IN THE COMPETITION APPEAL TRIBUNAL

Case No.: 1404/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Friday 17th March 2023

Before:
Sir Marcus Smith
(President)
Eamonn Doran
Professor David Ulph
(Sitting as a Tribunal in England and Wales)

BETWEEN:

David Courtney Boyle

Class Representative

v

(1) Govia Thameslink Railway Limited
(2) The Go-Ahead Group PLC;
(3) Keolis (UK) Limited

Defendants

-and-

Secretary Of State For Transport

Intervener

A P P E A R AN C E S

Mr Charles Hollander KC, Mr David Went (On behalf of David Courtney Boyle)

Mr Paul Harris KC, Ms Anneliese Blackwood, Ms Cliodhna Kelleher (On behalf of Govia Thameslink Railway Limited, The Go-Ahead Group PLC, Keolis (UK) Limited)

Ms Anneli Howard KC, Mr Brendan McGurk (On behalf of the Secretary of State for Transport)

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Friday, 17 March 2023

(10.30 am)

Housekeeping

THE PRESIDENT: Mr Hollander, good morning. Before you begin, a few matters of housekeeping and a little more. I think we've got some very provisional views which we want to articulate to assist the parties in addressing us but before I come on to that, first of all these proceedings are being transmitted over live-stream and they are being recorded and transcribed by my direction but nobody else should transmit or photograph or record what is going on and to do so would constitute a contempt of court. I know no one will do that but it's appropriate that I give that warning.

Secondly, you will see, and I think you've been told that we are joined remotely by Professor Ulph. He is on the screen. I know this will work fine, provided the technology allows us to do so, I would hope that anyone in the court, if they perceive a problem with the transmission, and if Professor Ulph himself will speak up if there is a problem, please do so and we will rise to address matters. We do want Professor Ulph to be fully integrated in this process and that notwithstanding any problems that are thrown our way by the technology. So please do speak up.

Thirdly, as I have indicated, we've read the papers, and particularly the very helpful written submissions that we received from the two parties and we know the Intervener is here to assist as appropriate.

We have some provisional views on what is, we think, a very important and for the action very serious case management question. So to begin with a statement of what is obvious, but which nevertheless needs to be said, collective actions are

special. They involve a process of certification and that process of certification places a great deal of weight on the expert reports that accompany the application. And we all know, the Microsoft v Pro-Sys jurisdiction, as I will call it, which has been given an increasing prominence as the cases go by in the Court of Appeal in McLaren and in my own recent decision in Gormsen, which both of you cited.

So expert reports and the blueprint to trial really do matter.

There is also a continuing supervisory jurisdiction, the Court of Appeal uses the phrase “gatekeeper” but I'm not sure that is quite right. There is clearly a gatekeeper function but that function continues as the action proceeds and gates have the sense that once you pass them, one needn't worry anymore. Well, that's not the jurisdiction that we have. The need to ensure that the action is properly proceeding is a continuing duty on this tribunal and it is reflected in rule 85 of The Tribunal Rules, we have the obligation to act of our own motion if appropriate, to stay or desist proceedings and that is a procedural weapon which is not completely aligned with the way purely private actions work. So we have that well in mind.

So with those general points in mind, we have self-evidently a degree of concern with where we are now.

Now, Mr Harvey leaving the case is emphatically not the Class Representative's fault. He appears to have acted, and I don't want to say too much, because we don't know what's gone on, but he does appear to have acted somewhat unprofessionally in leaving the Class Representative in the lurch in the way he has done so and that is something which is the responsibility of the Class Representative but not the Class Representative's fault. I want to make that very clear. It's a problem and we need to handle it in the best way we can, and clearly the Class Representative has been seeking to do so.

That being said, I do have to put on the record the initial view, and, Mr Hollander,

you may well want to push back on this, but the initial view that the handling of that problem, not of its making, by the Class Representative leaves something to be desired and I am just going to pull up a few of the documents in the very helpful bundles that have been prepared to explain why I am saying this.

So if we begin with bundle 1, tab 38, which is a letter dated 1 December 2022 from Maitland Walker to the Registrar, we see an articulation of the problem in paragraphs 5 and 6. Now, when I read the written submissions yesterday --

MR HOLLANDER: Is that the right reference?

THE PRESIDENT: I'm talking about tab 36.

MR HOLLANDER: You said 38.

THE PRESIDENT: So sorry, that is entirely my fault. CMC 631 is where I'm looking at. I'm sorry, I misspoke. What we have here is an articulation that Mr Harvey has informed the Class Representative without warning that he is taking a six-month sabbatical. So the problem is articulated. But in paragraph 6 over the page we see that it is rather low-keyed, and certainly with hindsight, and applying a standard of perfection, I am somewhat blaming myself for not requiring the parties were in front of me before Christmas to deal with this but that didn't happen and I didn't make it happen.

Going on with the correspondence, we see in tab 43 that the debate about the finalisation of the order and the progression of the action is carried on in inter partes correspondence between Maitland Walker and Freshfields, and there's again a low-keying of the problem. Moving on, I will do this quite quickly, to tab 47, page 658, we have the slight oddity of the parties negotiating the form of the Draft Order and all but one point has been agreed. Now, that is where I think things have gone quite seriously wrong because I really don't see how one can be going about agreeing a Draft Order which is dealing with things like disclosure and expert

reports when the position regarding the expert evidence is at large.

So at this point, and we are talking 9 December 2022, I do feel that there is a real problem that is not being addressed by the Class Representative. The last reference that I'll take you to, the second volume of the paper bundles, tab 61, and we see there that there is a liaison between the parties over the draft list of issues. This is a letter to the registrar again, and there's no sense that there is a real problem arising in relation to the blueprint to trial because the blueprint to trial is, as we all know, expert-dependent.

So my short point arising out of this rather lengthy reference to the materials is that this is a point that should have been on my desk festooned with red flags before Christmas. We are where we are. It's March.

Our view, and we'll obviously hear Mr Harris on this, but our view is that given the position regarding experts, we have little option but to adjourn. Now, I will hear Mr Harris on this because I know that is not your position. But it's our duty to try the case fairly and even if we have views about how the matter could have been handled, we are not really in the blame game, we are in the game of ensuring that this matter is tried fairly and properly and that any mistakes are rectified not by making an unmanageable set of orders but in costs. So our provisional thinking is that we have no option but to adjourn but we will want to hear argument on that.

One of the points that feeds into this question is this: we are not minded to force Dr Davis to adopt Mr Harvey's reports. That's simply not what an expert does. An expert, particularly an expert economist in this sort of proceeding, is there to provide independent opinion evidence which enables the blueprint to trial to be understood. It may very well be that when he's considered it, Dr Davis takes the view that he is happy to adopt Mr Harvey's evidence hook, line and sinker, but we regard his reservations in this regard as entirely appropriate, given his role in these

proceedings. It is something which feeds into the need to revisit the expert question properly and not in haste and certainly not in terms of telling Dr Davis: you must put a big tick and commit to Harvey 1, 2 and 3.

So the adjournment question, and I'm nearly finished, the adjournment question is given greater clarity if we ask what do we do now. We have three broad options which I'm going to lay out for the parties to consider. There are variants on a theme but essentially the three options, and I will set out the advantages and disadvantages as I see them when I articulate them, are these: first, we can revoke certification altogether and start again. That has the virtue of clarity, the Defendants would get their costs thrown away, that would be easy to compute, and Dr Davis gets the chance to frame his case anew, we start the Microsoft v Pro-Sys system again and we get a fresh bite of the cherry.

Problems about disclosure resolve themselves because they don't arise.

Now, that has the considerable virtue of clarity but it doesn't seem to us to have very many other virtues because it involves throwing away a lot of costs, losing whatever momentum has been built up, going forward, and for that reason it's a little bit too like a scorched earth policy for our particular taste, but that is for better or worse option 1.

Option 2 is no revocation, Dr Davis is given the opportunity to frame his views in a new report, adopting or not adopting what Mr Harvey has said as he sees fit, but he has to do so without further disclosure at this stage from the Defendants.

Now, that has the virtue of keeping the certification intact, maintaining what forward momentum as we have, but repairing matters so that we get our Microsoft v Pro-Sys blueprint to trial.

Option 3 is the same, but Dr Davis gets the opportunity to ask for material from the Defendants, and produces not a first cut report to be embellished and refined on

disclosure but a much more advanced document which will take us further down the line. Now, that has some attractions, but the problem that we see with it is that it will result almost certainly, given the history, in an argument about disclosure and we will not have the materials because we will not have an articulation even in preliminary form of what Dr Davis thinks to enable us to resolve in a reasoned way a disclosure dispute. Put it this way, let's suppose we have an argument as I think we almost certainly will have in the future, about disclosure, Dr Davis says: I want to see this, and Mr Harris's clients say: well, this is very sensitive material, we are not prepared to disclose this without knowing what your case is. If that dispute were to come before the tribunal, we would I think be in great difficulty in resolving it in favour of the Class Representative because we would actually not know what the dispute was about because the claim in a Microsoft v Pro-Sys sense will not have been articulated. I am sure there are variants on these themes and we have tried to colour them from one extreme to another, but we are obviously open to hearing from the parties about what they think we should do.

But working out what we do immediately going forward with this issue, does constitute the delta which informs further decisions about the timing going forward and we think we need to resolve this delta first before we go on to more specific timing questions. I'm conscious we have thrown an awful lot at the parties. If, Mr Hollander and Mr Harris, you want time to think, you obviously will have it, but if you want to go ahead and tell us that there is in fact a magic solution and we have missed it, then please do that as well.

So Mr Hollander, Mr Harris, would you like a bit of time to think things through or do you want to go straight in?

MR HOLLANDER: I am happy to go on, subject to Mr Harris.

MR HARRIS: We would like a 15-minute adjournment, please, so I can take some

instructions.

THE PRESIDENT: Well, you shall have it I think, Mr Hollander, that's great, I am sure both sides could use it and I do think this is an interesting but difficult question. Mr Hollander, I should say this: I have articulated provisional views, do push back as hard as you can. If I have got it wrong, then I would be delighted to be told. We will rise --

MR HARRIS: Can I just make one enquiry --

THE PRESIDENT: Of course.

MR HARRIS: -- before taking instructions. The provisional view, which we can all argue about in due course, is an adjournment. But does the tribunal have a provisional view as to when, to when the adjournment would be? Because, as you know, if there is to be an adjournment, we don't agree as to when that should be.

MR HOLLANDER: Can I help on that before you say anything?

THE PRESIDENT: Of course.

MR HOLLANDER: I'm so sorry, I wasn't --

THE PRESIDENT: Not at all.

MR HOLLANDER: I saw there are two passages in my learned friend's skeleton where he points out that their counsel team have problems next summer in 2024 because of Trucks 3. It did seem to me, I mean, the history -- we will have to go into a little bit of the history of the expert change but it did seem to me somewhat unfair on the Defendants if as a result of our expert problems they swap a date where their counsel can do for a date where their counsel can't do. So it seemed to me only fair, that if it has to go back until Autumn 2024 to assist my learned friend, we certainly are not going to object to that. So I don't know if that assists -- I just mention that before --

THE PRESIDENT: That's very helpful, Mr Hollander.

To answer your question, Mr Harris, the answer is it will be up for grabs. So it may be we have to adopt a circular process, in the sense that we say we are minded to adjourn it but on discussion that outcome proves so unpalatable that we then have to go back to say, well, actually, having considered it, we need to stick with the date that has been pencilled in. But I don't think, on my feel of the papers, that we are going to get there because the fact is this was always quite deliberately a -- not ambitious, but a tight timetable in accordance with the tribunal's usual practice of moving things forward as quickly as practically possible. So there is always pressure on parties.

My sense, and by all means correct us if that is wrong, is that the issues with the expert are such that we are in grave danger of having an insufficiently articulated blueprint to trial and therefore trial, if we go on a seven-month run from a not quite standing start, and we have a lot of sympathy with the desire on the part of the Class Representative to stretch the timetable. That's why we've said what we've said. But no one likes adjournments, least of all me. We had this ready in our minds for the autumn, we can't, I think, do that but that is something clearly we want to examine, but we would obviously be very sympathetic to ensuring that there was an absence of prejudice to the Defendants within reason. Mr Hollander, that's very helpful what you've said. But the fact is we don't like adjournments, but I don't think there's much option.

MR HARRIS: Well --

THE PRESIDENT: We will hear you on that.

MR HARRIS: I'm not sure that we see that quite the same which and we may argue against it.

THE PRESIDENT: No, no.

MR HARRIS: But the provisional indication about dates from Mr Hollander was

helpful, so I will take that into account.

THE PRESIDENT: Please do. Again, what I said, Mr Harris, to Mr Hollander goes for you and I know you know this but we are positively assisted by firm and appropriate push back on our provisional views, they make our judgments better, that's why you are here and I know you know that.

MR HARRIS: Thank you.

THE PRESIDENT: Well, it's five to, we will resume at a quarter past. Thank you very much.

(10.55 am)

(A short break)

(11.20 am)

Submissions by MR HOLLANDER

THE PRESIDENT: Mr Hollander.

MR HOLLANDER: Can I first of all deal with the comments you made --

THE PRESIDENT: Of course.

MR HOLLANDER: -- before we adjourned. I'm sorry the tribunal think we should have acted differently. We had thought, rightly or wrongly, that we had acted responsibly and if I just take you through the reason why we did it.

THE PRESIDENT: Please do.

MR HOLLANDER: The issue first arose, as you know on, 28 November, there were then 24 hours where we were -- I think it's all explained in Mr Maitland-Walker's witness statement and we deliberately put in a detailed witness statement because we didn't want the tribunal at this hearing to think we were holding back anything as to what had happened because I have never seen anything quite like it I have to say.

THE PRESIDENT: Nor have I, Mr Hollander.

MR HOLLANDER: There it is. We then wrote to the tribunal on 1 December, page 631. We thought it was our obligation not only to tell Freshfields and also the Secretary of State but to tell the tribunal immediately, which we did. We raised it in paragraph 5 on page 631, and we made that clear and we said we would write to the tribunal and the parties with details of replacement as soon as possible.

There were two things. First of all, we were under an obligation to deal with the list of issues and the other directions by 1 December and it didn't seem to us that it was open -- we thought that if we had said no, we can't do this until we have a new expert, we would be criticised for doing that. So that's why we pursued that.

It also didn't seem to us it was for us to say there should be another hearing in the meantime. We told Freshfields, and I am not criticising them at all, but they knew what the position was and therefore they were on notice of the position and we told the tribunal and therefore both the tribunal and the other sides were aware of the position and frankly it didn't seem to us that it was appropriate for us to say there should be a hearing, it was for others to say that. But be that as it may --

THE PRESIDENT: Mr Hollander, let me try and shortcut this because the trouble with any new jurisdiction is that parties are feeling their way and when I read through the papers yesterday, my first thought was what had I done wrong. And frankly --

MR HOLLANDER: I think that is a bit unfair actually.

THE PRESIDENT: Hear me out. It did seem to me that we had a major difficulty which we were dealing with now, rather than before Christmas, and four months in this sort of timeframe is incredibly precious. So I asked myself why hadn't I, as the Chair of this tribunal, proactively, because the tribunal is a proactive case management tribunal, got the parties in, given the critical importance in collective proceedings of the experts. So I went to this letter and I got a degree of comfort from this letter as I was flagellating myself in my room saying this has gone wrong

and it's my fault. I looked at it and thought, well, we can see why we didn't spot it. So I am not really criticising you. I don't think I'm at the end of the day really criticising myself but I think for the future, and one hopes this doesn't happen very often, but where there is a problem with an expert departing in circumstances where -- and of course the problem is that Mr Harvey's consultancy is a small consultancy, if this was a very large consultancy, the problem would be rather different because there would be a fully-fledged second string who could step in seamlessly because that's how these large partnerships operate. You didn't have that problem, no one is criticising you for that but it meant that Mr Harvey's sabbatical was particularly significant because you really couldn't go to his assistant.

MR HOLLANDER: I see that.

THE PRESIDENT: I think what I'm going to be doing is at the end of this there will be a short ruling, I will reserve it because I want to frame it quite carefully. But for the future, I think I will want to be saying in collective proceedings it is going to be important when you have something like this to get it before the tribunal quickly and I quite understand why the letter was written in these terms, we are trying to work out how this jurisdiction operates, I think for the future it would have been better to say you have to get a grip of this, tribunal, and you have to positively say you don't want a hearing, rather than proactively say you do. That I think is the debate we are having.

MR HOLLANDER: I take all that on board and I understand exactly what you are saying, sir. I would say this though, again for consideration, I struggle to see how the tribunal could have produced a useful ruling as of early December. I would have thought the tribunal's first reaction would be: well, how long is it going to take you to get another expert? Let us know as soon as you have one and whether that expert says everything Mr Harvey says is a load of rubbish. Because I am not sure -- let's

assume it had come back in front of you in the first week of December, what could the tribunal have done? So they would have said no, let's -- how long -- they would have asked all those questions, I think, and would have suggested -- would have said: well, we need to know as soon as possible, we know to know what steps you are taking to get another expert and so forth. I would have thought, again it's a matter for you, very difficult for the tribunal to make any useful rulings as of the first week of December.

