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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case Nos. 1304/7/7/19  
1305/7/7/19

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

9 April 2019

Before:

**THE HON MR JUSTICE PETER ROTH**  
(Chairman)  
**SIMON HOLMES**  
**PROFESSOR ROBIN MASON**  
(Sitting as a Tribunal in England and Wales)

BETWEEN:

**JUSTIN GUTMANN**

Applicant

- and -

**FIRST MTR SOUTH WESTERN TRAINS LIMITED**  
**STAGECOACH SOUTHWESTERN TRAINS LIMITED**  
**LONDON & SOUTH EASTERN RAILWAY LIMITED**

Respondents

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**CASE MANAGEMENT CONFERENCE**

## **A P P E A R A N C E S**

Mr Philip Moser QC and Mr Stefan Kuppen (instructed by Charles Lyndon Ltd and Hausfeld & Co LLP) appeared on behalf of the Applicant.

Mr Tim Ward QC and Mr James Bourke (instructed by Slaughter and May) appeared on behalf of First MTR South Western Trains Limited.

Ms Sarah Abram (instructed by Dentons UK and Middle East LLP) appeared on behalf of Stagecoach South Western Trains Limited.

Mr Paul Harris QC and Ms Laura Elizabeth John (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of London & South Eastern Railway Limited.

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1 THE PRESIDENT: Good morning. Thank you all for your helpful skeleton arguments and for  
2 the efforts made to co-ordinate as between the parties and co-operate, which we appreciate.  
3 If we look at our agenda the first item is to consider the appropriate forum for the  
4 proceedings and everyone agrees, and it seems to us clearly right, that it should be England  
5 and Wales, and we make that order.

6 Secondly, the question of whether the two applications should be heard together, with the  
7 evidence in one to stand as evidence in the other - that obviously does not necessarily mean  
8 they will be resolved the same way - and again there is a general consensus that that is  
9 appropriate. It seems to us appropriate and we shall make that order accordingly, and as in  
10 the agreed draft, that all documents are to be served on the party in the other application.  
11 The next question is confidentiality, but just before we get to that, Mr Moser, there are two  
12 matters that I wanted to raise with you on the application - it does not matter which one we  
13 look at, because I think they are in similar form. If one looks at the collective proceedings  
14 claim form and the relief sought at the very end, we note that, as well as damages and  
15 effectively an injunction, you are seeking a declaration. You might want to reflect on that  
16 because the Tribunal does not have jurisdiction under s.47A of the statute to grant a  
17 declaration. If it cannot grant a declaration under s.47A - without hearing argument on it,  
18 but certainly speaking for myself - it is very difficult to see how it could do so in collective  
19 proceedings if it cannot do so in individual proceedings.

20 MR MOSER: That is a very helpful indication, Sir, and we will certainly reflect on that.

21 THE PRESIDENT: The other point that I would mention is, I see that you have brought, or are  
22 seeking to bring, the case alleging breach of the Chapter II prohibition and also Article 102  
23 of the Treaty. It was not evident from the claim form that there is here an effect on trade  
24 between Member States. I am not sure it really makes any difference to any part of the  
25 claim, but again you might want to think - and you do not indeed address in the claim form  
26 any effect on inter-State trade - whether really this is an Article 102 case at all, or whether it  
27 should not be brought purely as a Chapter II case.

28 MR MOSER: Sir, indeed, we will reflect on that also. The thinking there is essentially exactly as  
29 you have indicated. It almost matters not at all, and it was put there for the sake of  
30 completeness, but we will reflect on whether that is even necessary.

31 THE PRESIDENT: Yes, and there are events going on elsewhere which could possibly have  
32 implications if you are pursuing a European case here, and I wonder if we need even to get  
33 into that situation. Perhaps you can indicate that to all the parties by correspondence as well  
34 as the Tribunal.

1 MR MOSER: Yes, Sir.

2 THE PRESIDENT: Thank you. If we then turn to confidentiality, first of all, we have been  
3 presented with, helpfully, a draft confidentiality order establishing a confidentiality ring.  
4 Am I right that that has been agreed in the form presented to us?

5 MR MOSER: That is correct.

6 THE PRESIDENT: In that case we will make that confidentiality order in the form of the draft.

7 MR MOSER: I am grateful.

8 THE PRESIDENT: Then there is the question of what is treated as confidential and what is not.  
9 We see that progress has been made in producing less redacted forms of the documents.  
10 We are concerned in any proposed class action or collective proceedings that as much as  
11 possible should be in the public domain so that proposed Class Members, not just on any  
12 question of whether they want to opt out, but just generally, should be able to see as much  
13 as possible of what is proposed for their benefit and in their name. On that, could we just  
14 look at the litigation funding agreement for a moment. We have got a confidential  
15 supplemental bundle, as it is called, but in fact it has also got the non-confidential versions  
16 in it, and I think at tab 6 of that bundle is the revised confidential version - if you have got  
17 that, Mr Moser?

18 MR MOSER: I have.

19 THE PRESIDENT: And then at tab 7 is the non-confidential version. On the first page, p.1, we  
20 see that recitals (c) and (d) have been redacted in the non-confidential version. I did wonder  
21 whether that is really necessary. If you look at clause 37 of the agreement, which is non-  
22 confidential, you will see that that says, quite reasonably:

23 “The Class Representative confirms that the effect of this agreement has been  
24 explained to the Class Representatives by the solicitors, including the following  
25 matters ...”

26 and 37.7 are the methods of financing the costs of the action including BTE and ATE  
27 insurance and external finances; and 37.8, the advantages and disadvantages of external  
28 funding. So that is all in the public domain. You might want to consider, therefore,  
29 whether really there is any reason why recitals (c) and (d) in the introduction need to be  
30 redacted. I do not think it can be said that if (c) and (d) were open - they have been  
31 disclosed within the confidentiality ring, so there is no question of waiver of privilege  
32 whether it is confidential or non-confidential.

33 MR MOSER: That is the nub of the issue, Sir. The redaction of (c) and (d), along with a couple  
34 of other things, are what I might call an ‘out of an over-abundance of caution’ redaction.

1 The thinking behind it was that where matters of legal advice are referred to, even though it  
2 does not refer to the content of the advice, some mischief might be made by someone in  
3 seeking to argue that privilege had been waived, and seeking disclosure of the underlying  
4 material, either already produced or yet to be produced, and (c) and (d) fall into that over-  
5 abundance of caution category.

6 It was dealt with very sensibly between the parties. We wrote to the other side and said,  
7 “Surely you’re not going to argue that if we unredact”. They said, subject of course to it  
8 actually saying what we are saying and what we maintained it said, they would not take  
9 such a point. So we unredacted in relation to the other parties.

10 Another way round it would be for the Tribunal to come to the view that it would not  
11 entertain any application for a mischief making application to lift privilege, in which case  
12 that would do the same trick generally.

13 THE PRESIDENT: Yes.

14 MR MOSER: That is why it is still redacted.

15 THE PRESIDENT: Yes, although 37 says that there has been explanation by the solicitors of  
16 these matters. I am not sure that really changes things much.

17 MR MOSER: Not a great deal.

18 THE PRESIDENT: A Class Member in theory, or potential Class Member, could write and say,  
19 “Can you tell us what the explanation was”, and you would say, “Well, we do not want to  
20 disclose that generally because it might weaken our litigation position in your own interests,  
21 and so on.”

22 MR MOSER: I think the difference that was perceived, and it is perhaps a distinction without a  
23 difference, is that those other bits relate to legal advice. If one turns back to tab 6, Sir, in  
24 the supplemental bundle, there are three kinds of redaction. I am sorry if they are not all  
25 completely consistent in the bundle. In tab 6 at p.1 of the litigation funding agreement,  
26 there is the yellow, which is the redaction against the public, in that case the address of  
27 Mr Gutmann, and there is the orange, which is what I have just described, (c) and (d), and  
28 there are, I believe, two or three other places where there is orange. One is at 7.3, one is at  
29 13.3, and there is one at 21.6, and they all fall into the same category, Sir, of references to  
30 documents. At page 32, the update to the funder, and right at the end, p.34.

31 THE PRESIDENT: That is the pro forma of a report?

32 MR MOSER: That is why that was done. I take the point that an inventive person could equally  
33 come along and say, “Well, what is the explanation?” We took the view that that would  
34 really be more than an over-abundance of caution.

1 THE PRESIDENT: Yes.

2 MR MOSER: If the Tribunal is of the view that none of these are of a quality where an  
3 application would be entertained, then our reservations would be groundless.

4 THE PRESIDENT: Yes. While you are on your feet, before I ask my colleagues, the other  
5 redaction I was not clear about is why the identity of the ATE insurer is confidential in  
6 itself. That is 1.15. We are not talking about the policy, we are just talking about who the  
7 insurer is.

8 MR MOSER: We have made that redaction for the reason that we considered it commercially  
9 confidential as to who the insurer is.

