the amended LFA, that the cost budget should -- and I'm quoting here from our skeleton:

"[Include] details of the value of the capital committed by the CR's funder to date."

Because otherwise it won't be helpful to the tribunal when we come back on the next occasion, because you won't then be able to ascertain how it relates to the LFA. So --

MR JUSTICE MILES: Is there an objection to that?

MR HOLLANDER: No.

MR JUSTICE MILES: Very well, no objections. We will order the value of the capital committed.

MR HARRIS: I'm grateful. And the reference to the "if the errata sheet is allowed in"

is tab 24, page 841. On further reflection, Dr Davis has said that it's not zero at the bottom end, but he says £40.6 million, and it's not £319 million at the top end, but it's apparently gone up to £333 million. But you can see that on page 841, if you want it.

MR HOLLANDER: Just in terms of "if the errata are allowed in": of course, Dr Davis owes an obligation to the tribunal; if he sees there's an error in his report, he's got to correct it and he'd be in breach of his obligation if he didn't.

MR HARRIS: So it won't surprise you, of course, that Mr Hollander yet again fails to address the fact that this is in breach of the order. Dr Davis was ordered to do this by the 31 July. He hasn't begun to address you as to why he didn't, what the excuse is, anything.

MR JUSTICE MILES: But these are errata.

MR HARRIS: But these are not limited to it.

MR JUSTICE MILES: We may at some point call them back for questions.

MR HARRIS: Yes.

MR JUSTICE MILES: But to the extent that there are errata, they're correcting things, then he must be allowed to do it. To the extent that there are new points, there may be a debate.

MR HARRIS: Yes, well, just --

MR JUSTICE MILES: You haven't asked me to, I'm pleased to say, do a line by line review of that.

MR HARRIS: No, and the --

MR JUSTICE MILES: And which side of the line they fall on.

MR HARRIS: The reason for that, sir, is because there's no application in relation to this errata schedule.

MR JUSTICE MILES: I'm not sure it needs one if there's genuinely errata -- that's the problem.

MR HARRIS: Well, agreed. Agreed, but the reason I haven't addressed you is it's my learned friend, in my submission, to establish before you a reason to allow in new evidence of an expert variety that is not limited to simply typographical or grammatical, or the odd calculation change.

MR JUSTICE MILES: Well, if it is new evidence, it's probably got some force, your submission. If it's not new evidence and it's a --

MR HARRIS: Yes.

MR JUSTICE MILES: -- correction, then I think it has a great deal less force.

MR HARRIS: I accept that, sir, but what I'm saying is, it's not for me to address you on this. This is for Mr Hollander to say, I --

MR JUSTICE MILES: Well, no, because he says it's all errata.

MR HARRIS: Well, can I -- in that -- there are sep --

MR JUSTICE MILES: If there's going to be a debate about this at some point, it will have to be resolved.

MR HARRIS: Yes. Well, there certainly is a debate about this. It will have to be resolved.

MR JUSTICE MILES: Will it be resolved now, or when?

MR HARRIS: Well, I'm in your hands. I mean, I would rather --

MR JUSTICE MILES: We'll have to go through item by item and decide whether it looks like a correction or not.

MR HOLLANDER: If it's going to be suggested that these are not errata, which is the first I've heard of it, then they need to be identified which ones are not. I don't see how that can be done on the hoof. I'm not aware it's ever been suggested before. This is new evidence.

MR HARRIS: So it's in our skeleton, we'll find the reference, but let me give you three examples. I don't want to do it now because if -- we've got limited time, we've got to

decide the way forward. I'd much rather, if there's any extra time, deal with some cost applications, because we say we've been held out of serious amounts of money for a long time.

Let me give you the three examples. It's not just the estimated damages figures that have changed, but there's brand new substantive evidence on the treatment of pass-on, and there's brand new substantive evidence on the treatment of set-off and effects. On no view can they be described as errata. That is new evidence, and there's no attempt has been made to explain to you why that couldn't or wasn't done by the time that you ordered.

The reference to where we've raised this before in writing is in our formal written response to the CR's applications. It's at tab 28, page 943, paragraph 38. We say, in terms, it's not limited to errata, "seeks to introduce new evidence", and we give several examples, some of which I've just given to you. So it's not right that Mr Hollander hasn't been presented with this before.

But, sir, I'm really in your hands now. I mean, I appreciate I raised some other things at other parties may have some things to say about, and the costs are discrete. I would love the opportunity to address you on at least one of them, but I'm in your hands.

MR JUSTICE MILES: Well, is it going to be possible to complete the submissions on one of them, if not both?

MR HARRIS: Well, I think it depends upon how much more engagement the tribunal has with my learned friend about the way forward, whether there should be another hearing, what might happen at it.

If there's to be limited further engagement, then I apprehend that I would be able to get through -- well, one of my cross applications, namely, the one for cost thrown away by the change of expert.

MR JUSTICE MILES: Is that an estimate based on your submissions, or the whole --

MR HARRIS: No, I'm trying to factor in how long I would take, therefore the response, and any short reply. But equally, I'm very conscious -- I mean, it's not for me to talk about Mr Page's client, but he's sat here very patiently. He has applications as well.

MR JUSTICE MILES: How long do you think yours is going to take?

MR PAGE: Good afternoon, members of the tribunal, I'm Mr Page for the transcript. In terms of the application of the costs thrown away with the resignation of Mr Harvey, my working assumption is that I'll go second on that. Our costs are really very low indeed. I won't need more than five minutes, frankly, whether that a self-standing point or whether I come after Mr Harris.

The second application is rather more substantial, because that looks at our role in the expert-led requests. Now, Mr Doran and Professor Neuberger have been present for a number of the hearings where that process evolved. But, you, sir, and indeed me, were not present at those hearings, and it will be necessary, I think, to go through the narrative of that (inaudible).

Doing the best I can, I think I could crunch through my submissions on that application in about 45 minutes to an hour, but Mr Hollander will want to respond to that, not least because the quantum involved now have about £800,000, a bit more than that.

MR JUSTICE MILES: Indeed.

MR PAGE: So, there will need some appropriate air time for that application. But the first one, very short, very strict.

MR JUSTICE MILES: Right. Okay.

MR HOLLANDER: Well, I thought we'd finished the whole thing yesterday, so it shows how much I know. Sorry. I would invite the tribunal at least to have a general discussion about the way forward before we finish today. In other words, where are we going to in terms of moving forward? That may or may not take very long, but I would have thought that's perhaps the most important because, as you know,

I mean --

MR JUSTICE MILES: How long is that, do you anticipate?

MR HOLLANDER: I wouldn't anticipate terribly long. I mean, the tribunal will have a view of its own. But I would have thought that's the most important thing to get through this afternoon. (Pause)

Housekeeping

MR JUSTICE MILES: We anticipate that it would be a good idea to discuss the way forward. Why don't we do that first and see how long that takes, and then see how much time is left. I mean, from the tribunal's point of view, there is obviously a concern with the length of time that these proceedings are taking. We think there is a need to inject a degree more urgency into them.

What we would want is, first of all, engagement on the question we raised about whether there's room for preliminary issues. Secondly, some sort of road map from here down to trial. We have in mind -- at the moment albeit, it will have to be subject to checking and so forth -- it may be possible to accommodate a trial very early next year. That's to say January next year. So we'll be able to accommodate that.

It's always useful to have a target date when trying to work out what steps need to be taken and when. So we would want the proposals of the parties. In fact, we'd obviously want agreement as far as possible, but we would resolve any differences as to timetable down to trial, but also the possible framing of preliminary issues.

Does anyone want to address tribunal on that at the moment?

