IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1175/5/7/11
1176/5/7/11
1177/5/7/11
1178/5/7/11

Victoria House,
Bloomsbury Place,
London WC1A 2EB

18 April 2011

Before:

LORD CARLILE OF BERRIEW
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

D H FRANCIS Claimant

- v -

CARDIFF CITY TRANSPORT SERVICES LIMITED Defendant

D B FOWLES Claimant

- v -

CARDIFF CITY TRANSPORT SERVICES LIMITED Defendant

N V SHORT Claimant

- v -

CARDIFF CITY TRANSPORT SERVICES LIMITED Defendant

2 TRAVEL GROUP PLC (IN LIQUIDATION) Claimant

- v -

CARDIFF CITY TRANSPORT SREVICES LIMITED Defendant

_____

CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. Michael Bowsher QC (instructed by Addleshaw Goddard LLP) and Mr. Adam Aldred (of Addleshaw Goddard LLP) appeared for the Claimants 2 Travel Group PLC.

Mr. Huw Francis appeared in person and on behalf of DB Fowles and NV Short.

Mr. Colin West (instructed by Burges Salmon LLP) appeared for the Defendant.

_____

THE CHAIRMAN: Can I know which is Mr. Huw Francis, please?
MR. FRANCIS: I am, sir.
THE CHAIRMAN: And Mr. Fowles is not here?
MR. FRANCIS: No, Mr. Fowles is not here.
THE CHAIRMAN: Mr. Short?
MR. FRANCIS: No, he is not here either, sir.
THE CHAIRMAN: So you are the only one of the individuals, Mr. Francis?
MR. FRANCIS: That is right, sir.
THE CHAIRMAN: I am sure that learned counsel will do everything they can to be as helpful as possible, but if there is anything that you do not understand, just stick your hand up, or something, and we will make sure that you understand exactly what is going on – all right.
MR. FRANCIS: Thank you.
THE CHAIRMAN: Do not be shy about it.
MR. FRANCIS: Okay, sir.
THE CHAIRMAN: Who is going to go first?
MR. BOWSHER: Sir, my name is Bowsher, I am for 2 Travel, that is the claimant in the 2 Travel proceedings. I appear with Mr. Aldred, and Mr. Curtis of Addleshaw Goddard with Mr. Curtis's support worker; and Mr. West is for Cardiff Bus, and you know Mr. Francis already.
The Tribunal has already set out a helpful ----
THE CHAIRMAN: Would it be helpful to you, Mr. Bowsher, if we just went through the agenda and I gave you some preliminary but non-binding thoughts.
MR. BOWSHER: That may be very helpful and it will probably save a bit of time.
THE CHAIRMAN: It might save a lot of time. Let us start with the forum. This is a Welsh case through and through, it is a Cardiff case, so presumably the forum is England and Wales, and one would assume Wales. Any comments on that?
MR. BOWSHER: From our perspective, I think there was a feeling that it would be convenient to have it heard here in London where the CAT has all its resources, and I think that is probably a position that Cardiff Bus shares, but I do not have instructions about it – I am afraid that is one point I meant to canvass with Mr. Francis.
THE CHAIRMAN: This is a completely Welsh case. If it was a large Welsh contract, or personal injury claim, it would be heard in Cardiff or possibly Newport, which has many delights to offer. Why should this Welsh case not be heard in Wales?

MR. BOWSHER: Well, one of the issues here is that, of course, my solicitors, who are acting on a CFA, are not from Wales. They are going to have to fund ----

THE CHAIRMAN: They are from Leeds, are they not?

MR. BOWSHER: They are indeed, and it is considerably ----

THE CHAIRMAN: You do not have to instruct solicitors in Leeds in a Welsh case. I am sure they are extremely good, but there are plenty of solicitors in Cardiff ----

MR. BOWSHER: Who are prepared to take a commitment on a CFA.

THE CHAIRMAN: I am sorry, that was facetious.

MR. BOWSHER: Particularly when the solicitors are taking on the matter on a CFA, it becomes a rather important point, and one tries to keep costs to a reasonable level. I would suggest that London is a suitable central place. It may be that the sensible way forward is to leave the question of where the hearing should be heard over until one gets nearer to an actual hearing and decide ----

THE CHAIRMAN: I am quite serious in my view that what is, on the face of it, a Welsh case, particularly because of who the defendants are and their foundation and origins, as it were. If there is any accountability to take into account it is definitely situated in Wales. I can see the arguments of convenience for hearing the matter here. I am inclined to the view that you have suggested, that we leave the forum in abeyance. It may be related to the length and where any witnesses who give evidence are coming from.