THE PRESIDENT: I agree with that, save for this: there has quite rightly been a degree of pressing from the Defendants to say just what is your case. And entirely understandably there's been a desire to ensure that you jettison as little of Mr Harvey as possible, consistent with Dr Davis' obligations as an expert himself. And I think the one thing that we could have made clear was that the order that we made which was being sought to be agreed at this time, and the list of issues and all that, ought to be stayed as work, whilst this fundamental problem was ascertained. So I think we would have been having this conversation of where do we go from here four months sooner. And that I think would have enabled both sides to say how do we handle this problem, with the tribunal available to intermediate and rule on any questions, which is more or less where we are now, but we would have been able I think to get a grip sooner, rather than having the sticking plaster conversations we see in the correspondence where one is saying we will try and agree the list of issues without an expert fully on board. This is why these things are very difficult. If this had been a private action where actually the identity of the expert is not fundamental to the court's certification jurisdiction, I think the conversation would be very different. That is why these cases are so peculiarly difficult, because the court is somehow thrust into a supervisory role over the claimants, which it doesn't have in the ordinary A versus B civil action.

MR HOLLANDER: I see entirely what you are saying, sir, and I don't seek to push back further, I have made the points. I just want to make a couple of further points.

THE PRESIDENT: Please do.

MR HOLLANDER: First of all, when you are looking at the way forward, you need to bear in mind that Harvey 1, 2 and 3 were all pre-certification. Now, you may remember me complaining bitterly at various early stages of this that the Defendants had not shown their hand in this case. And you may remember, I'm not going to repeat it in detail, that we produced a very long pre-action letter to which we never had a substantive response and they kept their powder entirely dry, as they were entitled to do, at the certification stage.

So the position is that Mr Harvey's reports were all for certification purposes, they did not take into account the pleadings that were exchanged afterwards, in fact one thing that perhaps was slightly unfortunate with hindsight was that we only got the Defendants' Defence I think a week before the October CMC. So we had only just had it even then, and the Statement of Intervention.

So if Mr Harvey produced a report today, Mr Harvey would no doubt produce a different report from Harvey 1, 2 and 3, because he would want to take into account the way that the case is now being put in the light of the Defence and the statement of intervention and all the matters that he could not or would not have anticipated necessarily at the pre-certification stage.

So I think it's also relevant to have in mind, when you consider the way forward, that we are not dealing with an up-to-date Harvey report in terms of the comparison – it's not between what Dr Davis says now as opposed to what Mr Harvey said yesterday, but what he said at a time when the case looked from the perspective of an expert somewhat different.

So I think that's quite important if I may say so in dealing with it.

I have made the point I have, I still think there would have been difficulties. You know, I understand exactly what you have said and I have taken the points you have made entirely on board, I still think there would have been difficulty if this had come back in December; yes, it may be the tribunal would have stayed the list of issues and the directions but I think they would have said: if you can get another expert tomorrow it all looks a bit different; if it takes you so many weeks to find someone -- one of the problems, as you know, is that Mr Harvey refused to permit his team to assist another expert, which was -- there we are. So I think the answer is you wouldn't have known in early December. Although, as I said, I've never had this before in any case of any sort and it sounds as though you haven't either. There will be other cases going forward, for example, where the expert who provides a report at certification -- let's suppose just after we had had the October hearing, Mr Harvey had said to us: well, I can't do the second half of 2024, I'm having a sabbatical, assume he had said that: and I'm not available. So there will be other cases I suspect in this jurisdiction where the expert who has provided the material which is the basis of the certification is simply, for perfectly reasonable reasons or proper reasons, just simply not available for the trial, and therefore one needs to have a different expert.

I mean, the circumstances of this might be slightly unique, but I don't imagine it will be going forward a unique problem.

THE PRESIDENT: You are absolutely right, Mr Hollander, which is why there are general implications of this matter. You are entirely right to say it is in some respects unique and certainly extreme. But it is something which is liable to crop up in less extreme variants, more frequently. And one of the things that is going through my mind is that it may be that at certification there needs to be an expert resilience test so that we know that there is a fall-back if there is a problem with the primary expert.

Now, in most cases where one has, as I say, a big economic consultancy, the problem --

MR HOLLANDER: You say that, sir, when you made that point a moment ago I thought, yes, I can completely see the difference but if the tribunal works on the basis as they do --

THE PRESIDENT: Of ad hominem instructions.

MR HOLLANDER: -- **(overspeaking)** produce their own individual views, you may find that there are two experts within the same big consultancy who have different views.

THE PRESIDENT: I completely agree and that is something which even my resilience test doesn't resolve. It's simply that this case has a number of factors, you have identified at least three, which make it peculiarly difficult to handle. You are right that they may find themselves present in a less extreme form in another case and certainly what I'm suggesting isn't an immediate resolution, it's simply something that, given the importance in the certification process and the ongoing gatekeeper role, it's something that we need to have I think our eye more firmly on the ball than in purely private litigation where it is much more: it's your job to make good your case, you go to an expert that you see fit, because the court ultimately is concerned with controlling the evidence that comes before it, not necessarily who is giving it. Whereas in certification that is a slightly different question. This is all very helpful but ... it's really helpful for the future, not for the past. And I suppose the key question I have, I'm sure you will be coming to it, is what does Dr Davis need in terms of time in particular but also information in order to put himself into the position that he would be in had he been the expert from Day 1?

MR HOLLANDER: Just leaving the first part in a sense, my submission is that we shouldn't be criticised and you shouldn't either. You have my submissions on that.

Can I just in terms of way forward, there is a separate issue about structure of the trial which we will come on to in a moment and you've seen Dr Davis' letter.

THE PRESIDENT: Yes.

MR HOLLANDER: I will need to address you in due course or now, whenever you prefer, on that issue, which is separate.

THE PRESIDENT: It is separate. Just to give you an indication, things like structure seems to us ought to be addressed when we have a very clear idea of where we are going forward now. I mean, in a sense structure assumes adjournment.

MR HOLLANDER: Yes.

THE PRESIDENT: And we've given you an indication. So structure is obviously on the table from that point of view. But we do I think need to reach a definite view about where the trial that is listed goes before we can discuss structure.

MR HOLLANDER: I understand. So I think your next question is what more should there be from Dr Davis now, if anything.

THE PRESIDENT: Yes.

MR HOLLANDER: What we asked him to do was to consider whether he agreed with what Mr Harvey had put forward. You would expect two things, first of all, as I've indicated, he's looking at the case when it's progressed further from where Mr Harvey was and you have that point already. And secondly, the idea that he should simply say: I agree with every paragraph of Harvey, is not how experts operate in this jurisdiction. You have that point well. But, however, I think he's made it clear that he does support the approach of Mr Harvey really in each material respect. And that as we understand it is what he was saying in the report that he produced.

Maybe we should turn to that --

THE PRESIDENT: Yes, I think we should turn to it because I think Professor Ulph

got a rather different sense from what Dr Davis was saying. So let's turn that up.

MR HOLLANDER: 468.

THE PRESIDENT: Yes.

MR HOLLANDER: He starts with Harvey 1 at 474. The conclusion in respect of Harvey 1 -- he talks about preliminary views, and I understand that he's -- but, I mean, he'd not seen the disclosure at this stage but then neither had Mr Harvey and, as I've said, he's further on in the process than Mr Harvey was. And his conclusion in 21 at 477 is his preliminary view that his evidence on the factual position -- so this is just simply Harvey 1, which looks at the data analysis in respect of the various fares and he says that his evidence on the factual position is reliable, noted and agreed, and when Mr Harvey says his results would be subject to refinement in due course in the event that proceedings are drafted and disclosure ordered. Well, that is just simply adopting it.

Harvey 2 is dealing with methodology. He deals with the start of that at 477. If you look at paragraph 30, in terms of methodology, 479:

"While I will no doubt need to reflect on points of detail as I get further into the case, as is envisaged by the CAT in the CPO judgment, not least because disclosure will provide information that will inform the right economic approach to the question of damages, overall, I currently believe I can comfortably adopt Mr Harvey's proposed approach to the damages estimation as consistent with my own preliminary views."

Then he talks about market definition at 480 and looks at the way that Mr Harvey approaches market definition, refers to the various approaches in paragraph 34, and then in paragraph 37, at 483, on market definition agrees with his framework and his three approaches, those were ones at the bottom of 481 at paragraph 34, to estimating the extent of demand size substitution following a price rise, sensible starting point and propose to follow the same approach.

He sees no reason why Harvey's description of the data and other information can't provide a sensibly preliminary roadmap for disclosure.

Then on dominance, again agrees with the principle. And after discussing that at paragraph 45 on 486:

"Overall then, in relation to dominance, I agree that Harvey's framework provides an appropriate one for the analysis that I can comfortably adopt, albeit subject to the possibility that Mr Harvey's methods may need to be adapted as the case proceeds - as the CAT has highlighted may be necessary. In addition, I see no reason why Mr Harvey's description of the data and other information he expected to rely on can't provide a sensible preliminary road map for disclosure."

C and D, this is the platform 13 and 14 claim, he deals with at section 3. He basically says Mr Harvey said this was the same as the rest and I agree with that at paragraph 48.

THE PRESIDENT: Yes.

MR HOLLANDER: On page 488 there's a minor point raised about identifying penalties. I'm not sure that is a significant point, paragraph 49.

Then he talks about a significant reorganisation of the counterfactual. And he refers to that section of Harvey 3 where Mr Harvey responds to criticisms from the Defendants suggesting the methodology does not deal with the counterfactual scenario where changes in the fares charged may have cause differences. So, in other words, the counterfactual involves that GTR would have acted differently in a rather broader sense in the counterfactual.

The difficulty with that is that that is something that really has only arisen from the Defence. Mr Harvey dealt with the Gibb report, I think we pleaded a reference to the Gibb report, which is what Dr Davis refers to in paragraph 50 and there are various possibilities. But what has happened I think since is that the Defence has pleaded

a fuller case in respect to what might have happened in the counterfactual, which wasn't available to Mr Harvey.

If you look at paragraph 54 at page 490:

"Overall I agree with Mr Harvey that his methodology can proceed largely as described in Harvey 2. I will add the caveat that I accept there could, in theory, be a reorganisation of services in the counterfactual that would have mitigated or even entirely removed any gains associated with the removal of price discrimination, for example if the entire operation would have been shut down. However, in light of Mr Harvey's instructions in relation to the Gibb report, he did not amend his methodology."

And I think that is something that's really arisen since.

"I adopt Mr Harvey's methodology in that context. … In summary, Mr Harvey accepts he would need to adapt his methodology to reflect alternative counterfactuals should they prove relevant and I agree that that would be necessary and appropriate, otherwise he sticks to his methodology."

I think that is an area that has developed since Harvey 3 in terms of what the counterfactual might be in terms of reorganisation, which is why Dr Davis reflects that.

Then downstream pass-on in terms of essentially fares that the customer didn't actually pay for themselves, he deals with that at 58. 491:

"Mr Harvey does not indicate the precise approach(es) he would adopt beyond saying it "will depend on several factors". In my view, Mr Harvey makes a useful but tentative step in the direction of a methodology suitable for assessing pass-on. The methodology for business customers will clearly need to be further developed in order to be implemented, but for the moment I see no difficulty in adopting his proposed approach as a sensible starting point for the next stage of the litigation."

Then over the page, at 492, I'm not sure paragraph 59 we need to get into. Summary:

"I will no doubt need to reflect on points of detail as I get further into the case, not least because disclosure will provide information that will inform the right economic approach to the question of damages as would have been case for Mr Harvey as noted by the CAT in the CPO judgment… I believe I can comfortably adopt Mr Harvey's proposed preliminary approach to market definition, dominance and the damages estimation."

Then he produces a caveat in paragraph 61 that I think you've seen:

"…I am only very recently instructed…. Since I have not had the opportunity to read and digest all - or indeed many - of the documents in the case record, this is necessarily my provisional opinion. I should also make clear that I would want to reserve the right – indeed believe I would have a duty to the CAT - to move away from [aspects of Mr Harvey's proposed methodology] in due course, should my review of the case record or evidence, (particularly that available following disclosure) suggest doing so would be appropriate."

So I think what he is doing is saying: well, I can see that, yes, it is a preliminary basis, but he is, in my submission, very clear that he is happy to adopt really the approach at each stage of Mr Harvey and certainly I don't understand that there's anything where he wishes to adopt a different approach. The position that I think perhaps there is the most significant change, is first of all there's the reorganisation in the counterfactual point, but that I think is something that really has arisen largely since Harvey 3, in the light of the pleaded case that has arisen.

Secondly, there is the matter of the overlap between abuse and counterfactual pricing which is the subject of the 7 March letter, which we'll come on to in due course, where I think what he is saying is that actually if you look at the question of

abuse, you are going to have to get into some counterfactual pricing. We will obviously come back to that later, but that's the point he's making and that I think is a development from Mr Harvey, because I don't think Mr Harvey had -- perhaps because it was at an early stage, not a point that Mr Harvey had really thought about in the light of the Defence, because he hadn't got the Defence at that stage.

So I'm not clear at the moment, I know you referred to the idea of having a further report from Dr Davis, I'm not at the moment clear what he would be able to say in a further report that he hasn't already. I mean, whatever else one says about what's happened in terms of the experts, I mean he was instructed on 22 January and he produced this, you know, it's a comprehensive report which it's impressive that he's done so in a fairly short space of time. But, you know, he's obviously a thoroughly experienced expert and he's not going to be committing himself in the way he's done unless he is content with this.

What has been said by the Defendants is that -- I mean, there's been some correspondence, as you know, and you probably have not had a chance to go through it, as to what extent there are differences. So I would like to deal with those. It's perhaps convenient to deal with those, if I may.

THE PRESIDENT: No, indeed, but just it may well be that that there's a more extensive shopping list from Mr Harris but on my shopping list in terms of where I would want Dr Davis to go, is I would certainly want his caveat in paragraph 61 removed, with whatever other qualifications to the substantive expressions of opinion of Mr Harvey that went with that removal done. And one of the things that I think we do need to talk about is how long it would take for whatever other caveats Dr Davis thought appropriate, given future developments of the case, future disclosure, I would want the -- I've only just looked, entirely understandably I stress, I've only just looked at Mr Harvey's proposed methodology and viewing that as I stand in light of

the materials he has, the Reply, Mr Harvey's reports, here is my view and excise the, as it were, ad hominem Harvey caveats. So that is something I think we would want to have done. Maybe more, and I'm sure, as I say, the Defendants would have more, but that I think is something which we would see as necessary.

MR HOLLANDER: Yes. That's down to the tribunal. I hear what you say. That obviously can be done.

THE PRESIDENT: Yes.

MR HOLLANDER: And it can be done relevantly promptly I think because my understanding -- I haven't spoken to Dr Davis or met him in respect of this at all but my understanding is that he is pretty comfortable with the approach that's been adopted. So I would have thought that could be done relatively promptly. It is perhaps helpful to deal with the points that are made by my learned friend in terms of the objections. It's perhaps a convenient place to look at the Maitland Walker letter of 3 March because they deal with the points in some detail, 885.

THE PRESIDENT: Yes. Thank you.

MR HOLLANDER: If we pick it up at paragraph 5, I'm taking it from this, we can go back to the Freshfield letter if we need to but I hope the points can be -- it's the letter of 24 February. But I hope I can deal with it conveniently with reference to the -- just so you have the reference, if you need it, these respond to Freshfields 24 February page 844. Let me pick it up in the Maitland Walker response. The first point that's made against us in respect of -- or made by Freshfields is that Dr Davis has not clearly endorsed the methodology set out, and I'm not sure I need to deal any further with that point, you have my submissions in respect of that. We just make the point, we refer to what Dr Davis says in paragraph 5 and I don't think there is anything much more to say about it.

The next one is the reference in Freshfields' letter to the Meta Platforms

case referring to the importance of the certification and the role of the tribunal. This is about survey evidence. The complaint is that Dr Davis has not definitively committed to using surveys. And the point we make there in paragraph 7 is, well, Mr Harvey hadn't committed to using surveys, he contemplated the possibility of that, Dr Davis is adopting the same approach. He considers that it would make sense to hold off finally determining precisely which surveys or other primary search we required until after disclosure had been completed and the resulting documents assessed for relevance. And presumably also, as he points out, as this letter points out:

"We realise that this might have a significant impact on the overall timetable… propose that Dr Davis waits at least until he has had initial discussion with the expert acting for the Defendants", which remember that you required on the 14 October hearing.

I mean, I wouldn't have thought there is anything, with respect, terribly surprising about the fact that he said it's too early to reach a final determination as to whether I want surveys, that was Mr Harvey's position, he suggested it, but wasn't unequivocal about it at all. And I would like to wait until I've seen some disclosure and had a discussion with the other side's expert. That's the position on survey.