MR HARRIS: So we're content that we actively take away, but preferably because there's another CMC or hearing, you know, within say a few months, at which we can come back and make some decisions on this, post the ruling on amendments. But we would be very happy to liaise with all the other parties about a possible PI. Some of that thinking would have to be, well, if that happens, what would the window to

a January trial look like? Maybe the PI trial, and there'll be other contingencies. We would be very happy to do that. We don't feel the need to be directed to that, but it would very much help. It's because there's a hearing coming up so everybody's mind is focused.

MR JUSTICE MILES: I think that would be a bare minimum.

MR HARRIS: Yes.

MR JUSTICE MILES: That there would have to be another hearing.

MR HARRIS: Sir, there's agreement, at least on the front bench, subject to finishing off this discussion; if it helps that Mr Page's application on a discrete aspect of costs proceed this afternoon, hopefully with a view to being done altogether.

MR JUSTICE MILES: Right.

MR HARRIS: My applications for costs could then be postponed to this next hearing that we're anticipating.

MR JUSTICE MILES: That's helpful. Thank you.

MR HOLLANDER: I hadn't anticipated that the tribunal will be able to give us a trial date that early. That's very helpful. That.

MR JUSTICE MILES: I'd say it's not (overspeaking).

MR HOLLANDER: No, no, no. No one is binding you to it.

MR JUSTICE MILES: It's something we --

MR HOLLANDER: We understand.

MR JUSTICE MILES: -- think should be possible.

MR HOLLANDER: I mean, that I think raises slightly different issues from what I was anticipating because if that is the case then everyone needs to get on with this. And, I mean, I don't know what my learned friend would say about how long he needs to produce his expert evidence, his factual and expert evidence, because, I mean, I don't know how far he has got on it over the period since 31 July, given what the

tribunal originally had said in October, which envisaged that, I think it envisaged that, they would be working on it over the long vac last year. If I can find the bit in the transcript, in the judgment in --

MR JUSTICE MILES: I think I saw that, yes.

MR HOLLANDER: So, I mean, I assume that my learned friend has got a long way towards finishing it and therefore it could be ordered in a relatively short space of time. But he may tell you otherwise. We'll see.

So, I think that does affect things quite significantly, because going off, as he suggests, for three months isn't going to work if we're having a trial early next year.

Now, in principle, we had actually thought that there was at least a possible scope for the preliminary issue that was suggested. I think it would need to cover not merely regulatory breach but also the issue about government compulsion, if I can put it broadly that way. So, what's being said is that even if it's a regulatory breach, then we had to do what the Secretary of State told us. I think at the very least, it's quite hard to do one without the other as well.

As I understood what the tribunal were suggesting, the whole purpose of it would be to avoid having economists, which is always the big expense in these matters. So, I mean, there is some scope for that. On the other hand, if a trial date is available early next year, then in a sense, the sooner we get on with seeing the defendant's evidence. I mean, if we leave that until after a preliminary issue, for example, then that's going to be quite a long delay. We're not going to have a trial until much, much later.

So, I mean, I think that indication perhaps slightly changes the balance from where we had -- I mean, we were going to come to you this afternoon and say, we think in principle, if you can include that, it might be a good idea, but if we can have a trial -- then the question is what a trial includes anyway, if there is a trial.

My learned friend was saying that he'd understood that quantum would be separate. I'm not sure that's right. I don't want to get into a fight about it. But I think we had understood that originally there was going to be a preliminary issue.

So right at the start, Mr Harvey was the -- basically, Mr Harvey, there was a suggestion of a two split. Dr Davis then wrote a letter to the tribunal or to us, copy to the tribunal, saying that actually he thinks there's too much overlap for that to be a sensible alteration. And I'm not sure that that had ever really been grappled with in terms of where we were going. So, that needs to be resolved one way or the other, to put it neutrally.

So, I'm not sure any of that is -- but I think if there is a possibility of a trial early next year, then I think things need to be moving in terms, and it would be very helpful to hear how long my learned friend needs for his evidence, given that he's been working on it since 31 July.

MR JUSTICE MILES: Yes, I mean, it's probably better for me to say rather than that's when the trial will take place. Probably better to say that we think it should be possible to accommodate it from about then, because I think that's one of the questions that would have to be -- that would have to be --

MR HOLLANDER: That would be really helpful.

MR JUSTICE MILES: -- resolved, having heard what the parties say. And I can see that there may be arguments that part of the point of having a preliminary issue would be to reduce the amount of evidence that needs to be served and so on, but --

MR HOLLANDER: That then puts off the -- I mean, I understand the advantages of it.

MR JUSTICE MILES: Two things do slightly go hand in hand. I can see that or at least affect one another. Yes. All right.

MR HOLLANDER: But the next question, I think, and it's all sort of slightly related, is how soon we can have another CMC. And, I mean, it may -- well a matter for the

tribunal, if there are problems in having this tribunal in its current form. I mean, there is a possibility of the chairman doing a CMC alone, but you may or may not find that an attractive possibility.

MR JUSTICE MILES: I suspect that the -- I don't know, but I suspect that the problem may rather more be my availability.

MR HOLLANDER: All right. Well, so I just say --

MR JUSTICE MILES: We'll see.

MR HARRIS: Sir, can I show you, there are existing directions for a split trial. Mr Hollander seems to have overlooked them at tab 34, page 1436. And that's why I said, I think, the current proposal is to have a first stage trial that doesn't include quantum. And there it is set out in writing.

But I do, of course, accept that ultimately how the case is driven forward now is in the hands of this constitution of the tribunal. And what I was saying before, and I hope is sensible, is that the parties need to liaise and there will be lots of contingencies, won't there? It will be if the January trial is the PI, then the directions to it should be this. If the January trial is the full thing, whether liability or liability and quantum, then it'll need to be this amount of time and the trial directions leading to it. So, there'll have to be, in the usual way, there'll have to be contingent proposals debated between the parties. And then we'll have to come to you for some decisions.

MR JUSTICE MILES: Yes. I think that our initial reaction is that the parties should be communicating, setting out their positions on all of these things, liaising as far as possible, seeing what can be agreed and not agreed, and that there should be another hearing.

I think three months is probably, subject to availability, too long.

MR HARRIS: Yes, that was a random number.

MR JUSTICE MILES: And I think if possible, it should be rather sooner than that. On

the other hand, if there are still going to be a fairly chunky application costs in the offing, it will have to be a reasonably chunky hearing --

MR HARRIS: One of the reasons.

MR JUSTICE MILES: -- which affects the timing of any further CMC.

MR HOLLANDER: Yes, the only thing I'd say about -- I'm so sorry.

MR HARRIS: I'm so sorry. One of the reasons, trying to be as diplomatic as possible, I suggested three rather than say one, is because we would need, with respect, the amendments ruling and I'm conscious that there's a lot going on with the tribunal, and then we need a bit of time to digest it and liaise about what the -- so that's why I suggested three rather than, say, two or one.

MR HOLLANDER: The only thing I'll say, I had expected to come to deal with both the costs issues, all the cost issues today, and I'm perfectly content to do that whenever, but the cost issues are not urgent, whereas actually other issues about the way forward is urgent.

And as I said, I don't want to appear to be trying to put something off that other people want to deal with. But, there is no reason why a costs issue, that part of it, needs to be heard with any urgency.

If that involves having a hearing and saying, we're not going to deal with the cost issues at this hearing, you can deal with it next time when we've got more time, then I would have thought that was a possibility.

MR HARRIS: It won't surprise you that we strongly resist that. This is an application for costs, especially the ones thrown away that has already been made once and specifically was adjourned by the former president to today. And there is a prejudice to us of being kept out of the money together with -- I appreciate the interest can to some extent ameliorate that -- but there's another message here.

