IN THE COMPETITION APPEAL TRIBUNAL

Case No.: 1404/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP
(Remote Hearing)

Tuesday 05 July 2022

Before:
The Honourable Mr Justice Marcus Smith
(Sitting as a Tribunal in England and Wales)

BETWEEN:

David Courtney Boyle & Edward John Vermeer

Appellants

v

Govia Thameslink Railway Limited & Others

Respondents

A P P E A R AN C E S

Charles Hollander QC and David Went (On behalf of David Courtney Boyle & Edward John Vermeer)
Paul Harris QC, Anneliese Blackwood and Michael Armitage (On behalf of Govia Thameslink Railway Limited & Others)

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Lower Ground 20 Furnival Street London EC4A 1JS
Tel No: 020 7404 1400 Fax No: 020 7404 1424
Email: ukclient@epiqglobal.co.uk

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(12.00 pm)

MR JUSTICE MARCUS SMITH: Good afternoon. Mr Hollander, Mr Harris, can you hear me reasonably clearly?

MR HARRIS: Yes, sir, Mr Harris speaking.

MR JUSTICE MARCUS SMITH: Thank you. I can see you. Mr Hollander?

MR HOLLANDER: Yes, sir, I can hear you. I can't actually see you.

MR JUSTICE MARCUS SMITH: Ah.

MR HOLLANDER: I can see Mr Harris. Let me try ...

MR JUSTICE MARCUS SMITH: I can hear an echo as well. I am not sure what the problem is, but there is clearly an echo.

MR HOLLANDER: And I can see you, sir, as well now.

MR JUSTICE MARCUS SMITH: All right. We will proceed, echo notwithstanding. Thank you all for making yourselves available at such short notice. I am very grateful to you all. I have your written submissions, both for the substantive hearing next week, which I have read, and the short submissions you have produced overnight, which I have also read. I have made fairly good inroads into the bundles for the hearing so I am reasonably up to speed on what is going on.

What we are really talking about, I think, is whether the hearing next week can fairly embrace the new claim and the new expert report or whether the certification needs to proceed on the basis of the new claim and the new evidence being excluded such that if there is to be certification it's only on the basis of the old claims, the existing claims, with the new claims and the new evidence being adduced, if at all, in a later certification hearing.

Have I got that, broadly speaking, right, Mr Harris?

MR HARRIS: Those are two logical alternatives. The third one, sir, would be if

Mr Hollander persists with the application for the contested re-amendments, then next week's hearing has to be adjourned so that we have the time to deal with. So logically that's a third option, though neither party, as things stand, applies for an adjournment.

MR JUSTICE MARCUS SMITH: I understand.

Who should go first? I think, Mr Hollander, you can have a brief start, but I suspect your main fire should be saved for reply and we will hear Mr Harris and if we need to have a rejoinder we can go from there. But do set the scene, Mr Hollander, and then we'll hear from Mr Harris.

You need to unmute, Mr Hollander.

Submissions by MR HOLLANDER

MR HOLLANDER: I am so sorry. Let me just -- what I will do, if I may, is just identify the point as we see it and leave the submissions on it for reply.

Just so there's no -- I mean we submit that the tribunal's provisional view is correct, sir. Just so there's no misunderstanding, and it may be that you are completely on top of this already, if the price, shall we say, on any permitted fare on the factual is 100 and on a single-brand fare is 60, then on unregulated fares then in the counterfactual they would go to the same price which, shall we say, is 80.

The respondents say when one class member purchases both types of fares at different times you should net off the benefit of the single-brand in the counterfactual against the loss in the factual. Our primary case is there should not be a set-off at all because, one, they are separate and distinct transactions and, two, you are comparing apples and pears because in the counterfactual the single-brand fare is a vastly superior product than it was in the factual because in the counterfactual you are not being deprived of rights.

Now the respondents raise the set-off point in their response, and at 43(b) of our reply we pointed out that those who purchase single-brand fares in the factual suffered harm. At paragraph 37 of the rejoinder, which the respondents served on 1 June, they said: you've said customers have suffered harm but emphasised it wasn't quantified, and that's what led to Harvey 4 on 24 June.

Mr Harvey makes two points in this relevance. If I can just invite you to look at his fourth. At 2.10 he starts in this. The first point he does on methodology, which is all about -- sorry, do you have that?

MR JUSTICE MARCUS SMITH: I do, thank you.

MR HOLLANDER: The first point he makes is to identify the methodology he would use if there is to be a set-off whereby he would calculate the amount of a set-off on the hypothesis that the respondents are right all the way along. In other words, all he is doing is saying how he would work out how many of the class members have purchased both types of fares. 2.14 and 2.15 deals with that.

I would respectfully suggest -- and I will come back to this in due course -- that that is not terribly exciting. It's not an amendment point. That's simply setting out the methodology and effectively fine-tuning the methodology in the light of the point taken.

The second point, which is 2.21, is to estimate the value of the flexibility offered by an unrestricted fare, and he deals with the methodology at 2.21. In those paragraphs, he sets out the methodology he would use if it was necessary on this premise to calculate the value of what he calls the flexibility offered by the unrestricted fare.

Now it's the second part of those that is really amendment, the first part is simply a fine-tuning of the methodology, and that is the reason why we seek leave to amend to deal with that. That is the factual position. That was served on 24 June so 19

days before the hearing.

It probably is the time now for me to stop and leave the submissions to reply, if that's the convenient course.

MR JUSTICE MARCUS SMITH: I think that is a convenient course. (Audio distortion) and we'll then have Mr Hollander respond to his points. But if we need to have a rejoinder, then we'll have that as well.