10 THE PRESIDENT: Why is that commercially confidential, as to who you have got cover from?  
11 It is not so commercially confidential that the defendants have not been told, so they know.

12 MR MOSER: They know.

13 THE PRESIDENT: Why should not a member of the class you are representing know?

14 MR MOSER: Sir, it is going to be made public generally to everyone, and this is information that  
15 is known to the insurer, but not information that it is felt proper to share.

16 THE PRESIDENT: I struggle to know why----

17 MR MOSER: I am being handed a note that says it is fine to unredact.

18 THE PRESIDENT: Well, that deals with that one.

19 MR MOSER: I am grateful to everyone behind me.

20 THE PRESIDENT: Yes.

21 MS ABRAM: May I make some observations on those redactions from the respondents'  
22 perspective, Sir?

23 THE PRESIDENT: I am talking about the confidential/non-confidential at the moment. We are  
24 not dealing with redactions and matters you have not seen.

25 MS ABRAM: I understand that. From my perspective, the over-abundance of caution is very  
26 abundant indeed. I submit that there is no argument, no proper argument, that privilege can  
27 be waived by unhighlighting any of the material that is highlighted in the orange  
28 highlighting. There is no reference to the content of any advice that has been given, still  
29 less is there any attempt to rely on the content of that advice in the context of the  
30 proceedings. So, in my submission, there is no proper argument that privilege has been  
31 waived.

32 Of course, from the respondents' perspective, although I am not seeking to make  
33 submissions on this now, the concern that that gives rise to is that if there has been an over-

1 abundance of caution in the highlighting there may have been a similar over-abundance of  
2 caution in the material that we have not seen at all.

3 THE PRESIDENT: I am not sure that necessarily follows, Ms Abram, but we have got the point.  
4 Waiver of privilege is not really an issue, because if it was waived your clients would be the  
5 first people who wanted to see the advice.

6 Let me just have a word with my colleagues. (After a pause) We have a concern that if it is  
7 unredacted, that would that open the way for some less well intentioned potential Class  
8 Member asking for copies of everything, but we do not think it would waive privilege. We  
9 have no doubt you would say no if such a request were made, and the Tribunal would not be  
10 minded to make any order that they could obtain copies. On that basis we do think it is  
11 much better for the conduct of these proceedings if, so far as possible, matters that are  
12 known to the defendants should also be known to those you are seeking to represent. So we  
13 would like you, please, to unredact the material that is here shown as confidential except for  
14 Mr Gutmann's personal address, which we can quite understand he wishes to keep  
15 confidential.

16 MR MOSER: I am extremely grateful, and that shall be done. I should have said earlier, in fact,  
17 that Mr Gutmann is in court. He is sitting at the far end there.

18 THE PRESIDENT: Thank you very much, and we are grateful.

19 The other thing that has been, I think, redacted is the ATE insurance policy, which is at tab  
20 2 of this confidential bundle.

21 MR MOSER: Yes.

22 THE PRESIDENT: Speaking for myself, given the circumstances of this case where your client  
23 is as to adverse costs from the litigation funder, and this is really an insurance policy to  
24 cover part of that potential liability to the litigation funder, we do not see any reason why  
25 that needs to be made confidential.

26 MR MOSER: Sir, I was going to come to that, and this is, in fact, the most recent development.  
27 We have come a long way since the skeleton, and further since in correspondence. The  
28 most recent development is that we have come to the same view and we propose now that  
29 the ATE insurance policy also be made public, subject to the premium remaining redacted.

30 THE PRESIDENT: That seems reasonable. The premiums are redacted anyway, and the  
31 premiums obviously are confidential and will betray an assessment of risk.

32 MR MOSER: That is so, Sir. There are two other things. There is the----

33 THE PRESIDENT: There is something redacted in the definitions which was a bit of----

1 MR MOSER: I was coming to that. There is the Class Representative's address. That is  
2 uncontroversial. Then on p.3 - and this ties in to some extent with the redactions in the  
3 LFA, that I am going to be coming to - there is some redaction in matters that relate to  
4 issues to do with security for costs. Sir, you will have seen that there are redactions for  
5 matters to do with appeals, and matters to do with security for costs in the litigation funding  
6 agreement, and the reason for that is that it might give something away about litigation  
7 strategy.

8 THE PRESIDENT: Yes.

9 MR MOSER: Depending on the view that the Tribunal takes of the security for costs redactions  
10 in the LFA, those are likely to stand or fall with those.

11 THE PRESIDENT: I see. So you are content to deal with the ATE policy that way.

12 Then we turn back to the litigation funding agreement, and those matters that have been  
13 redacted altogether, which obviously we have not seen. The first one is, I think, in some of  
14 the fees that the litigation funder will get as defined in 1.6 and 1.7. Then there is the  
15 application of the costs limit in 5.6 and 5.7.

16 MR MOSER: Yes, and really in that same class of redactions - I know there are others in  
17 between, but in 9.4 is----

18 THE PRESIDENT: How the stakeholder proceeds will be - the priority of payment, yes.

19 MR MOSER: The priority of payments, yes. If I can take those first, those sorts of redactions are  
20 how the payments are going to be made, to what extent, as between the lawyers and in what  
21 priority. My submission on that is that what it is important for the public to know is that  
22 this is all funded, and the action will not grind to a halt. That is all out there, including in  
23 correspondence. I do not know, Sir, whether you have seen the recent correspondence, how  
24 much is at risk. The other matters, such as the so-called waterfall order of priority, exactly  
25 who will be paid in what order, we submit is of no real or legitimate concern to anyone  
26 except the payees. The public will be able to see how much the lawyers will be paid and  
27 where it will be coming from. The question, I respectfully submit, is: is it necessary to see  
28 these matters for the determination of the CPO application? These few redactions that now  
29 remain, this one class, and then also those in relation to appeals and security for costs for a  
30 different reason, which is litigation strategy, we say are the minimum.

31 THE PRESIDENT: Yes, I understand. What is the position of the defendants on these  
32 redactions, Ms Abram?

33 MS ABRAM: Well, until today's hearing, all that we had received from the applicant was a table  
34 asserting that each of the redactions was strategically sensitive, the same two words



1 repeated with no further explanation given. What I say about it is that it is very important if  
2 redactions are to be maintained, that specific explanations should be given of each  
3 individual redaction by the applicant in writing, so that the respondents can consider  
4 whether or not to challenge them, and the Tribunal can consider in due course whether they  
5 affect its view.

6 To take 9.4 as an example, one of my concerns is that, depending on what the order of  
7 payment is as between the stakeholders, that may affect the degree of control that the funder  
8 has over the proceedings, which is one of the matters that the Tribunal will have to consider  
9 on certification.

10 THE PRESIDENT: There is detailed provision about control in clause 14, and we would not  
11 normally necessarily need to know about how proceeds are going to be divided. This is  
12 proceeds after settlement or damages, I think.

13 MS ABRAM: I take that point, Sir. It may be that there is nothing there that is of interest, but, of  
14 course, one cannot know without seeing it and without having the proper explanations.

15 THE PRESIDENT: Yes.

16 MS ABRAM: There are a number of other similar concerns, not necessarily restricted to the  
17 respondents. To take clause 6 as an example, on p.10, it is now unredacted, it relates to  
18 appeals, and none of that material is available. It may be of real interest, not just to the  
19 respondents and the Tribunal, but also to prospective Class Members to understand whether,  
20 and on what basis, the costs limit, for instance, would be applicable to appeals. When Class  
21 Members are deciding whether or not to opt out of the class they might want to know what  
22 would happen if the applicant lost at first instance on any point.

23 THE PRESIDENT: I think that is a little bit academic in reality.

24 MS ABRAM: It rather depends on whether they lose on any point at first instance.

25 THE PRESIDENT: The idea that a train passenger is going to opt out because of concern about  
26 what might happen on appeal is really stretching the reality of this litigation, is it not?

27 MS ABRAM: That may or may not be the case, Sir, but what I do say is that it is very important  
28 that the applicant should explain the reasons for the redactions so that everyone can be  
29 satisfied that there are good reasons for them.

30 THE PRESIDENT: Mr Moser, do you have a difficulty about - it need not be a detailed and long  
31 explanation - providing through your solicitors a letter saying for each of the relatively few  
32 clauses that remain redacted the reason why?

33 MR MOSER: It is not a problem, Sir. We are happy to do that. We are very keen to avoid a  
34 further hearing about this.

1 THE PRESIDENT: I do not think we need a further hearing. There can be discussion as to  
2 whether there should be a PTR, and that might be sensible. If necessary, we can rule on it  
3 in writing if there are any disputes.

4 MR MOSER: I am grateful. I was referring to----

5 THE PRESIDENT: I think it is six, or something, so it could be taken up in writing. I think you  
6 understand that, while it is important that as much of the litigation funding is available as  
7 possible, there will be provisions to disclose the risk assessment of those in writing, and that  
8 is something that you are quite entitled to keep confidential and there will be matters that  
9 concern to some extent the commercial practice of this particular (inaudible). Therefore,  
10 there will be parts of this agreement that are understandably redacted. We fully understand  
11 that.