THE PRESIDENT: Yes. I mean, the problem that we have is that since we certified the matter in these proceedings, we have had the Court of Appeal's decision in McLaren, which has, I'm bound to say, resulted in a degree of re-examination of our processes here. I don't know what the Court of Appeal would say, I sincerely hope I don't find out, about the process that we have adopted here in terms of wait and see. But it's no criticism of anybody but we do need to look, going forward, at what the Court of Appeal have said about gatekeeper functions now and whilst one might say, well, what has been ordered in these proceedings in the past, and hasn't been

appealed, would have to stand, we are now in the position of having to revisit these things and it does seem to me at least that we need to be applying the new law to an old case because the old case has undergone a material change.

MR HOLLANDER: Yes, I understand the point. Although I think one can hardly criticise the fact that the question of whether there should be survey evidence should be left a little bit later in the process and after discussion with the Defendants' expert. Then paragraph 8, Dr Davis, over the page at 887, it's said that Dr Davis intends to conduct economic analysis concerning counterfactual pricing not contemplated in Harvey 1 to 3. Harvey 1 to 3, or Harvey 2 did in fact contemplate that there would be expert analysis of counterfactual pricing. We just refer to the various paragraphs there. He also, I've made the point already, that Harvey 2 and 3 was at a much earlier period when the issues were much less developed. But we say, no, that's not right to suggest that Mr Harvey wasn't contemplating counterfactual or expert analysis of counterfactual pricing, we refer to the paragraphs there.

The next point is paragraph 11. So there has been some debate about the suggestion that the way the case is being framed is different. We have made absolutely clear in paragraph 11 and elsewhere that we are not suggesting absent a breach of the TSA and/or NRCOT) that we are making a claim of abuse. So a breach of one or other of those agreements is a precondition of our claim. And there was a suggestion from Freshfields that we were rowing back from that. We are not.

The further point they seem to be making, and this is one which is picked up in my learned friend's skeleton, so if you look, perhaps it's a convenient place to show you this, if you look at my learned friend's skeleton at paragraph 63, page 956 to 957.

THE PRESIDENT: Yes.

MR HOLLANDER: So they want clarification in respect of this. If you look at the four points that they want clarification on, the Class Representative appears to

contend that if there is a breach of the agreement then ipso facto there is an abuse of dominance. Well, yes, that's our case. So that's yes. Two, the CR appears to accept that if they fail to establish that there's a breach then the claim for abuse fails. Yes, that's agreed. Third, it resists the contention that any such breach may be objectively justified. Agreed. It does not advance a positive case the ticketed practice is to abuse of dominance on the basis of (a) that irrespective of whether there was a breach of the TSA et cetera, agreed. The one that we take issue with is (iv)(b), is the suggestion -- because we do advance a positive case of the ticketing practices amounted to an abuse of dominance on the basis of their anticompetitive effect and the fact they amounted to -- and, I mean, we've pleaded that in terms. It may just be worth showing you the pleading to show you that. If we start with the amended Particulars of Claim, or the claim, which is paragraph 55 of the collective proceedings Claim Form, if you just pick up paragraph 55, I'll just show you how this works. It starts on page 60 of the bundle. We can take it fairly quickly. 55 is the reference to the Gibb report, this is in the, as it were, factual recitation of the pleading. The Gibb report, which is all about the -- you see the last sentence of that:

"…expressed concern that the fares structure was influencing demand in such a way that capacity wasn't optimally used, resulting in worse overcrowding and causing delays."

Then 64, on abuse of dominance, that particularises the abuse, and then over the page on 66, it's relying on all the matters set out above in terms of abuse. And it refers to at 64.3, unfair trading conditions; 64.4, different selling prices depending on whether there are brand restrictions; the end of 64, unfair disadvantage required to subsidise other passengers. Then 65, where it's unfair selling prices, unfair trading conditions and discriminatory prices, penalty and excess fares is an abuse of

dominance.

65 then refers expressly even at this stage to the abusive practices not being objectively justified, plead that there's no operational or other reasons why they must impose brand restrictions or charge higher price, no reasons of cost and efficiency.

68 as a result of all this, page 67, the prices charged were higher than they should have been.

Then finally on this one, 69, the effect of brand restrictive fares set out in paragraph 69, lack of flexibility and reduces options and so forth. So that is also looking at anticompetitive effect.

Then if you go to the Reply, where it's actually most clearly set out, this point, which starts at page 160. The one I wanted to show you is paragraph 18 at 169 which picks up paragraph 30(c) of the Defence, which I probably should have shown you. 30(c) of the Defence, it's at 104. And 30(c), which this responds to:

"Even if they are contrary to the contractual provisions on which the Class Rep relies, denies an abuse of dominance."

And they go on looking at the pro-competitive nature of doing what they're doing and they respond to that, page 169, at paragraph 18, and if you go on to page 170 at (ii), deny material differences in the nature and quality of the services to justify the differential pricing. At (iii):

"Even if… there are differences in nature and quality, differential pricing isn't justified by differences in the cost of providing the services."

Then (iv), which is perhaps the clearest exposition of this point:

"Imposition of the brand restrictions and differential pricing creates inefficiencies and is anticompetitive. As explained in 55, of the Claim Form, the brand restrictions influence demand on the London-Brighton mainline in such a way that capacity is not optimally used, resulting in worse overcrowding and causing delays."

Then 18 (b) and (c) deny that they are objectively justified by reference to the pro-competitive benefits.

I am sorry that took a bit of time, but the purpose of showing you that was to show why that last subparagraph is wrong, and is, in my submission, clearly pleaded.

I think that's the point we make at paragraph 11, we also refer to the list of issues on the same point. And just to look at 12 and 13 on this:

"When examining abuse and its potential to give rise to anticompetitive effects, it is standard practice to examine the counterfactual, you are not right in asserting that the counterfactual service levels can't assist the tribunal in determining the issue of abuse."

Then 13:

"We also note while the Defendants haven't laid out any detail of the SGEI defence, it seems to us without the benefit of anything more than the bare-bones of this defence that counterfactual pricing may well be relevant to that issue in the case. In particular the economics on this defence is likely to explore whether it would have been possible for GTR to provide the alleged SGEI based on the split between passengers and taxpayer determined by the Secretary of State if it had removed the brand restrictions. It will therefore be necessary to have considered the impact on GTR's revenue of complying with the competition law in the counterfactual."

The letter then goes on to deal with the split, which I think is a point for subsequent discussion today.

So those were our responses to the points which had been raised by ...

I think just in terms of where we are, and in the light of what the tribunal -- you made it clear, sir, that you want at the very least something further from Dr Davis which, as it were, takes out the caveats on the basis that I haven't -- and I understand that and I have made my submissions on that and if that is what the tribunal requires, that is

the tribunal requires, so be it.

So I would suggest in order to move this matter further, that actually, a minimalist report would be the appropriate course and that actually that would satisfy what the tribunal is looking for and the requirements, as it were, to make sure that the tribunal is satisfied as to the direction of travel and the structure. But I would suggest that the tribunal will need to consider the split trial issue, and I'll make submissions in respect of that, in the light of what Dr Davis says, that in other respects the position can be permitted to move on without further ado. We had been hoping that Dr Davis would be able to speak to the defendants' expert last month. They declined to do that. So be it. So there's been some delay as a result of their not being willing to permit it, although they have indicated they would be prepared to permit that after the CMC, but there it is.

I wonder if at this stage I should probably sit down.

THE PRESIDENT: Well, let's be clear about what it is that we are changing.

MR HOLLANDER: Yes.

THE PRESIDENT: Where is the order that we made? I did see it and I've now lost it in my ...

MR HOLLANDER: 584.

THE PRESIDENT: That's the order, yes, the Draft Order. 584. Let's go through this and just see what has been done, what needs to be revisited, and what for the future needs to be changed. First of all, you are saying that you are no longer advocating for and are positively pressing to change?

MR HOLLANDER: Sorry, I missed that?

THE PRESIDENT: You are no longer advocating for and are positively pressing to change the split trial direction in paragraph 2.

MR HOLLANDER: We are proposing -- well, I think it's a matter for tribunal. If the

tribunal says: well, we had this hearing in October, you are now having a second bite at it and we will have to live with where we are, but we would suggest that there are some quite cogent reasons based on Dr Davis' letter as to why tribunal should revisit it. But it's a matter for you.

THE PRESIDENT: These are all to an extent interconnected but we did have an appropriately hard-fought hearing where this matter was debated and resolved.

MR HOLLANDER: Absolutely.

THE PRESIDENT: So we are not minded to simply say we are going to rubber-stamp what we said last time, matters have changed in a number of respects, and we do think it is appropriate, particularly given the fact that you are looking to adjourn to revisit all of these questions. So that is something which is clearly on our list of things to look at again and we will do so.

MR HOLLANDER: So if we perhaps go to the paragraphs, 1 is done.

THE PRESIDENT: Yes.

MR HOLLANDER: 2 is, as it were, up for grabs.

THE PRESIDENT: Yes.

MR HOLLANDER: 3 is -- well, 3 has been done. So we did file the Reply, we filed a draft list of issues and we also gave an indicative list of factual expert witnesses.

THE PRESIDENT: Yes.

MR HOLLANDER: We obviously didn't have the expert on 1 December but we do now. We've sought with the Defendants to agree a list of issues. We have I think 5 is dealt with, 6 I think is dealt with as well.

There has been disclosure, there is an issue on disclosure before you today. I mean, there's a certain amount of material, what I'm asking for is relatively modest. So we can take that relatively shortly when we get to that. But there has been disclosure on the first and second tranche on 17 and 31 January by the Defendants.

So that has been dealt with subject to the points I'll make when I address that.

I think you had in mind very much expert-led disclosure and that's what was dealt with within 10 to 12.

THE PRESIDENT: Yes. So it is here that we are hitting the delay that is arising out of the December problems of Mr Harvey.

MR HOLLANDER: Yes.

THE PRESIDENT: Because we are now a month on and we obviously don't have because -- well, I don't think it's right to say that the parties' experts aren't in a position to say that they need material beyond the voluntary disclosure, I think you can say there is stuff that you want but we are still in the voluntary disclosure phase of the debate.

MR HOLLANDER: Yes.

THE PRESIDENT: And I think it would be unfair to Dr Davis and unfair to Defendants to say that the 20 February 2023 date could possibly stand. So we are now, at paragraph 10, into the position of having to revise in some sort of way the orders going forward. So I think we have paragraph 2, as you say, up for grabs, the dates, if nothing else, in paragraphs 10 and following are up for grabs and will need to be revised and we will need to understand what is doable there. But it may be that there is more fundamental change that needs to be done along the lines of what you were proposing for paragraph 2, which is inevitably going to have some bearing on what sort of direction we make, for instance, in relation to trial. I mean, the point I am really making is I am saying, as a provisional view in relation to adjournment, that you are telling me that these dates can't be done.

MR HOLLANDER: Yes.

THE PRESIDENT: In other words, that if I am saying I want an expert report from your clients by 4.00 pm on 14 July 2023, I'm not going to get it.

MR HOLLANDER: I think yes. I see that.

THE PRESIDENT: If on the other hand you were saying, and I quite understand, Mr Hollander, why you are not, if you were saying actually Mr Harvey having vanished from the scene, Dr Davis seamlessly coming in and none of these dates need changing and none of these questions require revisiting, well, we'd be in a different area but you are not saying that, you are saying: we can't make fairly the first tranche of the split trial you ordered.

MR HOLLANDER: Yes. I mean, I think it's fair to say, I'm not at this hearing out to criticise anybody.

THE PRESIDENT: No.

MR HOLLANDER: It is fair to say that on 16 February we wrote to the Defendants and said Dr Davis would be happy to meet your expert next week. And there was pushback from that on the basis that -- now, as I said, I don't want to criticise anybody, but that could have been done in the second half of February, even if they wanted to reserve their position as to Dr Davis, they could have done on a without prejudice basis, and they declined, and there it is, as I said. But we've lost a month, in a sense, through that.

THE PRESIDENT: I accept that. Mr Harris, I think, I'm going to discourage him from saying too much about this because I have considerable sympathy with the Defendants' issue here and it goes back to why a December hearing would have been a good idea because these are all things we could have debated. But frankly I think the Defendants had every right, and do push back on this if you wish, to say: look, we are very happy to deal with Mr Harvey, who has nailed his colours to the mast in his reports and who we were dealing with because he signed up to the case which has been put, we've now got someone else who is, entirely to his credit, coming in and dealing with a lot of material very quickly, and entirely to his credit

saying: I can't see any obvious problem with Harvey, but I'm certainly not going to say I endorse him 100 per cent. Well, if he said: I endorse him a 100 per cent, then I would be asking very serious questions of Dr Davis.

MR HOLLANDER: Exactly.

THE PRESIDENT: So the position is understandable. I don't want to get into criticism.

MR HOLLANDER: I deliberately put it in a way --

THE PRESIDENT: I know you have.

MR HOLLANDER: I was trying to avoid criticism.

THE PRESIDENT: Does mean --

MR HOLLANDER: All I'm saying -- I mean, it could have been done last month **(overspeaking)** --

THE PRESIDENT: We are now on 17 March, and those dates have been missed. So we are in the position, without allocating blame, I'm not particularly interested in blame until we get to the question of costs and we won't get to question of costs until we have worked out where we are going, what I'm interested in is what needs to change in paragraphs 10 and following so that we can get this trial, these proceedings, back on track. Because they most certainly are not on track --

MR HOLLANDER: I understand.

THE PRESIDENT: -- now.

MR HOLLANDER: I think you would probably say that the next stage is to get Davis 2, as it were. And I think, consistent with the comments that you made, I suspect that is the next step, and although we would be happy for the experts to meet before that, you may take the view and Mr Harris may take the view that it's better to get Davis 2 first. That's a matter for you.

THE PRESIDENT: So if we said we want Davis 2 of the sort that we have

articulated -- Mr Harris, don't worry, we will hear from you on this -- when would that be done by?

MR HOLLANDER: 21 days?

Can we work on the basis that we say 21 days? We will contact Dr Davis over the short adjournment, I don't anticipate that's going to be a problem. Can we proceed on that basis? If there is a problem, we'll tell you at 2.00 but I don't think there will be.

THE PRESIDENT: That's fine. 21 days or a month, we will see. But I want to be quite clear, this is a timeframe that enables Dr Davis to do a proper job and I'm quite sure he will tell you if he was unable to do that. But I don't want him to feel under any pressure to say it's got to be 21 days because we have a process into which he's being, as it were, interweaved.

MR HOLLANDER: Yes. You will also remember that he's now been involved in this for, what, six weeks after Davis 1. So his knowledge of the case, as it were, will have continued after Davis 1 as well.

THE PRESIDENT: Okay.

MR HOLLANDER: I think the logic is that 10, 11, 12, should follow Davis 2, as it were.

THE PRESIDENT: Yes.

MR HOLLANDER: Can I just mention, I mean, 12(c) refers to any applications for specific disclosure. In treating this as expert-led, I think what you had in mind was that most of the requests would be: well, I need to do this economic analysis, and therefore I need this information to do so.

THE PRESIDENT: Precisely so.

MR HOLLANDER: There is also, and I'm not sure whether Dr Davis has actually looked at the disclosure at all yet, but there are also issues which are more

fact-based, for example like the relationship between GTR and the Secretary of State, matters such as what staff were saying about ticketing practices, which are not really expert matters at all. And I think you cover that in (c), 12(c), any application for specific disclosure.

But I just wanted to flag up the point that disclosure is not entirely expert-led in this case.

THE PRESIDENT: No.

MR HOLLANDER: Because there are issues that have really got nothing to do with experts and certainly matters where I wanted to address you briefly this afternoon about disclosure are not really expert matters at all. I just flag that up.

THE PRESIDENT: I understand. But applying a rule of thumb, and we will obviously come back to detail, we are looking at -- well, any date in the past needs to reflect the date in the future. If we say a month for Dr Davis' next report, we are looking at essentially 17 April.

MR HOLLANDER: Yes.

THE PRESIDENT: Then we add to that the dates commencing with the paragraph one date, to a date after that. So we are essentially adding -- well, we would say instead of 20 February, read 20 May.

MR HOLLANDER: Yes. I don't think this order actually included anything about expert meetings.

THE PRESIDENT: No.

MR HOLLANDER: Certainly you envisaged and I think you envisaged in a letter you sent, which we can turn up immediately after the hearing, on 17 October, that experts would be meeting under the Harvey regime in December or January. So it may be, although I don't imagine on this point there's any dispute because I know the Defendants have now agreed that the experts can meet, obviously subject to this

hearing, and therefore it may be one should put that into the timescale. I'm told it's already in 17 but that's a later one, but I think you were envisaging an earlier meeting.

THE PRESIDENT: I think just to get a feel for how far these dates are off-piste, and leaving entirely on one side whatever reformulation we're doing, we are talking about at least three months. So we're looking at 20 February, exactly 20 February plus three.

MR HOLLANDER: Yes.