MR HARRIS: Sir, I am grateful for that final indication because of course strictly speaking this is Mr Hollander's application.

MR JUSTICE MARCUS SMITH: No, no. Well, let me make a couple of things clear so that both sides know where they are coming from. It's clear, I hope, that I am sitting on my own. I don't have the ordinary members who will be sitting with me next week. I would want them to be here, not because of any question of jurisdiction, I think I have jurisdiction to make the amendments if I choose to do so, but I want to do as little as possible today because it seems to me that matters ought, so far as possible, to be decided by the full tribunal, given we are so close to the substantive hearing.

So I am going to try and do as little as possible. What I am really trying to do is identify the scope of the material that will be before the tribunal next week so that both sides know exactly what they can and can't address. In other words, I am not, subject to anything Mr Hollander says, going to say, contrary to the indication I gave yesterday, that these matters should be admitted. I am not going to give permission today because I think there is something to be said, Mr Harris, for your point that, whilst one can deal with the merits question by way of a subsequent strike-out application, I do see that there is some force in what you say about that effectively pre-judging the eligibility condition and authorisation condition.

The question I think is whether the authorisation condition and the eligibility condition

are, in a sense, unitary, in that if I were to decide those conditions or the tribunal were to decide those conditions by reference to the existing claims as framed with existing evidence, whether that outcome wouldn't in fact inform the new claim and therefore the new evidence.

In other words, what I have in mind, and what I think you need primarily to submit on, is that I or the tribunal will hear, *de bene esse,* the claims to their full extent and decide whether the provisional view that I have expressed, that these are unitary questions which can be informed by the evidence as it stands, is in fact true and decide that on the basis of everything, amendments and the fourth expert report, whether that is in fact the case, in which case everything gets certified.

If not, if I am wrong and there isn't a unitary question, and one needs to consider eligibility and certification conditions claim-by-claim, as it were, then we would have to kick off the new claim for subsequent argument. So that's where my mind is trending, but I wouldn't want you to be pushing hard against permitting the amendments because I think, provided both sides know what the tribunal will be looking at, I can avoid making that decision today and if I can avoid it then I would rather do so.

MR HARRIS: Sir, thank you for those opening remarks. I confess that I am not sure I have fully understood. Let me see if I have understood two things at least. The first one is that, subject to any further argument today, in particular from Mr Hollander, you are not going to give permission today for the contested re-amendments, together with the supporting parts of the expert evidence; and that was principally why we were here today.

MR JUSTICE MARCUS SMITH: Well, I think we are principally here today because you want the new claim and the evidence out and Mr Hollander wants it in.

MR HARRIS: For next week.

MR JUSTICE MARCUS SMITH: For next week.

MR HARRIS: Yes.

MR JUSTICE MARCUS SMITH: What I am saying is I think, but you will want to persuade me that I am wrong, that we can look at it without your clients putting in anything more, if that's what they wish to do. If they want to put something more in, then fine, but I hear what you say that there just isn't time. My point is that there are three broad factors that go into a decision regarding certification: one is merits; one is eligibility; the third is authorisation.

Now, so far as merits is concerned, we can deal with that by way of a subsequent strike-out application in relation to any claims, including the new claims. That's not a problem.

So far as eligibility and authorisation are concerned, what I am really saying is if I was satisfied that both of those requirements, the authorisation condition and the eligibility condition, were satisfied in relation to the existing claims, would that conclusion read across to the new claims without more?

MR HARRIS: I understand much more clearly now, sir. Thank you for that clarification, or at least enabling me to understand better.

MR JUSTICE MARCUS SMITH: No, no, this is hard stuff, and let me be clear I would only be articulating this as a provisional view so that both sides know how we are going to approach this next week. If my provisional view turns out to be wrong and you would be entitled to full argument on that next week as well as today, if it's wrong, then we would have to have, if Mr Hollander's clients so advised, a further hearing to deal with authorisation and eligibility in relation to the new claims separately.

But really what I am trying to do is to keep the possibility at least of one hearing in play, rather than having to either adjourn or have two hearings which is, on any view,

bad case management.

Submissions by MR HARRIS

MR HARRIS: Yes, I understand, sir. So let me take those points at a very high level first so that you have a road map of our position.

We do not contend that the proposed contested re-amendments bear upon the authorisation condition. So that's off the table. As you know, there are other -- we take issue with authorisation but it doesn't --

MR JUSTICE MARCUS SMITH: No, no, of course you do. I absolutely have that.

MR HARRIS: But of the three, that is the only one where the re-amendments are not relevant.

Of the other two, merits, we say that that is relevant and it is relevant because, in the entirely orthodox way, one should not allow re-amendments if they are so bad as to be strikeable. I cannot address you on that either today or fairly at the hearing next week because I, as you have seen from the skeleton and the correspondence, have not had the proper opportunity. So I would be hamstrung on the second of the three pillars that need to be addressed.

Therefore, on that second one the only options are either they are not allowed to be presented next week -- and I hasten to add we are ready to proceed next week on the original claims and all the other amendments, bar these ones. So that's on the second pillar.

On the third pillar, namely eligibility, that's really a problem for my learned friend and not for me. We understand his claim to be such that there is a direct implication for the eligibility of all the existing claims that arises from his proposed contested re-amendments.

Let me explain that by reference to the new methodology, briefly explain this by

reference to the very parts of the new methodology that are set out in Harvey 4 that Mr Hollander just took you to.

So if you were to turn up Harvey 4 at paragraph 2.11 where we just were before.

MR JUSTICE MARCUS SMITH: Yes, I have that.