Shall we say forum either here or Cardiff?

MR. BOWSHER: England and Wales, location of hearing ----

THE CHAIRMAN: Forum England and Wales, location here or Cardiff. Would it be sensible so that we can work backwards, to start looking for a date for a hearing, if there is in the end to be a hearing in this case. It might make it simpler to work the timetable backwards from there, might it not? What I was going to suggest is that we went for a window of ten days, maybe in March 2012. That might be for the convenience of the Tribunal, and fit in with other people's ----

MR. BOWSHER: Starting on any particular date? I think 5th March is a Monday.

THE CHAIRMAN: Why do we not go for Monday, 12th March. I think, Mr. West, you were nodding – perhaps you were just nodding because you were agreeing with the broad thrust of what Mr. Bowsher was saying. Shall we pencil in Monday, 12th March as the hearing date with a window of two weeks at this stage, max?

MR. BOWSHER: Yes, that is two five day weeks presumably?

THE CHAIRMAN: Yes. Do you not work five day weeks, Mr. Bowsher?

MR. BOWSHER: I am afraid I work rather more than five day weeks, but sometimes one is taken by surprise by some Tribunals.

THE CHAIRMAN: This Tribunal will work five day weeks. Where do we go from there? Consolidation and the question of the hearing together of the claims: my understanding of the current position is that it seems to be broadly agreed that the claims of the individuals should be stayed – is that right?

MR. BOWSHER: We are neutral on the stay.

THE CHAIRMAN: Just wait a moment, Mr. Francis, I will bring you in on this in a moment.

MR. BOWSHER: We are neutral on the stay. We would have thought that there are evidential matters which overlap. Our feeling is that they can be heard together but they cannot be consolidated because, as plaintiffs, we obviously do not have the same interests.

THE CHAIRMAN: I am concerned about – we have litigants in person here – issues of costs. If it is stayed – it is either stayed or it is not stayed. If it is consolidated, that is not a stay, is it? If it is stayed, which seems to me to be a sensible approach in the interests of the individuals, we have to be clear about what happens to evidence that is led during the course of the hearing. Obviously all the evidence will be recorded, and, as always happens here, transcribed on a daily basis, which might be an argument for holding it here, in fact. If so, what will be the status of that evidence if there are hearings of the individuals' claims?

MR. BOWSHER: That was one of the reasons why it seemed to us that it might, as a matter of practice, be better to have the hearings held together because it is inevitable that some of that evidence would overlap. Although technically there might not be an issue estoppel that arises, the Tribunal might feel rather uncomfortable, having reached a finding of fact in one hearing and then think that maybe the evidence gives rise to a different proposition at a later hearing.

THE CHAIRMAN: What is the realistic prospect of the Tribunal reaching different findings of fact?

MR. BOWSHER: Pretty low. It is only if there is some ----

THE CHAIRMAN: Negligible?

MR. BOWSHER: Yes, negligible. I would have thought it non-existent, but I am just worried – in a sense it is not our problem it is more a problem at the second hearing when the individuals' claims are brought and there may be some new material comes forward then which the Tribunal thinks "If only we had known this …"

THE CHAIRMAN: Let us be clear about this, if there is a stay of the claims of Mr. Francis and others, the evidence that is taken during the action will be available for any ensuing hearings, I presume. If that is agreed I do not see a problem about a stay.

MR. BOWSHER: As I say, it is probably not so much our problem as for the individual claimants.

THE CHAIRMAN: Let us hear what Mr. West says about that issue.

MR. WEST: Mr. Bowsher may not be aware but it is now the individual's position that they positively apply for a stay. They emailed us on Friday about that and Mr. Bowsher may not have seen ----

THE CHAIRMAN: I do not think I have seen that email, but I can see the sense of it, Mr. West.

MR. WEST: The only parties affected are my clients and the individuals, so that seems to be agreed between us, and I also agree that it is very sensible the parties should ensure that all evidence is made available to the individuals whom I expect are highly likely to be witnesses in any event for 2 Travel, the former directors who were in charge of the business at the time.

As to whether the findings would strictly be *res judicata* on the basis of some form of argument that the individuals are parties or proxies, perhaps not, but we agreed that in any event the prospect of the court taking a different view at a subsequent trial is so minimal ----

THE CHAIRMAN: Even for this place it is a touch academic, is it not.

MR. WEST: Indeed. Yes, we agree there should be a stay and the evidence should be made available.