12 MR MOSER: That is very helpful.

13 THE PRESIDENT: And it may be that every one of these redactions is fully justified. So if you  
14 provide that letter then it can be taken up by any of the defendants if they want.

15 MS ABRAM: I am very grateful. May I just flag one further area, not because I am seeking a  
16 ruling from the Tribunal, but to flag it to the applicant. Clauses 8.8 to 8.12 are also redacted  
17 in their entirety. We do not know what they relate to. One might speculate that they may  
18 relate to security for costs and there may be reasons for the redactions but again that calls  
19 for an explanation.

20 THE PRESIDENT: Yes. I think it certainly would be helpful, and it would be helpful to us as  
21 well, just to know what those paragraphs cover in general terms.

22 MR MOSER: Absolutely, Sir, there ought to be no mystery about it at all, and I am sorry if a  
23 mystery has arisen. If one looks at the heading in para.8 on p.11, "Adverse costs and  
24 security for costs", and we then have paras.8.1 to 8.7 about adverse costs, and I am happy to  
25 reveal - I had thought it was clear by implication, but it is useful to have this exchange and  
26 I am grateful - that 8.8 to 8.12 are about security for costs.

27 THE PRESIDENT: They are all about security for costs?

28 MR MOSER: They are all about security for costs.

29 THE PRESIDENT: Thank you.

30 MR MOSER: I am also happy to say, and I have got 9.4 in front of me, it says nothing about the  
31 regulation of control by the funder. That is indeed a matter for clause 14, but we are happy  
32 to put in writing.

33 THE PRESIDENT: Yes, I think that would be useful. Thank you very much.

34 MR MOSER: Thank you.

1 THE PRESIDENT: Is there anything else on confidentiality that we need be concerned with?

2 MS ABRAM: Save to note that so far as the respondents are concerned, it would be extremely  
3 helpful if the same approach could be taken to the redactions in the ATE policy as in the  
4 litigation funding agreement. In particular on the ATE policy, which is at tab 2, and I do  
5 not seek to take the Tribunal's time up on this if the principle is agreed, on p.3 above the  
6 first hole punch, there is that definition that is redacted in its entirety, so that one does not  
7 even know what it is that is redacted. The same things apply there.

8 THE PRESIDENT: Yes, but I think as far as the premium is concerned, that can remain redacted.  
9 There is no explanation needed.

10 MS ABRAM: I am grateful.

11 MR MOSER: I am grateful. I have said what p.3 is, it is on the transcript, but we would say it  
12 again.

13 THE PRESIDENT: Thank you. Then, subject to those points, I think there is no difference  
14 between the versions that are in the confidentiality ring and the versions that are not, and it  
15 is really subject to, I think, Mr Gutmann's personal address.

16 MR MOSER: Exactly, the deed of indemnity, for the sake of completeness, there is nothing there  
17 apart from Mr Gutmann's address. Once we have removed the 'out of an over-abundance  
18 of caution' parts from the public version then indeed there is very little difference.

19 THE PRESIDENT: Yes, thank you.

20 MR MOSER: I am grateful.

21 THE PRESIDENT: You did say quite properly that as far as the potential class are concerned,  
22 and indeed as far as the Tribunal was concerned, one point of concern is that the actions are  
23 funded and will not grind to a halt for lack of money. At some point, and it may be at the  
24 hearing of the CPO application, you will obviously need to address the point that, as we  
25 understand it, the commitment under the litigation funding agreement, and this is quite  
26 open, has a limit of £6 million, and the costs budget that you have produced, I think to end  
27 of trial, shows a figure of about £9.5 million. I think post-trial costs are not relevant, but  
28 there is obviously a gap there.

29 MR MOSER: I can help you there, Sir, it is----

30 THE PRESIDENT: Have I got that wrong?

31 MR MOSER: You have got it absolutely right.

32 THE PRESIDENT: I think it is £9.5 million.

33 MR MOSER: There is a gap. The gap is explained in very recent correspondence, which I think  
34 arrived possibly yesterday, and that is in the supplemental bundle 1 at tab 58.

1 THE PRESIDENT: It is so recent that I do not think we have a tab 58. I think we have been  
2 handed some letters this morning which have not been filed. Are these letters of 8 April?  
3 MR MOSER: That is right. There was a late flurry of letters, even on Sunday and overnight,  
4 I am afraid. I apologise for the lateness of those.  
5 THE PRESIDENT: Yes, there is a letter from Hausfeld of 8 April.  
6 MR MOSER: To Dentons.  
7 THE PRESIDENT: To Dentons, yes.  
8 MR MOSER: That starts, “We refer to our letter to you of 4 April”, and at 2 it says, “We enclose  
9 a high level summary of the litigation budget”, and I hope behind it is a table. The table  
10 explains that the difference is that solicitors and counsel have agreed to work on risk for a  
11 proportion of their fees, and that is set out there.  
12 THE PRESIDENT: Right, and that covers the gap, does it?  
13 MR MOSER: It does.  
14 THE PRESIDENT: Yes, and then there are other matters. We will not pore over it now. It is  
15 obviously something that might be gone into again, and the explanation is there, and I am  
16 just flagging up that it may or may not be an issue, but you are well aware of it.  
17 MR MOSER: I am grateful.  
18 THE PRESIDENT: I think the next matter then is disclosure?  
19 MR MOSER: Disclosure, yes.  
20 THE PRESIDENT: Again, if we go to the helpful draft order that the parties prepared----  
21 MR MOSER: Before we move on, Sir, I am sorry to bring this back, but for the drafting of any  
22 order today, in the draft order at 5, there is obviously our request for the order about  
23 confidentiality, and subject to writing the letter and adjusting the redactions, as discussed,  
24 that is, of course, still what we seek in relation to the documents that are going to be  
25 disclosed. Perhaps it will be a question of drafting today, but after today I just put down a  
26 marker that in whatever order is produced today, there will have to be some at least  
27 potential version of this, even if now it only goes to the address.  
28 THE PRESIDENT: There will still be a confidential version and a non-confidential version.  
29 They will just be different.  
30 MR MOSER: Indeed.  
31 THE PRESIDENT: The only other thing on that, if we are looking at it, it is probably sensible in  
32 5(d), if that is retained, “No party shall refer to any confidential information at any hearing  
33 held in public”, and you need to add the words “without permission from the Tribunal”.  
34 MR MOSER: Yes.

1 THE PRESIDENT: I think, on the basis of the discussion that has been had there should not be a  
2 problem about drafting that part of the order.

3 MR MOSER: I am grateful. I thought I would just point it out before we move on rather than  
4 having to deal with it later.

5 MS ABRAM: Of course, Sir, that would be subject to the respondents' liberty to apply to render  
6 unconfidential some of the information that has been----

7 THE PRESIDENT: Yes, there is always that. I think liberty to apply is at the end of the order. It  
8 is already there.

9 MR MOSER: We will see what we need of this, Sir, after it is all shaken out.

10 THE PRESIDENT: Yes.

11 MR MOSER: My learned friend Mr Ward asks me to address the drafting in green as well. The  
12 drafting in green is not going to be necessary if we have the rest of the draft.

13 THE PRESIDENT: No, it will not be, will it?

14 MR WARD: For what is worth, Sir, the reason for the bit in green is we already have a  
15 confidentiality order in place which enabled all of us to see the confidential version of the  
16 litigation funding agreement, and so forth. What the Tribunal has agreed already to do is to  
17 now put in place a bilateral confidentiality ring of the more standard kind. I do not know if  
18 you will still conclude it is unnecessary, but the idea was to get rid of the old ring and just  
19 replace it with the new ring.

20 THE PRESIDENT: Yes. I have not got a copy of the old order, but if there is already a  
21 confidentiality ring order, should that not be referred to in the confidentiality ring order?  
22 Does that not replace the old one? Not the order we are now looking at, but the order we  
23 made a few moments ago establishing a confidentiality ring.

24 MR WARD: Yes, so the one you made a few moments ago is the one that will be effective going  
25 forward and which is, if you like, multi-lateral as to confidentiality. The old order that was  
26 already made by the Tribunal just concerned the litigation funding documents. This is a  
27 rather arid matter of technicalities, but obviously we only want one confidentiality ring.  
28 You have ordered what I would call an 'enhanced ring'. It could have been done by  
29 amendment, it could be done by replacement, that does not matter at all, but that is the only  
30 reason for----

31 THE PRESIDENT: I see, so this is supplementary to, it is an alternative, it is supplementary to  
32 the blue?

33 MR WARD: Yes, that is right, exactly.

34 THE PRESIDENT: I see. I am sorry, that seems right, Mr Moser.

1 MR MOSER: That does seem right, and I, for my part, like the suggestion that we simply put it  
2 in the drafting of the draft order that was made this morning, the confidentiality order in the  
3 heading.