MR HARRIS: What has happened in this report is that two brand new steps have been introduced that were not there before. They are item i and item iv. They were not there before at all. Yet they are now said to be, both of them, critical to the way in which Mr Harvey wishes to present his overall case for aggregate damages. That's their case, not mine. They had a case that didn't include these steps, we were ready to fight it and then they changed their mind.

But just to explain that in a little bit more detail, number 1 is intended to be a new step to identify, as Mr Hollander said a few moments ago, if you like, the overlap between people who bought what we contend are both cheaper and more expensive fares in the counterfactual. The reason that he has now done that is because of our point that we took ever since day 1 that an offsetting needs to be entertained -- needs to be factored in, I beg your pardon.

So he didn't do that before. He then finally has listened to what we've said ever since day 1, ever since December last year, and his clients and his experts have said: okay, we are now going to deal with that, and that's his way of doing it.

Now that's now a part of his proposal for getting to the proper overall aggregate level of loss. So we say that that's really his problem. He can't actually proceed, absent step number 1, because his case is now that in order to get to a proper aggregate level of loss overall you need to know what the overlap is and you need to offset as appropriate to come to whatever number that may be.

Likewise with iv, that's the so-called new claim, what we characterise as the new claim, and it is for alleged loss of travel flexibility. It's now part of Mr Hollander's

case that he wants to be able to add in these additional and new losses for this supposed loss of flexibility. But again that's really a matter for him. We were ready to fight the claim absent that.

But where the problem lies for us, sir, is if you were, at the hearing next week, to entertain frankly any submissions about the new i or iv, then again we are hamstrung because it's self-evident from this document that it is a matter of expert evidence.

Can I just illustrate that in a couple of ways. The first and most obvious point is that this is an expert report so my learned friend and his clients have had the opportunity going on for now over seven months at least, if they didn't think about this before they lodged their claim, to consider whether to make this claim and to consult with any and all experts that they feel like consulting with, and then to write up a report and then to lodge the report and then to amend their claim. That's all based upon expert evidence, and you can see it over the following pages.

So step number 1 is pages 9 and over the page to the whole of page 10. It refers to data, passenger surveys, and then incredibly Mr Harvey himself says at 2.15 that each of these approaches -- these are expert approaches that we've never had a chance properly to address -- he then himself says, so the expert for the other side says:

"These approaches have some advantages and disadvantages."

He even, unbelievably, goes on to set out what some of them are. In the second bullet point, he includes the phrase "which they may find difficult", and the further phrase "would need to be carefully designed and involve a specialist primary search provider".

I simply say those simply to illustrate that my opposing expert already recognises that this is all expert evidence and it may be difficult, it has advantages and disadvantages, it would have to be carefully designed, it may require yet another

expert. They've had the chance to do all this and we haven't.

MR JUSTICE MARCUS SMITH: Who is your expert? Has he put in any material to date?

MR HARRIS: No, we haven't put in any material to date because hitherto we've been able to take the opportunity to consult with any relevant expert in good time and decide how to respond. But we simply have not had that choice here.

It's worse here because, as you might expect, parties normally have recourse to economic consultants, such as Mr Harvey, and, without revealing anything that's privileged, this is a normal case from our perspective in that regard. But, here, Mr Harvey himself is saying that there is "carefully designed alongside specialist primary search providers". We have not consulted any such person, we don't know where we would get one, we haven't had the time to do it, but Mr Harvey himself says it's relevant.

Now I am not suggesting to you that if we did find one in the time available and we consult with that person that we night necessarily put in a report or seek to adduce an expert at the hearing, but the problem is that as of today, or as of next Wednesday, I just don't know because --

MR JUSTICE MARCUS SMITH: No, I understand, Mr Harris, but you say that goes not just to the question of strike-out but also to the question of eligibility.

MR HARRIS: Absolutely it does because, as you will well know -- and there is no need to recite process to anybody on this teleconference -- but it does of course require me to address credibility, plausibility, basis in fact, workability (including by reference to data) and wrapped up with all of that are questions of cost, which are intricately connected with what Mr Harvey himself says "may find difficult ... will have to be carefully designed ... and has advantages and disadvantages".

So I can't address you, either today or next Wednesday, fairly by reference to any of

those process eligibility criteria and that's deeply unfair.

It doesn't end there because that's only i; iv gives rise to the exact same difficulties, if not compounded. So just to quote from paragraph 2.21 of Mr Harvey's fourth report, this is his evidence, he says:

"It is inherently difficult to place a value on this."

Well --

MR JUSTICE MARCUS SMITH: Just pausing there, let's suppose for the sake of argument, leaving aside Harvey 4, the tribunal was persuaded, contrary to your arguments, that the eligibility condition was met, so on the stuff that you were prepared to argue for, is it your position then that the introduction of the new claim and the new evidence would cause the eligibility condition to cease to be met?

MR HARRIS: Yes, absolutely it is. I have not had the chance, as you know, properly to assess that or take expert evidence on it.

So the only choices are divorce them altogether from the hearing next week, which removes the unfairness, or adjourn, at the PCR's cost I hasten to add, and allow us the time and that removes the unfairness. But the one option that does not fairly present itself is carry on with them in somehow in (inaudible due to overspeaking).

MR JUSTICE MARCUS SMITH: You are not attracted by my *tertium quid*?

MR HARRIS: I am not attracted by *de bene esse* because I would have one hand tied behind my back. I would not be able to address you fairly on the eligibility criterion for the new part of methodology, and I would, for all I know, having taken proper advice and instruction on that, I might say to the tribunal: well, now that I have had the chance to digest it and understand it and take expert evidence, I actually want an expert report of my own. I might even say that I want permission to call an expert. These are matters that I simply can't address today or by next Wednesday.