THE CHAIRMAN: Mr. Francis, I gather that you would like a stay. What I am concerned to ensure is that you do not lose anything in evidential terms if there is a stay. Obviously it will save you costs if you do not have to be present; you can be present if you want to but you do not have to be present during the action between these two parties, so is there anything else you want to say.

MR. FRANCIS: No, I think it is a sensible course of action for us all to take, sir.

THE CHAIRMAN: Thank you. In that case, I will order that there should be a stay of the claims other than obviously the claim made by those whom Mr. Bowsher represents. The stay will apply until further order with liberty to any party to apply for the stay to be removed at any stage on 48 hours written notice.

Now, we come to alleged defects in the claim, and I have obviously read the arguments which have been set out in this regard. I am conscious too of the fact that the *Enron* judgment, in which I had some interest, appeared after the claim was drafted and, there we

are, that is just one of those things. Having read the claim, Mr. Bowsher, I am concerned about it. I do not find the blanket reference to the decision particularly helpful. I am very conscious, having been through the Enron experience of the wisdom of the remarks of Lord Justice Jacob, and my provisional view, but it is only a provisional view, is that the Tribunal would be much helped by an amended claim form which set out which parts of the finding bind the Tribunal as an issue of fact, setting out clearly identifiable and relevant findings of fact, why they are causative of the claim, and the consequences in terms of damages. Now, that seems to me to be in accordance with the decision of the Court of Appeal in *Enron*, and I think would actually shorten the case quite substantially because it would focus on the issues.

MR. BOWSHER: It may be useful to start looking at the nature of this case. This case is not like *Enron* in a number of distinct ways. *Enron* is a case where, you may recall from the Court of Appeal judgment that there is some comment that the claimant there made a lot of reference in its claim form to the findings about the market, but not so much about the actual events, and you will know far better than I the nature of the Enron claim was really a finding about generalised discrimination which was being taken, as it were, somewhat of a glancing blow to try and lead on to a claim relating to a specific group of contracts. This is a really rather different case. This is a case where the whole essence of the decision is that the defendant set out to cause damage to my clients, the victim, and that damage has occurred. The only real issue, and there is at least a finding that the conduct which was condemned by the OFT was indeed a contributory, or likely to be a contributory factor. We may need to argue about what precisely those words mean.

In my submission a great deal of the decision therefore sets out material which may not simply involve direct findings but relates to matters which are either a part of the claim or will be needed to rebut propositions which arise. We, of course, make a claim that says not only is this a straight forward claim for damages caused by the loss but also because they have actually intended to cause this loss, that is relevant causation and remoteness of damage, and their intention is relevant to the measure of loss because we also claim exemplary damages. So that, for example, the number of pages in the decision that go to why the various explanations which Cardiff Bus gives as to why in fact they did not really intend to do this and there is an innocent explanation for this, we say we will need to rely on all of that because those are findings which dismiss as implausible the various explanations going to intention. All that goes to say is that this is not a case where there are three or four specific findings which we are going to be relying upon, this is much more like a classic

case which we would have brought in the High Court rather than going to the OFT, where we could have just claimed damages, and there would have been a liability trial and then a quantum trial, and at the quantum trial one would simply have the liability judgment, one would not try to pass the liability judgment, the court would take the liability judgment in its entirety and take that forward.

My suggestion would be that it is not really necessary in this context to re-plead the claim; the claim sets out a perfectly coherent and valid claim. The issue that might arise is that there is so much of the decision that is relevant that it might assist if we were to simply state in bold terms what is the finding in respect of each paragraph. As you have seen there are 30 pages or so in annex A and there are some more in annex F on exemplary damages, where there are propositions which we either rely upon now, or may need to rely upon later by way of other exemplary damages claim, or rebuttal. That would be done in my submission not by amending the claim, there is nothing about the claim that needs amending but it can be done in a schedule form simply supporting the claim and so we would say: "Para. X says …" and we would set out the text, we would set out the straightforward propositions of fact, and then we would identify whether we are relying on s.47A(9), s.58 or *Iberian* or a combination of the above, and that would then enable my learned friend to simply in true Scott schedule fashion to be able to say: "We accept that fact", "We do not accept it" and so forth. The problem is these facts do not all relate to a particular proposition, a lot of them are part of the general background of intention or the general background of the effect of predation, so there are paragraphs and I can take you to them ----

THE CHAIRMAN: So let us be clear about what you are suggesting because I am concerned that the three members of the Tribunal should be able to have a clear documentary picture upon which to build their assessment of the case. You are assessing in effect that there should be a schedule which sets out in three columns broadly, first of all, the finding relied upon; secondly, the basis upon which it is asserted that that finding caused loss; and, thirdly, the extent of loss claimed on that basis.