4 That is very helpful. I am grateful to Mr Ward, because that is going to save four letters!

5 THE PRESIDENT: And no doubt a certain amount of money!

6 MR MOSER: Disclosure then.

7 THE PRESIDENT: Yes. The first is disclosure that you have sought and that two of the  
8 respondents have agreed to give you. Do I take it that the position is----

9 MR MOSER: The 'stop press' is that all three agreed by letter this morning. I see my learned  
10 friend Mr Harris has a copy if the Tribunal has not got one.

11 THE PRESIDENT: Yes, it is in relation to the relevant services presumably. I do not know - for  
12 example, Stagecoach may operate other services elsewhere on other routes, as it were, on  
13 other lines?

14 MR MOSER: It is only the relevant services, Sir.

15 THE PRESIDENT: Yes, so it probably should say 'relevant services'. I believe they have  
16 interests elsewhere. It may be that the definition of 'boundary fares' is such that it would  
17 not apply.

18 This is simply the numbers of fares, or is it also information? It is just volume or is it also  
19 value?

20 MR MOSER: It is volume, Sir. It is a piece of the puzzle that we cannot detect from the outside.

21 THE PRESIDENT: No, I understand that, I just want to clarify. At this stage it is just volume  
22 and not value?

23 We can come back to the dates in a moment for disclosure. Then there is the application  
24 made against you, and this has been discussed in correspondence. Correct me if this is  
25 wrong: my understanding of the correspondence in summary is that while your position is  
26 that they would not be entitled to this information at this stage, given the approach the  
27 Tribunal has indicated in the past to disclosure CPO applications, you are not objecting to  
28 providing it - is that correct?

29 MR MOSER: It is correct, but I do want today to sound a warning as to the three kinds of  
30 documents, because we have been looking at this since it was first asked for on Thursday.  
31 There has been a lot of correspondence, but it has gone out in something of a rush. The  
32 situation in relation to the three kinds of documents is slightly different. The first at 8(a) is  
33 that relates to AlixPartners, and what we have said in correspondence is that, in principle,  
34 we would be prepared to do this. We have taken advice from AlixPartners as to what it

1 would involve to produce this information, which are the instructions that we said in one of  
2 the recent letters we would take. It turns out that to do this fully would cost some £25,000.  
3 It would involve extracting the source data and also the intermediate data, providing a  
4 transformation logic code, which transforms the one into the other, which needs to be  
5 cleaned and annotated to make it readable, providing supporting documentation and  
6 instructions on how to run the code, which includes third party documentation relied on to  
7 interpret the data, and output files, which includes multiple Excel files that transform the  
8 intermediate data into the tables and figures in the final report. There are three Excel  
9 models, they would need to be checked, formatted and related matters removed.

10 THE PRESIDENT: Yes.

11 MR MOSER: Around two weeks are sought by Alix for this. Notwithstanding the fact that we  
12 indicated in correspondence that we are, in principle, willing to do this, my submission  
13 today is that it would be simply disproportionate to provide this, not least since there is no  
14 particular reason that has been put forward as to why it is required, if it turns out that many  
15 hours would be required at great expense.

16 THE PRESIDENT: Yes.

17 MR MOSER: It seems to us inherently unlikely that the respondents are going to seek to reverse  
18 engineer the Alix coding to check their calculations over hundreds of hours, at least to any  
19 particular end, or that that would produce a work product that would take the Tribunal any  
20 further forward for the purposes of the certification hearing.

21 THE PRESIDENT: Yes.

22 MR MOSER: We have also explored with Alix the idea of giving simpler raw data, but that  
23 would have two drawbacks: I am told the data would be unintelligible to the respondents,  
24 so that does not seem particularly useful. Also, if they tried to make it intelligible that  
25 would probably just shift the cost to the other side, and at greater length because they would  
26 not know where to start.

27 I am sorry to start with probably the most unhelpful of the disclosure responses.

28 THE PRESIDENT: Yes. Do you want to go through the other two?

29 MR MOSER: Yes. In relation to draft order 8(b) to (d), this is again one where we say that,  
30 subject to privilege, proportionality and relevance, we are, in principle, prepared to look at  
31 this. We have asked - there is correspondence, I do not think I need to take you to it - for  
32 until the 12<sup>th</sup> to come back with our considered response and what we propose to disclose.  
33 We just want a chance properly to go through this and give one properly considered  
34 response on Friday, rather than rush into it today. The request was made on Thursday, as

1 I say, and we have spent quite a lot of time just dealing with CMC matters generally  
2 between then and now. So we would like to write to them on Friday, please.

3 THE PRESIDENT: Yes, instructions to an expert are normally disclosed under the CPR, point  
4 (c), in the report, what instructions they had.

5 MR MOSER: The other matters might or might not turn out to be disproportionate once we have  
6 had a clear picture from Decidedly.

7 THE PRESIDENT: That is (b) to (d)?

8 MR MOSER: (b) and (d), yes.

9 THE PRESIDENT: Yes. Then, the third category?

10 MR MOSER: The third category is again possibly a difficult category. That is working  
11 documents essentially of Charles Lyndon.

12 THE PRESIDENT: This is (e), is it?

13 MR MOSER: This is (e) over the page. I can say immediately as to (e)(ii), that is a nil return  
14 category, so we need not worry about (e)(ii) because those documents do not exist; but  
15 (e)(i), this is a stand-alone action and there was some work obviously done at Charles  
16 Lyndon from 2016 to 2018 in advance. We do need to take a view on potentially  
17 fundamental issues that may arise as to the privileged status or otherwise of lawyers'  
18 documents in CPO proceedings prior to the instruction by the proposed Class  
19 Representative clients. It appeared to us yesterday that although we have indicated again  
20 that we are happy to look at this in principle, if the Tribunal were to indicate to us today that  
21 it did not think that it would be particularly assisted by the disclosure of this further  
22 underlying information for the purposes of the certification, then this is another work stream  
23 that could perhaps be saved. It is hard to see, in my respectful submission, why it is  
24 necessary for certification.

25 THE PRESIDENT: Yes, it is not research you are relying on?

26 MR MOSER: No. There is a slide that refers to the fact that there was previous research. With  
27 respect, it is self-evident, this cannot suddenly have arisen on the day we instructed  
28 Decidedly. We are not relying on the previous research. The reason that was given very  
29 kindly by letter on Sunday from the other side was, well, it goes to strength of claim  
30 potentially. But strength of claim is very much a second order question in these sorts of  
31 proceedings, because that, if anything, goes to the question of is it an opt-in or opt-out,  
32 which I submit is not going to be a great mystery in this case. So I would ask the Tribunal  
33 for a ruling, or at least a strong indication, as to whether or not this is going to be something



1 that the Tribunal thinks is necessary before we embark on some satellite arguments around  
2 privilege.

3 THE PRESIDENT: When were these asked for, these various categories?

4 MR MOSER: I keep saying on Thursday. I think that is approximately right. There is the letter  
5 of, I think, 3 April, which is at---

6 THE PRESIDENT: That is in our supplemental bundle.

7 MR MOSER: Supplemental bundle 1, tab 50, from Freshfields Bruckhaus Deringer.

8 THE PRESIDENT: Which tab?

9 MR MOSER: Tab 50 of supplemental bundle 1, para.6. The 3<sup>rd</sup>, I am told, is a Wednesday, and  
10 we were asked to react by Thursday, which I think we did initially by a holding letter, and  
11 then shortly afterwards more letters followed.

12 THE PRESIDENT: Yes. Shall we then hear from the respondents on this?

13 MR WARD: Sir, I will address you, if I may, on the data that lies beneath the Alix report,  
14 because that was a request made by my clients.

15 THE PRESIDENT: That is (a)?

16 MR WARD: Yes. The starting point is that the Alix report is clearly of importance to issues on  
17 certification. There is a modelling of the methodology that would be used to calculate  
18 aggregate damages, clearly a matter for certification, and as part of that there is modelling  
19 of, for example, the number of people who are Travelcard holders and also ticket  
20 purchasers. So it is inescapable that Mr Holt's report is of importance for certification. We  
21 made the request in the expectation that it would be very easy to satisfy, because inevitably  
22 a report of this kind is the ultimate work product of quite a lot of underlying analysis, and  
23 one would have expected that underlying analysis to be readily available. Indeed, no doubt  
24 that is why my friend's solicitors' initial reaction was, "Yes, of course, you can have this".  
25 So it was surprising, in my submission, to hear that it would require £25,000 worth of work  
26 to convert whatever it was that AlixPartners were using to produce their report into  
27 something that we could see to see how they produced the report. On the face of it, this is  
28 just the same thing.

29 THE PRESIDENT: Well, we are told that it would, and I am sure that is correct.

30 MR WARD: I am not suggesting for a minute it is untrue, but what I do suggest is that there may  
31 be a middle path and that perhaps Mr Moser could take back a request that consideration be  
32 given to what could be a proportionate response that would not cost £25,000 and would  
33 provide a degree of assistance that is appropriate for the certification stage.