It doesn't end there, sir, because this claim, if you could just have a look please back

at page 9 of Mr Harvey's report, so it's paragraph 2.14, it's not limited to expert evidence.

Mr Harvey's new first step also includes the need on my part to assess whether or not to put in new factual evidence, because if you look at 2.14, the first bullet, (i), using GTR's sales data, one of his proposals is to use GTR's sales data, but he goes on to say depending on the scope of GTR's sales data. But I need to take instructions on what that is, and I need to adduce evidence.

MR JUSTICE MARCUS SMITH: Why do you need to do that?

MR HARRIS: The proof here is in the pudding because what Mr Harvey is saying is: I might be able to just run this methodology using data. But if we have not had the chance yet to ascertain exactly what that data is and whether he can run the methodology using our data.

When this arose in Harvey number 3, at paragraph 3.16, in exact parallel to this situation and Mr Harvey put forward a new methodology in Harvey number 3 and said he might be able to run it using GTR's sales data, that was on the scope of penalty and excess fares claims, we said: well, now that you've made that proposal, let's go off and look. We adduced a witness statement from a Ms Julia Burgess and she explained that actually it can't be done in the manner that Mr Harvey had contended that it might be capable of being done. That's a fair approach. He suggests it might be capable of being done. We look into the facts. We adduce some factual evidence and we say: actually, no, you are wrong, on the facts that can't be done in the manner for which you contend. We need, in the interests of fairness and justice, to be able to do the same here and we haven't had that chance.

The same goes for a point in section number 4. Mr Harvey on section -- the fourth step, at the top of page 12 of the report, refers to "some expert methodologies that I have not been able to assess", namely established valuation techniques, something

called a stated preference survey or a conjoint study, as to which I have precisely zero instructions for today because there has not been time. But at the top of the next page he then says it might be that GTR itself has conducted valuation studies. Well, again I need to take instructions. I need to find out whether Ms Burgess or her colleagues actually have ever done something called a valuation study because that bears upon what Mr Harvey now for the first time says is part of his new methodology.

So, to take a step back, I need to have the opportunity not just to take expert evidence -- expert input potentially from two experts and potentially then to at least address the question of whether I should adduce my own report and, thirdly, whether I should call my own expert, leaving aside that I need that expert evidence in order to determine what questions, if any, to ask of Mr Harvey if this is let in, and I won't have a chance to do any one of those four things, but on top of that I also need to have proper opportunity to adduce factual evidence on at least the two matters to which I have drawn your attention. I won't have the opportunity to do that either. I certainly am not in a position to address it today and I won't be in a position to address it by next Wednesday.

It doesn't end there, sir, because where is the provision in the timetable, I ask rhetorically, utterly ignored by Mr Hollander and his clients, for me to respond to these proposed amendments if they are let in? Where's my ability to plead back? That's not catered for, but that's not fair. Where's my ability to address this in the skeleton argument once they are let in and once I've taken instructions? It's utterly ignored by Mr Hollander, but that's not fair.

We have not addressed these contested re-amendments in the skeleton we put in at 4 o'clock yesterday for obvious reasons: they are not currently part of the case. So I would be denied the opportunity on expert evidence, on factual evidence, on

responsive amendments and on skeleton arguments, and this is all entirely due to the last minute decision of Mr Hollander and his clients to simply change their minds. You will have seen, sir, that in paragraph 43(b) of the reply it's said in writing that the reason they didn't put forward the exact claim that they now seek to put forward is because they consciously decided not to do it, and they did so allegedly on the grounds of simplicity. Well, I don't particularly care what their reason was. We were faced with a deliberate and express written decision not to pursue this claim and not to seek any damages in respect of it, and that was as recently as 25 March. Now they've now changed their mind. Well, that's a matter for them, but it has badly prejudiced me and that's deeply unfair.

It's, with respect, we say worse than that because Mr Hollander's clients have now addressed the tribunal three times on this topic, without drawing the tribunal's attention at all to paragraph 43(b) wherein they took the deliberate choice not to make this claim. So he wrote an application which doesn't mention this point. They then wrote a letter yesterday which doesn't mention this point. They then put in a skeleton argument this morning which doesn't mention this point, but this is the critical point.

It would be grossly unfair, in my respectful submission, for us to be forced at the last minute to address in any way, shape or form next week this proposed new claim in circumstances where they deliberately decided not to pursue it.

MR JUSTICE MARCUS SMITH: Mr Harris, there's no question of your adducing further evidence.

MR HARRIS: Well, with respect, that would be a matter that we can't address properly yet because if my learned friend put in --

MR JUSTICE MARCUS SMITH: (Inaudible due to overspeaking).

MR HARRIS: With respect, sir, that would be not fair. You cannot fairly pre-judge

now, in my respectful submission, whether I would have the ability to adduce expert evidence in response to a new expert report when I haven't been able to take instructions on it.

MR JUSTICE MARCUS SMITH: No, I accept that. I am saying that there's no compulsion. We obviously would have to take into account that you have been met by this change late. The question -- look, if this was a trial we wouldn't be having this argument. But it's not a trial, it's a question of certification.

The question is whether the eligibility condition, if determined in relation to the old claims, carries across to the new. Now you say no, what I am saying is maybe, and I don't want that possibility, if it is a maybe, to be closed out next week.

MR HARRIS: Yes.

MR JUSTICE MARCUS SMITH: If you are right, then we have to have two hearings, no question.