MR. BOWSHER: No, not the last, because a lot of those findings are findings which we do rely upon and say are binding upon the Tribunal, but do not, in and of themselves, lead to a loss.

THE CHAIRMAN: So, in that case what goes in the third column is, "No loss resulting".

MR. BOWSHER: No specific loss

THE CHAIRMAN: Yes.

MR. BOWSHER: But the consequence may be that it relates to another finding which is taken forward.

THE CHAIRMAN: Well, that can go in the column.

MR. BOWSHER: Which can go in the column, indeed.

THE CHAIRMAN: It can go in the column.

MR. BOWSHER: Indeed.

THE CHAIRMAN: I am just concerned about the maximum possible clarity for the Tribunal.

MR. BOWSHER: Yes. I do not know if it is helpful to look at some of these paragraphs, I can show you how it might work in practice.

THE CHAIRMAN: Well, I have looked at them. This is why I am raising the point. Shall we hear what Mr. West has to say about this particular point?

MR. BOWSHER: Yes, okay.

THE CHAIRMAN: Mr. West

MR. WEST: (After a pause): What Mr. Bowsher proposes is clearly helpful and progresses matters to some extent, but we would still prefer it if the identification of the findings took place within the body of the pleading. But if that is not to be the order, then, clearly an annexe containing those schedules is the next best thing, so long as it does clearly identify in relation to each extract relied upon, the fact which is supposed to have been found in the wider sense of being relevant in terms of causation and loss. That should enable us, certainly, to deal with whether those are factual findings and, if so, whether we wish to apply to dispense with them. So far as in terms of Mr. Bowsher's various assertions that the decision provides indications, that my client is intending to cause damage, of course that only takes one so far, because, wherever one competes, whether on the merits or in an abusive way one intends to cause damage. So that in itself, I would suspect, would not take my learned friend so far as he perhaps claims it would. We have set out in correspondence the difficulties that we have with annex A, but many of those may be resolved if the further schedule is provided as my learned friend has indicated.

I would also ask that the time for service of our defence should run from when we received the schedule.

THE CHAIRMAN: We will deal with timing later. Could I just, in passing, make a comment about correspondence? The Tribunal has been — shall I say "generously" — copied in to correspondence in this matter so far. Can I ask that the Tribunal should be copied into correspondence, but only necessary correspondence for the Tribunal to see. The Tribunal really does not want take a ringside view of disagreements between solicitors, including

comments like, “Are you really being serious?” that appears in one letter. I really do not think the Tribunal should see correspondence of that kind. So, if a little bit of restraint on the (and this is addressed to everyone, it is not a criticism of anyone in particular) if a little bit of restraint on the copying of correspondence to the Tribunal could be exercised, it would be helpful. (To Mr. West) It is not a rebuke of you, you just happen to be on your feet at the time. Bad luck, Mr. West. Okay?

MR. WEST: Right.

THE CHAIRMAN: Thank you, Mr. West. Let us go back to Mr. Bowsher. There seems to be a degree of common ground, Mr. Bowsher. What I am inclined to do is not to order an amended claim form, but to order — and we will do the timing later — that there be served a schedule which contains at least the following three columns: first, a finding relied upon; secondly, a basis upon which it is asserted, if it be so asserted, that that finding caused loss; and, thirdly, the extent of loss resulting from that finding, or an indication as to where else in the claim that is linked to a claim of loss.

MR. WEST: Yes.

THE CHAIRMAN: I think if a schedule (this sounds awfully like the old fashioned Scott schedule) but if something like a Scott schedule — and they have served their purpose certainly throughout my working life — something like a Scott schedule, was served as a document of clear understanding that this was the developed basis of the claim, then I think it will make life much easier for everyone.

MR. BOWSHER: It will not be any secret that I learned my trade in the OR’s corridor so —

THE CHAIRMAN: Exactly. I did a pupillage in the OR’s corridor. Yes, Mr. Bowsher.

MR. WEST: I apologise for rising again, but just so that it should be clear what is meant by “finding”, what Lord Justice Lloyd talks about in *Enron*, at para.141 is:

> “Identification of the facts said to have been found, and by virtue of what passage or passages in the decision”.

THE CHAIRMAN: I have that very much in mind, and I am grateful to you for raising that. That passage is the foundation of such a schedule in a case like this.

MR. BOWSHER: What I had in mind is that we would, and it may take up rather a few pages, but that we actually copied the text and then, it does involve paraphrasing the paragraph, but then say —

THE CHAIRMAN: You can copy the text — you can cut and paste or you can summarise, it is entirely up to you.