One of the reasons we're very keen, if I'm successful in the cost application, is because

it sends a message. It sends a very clear message to this class representative who you've heard me submit, I accept, it's not agreed, but you heard me submit continually mismanages the case. And it's about time, in our respectful submission, that that is recognised with a cost order now, not least of all so that the funder appreciates that the mismanagement of the claim by the party it is funding is costing cold, hard cash to this funder as we go along.

So, I do respectfully say that at the next hearing, it is essential that enough time is set aside for the cost applications.

MR JUSTICE MILES: Well, we'll think about that. Thank you.

MR HARRIS: I'm grateful.

MR JUSTICE MILES: Right. It's now about 3.00. I think what we'll do now so as not to waste time which is available is to hear Mr Page's application. But that's on the basis that it can be dealt with today. Do you think that's realistic?

MR PAGE: I would hope so. As I was mentioning earlier, famous last words with counsel time estimates, but I think about 45 minutes and Mr Hollander thinks that he should be between 30 and 45 minutes in response. So, we're touch and go, and we'll see what (inaudible) reply submissions, but we'll see how we --

MR JUSTICE MILES: Right, we're not going to get through it today. So, that's a strong signal.

MR PAGE: Would the tribunal like to take a five minute break now for the transcriber?

MR JUSTICE MILES: Yes, and then you get a free (inaudible).

(3.00 pm)

(A short break)

(3.08 pm)

Costs applications (continued)

Submissions by MR PAGE

MR PAGE: So, this is the Secretary of State application for costs of the expert-led disclosure process. For your reference, the application itself is at tab 20; Mr Hennah's witness statement is at tab 21; our schedule of costs is at tab 22 and the draft order at tab 23. I'm not going to turn any of those up at this stage.

The punchline of where I'm getting to is that Dr Davis issued 41 pages of requests to my client. These were grouped into ten themes and further requests were made jointly, both to my client and GTR. Pursuant to those requests, we provided 19,984 documents. Mr Davis welcomed this level of disclosure, described it to the tribunal as helpful, but he then only cited 19 of those documents in his report. Also in his report, he reached conclusions which demonstrate that almost all of the documents were not necessary whatsoever and that conclusion could have been reached without the documents having been requested in the first place.

We say that something clearly went wrong in this process. We were told to open our cupboards for Dr Davis; we did so. Mr Davis was told in terms that he was being given an extraordinary level of power over my client and that he should use that power very carefully indeed. But he did not do that. Instead, he deployed requests which the former president described as being akin to a blunderbuss.

In his response to this tribunal in his witness statement, he has, on my reading of it, attempted to put some blame for what went wrong with the tribunal itself. He is wrong on a series of fronts in blaming the tribunal, not least that the president was clear and consistent in his direction and expectations from the outset; and secondly, that it was for the class representative to come back to this tribunal and ask for variation of directions or indeed go upwards to the Court of Appeal and ask them to look again if they had principled objections to the process.

What I propose to do in the time available to me is to look briefly at the orders and the transcripts, look even more briefly at the law and then look at some of the failures of

the process here. By the time I get to the third aspect, I hope, again, I can cut down on that, given what we might pick up on the way through the orders and the transcripts. So, dealing with the orders first of all, we don't need to get all of these up, but the original CPO order is 5 October 2022, and that's relevant from the perspective of my client, as that is when we become an intervener. It's tab 33, page 1429 of the bundle; you don't need to look it up because it simply says, "We become the intervener on terms to be confirmed in due course".

Then, just over a week later, on 14 October 2022, we have the October 2022 CMC, and we'll look in due course at the transcript. No order was sealed following that hearing, but there was a draft CMC order that was in an advanced state of preparedness between the parties before we had Mr Harvey's withdrawal, the process being set out in that order. There were ongoing debates, I won't take it too far, but the process, which was common ground between the parties as far as I understand it, that there would first of all be voluntary disclosure by GTR (audio distortion) voluntary disclosure by the Secretary of State, if so advised, and no fixed deadline for us to provide that voluntary disclosure, but there was an aspiration to provide it before the February 2023 CMC.

Third, there would be then effectively open season for Dr Davis to make expert-led requests or ELRs for documents in addition to the voluntary disclosure. Then, there would be engagement by GTR with those expert-led requests.

There was no reference in the draft CMC order to the Secretary of State being involved in those ELRs, and we'll see that that flows through from the dialogue in the October 2022 transcript. There was a provision in that draft CMC order for the consideration of third-party disclosure at the February 2023 CMC and that was included in that (audio distortion) to the Secretary of State.

What happened instead is we had Mr Harvey's withdrawal, effectively a wholesale

abandonment of the process. And there was a judgment at the end of the March 2023 CMC, this is on 17 March 23, at which the tribunal stayed the proceedings. There were discussions there about whether or not some progress could be made because Dr Davis was getting up to speed with the matter, but the tribunal concluded that it was "not prepared to manage litigation on a wing and a prayer". That, I should say, is a direct quote from page 1542 of the bundle.

The matter came substantively before the tribunal again in November 2023, and the order there, it is worth looking at briefly. This is at tab 39, page 1657.

MR JUSTICE MILES: Yes.

MR PAGE: Sir, you will have seen, of course, a lot of discussion about paragraph 1 in the course of the past few days about the class representative submitting his case in full. Then, after that paragraph, we then have the introduction of the expert-led request process. So it's paragraph 2: the general obligation on the parties to liaise cooperatively effectively throughout the proceedings and meetings between the experts, and then reference to disclosure requests.

The concept behind this was that there would be a series of expert meetings attended by my client's factual witnesses to discuss the ELRs with a clear purpose that it was providing the disclosure sought by the class representative in the disclosure request.

So, the orders set out the basic timetable and very basic parameters of the process. But the detail as to what properly was being expected of the parties and of my client in terms of cooperating with requests all comes from the transcripts.

Now, there's one transcript that I can happily save you from looking at, which is the October 2022 transcript. That clearly is not in your bundle, but it is relevant, just to give you some references to that hearing. Mr Doran was present on that occasion. It's transcript page 52, lines 17 to 18. There was a discussion at that time with the president saying that what he wanted was for the experts to say what they need and

how they're going to prove the case, and that he wanted the defendant's and the intervener's cupboards to be open, to have a look in them in terms of disclosure, and that is going to be important to operate things. That's on page 53 of that transcript.

The central question from the president was, what matters is what the experts say they need to deal with a point. This ought to be determinative, he said. So, that all happens pages 52 to 56 of the transcript. Repeated focus by the president on what the experts needed in order to prepare their reports.

Counsel for the Secretary of State at that hearing provided some brief comments on page 55 of the transcript and effectively put forward a note of caution saying that we had not envisaged becoming involved in disclosure, and we certainly did not want to run large-scale searches. The tribunal agreed with that submission expressly and agreed that we should be minimally involved. But said that my client should take a cooperative stance so that disclosure could be provided quickly. All the focus in terms of the substantive discussions was on the efficiency of production. So, in effect, if there were a set of documents that that both GTR and my client had, but that we could access more readily, then the discussion was, well, if it's easier for the Secretary of State to provide them, then we should provide them. We shouldn't stand on ceremony.

So that was where matters sat at the end of the October 2022 CMC. We then roll forward a year to the October 2023 CMC and this is in your bundle, and I would ask you to turn it up, please. Tab 7, at 159 (Audio distortion).

Before we get into it, in case the tribunal is so minded, if it did want to have a look back at the transcripts for the October 2022 CMC, that is exhibited to Mr Hennah's first witness statement. It starts at JH 1, page 4, and is electronically available to the tribunal in that file.

So, the October 2023 CMC: the discussion on disclosure happened entirely in the

context of this sequential process of setting out of cases. There are a number of passages I'd like to just to take you through, which are relevant for the purpose of my application.