MR HARRIS: Well, sir --

MR JUSTICE MARCUS SMITH: The issue today is whether I decide that now or whether I say: we've got three days next week. I am not adjourning it. What goes in?

I am not expecting you, to be clear I would discourage you, from attempting to fill the vacuum that you've identified. Clearly it would be unfair to do that. The question is whether I can fairly determine or the tribunal can fairly determine the eligibility condition, given the circumstances in which the new claim has been moved.

MR HARRIS: I understand.

MR JUSTICE MARCUS SMITH: That is where I am coming from. I don't want to decide it either which way. I don't want to say I can decide it. But, equally, it seems to me dangerous to say: I am going to kick this off, I am going to require us to have two hearings, when there is the potentiality, and I will say no more than that, the

potentiality to deal with these things in one go. It really does depend on what actually goes into the eligibility condition and whether I need -- I have an understanding of the new claim, to be clear both sides of the new claim, in order to determine that point. If I need to, then I obviously can't do it.

MR HARRIS: I think there are two points, sir, in response to that. The new step one and the new step four are said by Mr Hollander, and Mr Harvey for that matter, to go to the claim that they wish to present for aggregate damages. You have to assess the eligibility condition by reference to the aggregate damages methodology that is put forward.

So if significant parts of the new elements of the methodology are flawed in a certification sense, in addition to what we contend are certification flaws for remaining parts of the existing methodology, then, with respect, that plainly bears upon whether or not you can make an -- on the substance of the eligibility decision you and your colleagues would make after the hearing next week. That can't be avoided. That's the corollary of Mr Hollander's case. So you simply can't avoid having to try to address them in order to address eligibility, and that's the bit that's not fair.

The second point was I think you suggested that it would be not encouraging us to put in any expert evidence and fill the void and what have you, and I understand that. We simply don't have time to do that.

MR JUSTICE MARCUS SMITH: No, Mr Harris, if you wanted to put something in late, you obviously wouldn't reach -- have any opposition from me, and Mr Hollander would have to burn the midnight oil. But I think we are all proceeding on the assumption that that simply can't be done.

MR HARRIS: It can't be done and therein lies the rub, therein lies the rub, because I can't now address you next week fairly on why the additional points in the

methodology that form part of the overall aggregate methodology are flawed, both in a certification sense and in the relevant high level merits sense because this is a knocked out claim. I just can't do that, and it boils down to simple unfairness.

This of course could have all been avoided because Mr Hollander's client has known about this claim right from the beginning, and we've made perfectly clear right since December last year that we had an offsetting point, to which this is said to be partly a response, and we've repeated that throughout our pleadings.

Then on 25 March Mr Hollander's clients went into writing, consciously expressing to us that they weren't going to take the point. Then, as if that is not enough, which with respect it is, he then says: oh, well, we only realised -- I paraphrase -- that we needed to do this when we read your rejoinder. We don't accept that for a minute, but even if that were true that was on 1 June and he didn't put in the proposed re-amendments on the contested issues until 24 June.

That's completely unacceptable. He's had all the time in the world with his clients to seek input from any and all experts, write any and all experts reports, make any and all amendments and then present them at a leisurely pace, and yet we are completely hamstrung. It's preposterous, it's nothing less than preposterous, for Mr Hollander's clients to suggest now that we should have somehow anticipated that this claim that had been expressly disavowed was actually going to be pursued. That's one of the most ludicrous submissions I've ever heard, with respect.

It's equally ludicrous to suggest somehow this should have been dealt with in pre-action correspondence, leaving aside that, as we set out in our skeleton, the pre-action correspondence is not fairly represented in my learned friend's correspondence or skeleton arguments. In fact, we did engage with it and they rushed to jump the gun. But leaving aside that, they went on the record on 25 March to say they weren't going to do this, so we are obviously not going to prepare for it.

It's no answer -- I think I ought to just address this point, to say that later on you could seek to strike out this point. It's no answer for three reasons. First of all, it's relevant to whether you should allow any amendments that the point is strikeable. That's elementary and orthodox law. You shouldn't allow any amendment if it's a strikeable amendment, and yet I can't address you on that.

Secondly, and in any event, certification and strike-out are different, but you have this point, and I have not had the chance to ... Then, thirdly, you need to consider, you and your colleagues, merits at a high level in any event because this is an opt-out claim, and yet I haven't got the opportunity to address you on that.

Then there is one other, if you like, slightly more technical point that I feel I need to draw to your attention, even without having had the benefit of experts' input or instructions, and it's to do with the class definition. What you will have seen from my learned friend's skeleton for today is that he specifically states that they are not amending the class definition. That's important because they are not amending so as to add purchases of single-brand fares. They are not doing that. That's notwithstanding that their new point is that some purchases of single-brand fares, they accept for the purposes of the methodology, may have actually had a benefit and they want to net them off, right.

So that's the parameters of this issue. They accept that some single-brand purchases may have a netting off issue that they need to deal with in the methodology, but they are not amending the class definitions so as to add people who buy single-brand fares.

That means, sir, that they can only be pursuing a methodology for setting off in respect of those people who were already in the claim who happen also to have bought single-brand fares. So far so good. That is the only way they can be doing this. Yet they have no methodology at all, at all, for working out the overlap between

people who are already in the claim, on the one hand, and yet fall within the class definition, on the other hand.

In this regard, sir, you should just note that when you look at the class definition it simply doesn't include anybody at all who purchases a single-brand fare. So, for instance, you would find that at paragraph 18 of the claim form, whether in amended or proposed re-amended form. There are no references at all to people who buy single-brand fares. That is a point that has become clear to us overnight, even without expert input. It's an incoherent claim, for which there's no methodology.