34 THE PRESIDENT: Yes. You are not able to suggest a middle path, you are saying---

1 MR WARD: Well, we do not know. We only know what----

2 THE PRESIDENT: Underlying it, however, if Mr Holt has explained the methodology that  
3 AlixPartners have used, one can assess whether that is a sound or flawed methodology, but  
4 it is not at the certification stage the appropriate place to pore over the data and see whether  
5 it might be argued that it points to a different outcome. We are concerned whether there is  
6 data there on which the methodology that he has applied can be used, and whether it is a  
7 reasonable methodology. It is not a full-blown enquiry into the robustness of his report of  
8 anything like the kind that you could mount if the proceedings are certified and then it goes  
9 to a trial.

10 MR WARD: Sir, from our perspective it is simply this: the analysis in Mr Holt's report is of  
11 great importance to certification. We do not know, of course, what lies beneath it. I fully  
12 accept that certification is not the same as the full hearing if the case is certified, but if there  
13 are important points arising from that data that might bear on the adequacy of the method,  
14 we ought to have an opportunity to put them.

15 We will also give consideration in the light of what Mr Moser explained as to what we  
16 might suggest a proportionate and partial solution to this may look like. Obviously what we  
17 heard was new. We will take that away and we will write to the other side.

18 THE PRESIDENT: I think that is very helpful. As you pointed out, it was your solicitors who  
19 made the request. We do not need duplicative submissions from all counsel, and I think you  
20 speak for all.

21 MR WARD: We are happy to do that.

22 THE PRESIDENT: You have heard that Mr Moser. I think the position is, we will not make an  
23 order on (a). If you can go away and consider with Mr Holt what further information could  
24 be provided, it can be discussed no doubt through several more letters with the respondents  
25 and see if you can reach some accommodation. If not, there can always be an application  
26 made to the Tribunal. We will try, if the parties agree, to deal with applications in writing  
27 rather than having to bring everyone here for a hearing.

28 MR MOSER: I am grateful.

29 THE PRESIDENT: So that deals with (a).

30 MR MOSER: That deals with (a).

31 THE PRESIDENT: As far as (b) is concerned----

32 MR HARRIS: Sir, may I address you on (b)----

33 THE PRESIDENT: On (b), yes.

1 MR HARRIS: ----on behalf of the respondents. Can I just briefly show you one or two passages  
2 in the claim form, and then one or two passages from Decidedly itself, so that we can put  
3 this debate into context. It will not take very long. We need a version of the claim form,  
4 I am working in the one addressed to my client, London & South Eastern Railway, and it is  
5 tab 1.

6 THE PRESIDENT: I think, before you get into this in great detail, what Mr Moser said was, he  
7 was not making the same points as he made as regards (a), that they got the request very  
8 recently, and they are now working with Decidedly to see what information could be  
9 provided. So it is not being opposed in the same way.

10 MR HARRIS: I accept that, Sir. Why do I not address that first? We have no objection to there  
11 being a little further time - I think Mr Moser said until the 12<sup>th</sup> - to provide a greater degree  
12 of explanation.

13 That having been said, if we just have a look back at the form of the draft order, as regards  
14 8(b) and (c), and indeed to some extent at least (d), our position is that it ought to be very  
15 easy to provide some of these without any further time at all - for example, 8(c), the  
16 instructions.

17 THE PRESIDENT: Yes, (c) and (d), I would have thought, without hearing further from  
18 Mr Moser, ought to be matters that can be obtained and provided. I do not know about (b),  
19 that is rather more granular.

20 MR HARRIS: Can I take you to (b) in a minute, but as regards (c) and (d), first of all, easy; and  
21 secondly, as you pointed out, with great respect, these are matters that were obviously going  
22 to be asked for, so there is no sense in which the fact that the letter may have been last  
23 Wednesday, and here we are almost a week later, it has taken anybody by surprise. My  
24 submission is that as regards (c) and (d), those should be provided fairly promptly. We do  
25 not need any more time for them.

26 As regards (b), of course I did not do the instructing and nor did my client, but we have  
27 understood very clearly from the Decidedly report that they are an external consultant, they  
28 have been instructed to go out and do a particular work for a particular client, no doubt  
29 under a particular file name with a particular series of people, and it seems inconceivable  
30 that they therefore simply do not have a file with the work in it - a database and/or a file, or  
31 at least an electronic collation of the actual work that they have conducted. So they have  
32 got this client, Mr Gutmann, and/or however they have named it - perhaps one of the firms  
33 of solicitors - and then they will have 20 or 50 other clients, and they will have a computer,  
34 and then they will put into that database, or that file or those files for each client, the work

1 that they have done for those clients. Essentially, all we are saying as regards 8(b) is, let us  
2 see the full results of that research which are no doubt in that file. What we find difficult to  
3 comprehend is why it would take even more days to find out whether there is such a file. If  
4 there is such a file, that is the stuff we want from in it.

5 I do not particularly want to dig my heels in about whether there is further explanation next  
6 Friday, or what have you, but this does seem to us, with respect, to be very easy to provide.

7 THE PRESIDENT: Yes, thank you. Before going back to Mr Moser, does anyone want to  
8 address (e)?

9 MR HARRIS: Yes, if I could. We have heard, and no doubt Mr Moser can confirm in the next  
10 letter, that 8(e)(ii) is a nil return.

11 THE PRESIDENT: You have had it confirmed, you do not need a letter.

12 MR HARRIS: The previous research though is, in fact, more important, for this reason----

13 THE PRESIDENT: Why?

14 MR HARRIS: That is because - if we just turn up the claim form we can see how this is put for  
15 the CPO application. If you turn to para.38 - I think that is probably the same in both  
16 versions---

17 THE PRESIDENT: 38?

18 MR HARRIS: 38 of the claim form, under the heading "Availability of boundary fares", just  
19 before we look at the specific references to Decidedly, if you were to just turn the page and  
20 look at 42 under the heading "Abuse", just to remind the Tribunal, the abuse is said to be  
21 neglecting a special responsibility----

22 THE PRESIDENT: We have read that, you do not need to read it out.

23 MR HARRIS: It is important though because what it then goes on to say is, "It is failing to make  
24 boundary fares sufficiently available for sale." So it is right at the heart of the claimant's  
25 case in this stand-alone action where, as I shall show you in a moment, the strength of the  
26 claims is in issue at the CPO hearing, that they are able to adduce evidence that there is  
27 some of this supposed mis-selling, or insufficient availability of information, and what have  
28 you. What is the key piece of evidence for that crucial part of the application at the CPO?  
29 It is Decidedly, it is 38. So what does that say? It says that they have commissioned some  
30 research, a mystery shopper study, and then what was that for? Well, it says it was intended  
31 to provide an independent cross-check to earlier findings by the proposed Class  
32 Representatives' legal team, and in the event supported these findings.  
33 So it is put fair and square in the CPO application as part of the argument in para.38 of the  
34 claim form that there was a series of earlier findings. If they are not relied on, as we are

1 now told, why are they mentioned? Not only are they mentioned and, on the face of it,  
2 relied upon, but we are now told that Decidedly independently cross-checks them and  
3 supports them. What we say is, “Well, if that’s your case, let’s have a look”.

4 THE PRESIDENT: I will be corrected if I am wrong, but I did not read ‘cross-checked’ as  
5 meaning that Decidedly looked at the earlier findings and checked them. That is not my  
6 understanding of what was being said.

7 MR HARRIS: What it does say in black and white is that it supports these findings and we would  
8 like to know whether that is, in fact, because it is so central to the allegation of abuse in this  
9 stand-alone claim, and if you were to turn to the actual Decidedly report at tab 3, you can  
10 see that the very first substantive slide, internal p.4, if one turns it sideways, it makes  
11 reference in the second paragraph to “Charles Lyndon previously having carried out  
12 research in 2016/17 and earlier this year”. So again there is a cross-reference to it.

13 Sir, the first point is essentially, this is put forward expressly by the claimant; secondly, it  
14 is, on its face, expressly relied upon by the claimant; and then, thirdly, an additional and  
15 discrete point is that you will have noticed from the Decidedly report that it relates only to a  
16 period of some 11 days in December 2018. You will see that reference on slide number 7.  
17 Of course, this proposed claim period is for a lot longer than one week in 2018. Indeed, it  
18 goes all the way back to towards the end of 2015. On its face, the only material that it is  
19 being suggested that exists that is going towards this key allegation of abuse are these  
20 earlier studies by Charles Lyndon, and therefore they will be highly germane potentially to  
21 what you, the Tribunal, have to decide at the CPO hearing. Then whatever the right test is  
22 about abuse - arguable or whatever, I am not going to enter into that debate now - when  
23 assessing the strength of the claim on the stand-alone nature of liability, you will have to  
24 assess it across the time period. The Decidedly survey, for what it is worth, is only for one  
25 week, and yet there is, we know, this earlier material, and what we say is, that is another  
26 good reason why it should be put forward, combined with the fact that it is expressly relied  
27 upon.