The first is at page 1553, lines 6 to 9, where the president in his opening remarks commented that, on the issue of disclosure, because the tribunal wanted all evidence in its final form from the class representative, the tribunal stated that it would afford every assistance to the CR, including in regard to disclosure from the defendants, which would be expert-led to enable this to be done. Then, as part of the discussion with counsel that followed, turning forward to page 1556, please, we start then to look at the substance of what those requests should be.

MR JUSTICE MILES: Sorry, page?

MR PAGE: Page 1556, which should be internal page 8 of the transcript.

MR JUSTICE MILES: Yes.

MR PAGE: Lines 22 to 26, you see there a reference to the defendant being told to provide:

" ... material that you need which it is either agreed should be provided or which, if it isn't agreed, is dealt with at ideally a remote hearing simply in front of me, at which one can argue about what should or should not be provided."

Turning on to page 1562, internal page 14, lines 16 to 24. You should see there a comment from the president starting, "The economist says 'In order to do my job, I need this data'." Then he goes on to describe the data and then says at line 20:

"We are not going to have a process where the listed issues are framed by reference to the pleadings and by the lawyers. Instead, it will be Dr Davis saying 'I need this stuff or it would be desirable to have this stuff from the other side' and then there will be a debate as to how it is produced."

Over the page on internal page 15, page 1563 of your bundle and lines 17 to 19.

There, the president clarifies the issue in fairly stark terms and says:

"I think it is best to see this as a process that has no disclosure at all in the traditional sense. What it has is a process where the expert is saying, 'I need this to produce what I'm being told to produce by the end of February next year'."

Now, in the course of the CMC, the deadline was pushed back by some months and that (inaudible) what the main parties have been saying in this hearing.

Turning onwards to page 1572, internal page 24, lines 8 to 11, the president states:

"That's why we are saying it's not quite open season because we are going to control you [Mr Hollander] quite tightly, but Mr Harris is obliged to provide whatever stuff your expert needs to enable your expert to do the job that he is supposed to do on his own."

Now, turning onwards to 1577, internal page 29 of the transcript of this. The full passage is lines 1 to 12, but lines 1 to 6 introduces the point and the tribunal president states from line 6:

"[This is] what I mean by expert-led disclosure. I mean Dr Davis is put in the driving seat for a period of time. Now I suggested end of February. That may be too soon. That's a matter on which we will certainly be led by Dr Davis's views, but he is forced at a very early stage to articulate what he needs to make your case and that will be all kinds of material. Whether it be disclosure, factual evidence of another sort or supportive expert evidence, that's all articulated by him, but because you are the claimants, that's why we are handing that power and responsibility to him."

MR JUSTICE MILES: Yes.

MR PAGE: And turning forward then to 1587 and the submissions from Ms Howard KC on behalf of the Secretary of State, clarifying my client's role in this process. You'll see that her submissions start at line 11 and at line 13 -- she does manage to get 15 words in before the first interruption. Then we have at lines 15 through to 18, and the clarification from the president that, again:

"[Dr Davis is being given] the power and the burden. He is articulating what he needs. Doubtless he will be able to differentiate between that which is necessary and that which is desirable and that which is clearly fluff that, if it can be produced, [he] would like to have."

That discussion in terms of the hierarchy of desirability of documents or necessity of documents led up to a point to the bottom of that page, in the middle of the next section, concerning then what the tribunal would do and where it would draw the line, which is going to be on the question of necessity.

It explains that at lines 24 to 26:

"Generally speaking given that he is an expert with all the obligations that that entails, what Dr Davis says he needs he is likely to get, subject to the usual proportionality questions of, you know, how much it's going to cost."

MR JUSTICE MILES: Yes.

MR PAGE: Over the page, towards the bottom of page 1588, starting line 19 through to the end, we have a further statement of the principle by the president:

"What we would like to do is go to the person who bears the burden of pulling together the evidence, [and that's Davis], and saying "What do you need?" and attaching considerable weight to what they say, partly because they are bearing the brunt and partly because they are the subject to the obligation to the Tribunal to assist it in trying the case. Doubtless it would be helpful in that process to have not a legal pushback but an economist pushback."

So pausing there. Very much a case through the tenor of all of these comments that if there's going to be an objection, then so long as Dr Davis was saying, "I need this information", then the president is indicating that he would assume all factors in favour of Dr Davis, save where there were very major proportionality issues.

Of course, proportionality, in a case that perhaps north of £400 million, as certainly is

then committed, it would need to be a very considerable exercise indeed if that was going to trump the provision of a document that an expert is saying, "I need this in order to produce my report".

We do then hear further from Ms Howard briefly at page 1597, line 21. This is relevant only because it was there that the secretary of state put down a very small marker at that stage about costs, recognising that we are in a slightly unusual position as an intervener in this case, but nonetheless, if we're going to become involved, we may be looking for our costs.

Sir, I'm being asked to draw your attention to the next passage. So there was a, well, a marker put down by Ms Howard and then a marker put down by the president himself in response to that. Page 1598 through to 99, I'd like your attention to be drawn to.

Pausing there before I go on. Obviously as intervener, we have an interest in these proceedings -- hence we are intervening -- but our interest is both broad and narrow in the sense that: it's broad for the wider implications of these proceedings, potentially; and narrow in terms of the potential economic interest in the outcome of the proceedings. But, we are not a defendant, there's no relief is sought from us. And we are, for the purposes of disclosure, a third party. (Pause)

The last reference then, in this transcript is at page 1600.

MR JUSTICE MILES: I think the point the president was making in that passage is that although you are an intervener, you're quite unusual as being an intervener--

MR PAGE: That is fair.

MR JUSTICE MILES: Because of the extent of the potential financial interest in the outcome. One thing that's been going through my mind is that even if the general rule about interveners is costs neither way. I mean, would you, at the end of this case if the case was unsuccessful, be looking for your costs of the action?

MR PAGE: But I don't think I can fully commit myself on that either way standing here right now, but I accept that it is a fair question from the tribunal. What I can say is that there is no general costs shifting principle that works either in my favour or against my favour. So we have been granted permission to intervene in these proceedings on a strictly limited basis; I'm not part of the amendment debate earlier, and we don't seek to interfere in the broad case management of it, and in that sense, we take the case as we find it. But there are clearly limit to that principle, and that can work in all sorts of ways.

So if, for example, we did something that caused a wholesale abandonment of the directions, then doubtless the active parties would look to us for the cost consequences of that. Mr Harvey's resignation is simply the inverse of that situation. Similarly, for the documents which we voluntarily disclose to the tribunal in accordance with the October 2023 order, there would be no automaticity that we are entitled to our costs of that and indeed our costs of coming along and attending for the main trial. One would have to see as to what happens exactly at the main trial and the extent to which we have become a combatant rather than an amicus, before the tribunal would begin to want to engage with the question of whether or not we should be either entitled to our costs or indeed become subject to some sort of direct order.

So all of that is a question for the future, but on the question of disclosure, because we're not part of the general cost shifting principle, I'm asking for our cost on two bases: one is that we are a third party in the Norwich Pharmacal sense of the word, when it comes to disclosure. The focus on necessity from the present is all driven towards that concept, but also that the process, insofar as it was against my client, was of an order of magnitude that must sound in costs, because 19 out of 19,000 documents, something went wrong.

MR JUSTICE MILES: So is that a submission that what happened was unreasonable?

MR PAGE: Yes. Well, and I think, in fact -- I don't think I need to show unreasonableness. It's unnecessary. As in, not necessary. Anything which falls short of that is a process whereby the burden on Dr Davis was not discharged in accordance with what he was required to do, and that should properly sound in costs. And that's a combat point aside from my primary submission, which is an automatic entitlement, or getting close to an automatic entitlement, under Norwich Pharmacal (inaudible).