THE PRESIDENT: And going forward it is the same. So when we look at factual evidence we are talking about end of July. And I'm just, as I say, getting a sense of what corrective action needs to be applied at a minimum, and it may be that further surgery is required beyond that. But that's helpful material.

So, I mean, if we say factual witness evidence --

MR HOLLANDER: I'm sorry, you might want to decide paragraph 2, the split trial issue, before you go final on things like factual witness.

THE PRESIDENT: I'm not going final on anything, Mr Hollander, I'm trying to get a feel for just how bad the situation is. That's really the thing. So assuming we are sticking to a split trial, and I appreciate that things have to be revisited if we're revisiting that and changing it. Factual evidence with my plus three months scale is 28 July.

MR HOLLANDER: Yes.

THE PRESIDENT: Now, is that something which if we were to order that, you are comfortable with or is it something --

MR HOLLANDER: (overspeaking).

THE PRESIDENT: Sorry?

MR HOLLANDER: We have indicated we are not going to call factual evidence, so

I'm extremely comfortable with that. It may be that my learned friend has a different view.

THE PRESIDENT: It may well be.

MR HOLLANDER: That's a matter for him.

THE PRESIDENT: But expert evidence we'll be looking at 14 July plus three. So that's 14 October.

MR HOLLANDER: Yes.

THE PRESIDENT: Now, that is something where, again, we would want a high degree of comfort that that was a doable date, because we are not very keen on putting in dates that are not doable at this stage, particularly if by this stage the trial date is well and truly lost.

MR HOLLANDER: Yes.

THE PRESIDENT: And we are then into, well, when do we fix the next trial, subject always to Mr Harris's points about non-adjournment if he makes them.

MR HOLLANDER: Yes.

THE PRESIDENT: So 14 October, something that you are comfortable with.

MR HOLLANDER: I think so, yes.

THE PRESIDENT: Okay. Well, that's very helpful, Mr Hollander. Is there anything more you want to say about what we ought to be bearing in mind about putting this case back on track? And I'm very conscious we've parked the split trial/non-split trial issue and we'll hear more on that, probably after the short adjournment.

MR HOLLANDER: The point that's put to me that is if we are going to slot into this timetable an expert meeting before paragraph 10, which I think you had previously envisaged, it doesn't seem to be covered in this, but I think you had certainly envisaged that there would be and I think it may be one needs to put it back a little bit more than three months because one needs to feed that into the timetable. So if

one said -- I think you used the date of 17 April for Davis 2, or whatever date it's going to be, then if we are putting back item 10 to 20 May, it's possible, that's a little bit tight if we are having an expert meeting in the meantime, but perhaps a couple of weeks or so.

THE PRESIDENT: Thank you, Mr Hollander.

MR HOLLANDER: Shall I sit down.

THE PRESIDENT: Much obliged thank you.

Mr Harris.

Submissions by MR HARRIS

MR HARRIS: Mr President, members of the tribunal, and welcome to Professor Ulph to this case. Sir, I have really six sentences to read out, so as to structure what I want to say on this critical issue. What are we going to do, in a macro sense? The first sentence is this, in our submission we don't need an adjournment of the Michaelmas trial date at all.

The second sentence is that if you are not with me on that for the reasons that I am about to elucidate, the way forward would be to revoke the certification and start again.

The third sentence is that if you are not with me on that, the sensible course is for the tribunal now to stay these proceedings so that the requisite steps can be taken by the CR and at his expense, and then we come back at the expiry of that stay, with the question of revocation still live, but if the steps that have been taken by the CR in that interim period of the stay are satisfactory, you may say okay, the case can carry on, it can be certified in this slightly different guise. So that's the third.

The fourth, fifth and sixth sentences I'm not going to develop now but I want them very clearly on the record. There are profound costs consequences for whatever

now happens. Any of those three options or indeed the other options 2 and 3 that the tribunal mooted earlier on.

The fifth one is we very much do blame the Class Representative for where we are now. We absolutely do not accept any of this obfuscation that we have heard this morning. Absolutely not. And I can at the requisite time explain to you why the Class Representative is to blame.

And sixthly and finally because, I know it caused great consternation on our side, we utterly reject the notion that we have lost a month in this process as a result of the Defendants' alleged refusal to allow an expert meeting. That could not be further from the truth but, as I say, I can develop that one later. The most important ones are the first three. Why do we not need an adjournment, in our respectful submission; and, if you are not with me on that, why you should revoke; and, if you are not with me on that, why there should be a stay.

Just on that third one, just so that you know, the stay we say would be a stay save for my learned friend having to amend his case if that is what he really wants to do and in any event for him to put forward all the expert evidence that he proposes now to rely upon going forward. And there would be a third aspect in which the Defendants together with the Intervener would wish to consider if even if there's a stay, there could nevertheless be in Michaelmas term some short preliminary issue time points that could usefully be done. I say no more about that now because we haven't had a chance properly to consider it. But I just want you to know that even on the third option of a stay, there still could be meaningful progress potentially made in the case.

THE PRESIDENT: What you are saying in this option is it is a soft reset, it's not a hard reset so we don't cause confusion to the Class for instance by revoking certification. But we are rewinding the clock and you are saying: look, we reserve

the right to object to the certification being maintained, but we are entitled to see the colour of your money in terms of what changes in Harvey 1, 2 and 3 now that Mr Harvey has gone and Dr Davis has come in, and it may be there's no change at all, it may be a massive change, it may be somewhere in the middle but you are entitled to know.

MR HARRIS: Precisely, and indeed they are entitled to know. I mean, they are the Class on whose behalf Mr Boyle is supposedly acting, so they are entitled to know what the case is.

THE PRESIDENT: And indeed the tribunal is entitled to know because we do the certificating, absolutely.

MR HARRIS: I would only push back on the clarity point because we very much agree with the provisional indication given by tribunal earlier today that revocation has the major benefit of total clarity.

THE PRESIDENT: Yes, it does.

MR HARRIS: (Overspeaking) -- so it's clearer than a stay. Be that as it may, the third point is why there need not be any adjournment at all.

THE PRESIDENT: Yes.

MR HARRIS: Can I begin just by respectfully reminding the tribunal of one or two of the remarks that were made very clearly to Mr Hollander on the last occasion and if you want to turn them up, they are in tab 17 of the bundle, which is page 511, is where it begins.

THE PRESIDENT: If we are being made eat our words, Mr Harris, we had better see what we are eating. 17.

MR HARRIS: Tab 17, the particular points that I want to begin with are on page 564.

THE PRESIDENT: Yes.

MR HARRIS: And there are one or two other points as well but what you say in 564

on behalf of the tribunal, Mr President, is, picking up really the paragraphs lines between 3 and 10, you will perhaps recall saying:

"I want there to be proper progress so that we can make the trial date that I've ordered in Michaelmas 2023 and I will be pretty disappointed in you who act for the CR if you don't do certain things, I'm not going to formally order it but I'll be disappointed."

Then there was a list of issues, the draft indication of evidence:

"There will be disappointment because the expectations of the tribunal in terms of how we will manage the case next year will have been somewhat broadened and you can therefore expect altogether more - it says swinging but it means swingeing - orders in the new year in order to catch up."

THE PRESIDENT: I did mean swingeing.

MR HARRIS: Then there are other remarks in similar vein, for example the next page, 565, lines 23 to 25, and I quote:

"If that doesn't work ..."

I appreciate this particular remark was about disclosure but it's all part of the same theme of principle about how you need get on with this and do things probably and it says:

"If that doesn't work, all of the parties can expect the informal structuring to end and a somewhat more brutal formal structuring to begin. So we will see how it works."

And there are various other passages in here to the same effect and in particular in the context of the expert-led disclosure process, if you were to turn to the earlier page, 563, I don't want to read it all out but between lines 5 and 17, and on page 560 between lines 2 and 5, and earlier on in similar vein, what you are essentially saying on behalf of the tribunal is that if things start to go wrong, you have to come back and tell us. This is 560 at line 2:

"On the understanding the parties will be able to come back quite possibly out of court hours but come back at least before me in fairly short order to iron out any difficulties that emerge."

That was what was going on. The massive difficulty emerged and they never did come back, they didn't draw this to your attention despite the fact that we wrote something like four or five letters saying this is turning into a car crash, why don't you have an expert? What are you doing? How are you going to deal with things like the order for the expert-led request? How are the experts going to meet? We wrote as early as December once we learned that Mr Harvey had withdrawn and said: well, hang on a minute, how are we now going to liaise between experts as regards the expert-led request? How are we going to deal with the expert-led request?

So the point being on my issue number 1, we don't need an adjournment. Despite all of that, all that has happened --

THE PRESIDENT: Would you mind showing us the Freshfields letters? I focused on the Maitland Walker letters but I think I did look at them --

MR HARRIS: Absolutely. May I suggest that the sensible thing to do is that I will open at 1.00 -- after the short adjournment and I will take you through them so as not to interrupt, but there are several letters, black and white, quite categoric. But just taking a step back on the why don't we need an adjournment, let's just ask ourselves from a higher level what's happened here. So the experts were due at the end of November and the new expert came in approximately six weeks later, seven weeks later, in January. A week of that wouldn't have been real time anyway for Christmas. So essentially six weeks were out of the window. But they now have had the new expert and what's more, they have had the disclosure for two months, tranche 1, two months they have had that as at today, and they have had tranche 2 for over six weeks. And they've now got an expert and the expert's been able to write letters and

express views and all the rest of it. So it's really six weeks.

If we adopt the approach that was very clearly identified to the CR in these transcript references, which is: right, you've got to do this properly, you've got to keep me informed and if you don't do it, it will be a more brutal regime with formal structuring and a swingeing regime. If we now do that, we are still on track for trial in the end, and bear in mind the order was for the end of Michaelmas term finishing by Christmas. So that is eight months away. We still have time. We have lost six weeks, the trial is eight months away and we still have time provided the CR's toes are now held to fire in the form of swingeing orders and a more brutal regime, which is what he was told would happen.

Let's just analyse this a bit because it requires us to go back to pleading, because we don't accept what Mr Hollander just submitted about the state of the pleading. My submission is this. If they've now unequivocally in black and white said we are not amending our case, absolutely not, and we said to them several times, if they are going to amend, because we are now completely unclear what your case is, if you are going to amend, it has to be done in good time for this hearing today. They reject that. So they say no amendment. So the pleaded case is the pleaded case and nothing else. And we've just heard Mr Hollander say to you to: well, actually, there is almost no difference between what Mr Harvey said in 1, 2 and 3 and what Dr Davis is going to do. That was his submission just a few moments ago: it's almost no difference.

So I'm thoroughly confused as to why in those circumstances, with the pleaded case being literally identical, we lose about six weeks, Mr Harvey's reports are adopted by Dr Davis and there is almost no difference, that is what we were just told, why, if we just amend the timetable, we can't still reach the trial date in probably -- probably mid-November, four weeks from mid-November takes you to mid-December, Bob's

your uncle. I just don't understand it. I don't understand why that means we need to have some huge adjournment.

Now, in addition to that, I said I would do this, I just want to take you back to the pleading because the one -- the one -- to use Mr Hollander's phrase of a moment ago, development, quote unquote, that the way he puts it is that Dr Davis has now said he wants to do something new and additional, and that is what causes all problems. New and additional, it seems to be something to do with counterfactual analysis but for the abuse stage. Notwithstanding that the case is not going to change as a matter of pleading, that is what he wants to do.

Now, on the pleading, my first submission is he can't do it, it's not part of the case. I will do that in just a second. But let's assume you don't agree with me or you think, well, whatever, he's changed expert, he can now do that if he wants. Okay, let's do it in the form of a swingeing order, let's do it, do it quickly and make sure we don't miss the trial date. And especially because if we miss that trial date, it's going to go on for a long time because otherwise it's completely unfair to us.

So my submission firstly would be look at the pleading, there is no scope for some new and additional counterfactual pleading or whatever it's supposed to be, it's just not there. And even if I'm wrong on that, we can still do it in time. And in the context can you just bear in mind this whilst I'm doing that exercise, which is you certainly shouldn't allow this new counterfactual thing, whatever it is, for the purpose of the abuse stage to go ahead without putting Mr Hollander's feet to the fire today and finding out exactly what it is, including because we see that the costs schedule has gone up for experts by an absurd amount, like £4 million or something ridiculous. And it's completely unacceptable for the CR to come to this tribunal today and say: oh well, I now want -- I say it's in pleading, he says: and I want do something more and something to do with counterfactuals and this and that and the other, without

explaining, without even trying to explain to the tribunal exactly what it is and exactly how much it was going to cost because the thing that's been left silent so far is, in our respectful submission, something like £4 million worth of new and additional stuff that was never contemplated before, you might just refuse all together, you might say: I'm not doing it, and you might also ask yourself how does that fit in with cost benefit analysis that was part and parcel of my certification decision in the first place?

So let me, if I may, can I just do those two exercises --

THE PRESIDENT: No, I'm very grateful, Mr Harris. I deliberately didn't raise the question of costs with Mr Hollander because it seemed to me that we had enough on our respective plates without that. But you are raising something which was on our minds and was on our agenda for later on because that too is a material change from the position as it was at certification.

So we will want to go into that and I just want to make that clear.

MR HARRIS: To preface some remarks that I will be making later on, I say that if you are not with me and there does have to be adjournment and if you are not with me and there has to be a revocation, and instead there's either a stay or there's one of the other options and Dr Davis does some work, it needs to be very tightly controlled in terms of costs. But that's a submission for later on down the track.

THE PRESIDENT: It is. I mean, you will obviously accept there's a huge -- you're obviously having to ride two horses at the moment, in that your first sentence, no adjournment, is self-evidently wildly inconsistent with the horse of revoke certification, stay proceedings which is galloping in a completely different direction. It seems to me though that your no adjournment sentence or proposition presumes that which is not the case here, it presumes that the tribunal had got a grip of these proceedings in December and had lanced the boil of a lost expert then and dealt with

the process of reintegrating a new expert at that point in time, in particular dealing with the question that I think we all agree, that the one thing we can't do, it would be terribly wrong, is force Dr Davis into the shoes of another expert unless he's willing himself, as an expert, to do so.

Now, that is something that could have been dealt with in December, and we are only just dealing with it now in mid-March and, entirely properly, Mr Hollander is saying 21 days is needed, that seems to be rather tight, frankly, 21 days is needed in order to enable Dr Davis to do that and I don't think anybody criticises Dr Davis for that.

MR HARRIS: We do, sir, we do criticise him.

THE PRESIDENT: You do?

MR HARRIS: Absolutely, for reasons I am about to elucidate. We in front of the tribunal are only just dealing with this issue now.

THE PRESIDENT: Yes.

MR HARRIS: But the Class Representative has had this new expert in place since the 20 something of January. They have had the disclosure for two months and then over six weeks for tranche 2. So they could have been --

THE PRESIDENT: Don't get me wrong, I understand that point. But going on then with the horses going in two different directions, if the Class Representative had done everything that you are saying, then I can see the force in your don't adjourn point. But the fact is we are not there. We are, for whatever reason, in a situation where these very important questions are being dealt with now.

MR HARRIS: May I take that bull by the horns?

THE PRESIDENT: Please do.

MR HARRIS: Even with 21 days, we can still do the trial in Michaelmas term.

THE PRESIDENT: Okay.

MR HARRIS: Dr Davis and the CR's team finally do something quickly instead of sitting back. If needs be because you give some swingeing orders and a more brutal regime, which is what you said you would do, and he produces this new report, which we just heard from Mr Hollander is actually going to be no big deal, he says it's rather light touch, he's more or less already completely agreed with everything that James Harvey says, allegedly, and all he really needs to do is take away the word provisional from his existing report, bearing in mind he has put in a report already, subject to permission from the tribunal.

THE PRESIDENT: Well, and with that caveat.

MR HARRIS: Yes, but that's the point, according to Mr Hollander this morning, as it happens we don't agree, but this is his case, according to his case this morning it is, well, actually, there's really no difference between Dr Davis and Mr Harvey. And he even took you through and tried to persuade you that there is really no difference at all, it's really just it's sensible for an expert to come on and when he first comes on, he uses the word provisional. But that is weeks ago. He came on board nearly two months ago. So all I'm saying is you can still fit this trial because Dr Davis -- he wants 21 days, fine, we don't object to that. But even with 21 days, we can still hit the trial date and he needs to do his expert-led request extremely promptly, closer than 21 days bearing in mind that he's now had two months. So he could be told that has to happen next week. You could even order an experts' meeting, subject to their diaries, to take place Monday or Tuesday or whatever, we have agreed to that. By the way, we've always agreed to that. It's absurd the notion that we are somehow at fault for the fact that there's not been an expert meeting, but I will come back to that later.

So my point is if we've lost six weeks or so because an expert has gone, fine. We had six weeks' leeway in timetable before a Michaelmas trial in any event. If the

Class Representative now needs to do some things in August that we'd left rather fallow beforehand, so be it, their feet need to be held to fire, we can still do this and we just heard there is really nothing, really no changes, it's all the same act, it's just that Dr Davis, fair dos, he has to have his own name on a report which doesn't have the word provision on it when he gets round to it. My submission is you need to order him to get round to it promptly and then we can still do the trial.