28 If you would like, I can show you that it is also relied upon in the AlixPartners report. I am  
29 not anxious to take up more of the Tribunal’s time, but if you want the reference, the  
30 AlixPartners report, which is in tab 2, p.19, footnote 18, if you just want the references, it is  
31 3.2.21(c).

32 THE PRESIDENT: Yes.

33 MR HARRIS: Then, importantly, if you would look down at footnote 18, please, which is one of  
34 the footnotes for that section, what it says is, as I read it, that AlixPartners is relying upon

1 the raw data underlying the Decidedly mystery shop report, which is why it says that. It  
2 notes that the shoppers were not able to purchase - you can see the rest for yourself. Then  
3 there are three more footnotes, 19, 20 and 21, so we say that there is an aspect of fairness  
4 here, which is that the Decidedly report has plainly had behind it raw data - that is Alix's  
5 phrase, not mine - and Alix have relied upon it, and yet at the moment----

6 THE PRESIDENT: Is that not your category (b) and (d)?

7 MR HARRIS: That is right, but in addition we know that the Decidedly reporters, or we infer  
8 from that, p.4 of the Decidedly report, would have regard to the underlying Charles Lyndon  
9 previously carried out research into the availability of boundary zone tickets----

10 THE PRESIDENT: They do not say that, they say there was previous research and that their  
11 client now wants to conduct research objectively, independently.

12 MR HARRIS: I can only go on what it says.

13 THE PRESIDENT: Yes, but it does not say, "We are relying on".

14 MR HARRIS: No, but what it seems to say is that they are conducting research that objectively  
15 identifies consumer experiences against the background of the previously carried out  
16 research in those three years by Charles Lyndon. That is why it is in the background slide.  
17 Why else would they mention it unless they----

18 THE PRESIDENT: Well, that is the background to their instructions.

19 MR HARRIS: Well, maybe. Maybe, but in any event we can see that the claim form relied upon  
20 it and AlixPartners rely upon it. Can I just remind you - I expect you, Sir, are very familiar  
21 with this, but perhaps for the benefit of others, Rule 79 in the CAT Rules, 79(3), under the  
22 heading "Certification of the claims as eligible" says:

23 "(3) In determining whether collective proceedings should be opt-in or opt-out  
24 proceedings, the Tribunal may take into account all matters it thinks fit, including  
25 the following matters additional to those set out in paragraph (2)—

26 (a) the strength of the claims ..."

27 and it will not come as any surprise to you, Sir, that there will undoubtedly be a testing of  
28 the strength of the claims at this CPO hearing, because, of course, this is - how shall I put it  
29 - for today's purposes a very ambitious liability allegation. The Decidedly data seems to be,  
30 so far as we can make out, at the absolute centre of that allegation of abuse and liability.

31 I can go one stage further: it is not only in 79(3)(a) that the strength of the claims expressly  
32 arises at the CPO stage----

33 THE PRESIDENT: The Decidedly data is. I thought you were addressing (e) of the order.

1 MR HARRIS: Yes, and that ties in with my point about the earlier years. This Charles Lyndon  
2 data seems to be the only data going to this question for the earlier years. Yet the allegation  
3 of liability is for all the years.

4 THE PRESIDENT: Yes.

5 MR HARRIS: Then, of course, the Tribunal will be familiar with the fact that there is even the  
6 possibility of strike out applications. Under the Rules, it is suggested that they may well be  
7 combined with a CPO hearing. So it is not just the reference to strength of the Rules in  
8 79(3)(a), but there is also the question of strike out. Again, we feel, very strongly if I may  
9 respectfully put it like this, that if an allegation of this novel and ambitious variety is going  
10 to be advanced, then it is essential that both we and the Tribunal should have access to the  
11 same degree of underlying materials that the claimants have had access to and which they  
12 seem to rely upon in their own claim form.

13 So those are the issues of, if you like, principle. Then there is the question of  
14 proportionality.

15 Just to pause for a minute: we would invite you not under any circumstances to give any  
16 indication to Mr Moser that he invited you to give that it could not be relevant for the  
17 reasons that I have just given. On the contrary, on the face of it, it looks potentially very  
18 relevant.

19 Then there is the question of proportionality, as to which we have not really been addressed  
20 by Mr Moser, but just reading from proposed para.8(e)(i) of the order, that does not look  
21 terribly onerous on its face. What we are told elsewhere in the claim form or perhaps in the  
22 Decidedly report itself, I now cannot remember quite which, is that there were lawyers from  
23 Charles Lyndon that did some indicative investigations or surveys in those three years. It is  
24 inconceivable that that material has not been retained. Indeed, it must have been retained,  
25 because otherwise the claim form could not have been written so as to say that there has  
26 been a cross-check between the one and the other. So if it has been obtained by lawyers and  
27 retained by lawyers for the purposes of ongoing investigation, then we respectfully suggest  
28 that it must be easy to locate and identify.

29 I do take Mr Moser's point, though I apprehend for the first time mentioned today, that he  
30 may seek to construct an argument about privilege. Well, let us see that. Let us see that  
31 argument and let us see how it is said to play out.

32 In summary, therefore, we do not believe that until the 12<sup>th</sup> is required for 8(b), (c) and (d),  
33 but we are largely in the Tribunal's hands in that regard. It looks rather easy. As regards  
34 8(e)(ii), if there is nil return, so be it; and as for 8(e)(i), for the reasons I have given it does

1 look highly germane. It is relied upon both by the claim form and the expert report. It does  
2 not look very difficult to obtain, and that only leaves privilege as to which we should have a  
3 proper debate, and if it cannot be resolved amongst the parties it should come back before  
4 the Tribunal. So, unless I can assist further, those are our submissions.

5 THE PRESIDENT: Yes, and I take it those are for all the respondents. Just one moment. (After  
6 a pause) I know, Mr Moser, you might want to make some more submissions, but I think  
7 we will withdraw for just five minutes.

8 (Short break)

9 THE PRESIDENT: Mr Moser, if we could deal first with the last part of the draft, which is (e),  
10 you have explained that (e)(ii), there are no documents, so that is that. On (e)(i), what we  
11 wanted to know is are you relying for the purpose of the CPO application - that is all we are  
12 concerned with at the moment, the application for certification - on the results of any  
13 previous research carried out by Charles Lyndon?

14 MR MOSER: No.

15 THE PRESIDENT: You are not, in that case we do not consider that there need be disclosure of  
16 any such material. You will be relying on the Decidedly report, and it will stand or fall on  
17 that. Obviously the point is going to be made - it has been made now - that that was all  
18 done in 2018 or whatever. There it is. On that basis, it is not relevant to the application and  
19 we will not make any order as per draft (e).

20 MR MOSER: Just for the avoidance of doubt, we rely on the Decidedly report, on the matters in  
21 the AlixPartners report and on the disclosure that is going to be provided to us by the 16<sup>th</sup>.

22 THE PRESIDENT: Yes, and any other matters.

23 Looking back then at the other sub-paragraphs of para.8, as regards (c), we think that ought  
24 to be disclosed.

25 MR MOSER: So do we.

26 THE PRESIDENT: Subject to date, we can make that order now. We think (d) is something that  
27 ought to be disclosed, and should be readily available.

28 As regards (b), we have more of an open mind on that, and that is something rather more  
29 granular and which you need to discuss with Decidedly how readily it is available, and in  
30 what form - it should be readily available - and what the position is. So we will not make  
31 an order about that now, but we will ask those instructing you to look at that with Decidedly  
32 and see what can be provided to take it up in correspondence.

33 MR MOSER: May I briefly take instructions on one point?



1 THE PRESIDENT: That is at least how we - as I say, I have not heard from you further, but if  
2 you want to address us on - you said you were not resisting (c) - (d) you can, but I would  
3 have thought it is obvious why the survey design methodology is relevant.

4 MR MOSER: (After a pause) Sir, we are happy with both (c) and (d). It was really (b) that was  
5 our concern, not so much that it would not be findable, but that it was not something that  
6 would be easily gone through by today, say, and it would take a certain amount of work for  
7 people to comb through it, see what there is, where it is, and quite a lot of work would go  
8 into it. We, frankly, are not convinced that it is going to take matters any further.

9 THE PRESIDENT: If you can get some more details of how much work is involved, as you did  
10 on (a), where you were fairly specific on what is required, how long it would take, and so  
11 on, the Decidedly survey results clearly are very relevant to looking at the case, even at this  
12 stage. Unlike Mr Holt's report, it is somewhat of a high level presentation, if I can put it  
13 that way, or summary presentation. So more detail might be helpful. Whether it has to be  
14 all this detail, or whether it can be collected in some other way, it would go further than the  
15 slides which presented their result in a very summary form.