MR JUSTICE MILES: So that's a sort of generic submission that whenever you have someone in the position of your client who is then directed to give disclosure, they should get their costs of doing it. Is that a generic submission?

MR PAGE: I --

MR JUSTICE MILES: You put it on the basis of a principle, so I'm assuming that it is a principle that applies to more cases than just this one.

MR PAGE: Well, I don't think I need to go quite so far and say it applies universally.

MR JUSTICE MILES: No, but is it a general rule or something of that kind of nature?

MR PAGE: Certainly there is no obligation on us to be subject to the normal disclosure rules in this tribunal; we don't have adverse documents in the same way that other parties do; there's nothing alleged against us. But where we come before the tribunal and we ask to intervene and we give them permission to do so, and the tribunal then at a future hearing says, right now we want some documents from you. We've given what we wanted to give. We've told the tribunal we hadn't intended to anything more than that. So anything further is effectively an order on us from the court and in the ordinary way, as part of the equitable jurisdiction that anyone would see in the High Court, there is a cost consequence which flows from that. Whether it extends to all four corners against every intervener, I don't need the debate.

MR JUSTICE MILES: No, but you say it's a -- if you like -- a general principle.

MR PAGE: Yes.

MR JUSTICE MILES: A general rule.

MR PAGE: Yes. So Mr Hollander would need to persuade you that that should not apply here; that we are so actively opposed to what is going on that in no sense should we be taken as a third party.

MR JUSTICE MILES: Were you actually ordered to do it? I mean, you've taken me to those various bits where it happened that you were represented. I haven't quite worked out from that whether the tribunal was actually telling you had to do it.

MR PAGE: Well --

MR JUSTICE MILES: "You", as opposed to the defendant.

MR PAGE: Yes. So in this process we do have a direct statement that our factual witnesses must attend.

MR JUSTICE MILES: Yes.

MR PAGE: So we are told we have to do it.

MR JUSTICE MILES: Yes.

MR PAGE: If, sir, you're looking for some language in an order, then I'm not able to show that to you, but that's not because this was done on an unusually consensual basis, rather that was the preferred approach of the former president.

The litigants who come before this tribunal are -- I suggest -- well, I'm used to the concept that things said from the bench have standing and must be followed, particularly when one has a tribunal that one can expect to see again at the next hearing with the same constitution.

Indeed, we have a number -- I haven't taken you through them in these transcripts -- but we have repeated references from the former president that he did not propose to make a formal order in respect of this, and that these were all case management expectations for him. But they carried the weight of orders in that it's a judge of the High Court telling us to do something. I think tribunal could probably

expect the department to listen to that.

MR JUSTICE MILES: Yes.

MR PAGE: So I think I lifted my eyes from the page when I was at page 1597 to 1598. The last one from this transcript is page 1600, and lines 19 to 24.

PROFESSOR NEUBERGER: I'm so sorry, what page.

MR PAGE: Oh, 1600.

PROFESSOR NEUBERGER: Thank you. Sorry.

MR PAGE: Internal page 52, lines 19 to 24. The president states:

"What we want is Dr Davis to think 'How am I going to do this? I'm going to be in a witness box in a year, 18 months, two years' time. I'm going to have to defend the report. How do I do that? What materials do I need in order to do it?' We are proposing not a one process of disclosure. We are saying "Start writing. Work out what it is you need. Work it out [from] whom you need it and, subject to questions of proportionality, this Tribunal will help'."

So it couldn't have been clearer by the end of that hearing as to what the task was for Dr Davis going forwards. And there was ...

After then, there was proper engagement by all parties, not least the class representatives, to try and put that into effect. We engaged with it in good faith that Dr Davis was doing what he had been told to do. We saw that in that final quote, the critical part of that task was forethought being given to the content of the requests before the documents were being asked for. That's the only way you can then properly assess whether or not there is need.

So just to take you forward then on the chronology. I'm taking you through the October 2023 CMC, Dr Davis's requests, the 41 page document, was issued on 17 November 2023, and then the first meeting was on the 29 November 2023. Just for your reference, but I need not take you there now, Dr Davis's requests are at

a tab 5 of your bundle.

Now, at those meetings, the initial meeting --

MR JUSTICE MILES: Well, we better just glance at that. (Several inaudible words) trying to deal with it. But we better just remind ourselves (inaudible).

MR PAGE: As you're there, it might be useful just to look at -- if you're looking at any particular requests -- the ones which ended up causing us the most amount of expenditure are at pages 183 onwards. (Pause)

Request c, forgive me, at page 174 of the CMC bundle. "Section IV.E. Strength of actual or potential competition" for the market. We can see there two requests to GTR. Over the page, paragraph 33, a joint request to GTR and the department. Again, the same at paragraph 34. Paragraph 35 is asking directly from my client what its assessment was of the franchise competition, back in 2014.

MR JUSTICE MILES: Yes.

MR PAGE: So as I say, the first few meetings were attended by employees of the department; they report back concerns that Dr Davis might not actually understand -- I don't mean that pejoratively -- the nature of the relationships and the legal realities at play in the franchise and what it is that GTR had contracted to do. And indeed, what information that the department might have available to it as part of its oversight of the process.

There was only discussion about an Annie Harris, who's a lawyer at Eversheds, been working pretty much exclusively in this field for 20 years for the department, to go and attend the meetings. She's, I think I'm right in saying she's not an (inaudible) lawyer, at all, and her intention of attending was to go in and effectively run some education, in the broadest sense of the word, to Dr Davis about the process and our regulatory environment.

A proposal was put forward to Maitland-Walker, who rejected that on two occasions,

on the basis of the meetings should be free from lawyers.

We then roll forward to the first mini CMC in March 2024, and the president asked Ms Harris to attend that CMC and heard directly from her at the CMC. In parallel to that whole process, we probably (inaudible) right here, as part of the chronology, to mention a letter from Freshfields to Maitland Walker of 10 January 2024. That is at page 2153 of your bundle. You need not turn it up. But essentially that letter reminded Maitland Walker that Dr Davis's requests need to be focused on documents he genuinely, genuinely required for the purposes of this analysis.

So, in that sense, everyone was singing from the same hymn sheet as to what should be sought.

The 7 March mini CMC transcript is at tab 40, page 1660.

MR JUSTICE MILES: Sorry, tab 40, page --

MR PAGE: 1660.

MR JUSTICE MILES: Yes.

MR PAGE: Again, if I may, I'll canter through that. So, we have in this CMC, now, a direct dialogue between the president and Dr Davis. At page 1662.

MR JUSTICE MILES: So, this isn't attended by your clients; is that right?

MR PAGE: This is attended by -- yes, it is attended by representatives but we don't appear on the front page of the transcript.

MR JUSTICE MILES: Right. Okay.

MR PAGE: We did attend, yes. And we'll see, actually, some brief comment from Ms Howard towards the end. So, page 1662, a question from the president, line 20:

"Question: [Dr Davis] what do you need specifically?

Line 22:

"Question: Give me one thing that you need.

And there's some discussion about that and an attempt to articulate it.

Turning through then to page 1666. Internal page 7. Apologies, sir, for cantering through -- I'm conscious I said to be 45 minutes and I'm dangerously close to that already.

Page 1666, lines 6 through to 12 with a short stop off at line 2, the president stating he's "not very interested in the volume [of documents], that's not the point".

"What I want is a situation" says at line 6 onwards:

"... is a situation, where instead of creating requests which are met with responses saying: we don't quite have this, [he wants] a technical debate about [what's] available [and] what isn't."

It needs to be a focus on what actually needs to be proved and that's why the president went on to explain, and that's why he'd asked the lawyers to step back.

Then we have the discussion involving or relating to Ms Harris at page 1668, line 7 and a straightforward, direct question to Dr Davis at line 16/17 from the president saying:

"Question: Dr Davis, do you, as an economist, want anything from the intervener or is their material completely irrelevant to your work?