MR. BOWSHER: I mean there are, as you say, a lot of findings where — what I am anxious to avoid is that the claim form itself does not get buried in pages and pages of stuff about, you know, what happened on route 26.

THE CHAIRMAN: I think we have solved the problem, actually.

MR. BOWSHER: Yes.

THE CHAIRMAN: If I may say so. Good. So, that has been dealt with — do you want to say anything at all about that?

MR. FRANCIS: No —

THE CHAIRMAN: I thought you might not, but I thought I should politely give you the opportunity. Now, is there anything else relating to alleged defects in the claims that anyone wants to raise? No. Thank you. Now we are on to disclosure. There is an issue about third party disclosure in this case, because I think the copy of the decision that your side have, Mr. Bowsher, is redacted, is it not?

MR. BOWSHER: Yes.

THE CHAIRMAN: I am uncomfortable about ordering third party disclosure without the third parties being given the opportunity to make some representations if they wished to do so. And I think my suggestion would be that the parties write to the OFT and ask them if there are — the Tribunal can do it, can they not, Mr. West? The Tribunal could write to the OFT, which might simplify matters. The Tribunal could write to the OFT and ask if there are any issues about third party disclosure that the OFT would like to draw the Tribunal's attention and that of the parties before a final decision on third party disclosure is ordered. Is there dissent from that?

MR. BOWSHER: No, sir. If it helps, as far as — the key issue at the moment is names in the decision, and that is set out in, it is a letter which I hope the Tribunal has not been copied in on, but we can maybe provide a copy if it is helpful. It is actually six places where I think there are names in the decision. We obviously do not know who those people are. That is part of the point. There is an error in the letter, of course, there always is a typo at the crucial point, but, I mean, it is really identifying who those individuals are, because they may be potential witnesses.

THE CHAIRMAN: Yes.

MR. BOWSHER: Perhaps we can take that up informally with Mr. Lusty, as to how that might be dealt with.

THE CHAIRMAN: Yes.

MR. BOWSHER: And that is probably a sensible way forward.

THE CHAIRMAN: Yes. Are you happy with that, Mr. West?

MR. WEST: Entirely.

THE CHAIRMAN: Yes. Good. Now, in that event, could we have standard disclosure by Friday 15th July?

MR. BOWSHER: We have not so far dealt with dates for the defence or the new schedule, which is perhaps earlier.

THE CHAIRMAN: Yes. Let us deal with that first. What about your schedule by 31st May, Mr. Bowsher?

MR. BOWSHER: I would hope we can do a lot better than that. I am hesitant to say, with all of the incoming holidays, but I would normally have thought we can do it within two weeks.

THE CHAIRMAN: In that case, let us have the schedule by 6th May, I am perfectly prepared to allow your instructing solicitors to twist again, and maybe go for 13th May. (I see a nod for 13th May).

MR. BOWSHER: The 13th May.

THE CHAIRMAN: And how long do you reasonably require or request, Mr. West, for your defence?

MR. WEST: We have asked for four weeks after service of that schedule, which would not —

THE CHAIRMAN: 10th June – do you want an extra week, 17th June? 17th June for the defence. Standard disclosure by 15th July? I am sure something is going to go wrong in a minute because we are doing too well so far.

So that brings us to witness and expert evidence. I have read the papers, and again, as a preliminary viewpoint, given the size of the claim and the issues that are involved, it seems to me, as a matter of just disposal of the case, that on the face of it the defendants should be allowed to have their own expert witnesses.

MR. BOWSHER: The problem from our perspective is simply we will not be able to have any expert at all, other than a single expert. My learned friend says we have been funding the case. We have not. No funds have been provided for this case at all from 2 Travel. I am on a CFA, as is the rest of the legal team. The only way that an expert is going to be – for the quantification side of the case – made available to enable the claimant to follow through the logic of s.47A is, in my submission, through the logic of the Tribunal appointing an expert.

THE CHAIRMAN: What happens about the costs of a court appointed expert?

MR. BOWSHER: What would happen, in my submission, is either in that circumstance we would win, in which case the Tribunal would make an order for costs appropriately. If we lose there would then have to be some working out as to how that would work. Of course,

it is possible that we would lose but still have made some recovery, so the Tribunal could deal with as an order. The final position would be that we lose and there are no funds in place. There are then at least two possible situations. One is that public funds are engaged; or alternatively, we would have to look to take steps with an ATE policy but of course that would involve increasing the premium to cover that expert. What one, of course, cannot have is an expert acting on a CFA. So any expert would have to be acting on the basis that no payment is going to arise until the end of the day, albeit that the payment of that expert would be secured one way or another, so that he or she does not have an interest in the outcome.