But can I also explain to you that we don't accept for a moment that there is even any scope on the pleaded case for this new thing, whether it cost 3 million or 4 million, whatever, for some sort of counterfactual analysis. That's another reason why the trial can still go ahead. There isn't some new counterfactual analysis. There just isn't. And we thought that they had wanted to do this and they wanted to change their case so as to add it. So we say: are you going to amend? They are not. So can I show you the pleadings now?

THE PRESIDENT: Just on this approach, we don't ask why have the costs risen to 4 million, we just go ahead with the trial?

MR HARRIS: On the no adjournment?

THE PRESIDENT: On the no adjournment.

MR HARRIS: No, no, on the contrary.

THE PRESIDENT: How do you control --

MR HARRIS: In my respectful submission, whatever you now order, adjournment, no adjournment, stay, whatever, they need to be extremely carefully controlled in what they are now doing. Their cost budget has gone up from 10 million to 16 overall and it looks like the best part of 4 million or so or about 3 and a half million or so of that is down to the appointment of Dr Davis and that is utterly unacceptable. But I go on to develop that point now. We are all, I think, on the same page. What I just want to explain to you now is on a proper understanding of the pleaded case

that they categorically said they are not changing, there is no scope for this new thing that Dr Davis has somehow mooted, there is no primary alternative case, to pick up the wording of the letter of 21 February. I will just show you that before I take you to pleading, if I may. They say, "Having consulted with Dr Davis --"

THE PRESIDENT: Where are you looking at?

MR HARRIS: I'm looking at a letter at tab 102, which is bundle page 825. This is by way of preparation to taking you back to those passages in the pleadings. So this was a letter from my learned friend's solicitors, on 21 with February. So that is a whole month after Dr Davis was appointed. And they say in the first paragraph that he had discussions with Dr Davis. Well, thank the Lord, a whole month after he is appointed they've had some discussions with him. At the bottom of that page it says:

"The Class Representative had previewed a potential need to consider counterfactual pricing as part of the stage 1 trial, see for example Request 22 of the RFI … although the defendants responded to Request 22 by saying they concerned issues of quantum which will only be considered by the tribunal in the event that the Class Representative establishes liability at the Stage 1 trial. However [this is the important part], after considering the claim further, and discussing matters with Dr Davis, it has become evident that Dr Davis is of the view that the counterfactual prices and perhaps counterfactual service levels, that will play an essential role in any assessment of quantum [note quantum] will also be important to any assessment of abuse of dominance if the tribunal does not accept the Class Representative's primary position that brand different pricing is in and of itself abusive."

Then there's a few more details.

There is no primary case and alternative case that bears any resemblance to what is

put in this letter. It just doesn't exist. And I will show you that now in the pleading.

THE PRESIDENT: Yes.

MR HARRIS: If we could go back please to the very same passages of this very same pleadings that Mr Hollander took you to, you will see -- I'm going take them in the order I think that he took them -- they do not substantiate his submission at all. There is paragraph 55 of the re-amended Claim Form. So that's at page 60 of tab 2. And as Mr Hollander put it, and I quote:

"This is in the factual recitation section of the pleading."

That was at 11.06. Precisely so. If you re-read paragraph 55, you will not find in there an allegation of abuse of dominance.

THE PRESIDENT: Let me read it. **(Pause)**.

MR HARRIS: It's a bit of factual background. There's no allegation of abuse of dominance, there's no allegation even of the breach of the regulatory regime and most critically of all, there is no allegation about anything to do with counterfactuals, let alone that there has to be a counterfactual analysis that has anything to do with what Dr Davis put in his letter of a couple of weeks ago wherein he wants to analyse a loss of consumer welfare, directional flows of pro-competitive benefits, et cetera, et cetera. So it's not there. So that's the end of that one.

Then he took you to the allegations of abuse and I would like to do the same because it's also not there. That's page 64 under the heading "Abuse of dominance". 64 sets out the opening rubric then the particulars. So 64 says here are the abuses. Then let's look at them 64.1:

"The factual matters are repeated, including the fact that GTR is acting in breach of regulatory obligations."

And by all means read the rest but the key point is that their case, their only case, not their primary, but their only case, on abuse, is breach of regulatory obligations.

That's what 64.1 says.

Nowhere in there does it say anticompetitive effect, nowhere does it say there's a need in order to assess anticompetitive effects, something to do with counterfactual analysis. It's just not there.

Then more quickly, you can see exactly the same submission in 64.2 The allegation there is:

"In light of the practices imposed in breach of the TSA and NRCOT."

That is the allegation of abuse. So it's the same. It's acting in breach of regulatory obligations, nothing else. And it does not say anticompetitive effects, it does not say balancing, it doesn't say anything to do with total consumer welfare on balance being a little bit less. And there's nothing to do with counterfactual analysis. Exactly the same for 64.3. Let's just see:

"By giving rail passengers the choice ..."

You go all the way down, three lines up from end:

"That are impermissible pursuant to the TSA and the NRCOT."

So again it's the same allegation. It's you breach your regulatory regime in the form of these contracts, so note, TSA and regulatory obligations so far have appeared in every single one of the allegations of abuse, not a single word to do with anticompetitive effects or a counterfactual analysis of any kind, whether that be pricing or anything. Then likewise, 64.4:

"GTR imposes different selling prices."

Trace it down to the fifth line:

"Equally, imposition of brand restriction in breach of the TSA and NRCOT constitutes applying dissimilar conditions."

So, again, it's the same allegation. It's the same submissions again. It's a breach of the regulatory regime and nothing else. No counterfactual, no anticompetitive

effects, no new analysis. Then there is a summing up in 64.5.

But, again, by all means read it, it doesn't say anything about anticompetitive effects or counterfactual analysis or anything new.

All that we then have is that for reasons best known to himself, the CR decides pre-emptively to make some point about objective justification. Some people plead like that, some people don't. I tend not to do it, it's a matter for the Claimants. But in any event, let's look at opening words:

"To the extent relevant."

We say they are not objectively justified.

Well, at that stage they didn't know what was relevant and what wasn't relevant because we hadn't put in our defence on objective justification. So this is a meaningless paragraph for present purposes. But in any event, Mr Hollander read it out. Please feel free to re-read it again. It simply does not say: oh and by the way, there's another allegation of abuse that we are making, which is that on balance overall when you weigh up pro- and anticompetitive or when you analyse anticompetitive effects or when you have a look at total consumer welfare, look, that's abusive. They couldn't because of how it's structured. But it doesn't anyway. So it just doesn't do it. So, so far we have nothing at all in the re-amended Claim Form, saying that there is another allegation of abuse that involves looking at the counterfactual, or assessing anticompetitive effects.

Then it was misconceived, in my respectful submission, for Mr Hollander to then turn over the page to 67 and 69 because of course 67, 68 and 69 are under the heading loss and damage. So it couldn't possibly be connected with this or another and freestanding allegation of abuse, whether primary, secondary or anything. To cap it all, Mr Harvey's second report, which is the one that does set out an outline analysis of counterfactual pricing, goes to loss and damage. Not to abuse. It absolutely says

that quite clearly in his report. And it says it quite clearly in this pleading. So if you look, for example, at page 69, this is the further elucidation of the claim for the sum of money, in other words further particulars of the damage claim, not the abuse claim but the damages claim, if the breach of regulatory allegations have been made out, we see what Harvey 2 does, if you look at 69, you can see four lines down it says:

"In respect of the unregulated fares the overcharge is (a) the difference in price between any permitted fares and the counterfactual price as determined by the common methodology in Harvey 2."

And then (b):

Likewise “the price difference between a not Gatwick and the counterfactual price is set out in the common methodology in Harvey 2."

So, so far let's be clear, this is their claim, this document, and you will recall, sir, that you said how important, just a few months ago in Gormsen v Meta, or a few weeks ago, the pleading are to these claims, this is their claim. There is no allegation of some other abuse consisting of let's analyse effects and let's weigh them up or let's assess consumer welfare or anything like that. And Harvey 2 enters the stage by reference to loss and damage alone and those are the passages that Mr Hollander has shown you, I have just shown you them again, they do not substantiate this suggestion that there is something new and additional that Dr Davis should be allowed to do, let alone at great expense.

Then he says: oh well, now let's look at the Defence. But let's just pause a second before looking at the Defence. How can anything in the Defence conceptually add to the allegations of abuse that their expert wants to adduce in order to make out the experts' case? Conceptually it can't because it has to be in the Claim Form. But be that as it may, it doesn't. So let me show you. Let me show you why it doesn't. The Defence is at tab 4. The only passage that's relevant is paragraph 30, as

Mr Hollander's said. So we can turn back to paragraph 30 on page 104.

THE PRESIDENT: Yes.

MR HARRIS: We are quite categoric in 30(b) that we say:

"Even if, which is denied, CTR occupies a dominant position on any relevant market, we haven't committed any abuse. Each of the alleged abuses pleaded at 64.1 to 64.5 [that I have just shown you] depends on the premise that GTR has contravened the various contractual provisions on which the CR relies but that premise is denied."

That is the abuse case. And then it goes on. This is what Mr Hollander drew your attention to but let me explain to you what's going on here. We say:

"Even if, which is denied, the ticketing practices are contrary to the contractual provisions on which the CR relies, it is denied that they constitute an abuse of dominance."

There is this critical sentence:

"It is not *ipso facto* an abuse for a dominant company simply to breach a contract."

That's a proposition and that is as far as it goes. What we are saying is your case is and only is that we breached the regulatory provisions, we deny it. If we are right on that, end of case. But it doesn't as a matter of law follow in any event *ipso facto* that just because we breached an agreement, that's an abuse. That is not a difficult proposition and the rest of that paragraph simply gives examples, it's the further -- these are examples of how merely because we might -- which we deny -- have breached a regulatory regime, that doesn't amount to abuse and it's because the sorts of things that we are doing have pro-competitive benefit. There are differentiations in level of service, level of service in terms of things like racks and luggage space and easier ingress/egress, the things that are then elucidated. But critically, and just pausing there, that does not involve by us and certainly not by the Claimant's new expert any kind of difficult expert analysis, let alone a counterfactual

analysis. It simply doesn't arise. We are not going to do it, that is unless, contrary to my submissions, you allow Dr Davis in to do something that isn't pleaded and then we might have to respond to it but we don't need to do that in order to make our case at 30(c).

Then 30(d) is about the excess fares, which is sort of semi-parasitic on the same sorts of points. But then Mr Hollander drew your attention to 30(e). This is our case: "Further or alternatively the ticketing practices are objectively justified by reference to the pro-competitive benefits referred to in subparagraph (c) above."

Well, they are the same pro-competitive benefits that we are going to be addressing in outline terms in any event for the purposes of the proposition that *ipso facto* just because you breach a contract doesn't mean you're committing an abuse. But that is not some great big long involved [exercise], it's not even an expert's analysis, it's just the factual here are what we say are pro-competitive benefits, it's because they exist that *ipso facto* we might not still be committing abuse even if we breach the regulatory regime. No expert evidence and certainly no difficult or new counterfactual analysis. So that's the Defence.

Then to my amazement, Mr Hollander pinned his colours to the mast mostly by reference to the Reply, as if somehow in a reply you are allowed to, without elucidating it, you are allowed to come along and say at the certification, bearing in mind that this is 1 December, after certification, oh no, no, this introduces a brand new part of the case for which I now need an expert. Well, it doesn't. Because I've just explained to you what the Defence is. So almost irrespective of the wording that is used in the Reply, it has to be a reply to the Defence as pleaded. And the Defence as pleaded doesn't involve this counterfactual analysis or indeed expert evidence on the point. So it almost doesn't matter what the words say, they have to respond to our Defence, they can't just put forward a new case, let alone a new

expert case.

Then he picked it up 169/170. I will just finish this off, if I may, before the short adjournment. At paragraph 30(c) they raise a legal point, a pure legal point at (ii), bottom of page 169, they say:

"As regards paragraph 30(c), it is averred that the Defendants are not entitled to contend that there is a justification."

Well, I confess I have no idea what the basis for that is but whatever the basis for that is, it's pure law. So it doesn't involve an expert, it doesn't involve counterfactual anything. So that is what that paragraph says. Then there's (ii):

"It is denied that there are material differences in the nature and quality of services."

First of all, this has to be limited to the nature of the Defence but in any event it's not expert. It's fact. They say we said the words “are materially” -- they say in fact no, they aren't. So no expert.

Then thirdly, they say:

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

That wasn't our Defence. So I don't know what this is talking about. And even if it were our Defence, there's no basis for suggesting that (iii) gives rise to any need at all for a counterfactual analysis. It just doesn't appear. It doesn't say anything about total consumer welfare, it doesn't talk about anything to do with anticompetitive effects or how they have to be balanced or assessed, it's just not mentioned. So that's no basis for this new work that Dr Davis apparently says that he wants to do whether by way of secondary or alternative case. Likewise, the same with (iv):

"Imposition of the brand restrictions and differential pricing creates inefficiencies and is anticompetitive."

That is why Mr Hollander put so much weight on it but it's only the Reply and it has to respond to our Defence. It can't go beyond that and it certainly can't introduce a new suggestion of how it has to be an abuse coming in the Reply and on top of that, even there it doesn't say: and this is somehow all connected with some new counterfactual analysis and that relies upon expert evidence, and the proof of that then, members of the tribunal, must be in the pudding. If it had, if it had really done what Mr Hollander now says that it does in fact do, then the expert report would have had to come at least at the same time, if not before, this document because this would be a brand new introduction of a material new aspect of the case, at one point on 23 December called an alternative case and would have had to have been supported by expert evidence because it wasn't any part of what you certified. But it didn't get accompanied by an expert report, let alone about something to do with counterfactual analysis, and of course the problem for my learned friend on this point, just before I break for the short adjournment, is Mr Harvey was there at this point. So if it had involved all kinds of new counterfactual analysis, he could and should have done it before he disappeared. So this document is dated only three days after we were told that he had withdrawn from the case. So it's months after the CPO hearing and months after our Defence.

So for all of those reasons, Mr President, and I shall want to go further after the short adjournment, we say that there is nothing new, there is nothing new. And certainly there's nothing new that's pleaded. You shouldn't give any permission for Dr Davis to do something that isn't pleaded and all the more so when they categorically have confirmed that they are not amending their case. Perhaps that is a convenient moment unless there are any questions.

THE PRESIDENT: No, thank you very much. How long are we going to do for time? I mean, I'm keen that before we rise at the end of the day the parties have

a clear direction as to where this action is going. So we are going to have to be in a position to resolve the various different routes that the parties are advocating for. And I would like Mr Hollander to be in a position to have, as it were, as few options to argue against as possible. I mean, he's obviously going to resist the no adjournment line, he is equally going to resist your alternatives, which go in the other direction, of revocation completely or a stay just short of revocation. But how long are you going to need, Mr Harris? I really don't want to cut you back but I equally don't want the uncertainty to persist over the weekend and the following week.

MR HARRIS: Subject to of course the tribunal's convenience, we could perhaps take a shorter than usual adjournment. I mean, from our perspective half an hour would be adequate but equally that's pushing it, maybe 45 minutes, and that would assist, and the answer is I can take revocation and stay, as the next two topics, more shortly. Perhaps no more than 20 minutes when we come back. But then of course, there are a lot of other issues on the table --

THE PRESIDENT: There are.

MR HARRIS: -- that need to be dealt with by both sides.

THE PRESIDENT: You see, what I think both sides need to think about quite carefully is the tribunal's concern, not to permit an action which has fragilities to gallop forward to trial. That would be the case even if this were an ordinary private action. One does not want to have the serious concern of a last-minute adjournment. And the reason I'm raising with you, Mr Harris, the inconsistent horses, and I quite understand why it is quite proper what you are saying, don't get me wrong, but really your no adjournment primary position only works if it is absolutely clear that the Class Representative's case is unequivocally and without fudge or equivocation as pleaded and as stated in Harvey 1, 2 and 3.

The problem we have is that there is certainly some equivocation in the

correspondence on that and Dr Davis is properly caveating his position because for whatever reason he's not in a position as of today to sign off. Now, the problem I have is let's suppose in a month's time we get Davis 2, and it says: well, I'm very happy with 80 per cent of Harvey but actually I do things a bit differently and in my opinion this is how I do it. Now, that must be on the cards at the very least.

If that is so, then we are immediately building in, or recognising perhaps is better, the delays in the timetable that we were talking about earlier this morning with Mr Hollander. Clearly the dates in paragraph 10 and following of the order are no longer right. The question is how much we add to those dates. You seem to be saying it can be less than three months. I have to say I have some difficulty with that. If it's three months being added on to those dates, then an October trial is really incredibly difficult and we haven't built in at all the issues about the change in the cost profile, the cost budget of the Class Representative, which is a matter that rather strongly indicates a let's not review that on the hoof while we are heading off towards trial but moving back to a position that is closer to the considerations that we are debating regarding the criteria for certification per se.