He replied, "No, absolutely, we certainly do want ..."

"Question: It is relevant? You think they've got material you want to see?

And his answer, "It is relevant, undoubtedly".

Bottom of the page.

"Question: So the answer is yes, you want something from the intervener?

You can then turn forward to 1671, lines 16 to 18. This is now the president addressing Ms Harris -- Ms Harris, not Mr Harris he was then at that point --

"Question: Just to be clear, it's obvious from what Dr Davis has said that he regards the intervener as holding documents that he is interested in.

Ms Harris said what she could hopefully do if she were permitted to attend the

meetings.

Over the page at 1672, lines 13 to 14, Ms Harris states:

"Answer: I think the department stands ready to collaborate and help with the process, as was previously said.

Over the page at 1673, we then have, here, a direct comment on what is known as the "Award database". Thankfully, the documents are linked to the award of the franchise and it goes back to those three requests, I showed you a moment ago. Dr Davis brings this up in the discussion. It's mentioned at line 8 on page 1673. It says:

"Answer: [We've had] limited disclosure, 265 documents [so far, pausing there, already more than ten times that he actually cited in his report], with the exception of what now what looks like -- I understand is a set of 20,000 documents specifically related to competition for the franchise. We are expecting these documents to be useful and helpful for the exercise.

So, he welcomes the provision of this quantity of documents from my client.

We then have a comment from the president at the bottom and:

"Question: [His] impression [he states at lines 24 to 26] is that it's the class representative that has a lack of focus in how to take this forward and I'm concerned to address that.

And then we have a passage, which is heavily marked up on 1674, lines 9 through to 22 which is set out in black and white. So for Dr Davis and the obligation on my client.

So, I think this addresses your point earlier about, again, what is being asked of my client.

Dr Davis had to articulate:

"Question: ... during the course of that week what he needs from the defendants and the interveners and I will expect the interveners and the defendants to be saying what

they are doing to progress those requests.

"I'm not going to be very patient with general requests."

Line 18:

"What I want, Dr Davis, from you, is specific things which say: I need this for this reason because if I don't have this, I can't do the following exercise. I have no idea what exercise you are contemplating. I assume you do because we certified on the basis of your expert report.

"So you are the guy in control here. You identify what you need and we'll see what there is. I'm quite sure you won't get everything you do need, we will have to work our work-around that and that's why we have these conversations."

And the president describes his role at that stage as being a babysitter and that he's rather concerned that he's been brought into that role.

Over the page, 1675, in the middle of that page --

For completeness, I should say that line 10, the president starts off by commenting that he's "not in the business of blame allocation" before then saying at lines 14 to 16 that Dr Davis was:

"... being remarkably unspecific about the requests and the defendants and the interveners are trying to respond but they don't know what to give you."

That's a quote there from lines 14 to 16.

Two more short passages from this transcript. Page 1679. Here we get the famous blunder bus quote:

"The one thing I'm not interested in is: [the president says at line 15] we are not providing it, [we being the defendant, intervener] because we don't want to and I'm not reading that, Mr Johnson, to be clear, from either the intervener or the defendants, what I'm reading at the moment is a sort of shotgun blunder bus approach from the class representative which isn't helping you help them and that's what we are going to

change and we will see how we go."

Finally, sir, page 1693. We have a distinction being drawn again by the president between requests that are based on documents that Dr Davis would like to see and instead focused requests on line 1 all the way through to line 19. So, he doesn't want to see requests for documents he'd like to see; what he does want to see is:

"... focused, identified needs on the basis it isn't the last request but the first request, saying: we need these five defined classes and we need it for this reason."

That basis, the president said, he'd:

"... be expecting the defendants or the interveners to move extremely quickly to meet that need."

If the whole process proved -- went wrong in some way, the president was clear at line 19:

"Well that will be their fault, [ie the class representatives fault] because they asked for [the documents]."

So, if they get more than they need, effectively, it swamps them, they can't complain.

There's another mini CMC on 18 March, which we can skip over, with the same points were being made again. And a further mini CMC on 21 March 2024 where if it's in the same bundle, sir, it might be convenient to look up very briefly. Tab 41 (pause) (inaudible) page. Yes, it should be tab 41. It's, excuse me, bundle page 1705.

So, in an exchange with Mr Went, the class representatives, who'd -- an entirely understandable comment, and of course the submissions were talking about documents which were relevant and the president did not reply immediately and was concerned about the use of the word "relevant", we see lines 7 to 15, because that was precisely what he did not want document requests to be focused in on; it's not about relevance, it's about need. Does it meet "a need that Dr Davis has articulated?" That's what the president asks at line 12.

Sir, those are now the transcripts. The law, very briefly (inaudible) is that as an intervener, no relief is sought against my client. We have no general entitlement to cost recovery, in any case. The role of us as originally envisaged was to provide voluntary disclosure, to serve factual witness statements about the department's role; some discussion of whether or not we'd be tendering a witness for cross-examination, for trial, and then to make written and oral submissions (inaudible) at the trial.

In terms of receiving disclosure requests, we are in the position of a third party and the expert-led requests, as articulated by the tribunal, reinforces the point rather than dilutes it, because the north star of the entire process is one of need rather than relevant submissions. And that word that I've kept emphasising can be seen directly in the CPR test which you may be familiar with from another jurisdiction.

So, CPR rule 31.17 is a jurisdictional threshold that any applicant must hit. The documents must be relevant and necessary in order to dispose fairly of the claim or to save costs. And, when looking at both relevance and necessity, what courts are looking at there often is whether the documents are available from an alternative source. In essence, don't go and trouble a third party, if you can get those documents either from a public source or from the main defendant.

And if the jurisdictional threshold is met, the court then has a discretionary power to choose whether or not to make that order. And as we've seen through the transcript, there's a clear theme that the tribunal was saying to Dr Davis -- if Dr Davis, in his role as expert, is saying, I need these documents, then the tribunal would consider that the first threshold had been met and because of the case management process in this case, with the obligation of the class representative to put forward its case in full on a seven or eight-month process, that the tribunal would exercise its power in favour of -- discretionary power in favour of ordering the disclosure. And it gave that guidance in sufficient, clear terms that my client quite sensibly engaged constructively with the

process rather than coming back to the tribunal to ask for a formal ruling order on it.

Now, that test in 31.17 is identical to a test in the CAT rules; rule 63. Both tests, and I should say that that test has been looked at previously by the CAT and by the president and the timing of his previous ruling on a rule 63 application is potentially significant here, because it takes beyond any question that he had in mind the proper test, because it's the Umbrella Interchange Fee Claimants case, which again, you need not turn up, but it's in the supplementary authorities bundle from page 60 onwards.

Again, I should say there was no order made in that application either following that ruling. But that was a ruling given at the start of October 2023. So, just a week or so before we have the October 2023 --

MR JUSTICE MILES: Is that a case against an actual third party?

MR PAGE: That is a --

MR JUSTICE MILES: Not against an intervener?

MR PAGE: Correct, yes, yes.

So, I start from the proposition that for the purposes of disclosure, we are a third party. Now, under the terms of the CPR, the counterpoint to rule 31.17 is rule 46.1, which effectively provides the cost of indemnity. And for that, same principle applies and I'm able to state that proposition in terms not simply because I say so, but because Hodge Malek said so in the Trucks Second Wave Proceedings. And indeed he said so and quoted his own textbook as well. And that is in the supplementary authority bundle, page 113. The citation is 2025, CAT 3. It's paragraph 51.

MR JUSTICE MILES: Sorry, give me the references again.

MR PAGE: Page 113, paragraph 51 of the judgment. Setting it up, sir, it's the first half of that paragraph 51.