16 MR MOSER: Yes, Sir. That is well understood, and what we propose to do if that is acceptable  
17 is to get back on Friday with (b), as suggested.

18 THE PRESIDENT: Yes.

19 MR MOSER: That may already be the disclosure, or it may be our position on why it might take  
20 longer, or why there are some aspects of----

21 THE PRESIDENT: Again, if it is not every fare, or every purchase, but some agglomeration or  
22 some tabular presentation or something that gives rather detail, to adopt the expression that  
23 Mr Ward used in the other category of some middle way of doing that, then that might be a  
24 way forward. So we will not make an order today about (b) or (a). We have rejected the  
25 application regarding (e), but we will cover (c) and (d). It is just a question now of timing.  
26 There is one other document or documents that we think, as a Tribunal, might be relevant.  
27 Mr Harris, I have got the claim form against your clients open. If you turn in that claim  
28 form to para.25 on p.6, you see that there is reference to the Travelcard agreement entered  
29 into between TfL and the training operating companies, including your client. We think it  
30 may be very helpful to see the Travelcard agreement. I do not know if it is an annual  
31 agreement or if it is simply renewed, but we would like your client to disclose the  
32 Travelcard agreement or agreements covering the period 1 October 2015 to date.

1 MR HARRIS: May I just take some instructions? I apprehend that the claimants may have this  
2 and these already. One assumes that they have looked at it. May I just take some  
3 instructions?

4 THE PRESIDENT: Mr Moser, do you have them?

5 MR MOSER: We have a 1999 version of it.

6 THE PRESIDENT: But not the current one?

7 MR MOSER: But not the current one.

8 THE PRESIDENT: It is obviously the current ones that are important. I assume they are  
9 confidential agreements.

10 MR HARRIS: (After a pause) Sir, I am not able to obtain instructions right now, but we will  
11 obviously obtain instructions very promptly. We have heard what you say and we can see  
12 the relevance of this, so it will be a question of obtaining instructions as promptly as we  
13 can, informing the claimants and obviously the Tribunal at the appropriate moment, and  
14 then, depending on how many there are----

15 THE PRESIDENT: If it exists your client will obviously have a copy of it.

16 MR HARRIS: Exactly, yes.

17 THE PRESIDENT: And it will not be difficult to find. Whether there is one that is simply  
18 renewed by letter or whether it is renegotiated each year we do not know. The only  
19 question may be whether it goes in the confidentiality ring or whether it is open, and on that  
20 we express no view, but we think it should be provided to the Tribunal and to the applicant.

21 MR HARRIS: We will pursue that matter as promptly as we possibly can.

22 THE PRESIDENT: Obviously, Mr Ward, that goes for your clients, and, Ms Abram, for your  
23 clients.

24 MS ABRAM: Yes, Sir. May I just raise one other point on disclosure before the Tribunal moves  
25 on. In my skeleton argument I requested on behalf of my client disclosure of a signed  
26 version of the litigation funding agreement. I am sure that is an uncontroversial point,  
27 but----

28 THE PRESIDENT: Yes, we had rather assumed that has been taken care of, has it?

29 MR MOSER: That is uncontroversial. I had rather assumed it had been taken care of.  
30 Apparently it has not yet gone across, but it will.

31 THE PRESIDENT: It will be. I do not think we need worry about that.  
32 So that concludes disclosure, subject only to this: is there any reason we should not include  
33 in the order that you disclose the Travelcard agreements? The only question is by when.

1 MR HARRIS: May we communicate with the Tribunal about that? I have not been able to obtain  
2 instructions. We will do that very promptly.

3 THE PRESIDENT: We will not draw up the order, but we will be minded to include it then. Is  
4 there anything else on disclosure?

5 MR MOSER: No.

6 THE PRESIDENT: Then, looking at your helpful draft, there is the exclusion of certain persons  
7 from the class, including the members of the Tribunal, who will, with fortitude, forego any  
8 potential benefit. There is publicity, and you are content with the 16 April date, are you?

9 MR MOSER: We are.

10 THE PRESIDENT: Then there is the timetabling. I think the timetabling can sensibly work back  
11 from a hearing date. The position is this: we are not able to accommodate the case in the  
12 last week of July. I have some doubts whether it would be ready, in any event, by then, or  
13 rather whether the timetable would not be too compressed, but that does not arise, we  
14 simply cannot do it. We also cannot hear it, because of members' availability, in the  
15 suggested week in September. There are always greater complications when there are three  
16 members of the Tribunal. The week of 4 November is available and that does work for us,  
17 and in what is a pure damages claim, essentially - I know there is an injunction as well - we  
18 do not think the extra six weeks of delay is going to be significant. So that is where we are  
19 in terms of when we could timetable the hearing.

20 MR MOSER: Indeed, may I briefly take instructions?

21 THE PRESIDENT: Yes.

22 MR MOSER: (After a pause) I am grateful for the time. Because we have not concentrated  
23 much *inter partes* on the November dates recently, because we thought we had found a  
24 good solution in September, but clearly we have not, as far as I recall October is also out  
25 because of a hearing involving you, Sir, and I think Mr Holmes, which starts at the  
26 beginning of October.

27 THE PRESIDENT: That is right, I am hearing a four week case in the High Court.

28 MR MOSER: Yes, we thought that was the case, yes. It was just that we wanted to re-confirm  
29 why it was that October was not convenient, and that is why.

30 THE PRESIDENT: That is the reason.

31 MR MOSER: Sir, we work back from 4 November.

32 THE PRESIDENT: Yes, and 4 November I think is suitable for everyone. Three days should be  
33 adequate, but we are content to include a fourth in reserve.

34 MR MOSER: Three plus one.

1 THE PRESIDENT: Three plus one, excluding pre-reading, which we do not, in this Tribunal,  
2 include in the timetable, unlike in the High Court.

3 MR MOSER: Indeed.

4 THE PRESIDENT: On that basis, we start with the disclosure back in para.7. It can stay on  
5 16 April, if you wish, or----

6 MR MOSER: I believe that is agreed, Sir.

7 THE PRESIDENT: That is agreed as the date, fine. Everyone is content with that. Then,  
8 para.10, we have agreed is 16 April, and that will cover, I think, also 11 and 12, because  
9 you presumably wish to----

10 MR MOSER: We have no difficulty with 16 April for any of those days.

11 THE PRESIDENT: Yes, you want to do it all together, I suspect. So we come to responses and  
12 replies.

13 MR MOSER: Yes.

14 THE PRESIDENT: The one thing we have not, as Mr Holmes just reminds me, considered is the  
15 question of the respondents filing a costs budget. Is that pursued on your part?

16 MR MOSER: It is pursued, if I can put it this way, as an idea. We have got it in our skeleton  
17 argument. I was going to come back to it under AOB, but I am happy to deal with it. We  
18 are not making any application in relation to costs. We have obviously put forward what  
19 our costs budget is. We felt that it would be instructive and that the Tribunal might be  
20 attracted to the idea of the other side producing a costs budget so that one has some idea of  
21 where the costs might be going in this case.

22 THE PRESIDENT: The reason your client has to put forward a costs budget is because of the  
23 unusual nature of these proceedings and the need to be satisfied that there is funding  
24 available to cover the proceedings, and one cannot assess whether funding is available  
25 without knowing what your estimate is as to how much the proceedings would cost.

26 MR MOSER: Quite.

27 THE PRESIDENT: That concern obviously does not apply to the respondents. If they want to  
28 put in a costs budget they can, but I do not think it is for us to order them to do so. You say  
29 you are not pursuing it so I do not think we will include that.

30 Then it is the date for responses. In the light of the fact that the applications will not be  
31 heard until November, are you content with 14 June - Mr Ward?

32 MR WARD: Sir, could we try to persuade you to push it a little bit further back. We were doing  
33 our best to accommodate the possibility of an earlier trial than that.

34 THE PRESIDENT: Yes.

1 MR WARD: Obviously this is a complex matter, and----

2 THE PRESIDENT: If it were 28 June, would you be content with that?

3 MR WARD: We would be grateful for the extra time.

4 THE PRESIDENT: Mr Moser, in the light of the timetable, does that cause any problems?

5 MR MOSER: It causes no problems. Our concern, as always, is that the longer the other sides  
6 have the more costs can be generated. We see 14 June - it was 17 May or 14 June - very  
7 much as a sort of backstop for stopping spending on----

8 THE PRESIDENT: It does not necessarily generate more costs, because if everything has to be  
9 done in a rush then people have to work weekends, and with large firms it means the team is  
10 expanded to do everything quickly. So more time does not necessarily mean more money,  
11 it is really what is reasonable. You have obviously spent a lot of time preparing the  
12 applications. It is going to disrupt the timetable. I think 28 June is reasonable. How long  
13 do you want for your reply?