So what I'm in a rather long-winded way saying is that I think it's intrinsic in your submissions that the Microsoft Pro-Sys test, as articulated in McLaren in the Court of Appeal and Gormsen in this tribunal is at the moment emphatically not met. Intrinsic in your submission of no adjournment is that it can be met in very short order and that I think is where I have a difficulty. It may be that you are right, but it seems to me that the chances of your being wrong, it's nothing to do with you, the chances of your being wrong are really quite high. And if that is right, and there's a limit to how you can help me on this, you can of course say hold the Class Representative's feet to the fire, and if it helps, we'll do that. But the issue that I am grappling with is whether such swingeing orders will actually cure a problem which is altogether more

fundamental.

Now, if that is the position, then the responsible course is, painful though it may be, to adjourn and if that is where we are heading, then I would rather cut to the chase and deal with the altogether separately difficult issues of what we do in those circumstances. Because I think we are going to be having quite a lot of time debating whether it is right to move to a reset, whether it's a hard reset of revocation of certification or a soft reset of staying the proceedings and coming back as if it were a recertification so that your clients can have the liberty that they ought to have to say, well, what was certified last time shouldn't be certified now so please revoke now. These are all matters that require quite a lot of debate and I absolutely don't want you not to ride two horses if that is the way you want to put the case. But if we continue to do that then I think we are liable to end up with a non-determination at the end of this afternoon and if we have to do that, well, so be it but I'm not keen.

MR HARRIS: Sir, very briefly, in one minute, I have finished making the submissions on not having an adjournment, I will move on to revocation, but I would respectfully say that it's the Class Representative who can't have his cake and eat it and ride two horses because on the one hand he's come to you today through counsel and said: nothing really to see here, Dr Davis is not really going to do very much and it's all really the same as Mr Harvey, but for some reasons that are best known to them, they are just not ready. That can be solved by swingeing orders if there's not really much to do that's different. But if, on the other hand, and this is what I will develop after the short adjournment, if on other hand your fears, understandable fears, are well-founded and in fact it is going to be more of a change, then he can't carry on as if he still has the certification because by definition it will require some amendments and it will require a new expert to produce a new report with something new and, we are told, big and substantial in it with a big new budget,

and that's not a fair basis to treat us and that is what I will develop after the short adjournment if I may.

THE PRESIDENT: Well, thank you, Mr Harris, that's very helpful.

Mr Hollander, you have heard the debate going on. I am not asking you to say anything but I do think anything you can do by way of proper assurance that there's going to be no shifting of goalposts at either the pleading level or at the expert level would be helpful. My concern is that I'm not sure that you can sensibly give those assurances. I know you will think about that because I have the highest regard for both teams. But given the position that Dr Davis is in, and I say this being very respectful of the position he has taken in his first report, I think it's a very responsible position he has taken, that we can't put in his mouth words of unequivocal endorsement of Mr Harvey's position, particularly when having had the opportunity to do so, he quite rightly has not done so to date. And I think that, in Dr Davis's own words, is the articulation of the fragility that I see exists at the moment. And as I say, Mr Harris, it's nothing really to do with you. To a large extent it is in the Class Representative's court, the difficulty is that the Class Representative quite rightly has limited control over what their expert thinks because that's the point of the expert, to provide an objective view of the case. And that is the problem that I would have liked to have closed out in December but we are in March and it's not closed out at the moment. Now, it may be that even if we had done this in December, we would be in the same position and we would be adjourning, but we would have had four more months.

MR HARRIS: Sir, I understand, maybe I can just leave these postscript remarks before the break. They are these there. There is also the Intervener represented by Ms Howard, who understandably has some role to play in this and I am going to be liaising with her further over the short adjournment to see if we can identify,

assuming I'm wrong and there is an adjournment, whether there is something meaningful and constructive that could nevertheless be done in Michaelmas term, so I will come back to you on that. I will address you as promised by reference at least to a few of the letters where we said in December and early January: come on, what's going on here. And then I'll principally deal with the revocation and stay things. But I reserve all my rights on the other points, for example costs and how we are not to blame and who is to blame and what have you but I won't develop them.

THE PRESIDENT: No, you needn't worry, Mr Harris, we have those well in mind. That is something which I am more relaxed about leaving over. In a sense, they will follow from what we decide today. As you say, there are likely to be costs implications, whatever course is taken, because no one is saying there's nothing to be repaired here, the debate we are having is how much needs to be repaired and on that, well, we have a range of views.

MR HARRIS: Precisely so. When would the tribunal -- when is convenient to come back?

THE PRESIDENT: I'm keen that no one be shut out, we will resume in half an hour, so quarter to.

Mr Hollander, of course.

MR HOLLANDER: What is the latest the tribunal can sit this afternoon?

THE PRESIDENT: I'm sorry?

MR HOLLANDER: What's the latest the tribunal can sit this afternoon?

THE PRESIDENT: I would be reluctant to go beyond 4.30 but I think we probably can, we will discuss that, I suspect we will be able to cast some more time out.

MR HOLLANDER: So quarter to?

THE PRESIDENT: Quarter to. Thank you very much.

(1.15 pm)

(The short adjournment)

(1.45 pm)

THE PRESIDENT: Mr Harris.

MR HARRIS: Members of the tribunal, good afternoon again. With your permission, what I will do is I'll show you, as promised, four letters in December. Then I'm going to show you a quick passage from Mr Maitland-Walker's third witness statement and it will be immediately obvious why when I have shown you the letters, a couple of other letters in January that will be much quicker because I said I would do that. I have taken some instructions and our position is that we appreciate it might be difficult for the tribunal to give a revocation order today, and the better course would therefore be to do a soft stop or what I call a stay, so it's a stay pending a possible future revocation and I'll develop that after I've -- and that will take 20 minutes/half an hour and then we will have plenty of time.

Of course, one advantage of the stay, just to preface that, is if you are with me on that, bar some work that obviously has to be done during that period by my learned friend with his expert, a lot of the other issues that are on the agenda for today are stayed, so you don't have to decide them. But I will come on to that.

As advertised, at tab 40 of the bundle, so that's page 639, very promptly after we were told about the withdrawal of Mr Harvey, we wrote and in no uncertain terms, tab 40, page 639, on 6 December we wrote and said: well, hang on minute, in light of what you heard not very long ago at the hearing about how it's tight and ambitious and you need to keep the tribunal informed, picking it up at paragraph 3:

"We can't comment on why he's withdrawn but the news is of significant concern because your client's claim rests squarely on and was certified on the basis of what Mr Harvey says."

That is paragraph 3. Then at paragraph 4 we go on:

"Further, as you are aware, the tribunal has recognised the timetable is tight and requires expedition."

Then we say:

"Mr Harvey's withdrawal has already caused your client difficulty in confirming the scope of his expert evidence."

So pausing there, that is 6 December, bearing in mind what I showed you in the transcript about your disappointment if they can't do things by early December, on 6 December they've already not complied at the very least with, if you like, the principle of your ruling of this tribunal's ruling.

And then:

"This in turn impacted upon our client's ability to confirm the expert evidence that they will seek to introduce by 23 December. Please confirm urgently and in any event by 7 December the steps your client will take."

Et cetera, et cetera. Paragraph 7(a):

We say “once you've secured the new expert as promised, we consider that your client should provide at a minimum a signed witness statement, accompanied by a statement of truth confirming (i) whether you adopt each of the reports and ..."

Just pausing there, it's never been our case that you have to adopt every single word of every report. What we said right at the beginning was whether he does and if not, where the changes are, what he does and he doesn't or she doesn't adopt, and we were saying that within days of being told that Mr Harvey had withdrawn. So that's the first letter.

The next letter is at tab 44, which is page 647. We got a response that didn't respond to these questions that I've just shown you from that letter of the 6th, so we wrote again on the 8th and we said:

"We refer to your letter of the 7th and our letter of the 6th, please now confirm."

In other words we are saying: hang on, come on, this is urgent, can you please tell us what steps are being taken?

And over the page we say:

"We trust that the response to our separate queries regarding the scope of your proposed expert and factual evidence will follow by 9 December as requested given the tight time limits to which all parties are working, in particular the upcoming deadline for our clients to confirm the scope of their factual and expert evidence."

But we kept getting brushed-off, which is: we don't have a new expert; when we do, we will tell you what is going on. But this is what we had to do. Then at tab 58, so this is a couple of weeks later on 21 December, it's still deeply unsatisfactory because there's no expert. So we have to write again on 21 December and we say at paragraph 2, we remind the CR that under the heading "Engagement of a New Expert Economist" that the timetable is tight, it requires both parties to move expeditiously in preparation of their case.

We say:

"The withdrawal of Mr Harvey has imperilled the procedural timetable, in particular as the disclosure process which is already underway is intended to be expert-led."

I just pause there, it will not have escaped the tribunal's notice, although Mr Hollander glossed over it, they are in breach of your order. It's not: oh -- that's what it is, let's call a spade a spade. You ordered them to do certain things and they didn't do it and they didn't write to you in advance and say: we are not doing it, can we have some more time? They just flouted your order.

Then paragraph 3:

"Pursuant to the Draft Order the Defendants are currently preparing their list. The Defendants need fully to understand the intended scope of the CR's new expert economist witness evidence. The Defendants are also working to provide voluntary

disclosure by the 17th. The CR's new expert economist will then need to review that disclosure without delay so as to be able to formulate any specific disclosure requests by 10 January."

I hasten to add: as ordered.

Then over the page:

"We anticipate ..."

This is why my instructing solicitors and I were so perturbed by the suggestion that we are somehow at fault that there hasn't been an expert meeting. Look at paragraph 4, this is back in December and this is then reiterated on multiple further occasions:

"We also anticipate that it may be helpful for the parties' experts to have a without prejudice meeting in early 2023 to discuss the issues relating to, for example, market definition and dominance."

But, of course, that couldn't happen because they didn't have an expert. So we've been pressing all along. All that happened slightly later in the correspondence is Dr Davis came on board and said: oh, here's my provisional view and by the way I haven't read all the disclosure, we simply said it would be better to have a meeting when he actually has not got a provisional view and when he has read the disclosure. So we said there's a danger of wasted costs otherwise. That's the true situation, not how it was presented to you by Mr Hollander.

But be that as it may, the last letter before December, and then I just want to show you something that will not be apparent to you that arises out of Maitland-Walker's witness statement, the last letter is at tab 64, that's 23 December. So this is now the fourth time that we've had to write on this topic within two or three weeks of being told about the withdrawal of Mr Harvey. Picking it up under the heading "Expert Evidence" on page 737, we say:

"There is considerable lack of clarity as to the expert evidence that the Class Representative intends to adduce."

Then we give some examples.

In particular, if you look at the top of 738, there's lack of clarity that should have been being resolved by the liaison between experts that you, members of the tribunal, and we were anticipating had been built into the format of the order. There should have been clarity during this period on this proposal for the -- quote – “expert primary research provider”.

Now, the new point, and I will show you two more letters after this, but the new point that you won't be aware of arises from Mr Maitland-Walker's witness statement that we only received a few days ago. If you could please turn that up, that's to be found at tab 21. So in my case it's the other bundle. In any event it's page 590.5.

THE PRESIDENT: Yes.

MR HARRIS: It's this, just as you turn it up, at no point in December, despite those four letters, and at no point in January and in February, despite the other letters I'm going to show you in a minute, were we told that in fact, notwithstanding the withdrawal of Mr Harvey, there was a very able person who was fully read into the case who could have carried on doing things in the very period that has caused this case to collapse, if I'm wrong on the adjournment point. But suddenly a matter of days before this hearing we get a new witness statement from Mr Maitland-Walker dated 9 March, only a few days ago, if you look at it at paragraph 11, unbeknownst even to us, let alone to you, he says the only alternative proposed by Mr Harvey was that his associate Ms Aastha Mantri take over as expert economist in the case you will see that at paragraph 12, second sentence, it is said that some of those expressed a preference to work with Mr Harvey's junior team not least given their, and I quote, "considerable knowledge of the case developed over the lengthy period

they had already been involved with the case."

We did not know that in December, despite us writing and saying there is a problem here, what's going on with the issues, what's going on with the expert disclosure? I would like to hand up a short hand-out now just to give you a few more details about Ms Mantri that we have been able to ascertain since the date of this witness statement. I apologise to Professor Ulph, because I will have to read out some of it because we couldn't figure out a way of getting this to you in time, although this will be made available.

Ms Mantri, this is just factual information about Ms Mantri and the annex shows where we got it from, it's places like LinkedIn and website reports. Ms Mantri is a senior member, major role, she is already described by Mr Maitland Walker as having considerable knowledge of the case developed over the lengthy period, she's got a first from Bristol and a top quality master's degree from LSE, not only that but she used to work for none other than the DfT, who is an Intervener in the case, and the case is all about the transport market. She has vast experience of markets and economic modelling, she regularly speaks on the competition circuit, she was previously at Compass Lexecon and she's spent years at the DfT, she has also worked on other CPOs.

So whilst I'm not suggesting, members of the tribunal, that it was illegitimate for the Class Representative to say: okay, Mr Harvey's gone, we don't want somebody more junior as a testifying expert at the trial, what I am saying was it was highly relevant to what could have happened in December and it could have happened by way of adherence to the court's orders instead of just being flouted, and in particular the expert-led disclosure process could easily have been carried out with her pending the appointment of a new economist. And it says in Mr Maitland-Walker's witness statement that: oh well, some of the new economists -- Mr Harvey apparently said

no, he won't allow somebody in his firm to work with another expert economist from a different firm. But that's not my point. I'm talking about the interregnum period where there was no other economist. There was no other economist except for somebody who was extremely well-qualified and very well read into case. Indeed, If you look at last sentence of paragraph 12, Mr Harvey declined that proposal, ie working with somebody else. But what did he say? He expressed a view that in his judgment Ms Mantri should be the economic expert in the case.

That is how much confidence he has in her and all I'm saying is that the legs shouldn't have fallen off of the directions and the directions could have been adhered to using that method but we weren't told and you weren't told and that is truly blameworthy and I make absolutely no bones about that.

Then just to finish that off, the last two letters, much quicker, going back to the other bundle, at tab 100, there is a long letter that we wrote, including about experts, it's at page 819 of the bundle, and we essentially pulled some threads together and the only point I want to pick up, because there are pages here about the unsatisfactory position that we've now reached because of the lack of an expert and him coming on board too late, the only one I want to draw your attention to in particular is paragraph 10. One of the unsatisfactory things is that the case was certified in July last year, July, and in July last year Mr Harvey had said, and you have certification on the basis that there was going to be, quote, “primary research”, unquote, or there might possibly be, and in particular reference was made to service. And here we are in March, the next year, we were, even before his withdrawal at the end of the November, so we were months and months and months post-certification, and we had got absolutely no further with what was said to be essentially an extremely important part of his case. I will come back to that later because one of the things that I say should happen during this stage is that when Dr Davis puts forward this

new report that we are told he's going to produce, he should absolutely be ordered to address that issue: are we going to have a survey; if so, what's it about, how much is it going to cost and when's it going to be done? I will come back to that. The last one is just page 844, which is a bit later on in the bundle. Sorry, I don't have the tab number. 108. This one just rounds it all off because what we just say in a letter that draws a lot of threads together -- incidentally, if you need look back at any letter, drawing the thread together, this is the one, but just in paragraph 2(a) what we say is at that stage there is a complete lack of clarity because Dr Davis appears to be indicating that he's intending to depart from Mr Harvey's approved methodology, et cetera, et cetera.

So where are we then? I said I would show you the letters. I have made the point about Mr Maitland-Walker. That takes me onto revocation or sort of a soft stop, a soft reset I think was your word, Mr President, and that's the one that we go for. What we say is the proper course now is to let the Class Representative have one go at a last-chance saloon and only one and it should be very carefully ordered and what should happen in that last-chance saloon is everything should be stayed except the following. They should put forward definitively whatever report it is by their new expert that they say they now want to rely upon and it should be done on the basis of the existing disclosure, bearing in mind of course, my Lord, that normally a certification report by an expert is put forward without any disclosure at all, and yet they've now had the disclosure from us that they are going to get. So they are already a massive step further forward. And we say that that could be done, they can have three months --

THE PRESIDENT: And they have the benefit of your Defence as well. They know the battle lines.

MR HARRIS: Absolutely. Very much so. If you are against me on the no

adjournment, then in those circumstances they can have three months from our perspective. That takes us to mid-June. And what we say is there then should be before the end of term another CMC and what should be essentially on the agenda at that CMC is: is this an expert report now looking like it might be satisfactory and is it accompanied by any necessary amendments and what, if anything, has happened about the costs of getting to this position? I'm going to come back to that point in a minute.

If it turns out that it's not satisfactory, this being the very last-chance saloon, and/or if it turns out that it's not accompanied by proper proposed amendments, then there's no doubt that we would be saying at that hearing: okay, let's come back early in Michaelmas term and we are going to be applying to revoke. So it gives the chance for the tribunal to take stock without anything rumbling along and it also gives you a chance to take a very careful grip on the costs element that I'm about to address you on and it's really their work and this is their last chance. So there's no formal revocation now. That takes care of the point about lack of clarity for people who are in the class. But it is very clearly on the basis that we reserve our rights if this doesn't work, despite it being last-chance saloon, to come along and say in Michaelmas term: right, we think you should now have your certification revoked.