MR HOLLANDER: It's the Maitland-Walker authority. Just so -- (Pause)

MR JUSTICE MILES: Thank you.

MR PAGE: And you'll see at line 4 of that paragraph is references to the "Disclosure" textbook, paragraph 4.67. That is Mr Malek's textbook. I followed through the reference. I can confirm he doesn't, at that paragraph cite any other CAT decisions, but as the court would expect, that paragraph does contain a series of --

MR JUSTICE MILES: I understand that that case was not a rule 63 case.

MR PAGE: Yes. So, all I take from paragraph 51 is the general proposition that a non-party disclosure under rule 63, the price of it is generally that the applicant is required to pay the non-parties' costs of the exercise. And it's quite right here that we don't have that would apply because it's a Trucks case and the respondent is Daimler. So, they are a car (inaudible).

MR JUSTICE MILES: They're a party, is that right? Or --

MR PAGE: Yes.

MR JUSTICE MILES: Why was anyone talking about rule 63?

MR PAGE: No stone unturned.

MR JUSTICE MILES: Sorry?

MR PAGE: No stone unturned.

MR JUSTICE MILES: But it doesn't seem to be a particularly relevant --

MR PAGE: Well.

MR JUSTICE MILES: -- submission if (inaudible) party. But --

MR PAGE: I think that that the submission didn't find the favour of court, I think it's fair to say.

MR JUSTICE MILES: So, that's --

MR PAGE: But there will be others, I'm sure, in this room who are more closely involved in that --

MR JUSTICE MILES: So, it seems to have held that it has rejected the submission,

that it was a non-party.

MR PAGE: Yes. But as I say, I'm -- all I need for that judgment is the general proposition that the learned chair is making that the general proposition applies, generally.

Now, the concept of expert-led requests, here, as against my client, clearly, the first two limbs of the test were satisfied against us because the tribunal adopted a working principle that all requests were necessary and that it would exercise its discretion in favour of granting the requests, absent a major proportionality issue.

On the third limb of the cost recovery point, that was left open; markers were laid down. They'll show you by Ms Howard in the submissions of the October 2023 CMC. But the point was left open, and that's in line with the nuanced position of the Secretary of State in this litigation. But, nonetheless, in essence, this was a Norwich Pharmacal practice against my client.

Now, the ELRs, specifically, the concept of those has developed and perhaps even expired during the course of this long-running litigation. I've taken you through, sir, the dialogue between the bench and the bar at one point and the bench and the experts. The whole purpose of the exercise was to save costs, not increase them. And that was because the whole idea was to avoid disclosure of relevant but unnecessary material. So, there's going to be a higher threshold with Dr Davis effectively starting with a cookie cutter of his report, working out what data he needed. And at that point, coming to the defendants and the intervener, if necessary.

Now, the expert-led request process has now been formally articulated in a ruling by the tribunal, by the president, again in the second wave of proceedings. That ruling's neutral citation is 2024 CAT 2. That, I'm afraid to say is not in the bundle. The process is summarised back in Mr Malek's ruling, paragraph 18. Mr Hollander has drawn attention in his skeleton to the fact that Mr Malek stated that the expert-led request

should be the exception rather than the rule.

That point has been taken rather further by Mr Hollander who describes expert-led requests as "notorious for increasing costs". I'm quoting there from paragraph 58 of his skeleton. That, I say, is a wholly unfair characterisation of the process. There's nothing wrong at all with the concept; it's perfectly sensible, in the appropriate case. If here the class representative had objected to the principle, it could have demanded a judgment and sought to appeal the decision, or it could have come back to the tribunal and asked it to vary its direction.

But the error here is in its implementation, not in the principle itself. The proper process should have been that requests that were made should have been made primarily to GTR, focusing tightly on the issue of need; requests to my client should have been kept to the absolute minimum; we should have been told that as soon as we found documents that turned out not to be necessary, that we can stop looking for those documents and stop providing them; and throughout the whole process, Dr Davis and those instructing him should have been alive to the obvious point that requests to my client were going to generate a large quantity of work and, particularly when one is looking at the assessment of the franchise and tender exercise, there are issues of privilege there, potentially political sensitivity as well. (Several inaudible words)

Then, turning on to my final point, the failure of process. My preliminary answer to this is I shouldn't even need to go this far to succeed in my application. We don't need to show that things went wrong to get our costs. We are a third party and we were directed by the tribunal to give disclosure, which properly would be entitled to the costs of that exercise. But if we do need to show that the process failed, then, unfortunately, we can do so all too readily.

First, in my opening comments, I provided you the statistics of the sheer disparity of

documents being disclosed versus the documents actually used in the reports. We have the 33 requests to GTR, ten requests to the department, sub-requests for 41-page documents -- I've mentioned previously that the 41 pages of the requests were accompanied by 4000 pages of exhibits. We then have 39 meetings that we attended, nearly 20,000 documents that we disclosed, and the mere 19 documents that were then cited.

Dr Davis, in his witness statement to the tribunal, effectively says, well, if you ignore the Award database actually I used a decent quantity of documents, well, as ever, if you ignore all the work we did, we didn't do any work.

But even that, I'm afraid, didn't stack up. Even leaving aside the Award database, there is something close to a thousand documents which we disclosed and the usage rate, then, to one decimal place, I think it's 1.8 per cent.

Second, the Award database itself, rather than being sidelined, provided a very useful snapshot of what went wrong. It was identified -- it came out in the original request, and we saw that at page 174 of the CMC bundle.

The focus that we were asked to provide was on the tender assessment. Dr Davis was repeatedly told that the process would be very costly, and this comes out in a stocktake letter that my client sent. Not sure I can give you -- I've got a bad reference here; it's page 219 of Mr Hennah's exhibit, but it'll be in the CMC bundle as well. It's the Linklater's letter of 15 March 2024.

Now, the costs earned of my clients peaked in this period of December to March when we were engaging with that Award database request and we were spending costs at a rate of £150,000 per month. Again, we've seen the transcript, the positive remarks by Dr Davis that he was going to receive these documents.

I'm being given the page reference. The letter starts at page 2204 of the stocktake letter and you have to turn to the table within that where there is a reference there from

Linklaters saying, "We told you on these three occasions".

MR JUSTICE MILES: Page? I'll need to turn that up.

MR PAGE: Page 2215 of your bundle.

MR JUSTICE MILES: Very long letter.

MR PAGE: So, what there is, is we have a short letter, followed by a long table. So, the letter itself is two pages and what then happens over the next, I don't know how many pages, is a table where, on the left-hand side we have the Dr Davis requests as addressed to the department and a response from us saying, "This is how far we've got and whether or not they're open or not".

The response for us for, as I say, row 13 of page 2215, talks about the Award database and identifies the various times where we said to Dr Davis that this was going to be a considerable volume of documents. And that was all pre-March, that dialogue. So, the comment we have from Dr Davis in the March CMC was very much in light of the information already provided to him by that date.

So, let's finish off the story in terms of the Award database and what was said about it in the report. That is in the CMC bundle, page 394 to 399. So, you should have --

MR JUSTICE MILES: Can you say that again?

MR PAGE: Yes, so volume 1, tab nine is Davis 4, which is his main report. Page 394 of the bundle, which is internal page 130 of the report. You should see there at 394 the heading, "Does competition for the market eliminate market power in the market". What then happens is it's separated into two sections. The first is the lesson from the economic literature, and there's a long quotation there from a paper by Professor Paul Klemperer.

MR JUSTICE MILES: Yes.

MR PAGE: And over the page at 396, Professor Klemperer summarises the conditions when he says that a competition for the market can mean that competition

effectively carries on through into the market itself. I'm going to look at the detail of those four conditions, but the conclusion is at page 211, and this is now Dr Davis's voice speaking again in this report:

"It's far from obvious that the 2014 franchise tender process did satisfy the conditions laid out by Professor Klemperer."