14 MR MOSER: Sir, one of the aspects of our original timetable that to some extent I was frankly  
15 concerned about, but we were willing to make a sacrifice for in the interests of trying to get  
16 this heard by July, was that we only allowed four weeks for our response to three replies  
17 and indeed any objections which was extremely ambitious. I have explained why we did  
18 that.

19 THE PRESIDENT: You can have more.

20 MR MOSER: We would like more. If the hearing is not going to be until November, then we  
21 would ask, please, that our response be by 30 September.

22 THE PRESIDENT: That is quite late. You have all of July. I would have thought an earlier date  
23 in September is possible, is it not?

24 MR MOSER: I am sure it is. I had really thought of August as being a non-month, and that  
25 would give us eight weeks instead of four.

26 THE PRESIDENT: This is reply rather than your original application, so if we said some time  
27 earlier in September, is there any objection to that on the part of the respondents?

28 MR WARD: Sir, no, but we do say though that early in September would be appropriate. August  
29 is not a non-month any more in the law, even though, of course, it is sometimes difficult  
30 because of people's overlapping holidays.

31 THE PRESIDENT: If we said, Mr Moser, 6 September, that is----

32 MR MOSER: Might I persuade you, Sir, to go as far as 13 September?

33 THE PRESIDENT: We will say the 11<sup>th</sup> - all right.

34 MR MOSER: I am grateful.

1 THE PRESIDENT: It is not going to really make a difference.  
2       Objections: you are going to be putting this in your notice. I would have thought it should  
3       be 5 July, and no later.  
4 MR MOSER: We are happy with 5 July, Sir.  
5 THE PRESIDENT: Third party, again 5 July, para.16.  
6 MR MOSER: Yes.  
7 THE PRESIDENT: Paragraph 17. It might be useful to put in a date for a PHR. Maybe some  
8       time in late September, it is just a question of when we could - can we come back to you,  
9       because there are some difficulties on dates in September. It may not need the whole  
10       Tribunal. I think we ought to correspond with you about dates for that. I will also check  
11       my trial timetable for October.  
12 MR MOSER: Thank you very much.  
13 THE PRESIDENT: Then I think skeleton arguments----  
14 MR MOSER: Seven days was because of the compressed nature of the original proposals. We  
15       would not object to 14.  
16 THE PRESIDENT: It is in your interests to have longer, because you will have three. Could we  
17       make it clear that skeletons should be, so far as possible, non-duplicative, and more  
18       particularly oral submissions at a hearing should be non-duplicative, and you should, please,  
19       liaise between you. There are very discrete issues that may arise. On bundles, there is an  
20       advantage of counsel having the bundles when you do your skeletons, because you can  
21       cross-refer. If that is the case they should be prepared 14 days before, if not a bit earlier.  
22       Can we say 14 days before the hearing for filing, so the bundles are filed with the skeletons?  
23 MR MOSER: What would be really useful, of course, would be for it to be 21 days so that we  
24       have the bundles when we are drafting the skeletons.  
25 THE PRESIDENT: There seems to be general nodding at that, so we will say 21 days before.  
26 MR MOSER: There is nodding in the first row!  
27 THE PRESIDENT: You can always apply or agree an extension of that. This is filing at the  
28       Tribunal, so I think we will make the order actually 14 days before. If you can have them  
29       for your skeletons that is obviously desirable, but that is a matter to organise between you.  
30       As far as the Tribunal is concerned, we do not need them before the skeletons, so we will  
31       say 14 days.  
32 MR MOSER: We are grateful. We are also grateful for the very helpful indication, that I am sure  
33       has been listened to, about non-duplicative argument. If it were possible to give a similar  
34       indication as to both the non-duplication and a general non-need for disproportionate

1 evidence in relation to responses and replies at 13, which reads, “To serve responses to the  
2 applications, including any evidence”, we would be grateful also. I am sorry to go back to  
3 that.

4 THE PRESIDENT: Yes, I think we will leave that to the good sense of experienced counsel in  
5 the way they prepare it. The only other thing that I would wish to say as regards skeleton  
6 arguments is that they are skeleton arguments, they are not full briefs. I would like to,  
7 therefore, impose a page limit on skeletons. It seems that there are three respondents, and if  
8 they have 25 pages maximum each, 1.5 spacing, 12 point font, and standard margins!  
9 Mr Moser, for your skeleton, if you are dealing with three such skeletons, 40 pages, that  
10 will be quite enough.

11 MR MOSER: Indeed.

12 THE PRESIDENT: And that will be included in the order. There may be in due course a practice  
13 direction from the Tribunal on skeletons, but there is not yet in such detail.  
14 Is there anything else?

15 MR MOSER: Coming to the other matters on the Tribunal’s draft agenda, I have one point that  
16 I would like to raise, not so much really for an order, but rather like Ms Abram’s point  
17 about unanswered questions, we have asked in our letter before action about any transitional  
18 arrangements in relation to liability as between the two South Western respondents and we  
19 have not yet heard back. Could I ask the Tribunal very briefly - I do not want to take too  
20 much time - to turn up the bundle, the South Western bundle, at tab 14, there is a letter there  
21 of 2 January, the letter before claim.

22 THE PRESIDENT: Tab 14?

23 MR MOSER: Tab 14. It happens to be the letter to First MTR, but they are both in the same  
24 format. On the last page of their letter, para.41(h), the last full page before we get to  
25 Mr Gutmann’s CV, is a request for an explanation “as to whether liability for any  
26 infringement during the period lies with you” - meaning MTR - “and/or Stagecoach South  
27 Western Trains”. So that is the period when the franchise changed. We have not yet had a  
28 response to that other than MTR responding to us - we need not turn it up - essentially  
29 saying, “We suggest you plead out your case and we will respond by way of defence”.  
30 I want to, as it were, through the Tribunal, just to re-submit that question. It would be  
31 useful to know whether any point is taken about this and what the situation is as between  
32 the two defendants, especially if we are now not going to get their reply until the end of  
33 June.

1 THE PRESIDENT: The position is, as far as injunctive relief is concerned, obviously that only  
2 applies to the current operation.

3 As far as the declaration is concerned, we have covered that. As far as damages are  
4 concerned, if liability is transferred, you would still have your claim against the original  
5 operator, would you not? It is just a question of who would sign the cheque or make the  
6 payment.

7 MR MOSER: We believe so. That is the difficulty we have. We do not know, of course,  
8 whether there is some other arrangement between them as to who signs the cheque, but  
9 perhaps Ms Abram is about to tell us.

10 THE PRESIDENT: But why does it matter at this stage?

11 MR MOSER: It matters to the extent that it crossed our minds that it may not be necessary for  
12 both to make full submissions and incur the costs thereof if in the end only one of them is  
13 going to be liable.

14 THE PRESIDENT: Well, the liability would be with the operator. They might have arranged for  
15 indemnities or have warranties, or whatever, when what I suppose is an operating licence  
16 was granted to the new one and they took over matters, but the liability would still be with  
17 the company that infringed, if you established the infringement, would it not?

18 MR MOSER: The legal liability, absolutely, Sir, yes.

19 THE PRESIDENT: So you would have to claim against them, even if somebody else was making  
20 the payment for them.

21 MR MOSER: That is correct, so we have had to claim against them.

22 THE PRESIDENT: Yes, and you would have to continue to claim against them to establish that  
23 liability.

24 MR MOSER: Yes, we would. The question that crossed our minds was whether it was going to  
25 be proportionate for both to defend that, when we are talking about, in the end, a legal  
26 liability and not the money liability?

27 THE PRESIDENT: Well, except that the evidence might be different. The practice might have  
28 been different, the instructions given to staff at booking offices might have been different  
29 and a completely different company. It seems to me that you have made your point. It is  
30 there in the letter. You can chase it by correspondence. I do not think it is a matter we  
31 would cover normally by order, because I do not think it would have the effect of removing  
32 any party from the proceedings.

33 MR MOSER: I was not seeking an order.

34 THE PRESIDENT: Yes.



1 MR MOSER: That, as far as we are concerned, is all the points that we wish to make.

2 THE PRESIDENT: Does anyone else from the respondents want to raise anything? The only  
3 other point I would make, and it is something we can come back to at the pre-hearing  
4 review, is that there may be when the final bundles are prepared still some material that is  
5 confidential within the confidentiality ring. When this case comes on for hearing in  
6 November it may attract some wider interest, I do not know, but one can see that it is quite  
7 possible, so there may be then requests for copies of the documents being referred to the  
8 Tribunal. So it is very important, particularly, for example, as regards skeletons that you  
9 prepare a non-confidential version as well as a confidential version that can be made more  
10 widely available.

11 MR MOSER: Indeed, and it is sometimes helpful to have the confidential in a different colour,  
12 such as yellow.

13 THE PRESIDENT: It certainly is, yes, for everyone.

14 Thank you all very much. Can you draw up the order, Mr Moser, and submit it to us?

15 MR MOSER: Yes, certainly.

16 THE PRESIDENT: And you will take forward the matters that you said you will raise or pursue  
17 in correspondence. Thank you all very much.

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