THE PRESIDENT: What you are seeking is an order under Rule 85.1 of the tribunal rules that the tribunal stays the proceedings, not as an absolute stay but a qualified stay in the way you've suggested under that rule.

MR HARRIS: Precisely, as an exercise in case management, given -- and I do not resile from this, very much blameworthy they are for where they are now and it needs to be dealt with by proper swingeing orders, and as part of what they need to do as part of this exercise they absolutely need to come completely clear about primary expert research or surveys. Enough is enough. This case was certified

back in July last year. We don't know and they are still equivocating and all they now say is: oh well, Dr Davis doesn't know, Mr Harvey said he might, he might not. Enough's enough.

THE PRESIDENT: Also, I mean, I'm not getting drawn yet into the question of blame but one thing that has changed since certification last time is that we have got McLaren and the Court of Appeal and we have if it's a change of approach, whatever change of approach is signalled in Gormsen, but I think the one thing you are saying is that this soft reset would be not on the basis of the law as it stood last year, but on the basis of the law as it would stand now.

MR HARRIS: I am content with that, yes, I don't have a particular view about that, but absolutely.

THE PRESIDENT: What I'm saying is it's not enough on this basis to say: look, you certified it last time, do it in the same sort of way, because I'm not sure we would have approached things in quite the same way last time if we'd got what the Court of Appeal said in McLaren there in black and white at the time, because what is quite clear is that the notion of saying let's leave things over to trial, and it will sort itself out there, is not an acceptable gatekeeper response on the part of the tribunal.

MR HARRIS: Quite so.

THE PRESIDENT: I don't want to go back into thinking what our thinking was last time but what our thinking absolutely will be next time, if that's the way we go, is we will be applying the test as expounded in McLaren, Gormsen and the other cases on this topic.

MR HARRIS: Quite so. Plainly I agree with that. That is clearly what I'm saying, there's a stay except for certain things, mostly for them, as I have just explained, and to be quite clear, it must include a full exposition of what the primary extra research is going to be, whether that is going to be from another expert and whilst it needn't

be the actual research, it needs to be a full and proper blueprint outline so that you can say yes or no.

Then before I come on to the costs, because I do have what we say are some conditions that ought to be set about the costs of things that happened --

THE PRESIDENT: No, no, I quite understand. But just also to ensure that we understand where you are coming from, nested within this stay will be a contingent ability to apply to revoke which will be in your client's right to press.

MR HARRIS: That's why I mention the CMC. For us, bar the one thing I am about to mention, or possibly two, it would be a stay of everything. We do nothing bar a couple of minor things that I am about to mention and then we come back before the end of the term. So they get three months from today, which takes them to mid-June, before the end of term we have a proper CMC, and then obviously the stay is lifted for prep for the CMC and then the CMC, but in the meantime we don't have to spend more money, save on two minor things. What we would be doing during the stay, on our submission, is the following. We would be addressing our minds responsibly with the Department for Transport as to whether there are any, for generic purposes only, preliminary issues that could be dealt with somewhere in the existing window in Michaelmas. I don't want to commit myself to that because it's early days but we have already started preliminary discussions, Ms Howard and I, and there might be some candidates for certain genuinely useful legal issues to be decided without any expert evidence in Michaelmas that would, if not dispose of then case, then substantially -- so, in other words, we won't be stayed from spending minimal costs, liaising with the DfT to try to come up with something sensible and we very much would, if there is to be such proposal, put it forward at the CMC before the end of term, so call it July.

So that would be one thing that we would be doing and the next thing that we would

be doing would be spending minimal money looking at the costs that are being spent by the Class Representative, and that takes me on to my next point.

We say that the stay should be conditional, there should be other aspects to the order that should be given today as well as a stay with the two carve-outs that I've just mentioned for my team. The first one is that it should be made completely clear by order that the costs of the new exercise, the new expert, the new report, and for that matter if there are any new proposed re-re-amendments, they should be in any event for the Class Representative. Come what may they should pay their own costs of this new exercise that is going to go ahead.

Secondly, we respectfully submit that the costs that are of and occasioned by this new expert report and we anticipate there are going to have to be proposed re-re-re-amendments, but whether that is true or not, the cost of and occasioned by that, it should be made clear today that they are for the bill of the Class Representative, not us, and we say that is fairly orthodox but certainly in the circumstances of this case.

Then we say in addition, so there are three points I make about costs, the first one is they pay for their own costs come what may. Secondly, they pay our costs of and occasioned by in any event. Thirdly, we say there needs to be some proper grip by the tribunal of this vast new proposal for cost expenditure and it would include the steps that I advocate should take place between now and mid-June and then for the CMC. So if you do order them to do something or you do give them permission to do something, you should say it's on the following costs conditions and then that's a matter for you but there needs to be something along the lines of a cost cap or a cost budget or strict cost management. That is why I'm getting the second-carve out for us during a stay. We would want to make sure that whatever you do order, if you are persuaded by my submissions that there are the costs conditions for them, is

in fact being done, we would want to look at the correspondence if need be and write a letter if needs be.

Those are the conditions and, as I said before, we would reserve the right to revoke and then it takes me only to the final point and then subject to any questions, I'll retire for a moment; is we see a further advantage of this, a stay, is none of the other things that are on the agenda today need to be dealt with at all, we don't need to revisit the question of a split now, we don't actually --

THE PRESIDENT: No, that's right.

MR HARRIS: None of it, it's all done. So unless I can assist further, having taken instructions, that's our position on the major question for today and I think Ms Howard may possibly --

THE PRESIDENT: We will certainly hear from Ms Howard. I'm just looking through your six propositions to see if I have any questions on those. Thank you very much. I will check with Professor Ulph, it's quite difficult on screen. If you have any questions for Mr Harris, Professor, now is the time.

PROFESSOR ULPH: I don't have any questions.

THE PRESIDENT: Thank you very much, Mr Harris.

Ms Howard.

Submissions by MS HOWARD

MS HOWARD: I'm going to be as quick as I can. I just have three points, largely echoing my learned friend's position. The first one starts from the Department and the Secretary of State's concern about the cost of this case and I think that then dictates into our proposals for the case management because we are extremely alarmed by the increase in the costs budget that the Class Representative has put forward, which is not just confined to experts' costs, it's the costs increase of about 4 million in the cost of experts but also over £1 million increase for the counsel and

solicitors and obviously whatever they produce going forward is going to result in increased costs both for the Defendants and for the Intervener and this is a sensitive issue because, as we flagged in our Statement of Intervention, and I will just give the paragraphs for the tribunal's pen, at paragraphs 111 to 112, there are provisions in the franchise agreements relating to the allocation of risk in relation to costs.

So the costs could, and it is dependent on different variables but they could end up being paid by the Secretary of State and the taxpayer. So that is the huge concern, that we are just sitting here at the moment obviously as an interested party, but with no control over these proceedings, and there are potential costs consequences.

So that then feeds into the case management and we adopt the submissions my learned friend has made. On the preliminary issue point, if there was a way of making use of the window, the trial window in November, we think that could be used very, very efficiently to deal with the preliminary issue along the lines that we flagged in our Statement of Intervention. That, for your Lordship's pen, is 114 and 4(h). That is because of the exceptions in Schedule 3 to the Competition Act.

So just to remind members of the tribunal, there is a total exemption where there is a legal requirement, and this is a prior issue, before you get to whether there's an abuse, and what market definition and dominance is, if the GTR has been required to comply with a legal requirement imposed by the Department of Transport and they've complied with that requirement, then there is a complete defence under the case law and competition law does not apply.

So we say in that narrow-framed issue, that could very, very sensibly be dealt with as a preliminary issue. We already have disclosure, that is completed. There will be limited factual evidence on this, quite narrowly-framed question, and similarly with the SGEI issue, that can be crafted to ask whether it provides a complete exemption from the application of the competition law rules.

If those two issues were dealt with as a preliminary issue, that could potentially clear a lot of dead wood that could either dispose of the claim altogether, or would at least then lay the ground to know what basis we were going forwards into the assessment of the abuse, the counterfactuals and proceeding with the phase 1 trial.

So we are willing to explore that with GTR and with the Class Representative to see whether we can pick up on those points, use some of the directions and the court's time profitably in a way that actually would proceed with this claim efficiently.

Then, last, third point, is we would very much support the submissions that my learned friend has made on costs. We think that there should be an order for wasted costs but not just for looking forwards to protection of this new report --

THE PRESIDENT: You are not using wasted costs in a technical sense?

MS HOWARD: I'm using costs that there should be costs protection for the additional legal costs that the parties have incurred.

THE PRESIDENT: You align yourself with Mr Harris?

MS HOWARD: Yes, but not just looking forwards for this new report, we think it should be dated back to 1 December for the additional costs, the parties can easily get a statement of costs together, that they've had to spend dealing with this debacle of the expert situation. Similarly, again, there should be a cost cap on the amount of costs that the Class Rep can charge for their expert report so that neither GTR nor the Secretary of State have to bear the totality of this potentially £5 million increase in fees.

Then we would lastly --

THE PRESIDENT: We will obviously hear from Mr Hollander about the increase. But we are not going to be in the business of imposing a cap on any new exercise. If we go down this route of a soft reset, as I call it, then we would want to revisit the clearly material change in costs at that time, either as part of an informed control of

the process, or as part of an application --

MS HOWARD: For cost budgeting.

THE PRESIDENT: Well, either for costs budgeting or as part of the harder edge of saying: look, you may have persuaded the tribunal to certify on this basis last time, the tribunal won't certify and will revoke the certification given what has now changed, but these I think are all questions for later on.

MS HOWARD: That's right.

THE PRESIDENT: And not for today.

MS HOWARD: No, that's correct, it's --

THE PRESIDENT: I mean, we are not saying no but we are saying let's take it step-by-step.

MS HOWARD: Yes. It would be for an application at the next CMC for protection there.

The only point I would flag on the timing of that, obviously, if there was some agreement to go forward with the preliminary issue in the Michaelmas term, having a CMC late towards the end of next term is going to leave things quite late if there needs to be factual witness evidence to be prepared and filed in time for that hearing. You might want to consider that window to accommodate directions should there be a preliminary issues trial. But those are my submissions. Unless you have any questions.

THE PRESIDENT: Thank you very much, Ms Howard.

Mr Hollander, before you rise, we are going to retire for five minutes so that we can give you a little bit of a steer about what it is you can address us on or what it would be helpful for you to address us on and what not. So we will rise for five minutes, and, Professor, if you could join us in the retiring room, that would be very helpful.

(2.21 pm)

(A short break)

(2.26 pm)

THE PRESIDENT: We are very much obliged to the parties for waiting for us while we just discussed where we are going from here.

Mr Hollander, you don't need to address us on the question of adjournment. We are going to adjourn the trial out of the list for this year.

The areas on which you do need to address us is essentially the basis on which we do that. You've obviously heard Mr Harris and Ms Howard on that, you see what they propose. We do want to hear you most emphatically on those points. I don't think you need spend very much time on the question of preliminary issues, and the reason I say that is because we are clearly always going to be receptive to preliminary issues that shortcut matters but preliminary issues are dangerous things to consider, they are particularly dangerous things to consider when you don't really know what it is that you are looking at. So this is a question that we would want to consider when we have got the clear articulation of the case there and it may be unchanged from now but we would need to be assured of that.

So we will hear that application if and when it is formally made, and we would allocate it a time as appropriate. I don't think there's any question of us maintaining the four weeks after the summer for this matter, I think it was four weeks. The tribunal has a number of calls on its time and we do need to use that time to the benefit of other cases. But the parties can rest assured that if the preliminary issue is a runner, we will get it on as fast as we can. But we would need to be persuaded that it was a runner first. And there goes my prejudice against preliminary issues. So we will take that as it comes but it's the hard-edged points advanced by the Defendants that we really need your assistance on.

Submissions in reply by MR HOLLANDER

MR HOLLANDER: It will not surprise you to learn that I really strongly disagree with what my learned friend Mr Harris has said on a number of counts**.** The first thing is you would have thought listening to him that we had been in deliberate flagrant breach of the tribunal's orders and that there had been some form of contumelious breach by the Class Representative. Really, his submissions proceeded on that sort of basis. In fact, what has happened is that there has been an event which occurred entirely outside the control of the Class Representative. What happened with Harvey was not in any sense the fault of the Class Representative and it cannot be suggested it is. One wonders if my learned friend's submissions would have been the same if Mr Harvey had said: I'm too ill to continue. We don't know exactly what was behind the decision by Mr Harvey and he is not telling us, as Mr Maitland-Walker makes clear in his witness statement. It may be that that is a or the reason, we know not. But I can't say one way or the other.

Is it really different from the position where your expert says; I can't continue because of illness? In our submission not.

And with great respect, I understand the concerns about progress and the way forward. But one should not proceed on this application on the basis that this is all the fault of the Class Representative. It really isn't. And I put to you this morning, and I need not therefore repeat it, the steps that we took. We thought, rightly or wrongly, that we had done everything that we could and should do, not only to make the other side and the tribunal aware of this immediately, but also to take steps to get another expert as soon as we possibly could. And we all know how long it often takes. I mean, I've seen occasions where it takes three or four months to get an expert. We acted promptly, we had the difficulty that you know about, that Mr Harvey wouldn't let his team work with a new expert. And my learned friend's submissions about Ms Mantri, the Harvey assistant, are quite extraordinary. He said

Mr Harvey had wanted her as the expert. It seems to us that she, in terms of experience, was totally inappropriate for a case of this nature. She just simply didn't have the experience. And he said, unhelpfully: well I'm not prepared to let anybody else work with her or my team.

Now that's what he said. I'm not quite sure what we were supposed to have done with that. The suggestion in some way that we should have carried on working with her, knowing that there was going to have to be another expert, is ridiculous, with respect. One hears these submissions all really blaming the Class Representative for what happened and with great respect that is completely and utterly unfair. We are in this position, and I made clear at the outset this morning, that in terms of timing I accepted that I didn't want the Defendants to be prejudiced by it in the sense that I have indicated. But to behave as though this is all our fault is, with great respect, totally inappropriate.

So that's the starting point.

The next stage is Dr Davis has said in terms in his first report, "I agree with Mr Harvey's approach." Now the tribunal has made it clear it wants that in less caveated terms. I understand that and I am not seeking to push back in respect of that. If that's what the tribunal thinks appropriate then so be it, and we will procure that. But do not think that that is going to produce some different approach, because it isn't.

I will come back in a moment as to the terms and the basis in respect of that. I did make the point this morning, which again I think rather got lost in my learned friend's submissions, that actually what Mr Harvey was doing was dealing with the case at a precertification stage, at a stage where no form of defence had been explained or put forward and therefore he was simply speculating or assuming as to what a defence would be at the pre-certification stage. We now have a very long and

detailed Defence and very long and detailed Statement of Intervention setting out the issues and therefore Dr Davis is able to look at that in a way that Mr Harvey never was.

Now, one point that my learned friend spent time on was counterfactual pricing, and suggested that there was some major difference here between Dr Davis and Mr Harvey. There are two different issues here that my learned friend rolled into one. First of all: is there a pleading problem? I took you through the pleading in detail. The pleading is, and I'm not going to go back to it, that breach of the TSA and so forth is per se abuse, and breaches of the agreements produces anticompetitive effect on the facts. Those are clearly pleaded and I've set out the paragraphs and I would suggest there is no possible doubt about that and the clearest is in 18(a)(iv) of the Reply, which I showed you and I'm not going to go back to.

If the tribunal thinks there is a problem there of course we can clarify but I would suggest there is no possible problem.

There is then a second issue which is: is counterfactual pricing an issue for expert evidence at whatever hearing there is? That depends, not just on my pleading, but the issues on the pleadings as a whole, including the Defendants' pleadings because there would have to be expert evidence on it if it was an issue as a result of the Defence, as well as the Class Representative's pleadings.

That is agreed to be an issue already on the list of issues, because if you look at page 177, and on the draft list of issues we have item 13 on page 177. So that puts that in issue -- that's issue 13.

THE PRESIDENT: Yes.

MR HOLLANDER: For what it's worth, in terms of the provenance of that, if you look at page 700 -- you may or may not find this helpful, but in the drafting between the parties and what was then issue 14, we had suggested, on page 701, you can see

(c) and (d) at the top of 701, and Freshfields had in its form as it is at 14, which I think reflected what they understood the short form of what we had put in in (c) and (d). So this was all contemplated at the time of the issues as being part of what the tribunal would be determining. Harvey 2 always recognised there would have to be expert evidence on counterfactual pricing. And again I showed you the references in the letter at page 80 so I'm not going to go back to it.