But then, when we turn over the page at 397 onwards, we discover that actually this bit of the report had been written before the awards request had been put in. It would never have been put in because he says at paragraph 214:

"While there was an auction for running the franchise on behalf of the [Department] at minimum cost and with weight placed on service levels, I understand that the Good Operator Standard obligations on the franchisee impose a requirement to maximise revenues no matter who won the competition for the franchise (subject to other obligations in the Franchise Agreement)."

Further on down the final sentence of that paragraph:

"The competition for the franchise does not itself appear to commit the winning franchisee to offering passengers attractive prices."

Now, that is an absolutely critical point here, because if you have an auction for the market where franchisees are bidding for the lowest price they can charge to consumers, then one can see how this principle might follow on through. But that simply wasn't part of the tender process here.

"There do not appear to be commitments to specific future price levels" -- this is Dr Davis again at paragraph 206 -- "in the TSGN auction" -- that's the auction for this particular franchise -- "(except to the extent that the Bid Fares Policy was negotiated at the time and that fares regulation is embodied in the franchise agreement)."

And over the page, we have then paragraph 217:

"Moreover, in respect of the service levels that are impacted by Brand Restricted fares,

I note that the [Department] intended that fares would be harmonised across brands at the date of the tender."

Then it goes on to discussion post-tender. So, all of that process, and the commentary, then, on this franchise award process that had generated 20,000 documents, if you look at the footnotes, all we have is a reference to the invitation to tender on a pretty basic point of what is it that people are offering; are the bidders offering prices to consumers or not, and the answer is no. And then an email from 2024, as part of this litigation. So, with the greatest respect, the request for the Award database was a complete waste of time.

Now, there's a separate point in the papers concerning the Maitland-Walker requests, but there's no difference in principle on the basis of those. The objections to them per se are the fact that they just simply weren't used.

Third point, and it's my penultimate point, the Secretary of State acted co-operatively throughout. He provided stocktake letters, explainers, and there was never any comment that the documents we were providing and the narratives we were providing were unnecessary or unhelpful. We simply don't recognise the comment made by a class representative that there was a lack of constructive engagement by us in the process; that's not borne out at all by the (inaudible) actual engagement.

Finally, Dr Davis, in his witness statement to the tribunal, has put forward a series of reasons or excuses for what has gone wrong. With respect to him, none of them cut muster. He only identified the actual legal test to be applied in March 2024, and he concedes that at paragraph 13(c) of his witness statement. He says he reviewed all the documents but didn't cite them and didn't need to cite all those which were potentially relevant, that's the phrase he uses at paragraph 17(b) on his witness statement. His use of that phrase, I'm afraid, demonstrates that he still doesn't quite understand the actual test that needs to be applied here.

He also explained at paragraph 20 that the Award database issue was never part of his positive case, and it was only dealing with an issue raised by the defendants. So, if that is the case, then the request should never have been made in the first place as part of this process. There was an exchange earlier between you, sir, and I think, Mr Harris, concerning (inaudible) the reference in reply.

And at no point in his witness statement does he say that the documents provided did not meet his requests or went wider than his requests. So there's no complaint about the documents being given or not given.

I'm conscious of the time and of the fact that it's perhaps a somewhat dry application to finish off on a Friday afternoon, but those are my submissions on the points. Our cost schedule is at tab 22.

MR JUSTICE MILES: We'll probably look at that on the next occasion.

Well, that took approximately twice the length of your estimate.

MR PAGE: I'm afraid so.

MR JUSTICE MILES: It's unfortunate, but there it is, we've heard your submissions. We'll have to wait until the next occasion to hear what (inaudible) says in regard to that.

Housekeeping

MR JUSTICE MILES: Right, is there anything else that needs to be discussed today? We're going to go away, obviously, and think about the main point. We'll hear the rest of the submissions on the costs applications in due course. We will liaise amongst ourselves about the timing of a further hearing and obviously we'll try and get to a judgment or a decision on the amendment points as soon as we can.

I think the best way of leaving it for today is to say that we will, through the CAT, liaise with the parties about fixing another hearing. How long will we need for that?

MR HOLLANDER: I think --

MR JUSTICE MILES: My experience in this case from the last two days -- well, everyone's experience -- is that this is a case with quite a lot of history and explaining points takes quite a long time. It sounded from what we were told by Mr Harris earlier as though the hearing we've just heard was a comparative tickler and that his application for costs is going to take rather longer. Is that right?

MR HARRIS: Yes.

MR JUSTICE MILES: We've only heard one at this one so far.

MR HOLLANDER: Can I just -- I mean, it's a matter for you to think about, and I'm not suggesting you decide this now -- query, just invite you again to consider whether you want to have a CMC and push off the cost matters because -- and I don't want to take clever points, but you know, Mr Harris's application was the next one on the agenda. On the one hand, he says it's terribly important to have it decided immediately; on the other hand, he's very happy to cede the floor to my learned friend for that to be done first today rather than his. But anyway, you'll no doubt consider.

MR JUSTICE MILES: Well, we had to deal with one or the other.

MR HOLLANDER: Well, all I'm saying -- no, no, all I'm saying is that you may want to consider whether there should be a CMC which doesn't deal with the cost issues and then they're dealt with separately, but that's a matter for you. I've made the point.

MR JUSTICE MILES: Okay, I've asked the question. How long do the parties think they need for the next CMC?

MR HOLLANDER: I think if we if we're talking about the way forward to trial, we could probably do it in a day. It may be there are other applications which are not urgent which need to be dealt with.

MR JUSTICE MILES: Break it into chunks. One day for that; how long for the remainder of the --

MR HOLLANDER: I think that's for the defendant. We've got the intervener costs

order, of which you've got an hour or so of that to go. We've got my learned friend's costs, which sounds like half a day, two hours, I don't know. He then may, I think, want to address you by the sound of things on the cost budget. But, I mean, perhaps I should sit down and let him.

MR HARRIS: My best estimate at the moment is two days with one extra in reserve. I say that in part because, as I adverted to earlier, there may be serious questions arising on cost-benefit analysis, decertification, authorisation of the representative. It goes without saying that if, when we finally do receive the budget, we wish to prosecute a formal application of a material nature, we will give everybody as much notice as possible and it could be that that would involve more time. That's the most responsible way in which I can respond to your query today.

MR JUSTICE MILES: Right, well, stuff that's on the table at the moment without another application. So, dealing with the rest of Secretary of State's application, which sounds like about another hour and a half or something.

MR HOLLANDER: Possibly, possibly slightly less than that, but an hour, an hour plus.

MR JUSTICE MILES: But experience has shown that.

MR HOLLANDER: No, no, I totally --

MR JUSTICE MILES: I'm going to take that advisedly. How long on -- and then discussion of steps going forward, including, without any predisposition, the possibility of some sort of preliminary issues and then steps down to trial. How long?

MR HARRIS: Two days, sir, with a day in reserve because we can't guarantee finishing. Then, it would get bigger if there was a serious application like decertification. But as at today, two days and a day in reserve is my most responsible estimate.

MR JUSTICE MILES: All right. We'll go away and think about that. There'll be communications through the CAT.

MR HARRIS: Thank you.

MR HILTON: Very quickly, may I address you also, will your judgment cover the point I asked you to address yesterday?

MR JUSTICE MILES: Yes. We've got a note of that. Sorry I didn't mention that.

MR HILTON: No, that's fine.

MR JUSTICE MILES: I understood that.

Right. Okay. Well, thank you all for your enormous assistance over the last two days. It looks as though, without doubt, we're going to have to meet again before too long. But we will consider our ruling on the points that have so far been raised. Thank you very much.

(4.37 pm)

(The hearing adjourned)