These are the sorts of points that I would like to be able to develop if this is allowed in, and then any and others that come forward with the benefit of expert evidence, but I am not able to do that.

MR JUSTICE MARCUS SMITH: Yes, thank you very much, Mr Harris.

Mr Hollander. Again, you had better unmute.

Submissions by MR HOLLANDER

MR HOLLANDER: I have unmuted.

As I understand what you were saying, sir, you are not going to make a final decision today, for the reasons you have indicated, and the purpose of this hearing therefore is to look at the parameters of next week and how we deal with it.

The points actually which are raised by Harvey 4, and there are two quite separate points, one is the methodology point which is how to identify -- if there is to be setting off, then what is the methodology for working out the basis of setting off and that's a pure methodology point. It's not a new claim in any sense, it is a clarification and, if you like, a stage further in terms of the methodology as I would suggest one gets in most collective proceedings hearings. That is in the same way that Mr Harvey also deals with how he would exclude the deceased persons and dissolved companies

and so forth. It's not an amendment point, and that is not a matter that is a matter of great surprise. Frankly, what he says in 2.14 is pretty straightforward.

The other point, which is the harm suffered by those who bought single-brand fares, that's a separate point and he deals with that. That is something that requires amendment.

Now the question about whether these go to eligibility, despite the fire and brimstone talk by Mr Harris, these are actually quite short and straightforward points. Ultimately, what this comes down to is simply how the tribunal most proportionality and sensibly deal with them, given the three days next week.

It is relevant to note that this is a matter where there has been no application for summary judgment or strike-out, where there is no expert evidence, despite the opportunity, from the respondents and the factual evidence is confined to two witness statements which complain about Mr Vermeer, one of the proposed class representatives, and one short witness statement saying on one particular point they don't have any data. Otherwise, the respondents have not put in any evidence at all in respect of this.

Now my learned friend will say and you would say: well, nevertheless, they need a chance, if they wish to, to deal with it. I think you've indicated already that you would not expect them, if they don't wish to, to put in evidence in the time before next week. So be it.

In that case, in my submission I am not quite sure how far one needs to decide the matter today because actually if one -- and the tribunal has powers, for example, it has powers under 77(2) to make a collective proceedings order attaching conditions, so that's one possibility. My learned friend would say but it goes to eligibility and that's a debate to be had.

In other cases, such as in the McLaren case, the tribunal said in certifying: but this is

subject to providing some methodology on one particular point, I think about deceased persons, and they were able to do that in the tribunal's main judgment. So the tribunal obviously has a number of powers and ways of dealing with it in a way that is sensible, proportionate and the most expedient in terms of costs.

MR JUSTICE MARCUS SMITH: Mr Hollander, let me just interrupt you there and paint the worst case scenario to see how you react to that.

You are absolutely right I am seeking to include but not to definitively include the new claim and the evidence that you want. Now the consequence of that is that Mr Harris, quite understandably, tells me, and I accept, that he simply cannot take the necessary instructions in the time between now and the hearing next week in order to make any kind of informed submissions on the new claim. That is understood. It does mean that he is going to be entitled to significant latitude in making the sort of points that he has made to me today next week.

Now the consequence of that is that I will have to attach, and my colleagues will have to attach, considerable weight to those points. As I said earlier, if this was a trial we would not be having this debate. It's not a trial, it's a certification application. It may be that you are right that there is a way of dealing with this problem which enables certification to be given, perhaps with conditions, perhaps not.

Now that's the best case. The worst case, and I think you need to embrace this, is that Mr Harris makes such inroads into the claim as modified by the new claim that actually you get nothing of what you want and we will have to kick off the whole thing for consideration with the new claim being debated with such evidence as Mr Harris is advised.

MR HOLLANDER: Those are the two --

MR JUSTICE MARCUS SMITH: Now that's the worst case.

MR HOLLANDER: Those are effectively the two possibilities. Essentially, one can do it all next week, subject to a right to come back, or one can't do it next week and therefore there has to be a further hearing. Those seem to be the two possibilities. Sir, you are absolutely right in identifying those, and exactly which one of those attracts the tribunal I would suggest is a matter for next week.

I would suggest that if one actually proceeds *de bene esse*, as it were, in respect of this, then Mr Harris is not in any way prejudiced and the tribunal will have to see where you get to in terms of this. I don't, with respect, see a difficulty in doing that. As you say, one possibility is we have to have a further hearing.

MR JUSTICE MARCUS SMITH: Indeed. I just want to make clear that if we go down that route, and again I am expressing a provisional view which I may very well change, but it seems to me fairly clear that your clients would be bearing the costs thrown away of the hearing next week. I do think that that needs to be articulated.

Now Mr Harris has said that the costs thrown away of an adjournment would be yours. We are not going to debate that because we are not having an adjournment. But clearly if one had the worst case that I am putting to you, and who knows what is going to happen next week, but clearly if one had the worst case and we come to the conclusion that we can't really decide the existing claims without the new claim, and we can't decide the new claim without material from Mr Harris or without the opportunity for him to put material in, then we would have to say: well, we need to have a further hearing. These last three days could have been avoided. I'm afraid the applicants pay the costs.

Now I am not saying that's the outcome, but I do think it's a possibility that I need to have on the table before you so that you can tell me how far that is wrong or how far you accept that as a potential outcome of next week if things go a certain way.