THE CHAIRMAN: That sort of begs the question of the justice of the case from the defendants' point of view, or the justice of the whole case. The impecuniosity, or however one cares to put it, of the claimant is not a good ground for depriving a defendant of the fair opportunity to adduce their own expert evidence on the complex issues arising, is it?

MR. BOWSHER: Sir, they are not being deprived of the opportunity of putting their case. With a single expert one simply has a situation where the single expert makes a determination for the Tribunal. That does not stop them from retaining their own experts to enable them to put points to the expert and so forth. In my experience, a single expert can often make these things much quicker. In a sense, a lot of the technical material can be dealt with before one gets to the actual final hearing. This is quite a relaxed timetable if we are working towards March. By March a single expert will have, one would expect, produced a report. If there are specific points of difference on the outcome, nothing is stopping the defendant from putting forward his position and saying, "We think that is wrong, this is the evidence we want to put forward". At that point they can always put forward their own expert evidence with the court's leave and say, "Well, actually, we think the single expert is wrong".

THE CHAIRMAN: Are we talking about a single expert here in any event? It seems to me there may be more than one issue for expert evidence.

MR. BOWSHER: In my submission, there is no call for any causation expert. We have never suggested that there should be one. This is a simple case about how certain abusive behaviour – did that or did that not cause certain subsequent events? There is a quantification question, which is a forensic accountancy discipline. There might be an issue about valuation of this parcel of land, although at the moment I rather doubt whether it is necessary to have a separate expert opinion about that. It is either a question of just going and valuing a piece of land, which can hardly be the most onerous piece of expertise that this Tribunal has ever had to deal with, or one simply looks at other collateral evidence.

There may be other reports. There may be other contemporaneous evidence which gives the Tribunal enough material to attribute a value to that land.

To us, this is simply a case where one needs to quantify the losses because, frankly, with all the expertise that this Tribunal can bring to bear in terms of commercial economic wisdom, and so forth, if this Tribunal cannot work out those causation issues for itself on the basis of the factual evidence one would be a little surprised, to be blunt. My learned friend refers in his skeleton to various decisions about why one would not have a causation expert on a single basis in certain cases, but the cases he has referred to are all medical cases, where the causation question is, "Did the medical negligence cause so and so to lose his leg or not?" That is obviously an entirely different causation question. That is a question of medicine, "Did X flow from Y?"

In this case we are saying that certain acts of predation which are well set out in the decision had a certain consequence, and it will be for the Tribunal to determine that on the facts.

In my submission, given that this is a technical mechanical process, it would be perfectly appropriate for that to be dealt with by way of a single expert and, as I say, if the findings of a single expert are controversial there is ample time in this programme, if the single expert's report is produced say some time later this year, for that to be controverted by the defendant putting forward its own expert evidence. One has seen that in other cases. What it does short-circuit is the need for experts to laboriously go over a great deal of material and produce an outcome which often is 70 per cent agreed anyway.

I should say that in terms of the impecuniosity, what effect that may or may not have, this is a special case. This is a case provided for by statute where a party has already been the subject of findings for breach of competition law. This is the sort of case where, for example, in a security for costs context, one would say the defendant cannot expect any sympathy where the whole tenor and burden of the case is that it is the defendant's act that has made us impecunious. You will be well aware of that line of reasoning.

The White Book sets out a lot of material about why single expert procedure does not raise any Article 6 issues. There are notes in the White Book about that, but again you are probably, sir, well familiar with that material. It is a perfectly proper and appropriate course and a sensible way of dealing with this in an expeditious and cost effective way.

THE CHAIRMAN: Thank you. Mr. West, what is suggested is that at least as a starting point a court appointed expert would be a sensible way of dealing with this, that it would narrow down the issues, and if you wanted to you could instruct separate experts anyway?

MR. WEST: Well, sir, I do not agree with that. I am not sure if Mr. Bowsher read my skeleton, but if he had he would have seen that the issues in this case are not limited to quantification, but they are also causation. I distinguished in my skeleton argument between the losses suffered, or alleged to have been suffered, on the Cardiff routes during the period of the infringement, and the losses resulting from the demise as a company as a whole.