What Dr Davis is saying is if you look at the counterfactual pricing merely at the damages stage, which was what was always anticipated, there is an issue as to what expert evidence will be required at what was stage 1 if the tribunal considered along that path. So you may need to look at the structure of the trial at this stage, which obviously doesn't arise in relation to what was being said. That was the point he was making as to whether it would go to the abuse as well as to the damages. It was simply a question of whether it would be necessary for both abuse and for damages, not whether it would be necessary at all.

That was all the issue.

So what my learned friend says about some great difference in terms of counterfactual pricing is just not well-founded.

The other point that he made in terms of the difference was survey evidence. Well, I don't really understand -- Mr Harvey said, "I may want to use survey evidence." Dr Davis says, "I may want to use survey evidence but I would like to make a decision on that after I've seen the disclosure and after I've talked to the Defendants' experts and discussed it with them." And one of the discussion matters presumably will be: well, what other methods can be used in terms of actually dealing with this issue?

I mean, I don't understand how that can be in any way controversial. And however definitive Dr Davis is I don't imagine he can say more than that because he wants to

talk, among other things, to the Defendants' expert.

So that's by way of dealing with my learned friend's concerns as to the points he's made as to what has happened. So where does that leave the tribunal?

The first question is: is there a problem in relation to certification? Well, in my submission no one is saying the case is now any different from what it was at the time of certification. The reason for decertification would be that the expert now being used by the Class Representative doesn't support the case that was certified. The reason for decertifying would be that the expert isn't available for trial. In my submission that is not a reason in itself to decertify at all and nothing that has happened today or since 28 November in our submission gives any support or any reason to decertify or suspend certification or anything of that nature.

Obviously, if Dr Davis were to come back and say, "Well now I've looked at the papers more I plainly take a different view to Mr Harvey", then things would be different. But at the moment they certainly aren't.

The other matter, which I don't think is relied upon on a certification basis, is the change in the costs budget. I don't understand that to be said to be a reason for decertification or suspending certification. I will just mention this, in Merricks, after the Supreme Court, the cost budget went up from 32.5 million to 45 million. The figures in this case are not out of line in terms of collective proceedings cost budgets. Sir, you may well be more familiar with those figures than I am. But what has happened, as you've seen, is that it has gone from a small firm to a big firm whose costs are significantly higher. And these are matters, in my submission, essentially for costs assessment and not for now.

So the tribunal I think has already indicated that it is of the view that the four-week hearing this autumn should be adjourned so I perhaps need not address you in respect of that.

The question was: how should one proceed? I'm not sure what the purpose of a stay would be, given where we are and what Dr Davis has already said. It seems to me, and it's a matter for the tribunal of course, but it would serve absolutely no useful purpose either to suspend or stay or decertify or to order a stay, other than to cause delay. I simply can't, with respect, understand what the purpose would be. I understand what the tribunal said about the idea of requiring Dr Davis to do a second report, and it may be, if that's the -- if the tribunal thinks that that is the appropriate course, and I know you've indicated that, that is the way forward and that is the next step before anything else is done, and I can see completely the logic and the force of that.

But I have to say beyond that, in circumstances where one has Dr Davis' first report, and you've seen what he said and I've taken you through it, we would submit that there is simply no useful purpose to be served by either staying or in some way suspending or doing anything else with the decertification.

You referred to the McLaren case, sir.

THE PRESIDENT: Yes.

MR HOLLANDER: The McLaren case talks about a blueprint to trial at the certification stage of course. But that has to be seen and is seen in the context of the fact that at that stage there's no defence set out, the material is all one-sided, there has been no witness statements, there's been no disclosure, and in a case such as the present there's been no setting out a case at all by the Defendants. So I would respectfully suggest that the position would not -- there's no reason to think for a moment the position would or could have been any different if that case had been decided before you certified in a case such as the present. The blueprint to trial was set out by Mr Harvey and Dr Davis has supported that.

I mean it's a matter for you, sir, as to exactly how you decide to deal with it. There is

a question as to -- given that you are requiring a Davis 2 -- as to what he should take into account, my learned friend said he should take into account the existing disclosure given. I thought that was remarkably inefficient if, I may say so. It's a matter for you. If that's what you want he'll do it, obviously. But it seems to me it's neither fish nor fowl. I understand that if he is going to do it now he has to take into account the pleadings that have been adopted, but there will be further disclosure, there will be further disclosure because it's going to be expert-led, and there may be further disclosure, because we already asked and said we're not happy with what's been disclosed. And the idea that at this stage no witness statements, part of disclosure done but not other parts, that he should be taking that into account seems, if I may submit, really rather inefficient. He should be asked, we would suggest, to look at the pleadings as they are and treat the matter at that stage and deal with it with on that basis. But if you think otherwise, so be it. It will be a matter for you. But that seems to us to be the appropriate way of doing it and the most efficient.

THE PRESIDENT: Well, a relevant question is, if we said that Dr Davis ought to take account of the material available to him, including disclosure, how much additional time would he require to do that? I mean, how much disclosure, for instance, are we talking about?

MR HOLLANDER: 2700 documents.

THE PRESIDENT: Right.

MR HOLLANDER: Listen, we will do whatever we are told to do, entirely, but I just wonder how efficient that is.

THE PRESIDENT: I have no doubt that you will. I mean, if it was going to produce in short order a better report, then taking account of the additional material makes obvious sense. I mean, Mr Harvey didn't have it but he wanted it. On the other

hand, if one gets into a situation where the work would be on the basis of a large amount of an incomplete set of documents which results in a not particularly better first cut, then of course that rather indicates that you are right. So I don't think there's a hard and fast rule here, I think it's very much, it depends.

MR HOLLANDER: I mean, as I say, it's a matter for the tribunal, of course.

THE PRESIDENT: Yes.

MR HOLLANDER: But we say that the voluntary disclosure is incomplete and doesn't do what it should have done. That's for another day. We also have not had the expert-led disclosure that the tribunal had in mind at the last CMC. I mean, he can do it. I would suggest it's a remarkably inefficient way of doing it, that he takes into account some documents and produces something that needs to be subject to review once the next lot of documents appear and once the witness statements appear and so forth. And the reason why, as you know, one has expert reports after witness statements and after disclosure is so one can take into account that.

And I think what the tribunal is really concerned with is to make sure we have something more unequivocal from the expert in the light of I think the points that you made, sir, about it being somewhat provisional in Davis 1. Again it's a matter for you entirely, you will form your own view. But I would suggest that's not really useful and it's likely to increase costs rather than save them.

What you really want to know is, take the provisional out and is Dr Davis holding back in some way and is he actually able to say, "Look, I'm happy with this now, I've got into the case", or are there concerns which need to be identified in his report? That's my understanding of what the tribunal want. Anyway, that's my submission in respect of that but of course it's a matter entirely for you.

In terms of timing, I've offered to do the short form, if you like, if I can put it that way, of Davis 2 in three weeks or a month, whatever. If he has to look at disclosure it will

obviously take longer. I think what sounds as though is being envisaged is some CMC in the -- whether it's May, June, July is a matter for you to consider. I mean, I don't have a particular view on that, probably sooner rather than later because there are important things to be discussed. And it may be you take the view that all that needs to happen is that Dr Davis needs to produce his further report and then we can have a further CMC. But again I'm entirely in your hands as to what's appropriate in respect of that.

I think the only other matter is costs.

THE PRESIDENT: Yes, indeed.

MR HOLLANDER: First of all -- let's assume you change solicitors from a small firm who cease to act, for whatever reason, to a big firm, and then your costs in any budget go up. Well, I mean those are matters for costs assessment in due course. But it can't be right, with respect, to say you can't have the costs of the big firm because you had the small firm to start with. That would be wrong, in my submission.

Now, are there any wasted costs in respect of this, and are they matters which should be the responsibility of the Class Representative in circumstances where, as I've submitted, there is absolutely no fault at all? That is not a matter, I would suggest, the tribunal should grapple with today. Because I think at the next CMC, or perhaps even after that, you can see exactly what costs -- I mean, suppose after that CMC in October Mr Harvey had said, "Look, I'm really sorry, I can't do this", instead of doing it in the way on 28 November, he had simply said to us, immediately after the CMC, "I can't do those trial dates, I have something else on next autumn"? I don't see, with respect, why that should lead in itself to any form of costs order against the Class Representative. But I think you may be in a much better position to see that at a further hearing when we see actually what the consequences are

and I would strongly resist any effort to deal with costs at this stage and there's no need for the tribunal to do so, in my submission. You are not prejudicing anybody's rights if you simply leave that over until the position becomes rather clearer on the next or a subsequent occasion.

So I think, unless there is anything further I can assist you with, I think those are my submissions in response. I have left over the question about the split trial because I think you indicated, and I think I understand why, that's not really for today.

THE PRESIDENT: Indeed. I mean, given the indication that we've given that we are adjourning and taking out of the list the trial, it follows that we can take a further look at the trial structure --

MR HOLLANDER: Yes.

THE PRESIDENT: -- and that in a sense feeds into what I said before you began your reply submissions about preliminary issues. So really, what we are saying is that --

MR HOLLANDER: All options open.

THE PRESIDENT: -- all options are open and we are not going to constrain the consideration of those options until we know exactly what is going on.

MR HOLLANDER: I understand entirely.

THE PRESIDENT: I think the reason it's been such a difficult matter of case management is because we don't know -- we may have a good idea but we don't know what, when he's really forced to remove his caveat, Dr Davis would say. We may make a very good guess but our guesses may be very different and that, I think, is the great unknown that has driven my concern about today.

MR HOLLANDER: I understand.

THE PRESIDENT: So we are certainly not going to make the situation worse by unduly constraining what the parties do now when there's no need to do so.

MR HOLLANDER: Absolutely.

THE PRESIDENT: Equally clearly, when the trial takes place is a matter that we will debate in light of diaries and other commitments later on.

MR HOLLANDER: Yes.

THE PRESIDENT: Because there's just no point in discussing that now. I mean, you've very helpfully indicated that you wouldn't oppose autumn of 2024, rather than before then, well, we'll debate that in due course.

MR HOLLANDER: No, I understand.

MR HARRIS: Sir, may I make four very quick points in relation to what I've heard?

THE PRESIDENT: Yes, of course.

MR HARRIS: Thank you.

THE PRESIDENT: Ms Howard, you will have the last word.

Further submissions by MR HARRIS

MR HARRIS: The most important one is my learned friend questions the utility of the stay but the utility of the stay is obvious, that we don't need to take any further decisions today on the other eight or nine outstanding matters, and of course all the other work that is currently ordered to be done, witness statements, et cetera, experts' reports all the rest of it, which can't realistically now be done, they are taken off the table. So that's the utility. And none of those decisions, none of the further steps will have to be taken until we see a proper blueprint. So that's the first point.

The second point is, just quickly, as regards costs that's the first we've heard today about how the cost budget has suddenly ballooned because it's simply -- the new expert firm wants to charge more. But first of all, that simply can't be right, leaving aside that that's the first we heard on the hoof today from my learned friend. Because the cost budget goes up from 10 to 16, and not all of that is the experts. So there's another two and a bit million that has absolutely nothing to do with changing

firm. And on top of that, what we do know is from Dr Davis' letter, which we don't need to turn up but the reference is tab 123, page 896, he does say he wants to do now something new and different and additional to what Mr Harvey proposed. So it's not a question of: oh, I'm just going to do what was on the table anyway but I charge more. It's: I want to do new additional stuff to do with counterfactual analysis. That's all the stuff about consumer welfare and balancing this and analysing service levels and what have you. That's the reference at page 896.

There is a prejudice. My learned friend says: oh well, there's no prejudice to you not having costs order now against the costs -- but there is a prejudice because we need to know what our costs budget is going forward and what we are faced by and what's to be potentially for our account and what's not potentially for our account.

Then lastly, you might have noticed that my learned friend simply dismissed these points that I made arising out of Mr Maitland-Walker's statement regarding Ms Aastha Mantri and her colleague. But he simply didn't answer the point, which was: in this period when they didn't tell you about her availability and her experience and her knowledge, and that of the other members of the team, when they didn't tell you that and they didn't tell us that, one of the things that has caused the car crash today could have been being dealt with. It's got nothing to do with testifying expert or experience. She could have dealt with expert-led requests, no problem. And he simply ignores that. And I simply can't resist, as I sit down, it's a bit rich for my learned friend to say "Don't worry, we'll do whatever we are told to do" when they haven't done what they were told to do last time in preparation for today.

THE PRESIDENT: Mr Hollander, you have the last word.

Further submissions by MR HOLLANDER

MR HOLLANDER: I think my learned friend had a (inaudible), that wasn't

a rejoinder at all. But let's not worry about that.

The stay, first of all. Now, so far as the stay is concerned the only thing that is likely to happen in the meantime is that there can be expert meetings in the light of Davis 2. If it turns out that Davis 2 is something different from what is anticipated, well that's one thing. But assuming that it isn't, there is absolutely no reason why there shouldn't be an expert meeting in the meantime and I would have thought a stay -- we are the ones who are doing the work because of the -- because there would be a one-sided stay, anyway. But it doesn't matter. There's absolutely no reason for it to be a stay. And that would enable the experts to meet some time before the next CMC, which I would have thought was helpful. We are not asking the Defendants to do anything else in the meantime and they are not obviously going to have to produce further disclosure or witness statements or experts reports. But there is absolutely no advantage, in my submission, in a stay.

Secondly, costs. Yes it is true that costs have increased. Beyond the main item is the expert costs. They have increased in circumstances where we have now seen what is being put in the Defence and the Statement of Intervention and all the issues that have been raised. Not a great surprise, I would have thought -- I would have submitted.

Thirdly, in terms of a costs order now it's prejudiced. Well, you have my submission. In my submission the tribunal really need to know how this is going to pan out before making any form of costs order and there's no possible prejudice in leaving that on the table till next time.

Finally, my learned friend has this thing about Ms Mantri. With great respect that is just outrageous. It is absolute nonsense. We have Mr Harvey say you can't work with anybody else. She is there without Mr Harvey. She is a junior, a no doubt able, a junior lady. What are we going to do with her, having lost Mr Harvey and not got

a new expert? How on earth are we going to get her involved even if Mr Harvey allowed it at that stage? That is a ridiculous submission, in my submission. And on that happy note ...

THE PRESIDENT: Thank you all very much. We are going to reserve our judgment because I think there are a number of things which will require careful framing for collective proceedings going forward and we want to have that made clear. But just so that you know, and we are very happy to make this into an order if it assists, we are adjourning the trial and taking it out of the list to be refixed in light of our judgment, but the parties should be under no illusion that there is no trial in the autumn.

Secondly, without in any way anticipating what we say about a general stay, we think that if the Defendants, and indeed the Interveners, want the benefit of an order saying that they should do nothing for the next week or so whilst it takes us to write our judgment, then we will make such an order. But we would hope that in the light of the order removing the trial from the list that isn't necessary, but if you want it, Mr Harris, you can certainly have it.

(Pause).

MR HARRIS: As long as that's categorically clear we don't have to do anything at all until we get the outcome of the tribunal, I'm not sure it needs to be a formal order but it's said in open court and it's the position.

THE PRESIDENT: It's on the transcript.

MR HARRIS: It's on the transcript.

THE PRESIDENT: What I don't want is costs spiralling up on the basis of a trial that isn't going to happen. That's really it. But I'm very grateful. It's on the record.

Mr Hollander, obviously Dr Davis does need to carry on getting himself up to speed; that's clear.

MR HOLLANDER: Yes.

THE PRESIDENT: So you'll obviously exercise sensible restraint in other costs but the work in terms of further acquaintance and familiarisation with the Harvey reports, the Harvey methodology clearly is very, very important and that will go on as per usual.

MR HOLLANDER: Entirely a matter for you. I don't know whether you want to express a view today as to whether he should start preparing -- because he will start doing it straight away, if you are able to express a view, the three members of the tribunal, today, before the reserved judgment, as to whether he should be doing it on the basis of, as it were, the pleadings, but no more, or he should be reviewing the disclosure, then he can -- it's a slightly curious position **(overspeaking)** --

THE PRESIDENT: I entirely understand, Mr Hollander. It's a difficult question but you are going to get an answer nonetheless, which is we want him to use the material, if it is useful, but he should not for the next week or so engage in a massive job of reviewing to see whether it is useful. In other words, at the very minimum, we will be saying he won't have acted improperly by using this material if it assists in his report. But we are not, whilst holding the ring, saying lift the bonnet and look at the engine underneath the disclosure to see what there is.

MR HOLLANDER: All the smoking guns.

THE PRESIDENT: All the smoking guns. I'm sure there aren't smoking guns but I'm sure there's a wealth of data that he may want to satisfy himself is relevant. That shouldn't happen. But if he's seeing the material in the disclosure that enables him to say: well that's really useful, I'll include it; he certainly shouldn't feel constrained from using that. And we will be much clearer about the constraints in the reserved judgment that we will hand down. I hope that assists.

We are all very grateful for the parties' very considerable assistance on this not

straightforward point. Thank you very much. We will hand something down as soon as we can.

(3.05 pm)

(The hearing concluded)