MR HOLLANDER: If there is a second hearing, there is a potential costs issue of

course. One would have thought that if you'd had three days already, then the vast majority of the points will have been, if not definitively dealt with, dealt with in substance and therefore the further hearing will cover those additional matters which arise out of this particular matter, which I would have thought, and again we'll see, could probably be dealt with in half a day or a day, but that could be controversial. It might be said that the costs that should be thrown away are the costs of the extra half day or a day.

MR JUSTICE MARCUS SMITH: Yes.

MR HOLLANDER: I thought that was a more likely -- and again we are not deciding any of these points --

MR JUSTICE MARCUS SMITH: We are not.

MR HOLLANDER: -- that seemed to me provisionally, if one went down that route and that was the result, and it was because of that, that might be a more likely result, I would suggest.

But those are -- we are where we are in respect of this. I was going to make the submission that some of these concerns are rather overstated. In the light of where we are, I don't think I need or want to make that submission.

MR JUSTICE MARCUS SMITH: No. I think I am going to discourage that sort of submission.

MR HOLLANDER: That's what I thought.

MR JUSTICE MARCUS SMITH: No, simply because if this was an adjournment application I would want to hear.

MR HOLLANDER: Of course.

MR JUSTICE MARCUS SMITH: But really what I am doing is I am really just ensuring that both parties know what the tribunal will be looking at and the attitude it will have towards those matters so that no one is taken by surprise next week. In

particular, if there is effectively an adjournment of a three-day hearing part-heard, no one is taken by surprise by that either. I want to avoid that obviously. But clearly Mr Harris has points to make. He has made them in staccato form today, but he will be making them in rather more than staccato form next week. To be clear, that's something which he will be entitled to do.

MR HOLLANDER: Yes. That's why I deliberately did not make, as it were, submissions on -- well, you understand why --

MR JUSTICE MARCUS SMITH: Indeed.

MR HOLLANDER: You have discouraged me, and quite rightly so.

I am not sure how much more I want to say in that case. I mean I think what you are saying, sir, is the hearing will go ahead. I think you are indicating that the hearing will go ahead -- I mean *de bene esse* is my word and not yours, but I think that's what it amounts to, with Mr Harris' position being entirely reserved and he having said, quite loudly I think, exactly what his position is and made the points clear and we are on notice of that. You've made clear there may be cost consequences in terms of that if you decide, depending on where you get to at the end of the hearing next week. I think on that basis I am not sure how much more you need -- of course it's a matter for you -- how much more I need to say.

MR JUSTICE MARCUS SMITH: No, indeed, Mr Hollander. I am very grateful to you. If I had more to ask, I would ask it. I don't.

I will give Mr Harris the last word because I think if he has anything to say I'd like to hear it, but I don't think I need to hear anything more from you.

Mr Harris.

Submissions by MR HARRIS

MR HARRIS: Sir, three short points of reply to that, and then there are two other

minor matters that arise today.

MR JUSTICE MARCUS SMITH: Yes.

MR HARRIS: Different matters.

The first point is Mr Hollander suggested that if the hearing wasn't able to be completed next week that I would somehow have "a right to come back". Then he said that I am not in any way prejudiced by the proposal that he puts forward. But first and foremost, that's wrong. I am prejudiced next week because I want to address you on eligibility, including with the benefit of expert and factual evidence, and I am not in a position to do so, and that is brought about entirely by his client's behaviour. It is a gross unfairness to my clients and cannot --

MR JUSTICE MARCUS SMITH: Mr Harris, let me interrupt you there. Let me say I accept that. The question I think is whether the prejudice is containable such that your clients get a fair hearing. The reason we are having this discussion today is because I don't want to pre-empt that because, like the parties, I want to avoid an adjournment, because it seems to me we are really talking about whether we have a three-day hearing which might work but if it doesn't with a further hearing which someone is going to have to pay for after the event, or whether we adjourn it off. It's the adjournment that I am at the moment keen to avoid.

But what the implications are of going ahead, I am absolutely not committing the tribunal to and that's why I put the doomsday scenario to Mr Hollander because I don't want there to be any illusion that if we end up at the end of three days or, having reserved a judgment, at the end of our judgment saying: we can't decide this because it would be unfair, then someone is going to pay the costs of that and my provisional thinking is it's going to be Mr Hollander's clients, not you, but that is again something that I am not committing to, it's not even a provisional view, but it is something that I do want both sides to appreciate is very much on the cards.

I mean, equally, if it was clear that we would have to have a further hearing inevitably, now I know that's what you say, but I am not completely persuaded of that, if it were the case that I was persuaded that there was no way we could decide this is in three days, then I think the adjournment option would have greater attractions. It's simply that I want to, particularly because I am sitting alone, ensure that we have a clear idea what we are hearing next week, with all options being open, that I am dealing with it in the way I am.

MR HARRIS: Sir, I will make these points briefly then because I think it's important that they are on the record.

My clear submission is that there is such unfairness that I will have one hand tied behind my back next week on this proposal and that's not fair. It's brought about by Mr Hollander and his clients for no good reason and it should therefore not be allowed. My submission is on this first point that you can see now that obvious unfairness and therefore you shouldn't enter into a hearing next week where that obvious unfairness ties one hand behind my back. That's the first point.

MR JUSTICE MARCUS SMITH: So are you asking for an adjournment then?

MR HARRIS: No, what I am saying is that the unfairness is manifest now and that there is a complete -- this takes me on to my second submission. There is another obvious way of dealing with the unfairness, which is to allow the proceedings to take place next week on the -- without the contested re-amendments, so on the basis of the existing claim, and then Mr Hollander, if he sees fit, after the hearing, he can apply to amend his case then and we can have an orderly and efficient and just hearing where he puts in his evidence and I put in mine, if he decides that he even wants to do it, and then there's absolutely no difficulty at all. That's the course that commends itself, with respect, to me and that deals with the unfairness.