So far as concerns the losses on the Cardiff routes, that is a claim currently quantified at £76,000, and the issue there seems to be if the white services had not run, and some of those or all of those passengers had gone in 2 Travel's buses, would it have made any money? That is not simply a question of how much money it would have made, but would it have made any money at all? The expert may come to the view that even if it had picked up all of the passengers that the white service buses carried it would not have made any profits at all. That indeed was the expert view of experts called LECG, who we instructed before the OFT, but the OFT took the view that proof of actual effect on competition in the market was an irrelevance at the stage of infringement.

THE CHAIRMAN: What sort of experts are they?

MR. WEST: They were forensic accountants. I am told they were economists, I apologise. Then at the second stage of whether the infringement caused the demise of the company as a whole, the argument is, had they been able to make these additional profits currently quantified as £76,000, the company as a whole would not have gone into insolvency. There again, clearly, the expert will have to consider the accounts of the company, including documents we do not yet have such as management accounts, the revenues of the company, its credit status, and so forth, in order to decide whether it would have become insolvent anyway.

That is also an issue of causation, because if the expert forms the view that this was a company on its way to inevitable insolvency, which is our case, then there is not any loss at all, so the quantification is zero. As I say, I do not understand my learned friend's suggestion that there is somehow a distinction to be drawn here between causation and quantification. The authorities which I refer to in my skeleton saying it is not appropriate to have a single joint expert on causation are relevant, I have brought them along if you need to see them, but that is what they say.

Our position is that there should not be a single joint expert, and our fundamental objection is to having the evidence of this single joint expert we have not chosen treated in some way as our evidence for the purposes of the case. My learned friend then says that his clients are impecunious, but there is actually no evidence about that before this Tribunal at all today.

They have not produced any evidence of their own impecuniosity. My learned friend says that the lawyers are acting on a CFA with an ATE policy. There is a notice of funding file in the case, which refers to a stage premium being paid, so I assume somebody is paying that premium.

MR.BOWSHER: "Payable", not paid.

MR.WEST: Payable, one assumes that they will at some stage be paid. But again there is simply no evidence about that, and we have not yet made an application for security for costs, but we would certainly like to have some more information about this position because if the position is that there is a risk that our costs will not be paid even if this claim fails then that is an application which we reserve the right to make in due course. Even if there is a single joint expert, as you said, the costs of that expert will have to be paid. The position under the rules is that the parties are jointly and severally liable for the fees and the ordinary position is that they are borne 50:50 depending on the outcome of the case. So my learned friend's clients will still have to pay half of the costs of the single expert, even if there is a single expert. We say it is duplicative to have a single expert with both parties instructing him and then at a later stage for us to instruct our own expert. The ordinary position should prevail that each party is entitled to its own expert.

As I have explained in my skeleton, the cases where a single joint expert is appropriate is either where the claim as a whole is very small, less than £15,000 or cases where the issue in question is of a peripheral nature. Here we have precisely the opposite, the issues for the single joint expert are the only issues in the case and my learned friend's clients have chosen to bring a claim for no less than £50 million, so fairness requires that we are entitled to our own expert and that is my submission.

THE CHAIRMAN: Thank you, Mr. Bowsher?

MR. BOWSHER: Sir, I am not sure there is a great deal I want to add. I would emphasise that the ATE premium is payable and of course payable not by our side, that is not the way payable ATE premiums work.

All I would say – and I am in danger of going over things again rather than simply replying – in our submission the single joint expert route was brought in by the CPR, it was the sort of process commonly used, for example in the Admiralty Court for very substantial claims. This is the sort of process which has been used in the OR's Court for large technical matters, particularly with something like this where the issues can be dealt with by a single person who can come up with an answer which the parties either live with – if they want to challenge it the rules enable them to challenge it and bring forward their own evidence to

challenge it later, but in our submission it is an expeditious way of trying to get an expert answer to most of the issues in question.

THE CHAIRMAN: Thank you. For the reasons which are briefly summarised in paras. 50 to 52 of the defendant's skeleton argument for the purpose of these proceedings I am of the view that the issues in this case relating to causation in particular are very substantial and that the justice of the case requires that the defendants should be able to obtain their own expert evidence. So, for that reason, I am not going to order a joint expert in this case.

We come then to issues I think of dates for disclosure, exchange of evidence and so on. Given the dates we have established so far, which I have slightly lost track of, we have dealt with standard disclosure, which I think was 15th July, exchange of evidence by 31st July – can that be achieved, or do you need a little longer than that?

MR. BOWSHER: No, that will be far too close after ----

THE CHAIRMAN: Far too close – well why do we not say exchange of evidence including witness statements and any expert evidence by early September?

MR. BOWSHER: Mr. Aldred makes the point that it would probably be sensible to have factual evidence first and then expert evidence.