There's a third point, sir, before I deal with the two completely separate discrete

matters.

MR JUSTICE MARCUS SMITH: Yes.

MR HARRIS: Which is that Mr Hollander made a point in his opening submissions of saying today that his principal case is that our argument about offsetting is hopeless as a matter of law. Okay, fine, we don't agree. But if he wants to run that point next week, let him. Then it may be that he doesn't even need his re-amendments, or he may not need all of them, or he may want to readjust them. So that again would be perfectly fair. I am perfectly happy to deal with an argument of law where I don't need any expert evidence or input.

So, taking those three points together, my respectful submission is not to allow, with respect, a mismanaged hearing next week where there is every possibility of it going short, wasting costs, we can all foresee that, but instead to having a manageable, just and efficient hearing on the existing papers and then if, at the end of that, Mr Hollander still wants to press the supposed re-amendments, including in the light of his principal claim, which is that we are all misconceived, then he can take stock and do it if he wants. That can be dealt with in an orderly manner and with normal cost consequences. That's what I have to say on those.

Then, sir, unless there are any questions about that, there are two very discrete points, although I would accept at least potentially one of them you could punt off to another day. Strictly, Mr Hollander says that we've consented to all the other amendments. We did so, but on the basis of the usual order as to costs and he doesn't accept that.

So, just to be clear, while you don't actually have to decide that today, we have not consented to all the other amendments if it's not on the usual order as to costs. We do consent to them if it's the usual order as to costs. I just want to make that absolutely clear.

Whilst I am on the question of the other amendments, he's again said we consent to them, but we've made clear that the July 16 date that appears throughout many of the amendments is not the correct date. July 16 presumably has been chosen by Mr Hollander's team as being the Saturday after the end of the hearing next week, on the assumption, I presume, that he is going to get permission for his amendments. But, strictly speaking, the relevant date is the date upon which the tribunal orders those amendments to be made. Just for the sake of clarity, I don't want there to be any misunderstanding.

But the second of these two discrete points does have to be decided today, with respect. We sent a letter about it this morning. Mr Hollander and his clients have seen fit to send to the tribunal a 40-page skeleton argument for the CPO hearing next week, which is precisely double the allowed length, in circumstances where we deliberately have complied with the practice direction, and that should not be allowed.

We are prejudiced by it because, firstly, it's far too long with no good reason; secondly, there was no application to which we could respond in advance of it having been put in; and, thirdly, it's replete with references to the very point that I am saying should not be part of the hearing next week so we are prejudiced by that.

The outcome, my Lord, ought to be that no permission is given for that skeleton at all, it has to be rewritten, it has to take out all references to the re-amendments and it has to be within the page limit, otherwise directions will have to be given for corresponding extra expense on our part, none of which should be payable by us in any event. So that's the second additional point.

MR JUSTICE MARCUS SMITH: Thank you very much. I won't invite you to respond to that, Mr Hollander. I think I can deal with this in a single ruling.

(Ruling extracted for approval)

MR JUSTICE MARCUS SMITH: Mr Hollander, I am sorry you are muted.

MR HOLLANDER: No, I was just going to apologise for not seeking leave in advance. It was only at a fairly late stage that it became apparent as to the length and that it would need to go beyond, and perhaps we should have thought about it before, and that some of the pages of course deal with what arose at the last minute.

MR JUSTICE MARCUS SMITH: I understand. Thank you very much, Mr Hollander. Mr Harris, is there anything that you need to further address me on?

MR HARRIS: Sir, may I just have another 30 seconds? I am trying to get some instructions on your proposed order for the costs of today.

MR JUSTICE MARCUS SMITH: Of course.

MR HARRIS: As you will appreciate, not all my instructing solicitors are here.

MR JUSTICE MARCUS SMITH: No, that's entirely fair, Mr Harris. Take as long as you wish. If you wish I can rise but shall we just wait and ...

MR HARRIS: I suggest we don't rise. I think this will be pretty prompt, if you don't mind just --

MR JUSTICE MARCUS SMITH: No, of course.

MR HARRIS: Thank you. Sir, we would respectfully contend that the better order would be costs reserved --

MR JUSTICE MARCUS SMITH: I was thinking that that might be --

MR HARRIS: -- until we see what the outcome is of next week and --

MR JUSTICE MARCUS SMITH: That's fair enough.

Mr Hollander, are you content with that?

MR HOLLANDER: It's a matter for you. I would have thought, given where we were and that Mr Harris did not get his primary case, that no order for costs was probably not a bad order, but it's a matter for you ultimately.

MR JUSTICE MARCUS SMITH: I am grateful.

RULING ON COSTS (Extracted)

MR HARRIS: Sir, we are also grateful. Thank you. Do I take it that we are proceeding as planned in person next Wednesday at the tribunal with full teams?

MR JUSTICE MARCUS SMITH: I very much hope so.

MR HARRIS: Yes.

MR JUSTICE MARCUS SMITH: I am very conscious that every time one says this someone pops up with Covid, but we will plan to be in person. Obviously whoever comes down next with Covid will let the tribunal know and we will try and move seamlessly into remote or hybrid as possible, but we are planning on an in person hearing.

MR HARRIS: Thank you.

MR JUSTICE MARCUS SMITH: Thank you for raising it. It's helpful to have that clear on the record.

Thank you all very much. I will end the hearing now.

(1.22 pm)

(The hearing concluded)