THE CHAIRMAN: That in fact is what I originally had in mind. Let us have a closing date for this: expert evidence by, say, 16th September, and other evidence by – how long before that – three weeks before that?

MR. BOWSHER: I am always fairly hesitant about suggesting orders in August.

THE CHAIRMAN: In that case, what about 29th July?

MR. BOWSHER: Given that the trial window is not until March there would be room, surely, to push the expert evidence back a month or so and then – I do not know what 16th October is ----

THE CHAIRMAN: Why do we not have expert evidence by 14th October and witness evidence by 16th September.

MR. BOWSHER: That would probably work better.

THE CHAIRMAN: Does that suit the convenience of everyone, and that would fit within the timetable.

MR. BOWSHER: Yes

THE CHAIRMAN: Which leaves the question of skeletons for the trial. What I would like to suggest is that the claimant's skeleton for the trial was available by the end of the year, Friday, 30th December, and the defendant's skeleton argument for a March trial be made available by 3rd February – that should be possible, all the work will have been done. I

would also like there to be another case management conference, perhaps in September, to just take a rain check on what has been going on in this case; I think it would be helpful to the Tribunal. I was not proposing to name a date in September immediately, we can do that administratively. Are you both content with that?

MR.WEST: Yes.

MR. BOWSHER: It probably makes sense to do it after 16th September, I do not know.

THE CHAIRMAN: Yes, well we will do that administratively.

MR. WEST: Provision for a meeting of the experts, my learned friend said they are not going to have one, but it may be useful to make provision in case they do come up with one.

THE CHAIRMAN: Yes, I thought we might deal with that at the case management conference in September, if we see where we are, but certainly the Tribunal will certainly want there to be a meeting with the experts, and indeed if the timetable needs to be adjusted to deal with any issues of ADR that might arise then of course you only have to ask and we will do our best to accommodate all parties. Mr. Francis?

MR. BOWSHER: I do not know whether it is worth making a formal direction about ADR now, because unfortunately the nature of this case given the number of parties involved, if it is going to settle it will probably have to settle through ADR and it is worth making a direction for that earlier than later.

THE CHAIRMAN: I am not inclined to make a direction, I do actually think and you may think I am wrong, Mr. Bowsher, but I do feel that the provision of the schedule which we have been discussing earlier will concentrate minds and may assist towards any question of ADR. I would not like to push back the hearing date because there can be problems after the end of March, but any of the other dates we can adjust if there is a question of ADR taking place. You know what ADR is?

MR. FRANCIS: I do, Sir, yes.

THE CHAIRMAN: I would say to all parties that if the individuals who are not legally represented here are encouraging ADR, then due respect should be paid to such requests.

MR. BOWSHER: The claims by the individuals have, of course, now been staked, but they might wish to attend, possibly, at the CMC in September, especially if there is going to be any question of ADR raised at that stage.

THE CHAIRMAN: Yes.

MR. FRANCIS: Sir, what I would say is that Mr. Fowles would probably want to make an amendment to his claim. He was in the bankruptcy court two weeks ago based purely on guarantees which he gave for 2 Travel and, whilst I heard what you said earlier on in your

direction in relation to the joint experts, I think it is only fair to say that the defendant seems to be funded to a large extent, by the local authority, the liquidator has a CFA, and the only people who have lost money and are paying out money at the moment are Mr. Short, Mr. Fowles and myself, and I think that is something that the court does need to bear in mind when we talk about ADR and various other financial matters, because a year from now Mr. Fowles will be bankrupted, as a result of these guarantees. I appreciate that that is an entirely separate issue, but I think it is something relevant for you to consider.

THE CHAIRMAN: Right. Well, thank you, and you made the point, if I may say so, sir, extremely well. That will all be considered, I am sure.

(After a pause) Thank you, Mr. Lusty. I have a request on behalf of the Tribunal, and the request is that all documents that, apart from correspondence, all documents that the Tribunal members need to see, could it please be put into electronic form and sent to the Tribunal in electronic form — where possible in Word form, where not possible, in PDF form. There are three members of the Tribunal; we live in different places; we communicate to a great extent electronically; and having everything on our portable hard drives is a great advantage for us in every case I do in this Tribunal I have about 40 or 50 files in my chambers, and actually carrying them around on a No.76 bus is a bit of a problem. So, electronics, please, and if anybody needs my private email, the Tribunal will supply it to the legal advisers to the parties. But, it can be done through the Tribunal, can it not? Everything will be password protected. We have the most vicious password protection system in this Tribunal that you have ever seen!

Now, is there anything else? Right. Well, thank you all very much.