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IN THE COMPETITION

Case Nos: 1304/7/7/19 1305/7/7/17,

1425/7/7/21

APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Friday 7th July 2023

Before:

The Honourable Mr. Justice Roth
Mr. Simon Holmes
Professor Robin Mason

(Sitting as a Tribunal in England and Wales)

BETWEEN:

JUSTIN GUTMANN

Class Representative

v

GOVIA THAMESLINK RAILWAY LIMITED & OTHERS

Respondents

A P P E A R A N C E S

Philip Moser KC, Stefan Kuppen & Alexandra Littlewood (Instructed by Charles Lyndon) on behalf of Justin Gutmann

Paul Harris KC & Anneliese Blackwood (Instructed by Freshfields Bruckhaus Deringer) on behalf of LSER and GTR.

Tim Ward KC & James Bourke (Instructed by Slaughter and May) on behalf of First MTR

Sarah Abram KC (Instructed by Dentons) on behalf of Stagecoach.

Digital Transcription by Epiq Europe Ltd
Lower Ground 20 Fumival Street London EC4A 1JS
Tel No: 020 7404 1400 Fax No: 020 7404 1424
Email: ukclient@epiglobal.co.uk

Friday, 7 July 2023

(10.30 am)

Opening remarks

THE PRESIDENT: Good morning. These proceedings, like all proceedings in the Tribunal, are being live streamed. An official recording of the proceedings is being made, but I must start with a warning that it is strictly prohibited for anyone to make any unofficial recording or take any visual image of the proceedings, and to do so is punishable as a contempt of court.

Thank you all for your skeletons which are short and to the point, which is much appreciated.

Clearly, it seems the main substantive issue is the question of the split trial, which therefore we should take first, I think.

Can I just, for my benefit and that of my colleagues as well, understand the basis on which it is being put forwards as regards dominance? Because the defendants plead -- I think all the defendants plead -- that two markets, the rail transport market and a separate market for the retail sale of tickets -- we can go to the defences if necessary, but you all know what I am referring to -- I think the class representative doesn't accept that there is a distinct market for retail sale, but then goes on to say: well, if there is, then the defendants are dominant on that one as well.

So when it is suggested that there should be a trial on the assumption of dominance, that would be on the assumption of dominance on all relevant markets. Is that right?

MS ABRAM: On whichever the relevant market is, yes.

THE PRESIDENT: Yes. Whichever the relevant market is, and so it would cover both, if both are relevant. Yes, that's what we thought. So, we wouldn't be deciding, of course, which is the relevant market.

Can you help us on this, Mr Moser. Mr Holt's survey, which is, obviously, absolutely critical to quantification, but it's not really relevant to abuse, is it?

1 **MR MOSER:** It is relevant to abuse, depending on how the defendants are planning to
2 develop their arguments on markets. There is a certain amount of uncertainty -- if one
3 can say that -- in the defences, as to precisely how they are going to structure either
4 the relevant market or argue dominance within it. So insofar as we don't know at the
5 moment whether the arguments on either countervailing market power or perhaps
6 a completely different market for tickets are going to be advanced or how they are
7 going to be advanced by the other side, then we say in principle, all the arguments are
8 suffused with uncertainty.

9 **THE PRESIDENT:** I don't understand -- we can look at your pleading of abuse -- how
10 Mr Holt's survey is relevant to abuse. You are basically saying they are charging twice
11 for the same journey. They should take better efforts at making boundary fares
12 available. They don't, in various ways, and so on and you rely on various cases and
13 so on.

14 I don't quite see how the survey goes to any of that, other than the stark figures which are not
15 in dispute, of the number of boundary fares sold and the number of journeys taken.

16 **MR MOSER:** It is perfectly correct, with respect, to say that it is not a matter to do with abuse,
17 so far as our case is concerned.

18 **THE PRESIDENT:** Yes.

19 **MR MOSER:** Our case is very straightforward. We say that they are dominant on their flows
20 where they hold 100 per cent or close to 100 per cent. It is almost an open and shut
21 case. To the extent that some tickets are sold by others, there is really nothing to see
22 here, because either they are also dominant or the effect of their dominance in the
23 related market is such that they effectively control that as well.

24 But the defendants have been, thus far, rather economic in their pleadings, so far as
25 dominance/market definition are concerned. They have chosen to focus, for instance,
26 on the third-party sellers and on overlapping services.

27 **THE PRESIDENT:** Yes, but that is all about market definition and dominance.

1 **MR MOSER:** That's true.

2 **THE PRESIDENT:** But if we assume dominance -- in other words, you win on dominance,
3 that's the assumption, so all of that is for another day -- and we then say: well, these
4 dominant defendants -- assumed to be dominant -- are they, by reason of the way they
5 make boundary fares available or don't make boundary fares available, are they
6 abusing that dominance? It seems to me that's a question of fact and law, and is not
7 going to involve the survey. Is that right?

8 **MR MOSER:** If we are right on dominance, then the survey is not going to be affected.

9 **THE PRESIDENT:** And it is not going to go to abuse.

10 **MR MOSER:** The survey is not going to ask any questions about abuse --

11 **THE PRESIDENT:** I appreciate it is not going to ask a passenger, "Is this an abuse?," as a
12 matter of Chapter II, but the results of the survey -- my question is, are the results of
13 the survey going to be material for your abuse argument or are they really going to the
14 quantum? They clearly go to the quantum, that's obvious.

15 **MR MOSER:** Well, that is obvious. Save that the way that matters are now put by the
16 defendants is that they say: well, actually, quantum can't be finally determined at
17 stage 1. It may have to be determined also at stage 2. We don't quite know how they
18 plan to run that argument.

19 **THE PRESIDENT:** Sorry to interrupt you, Mr Moser. You still haven't answered my question,
20 which is about abuse, not about quantum.

21 **MR MOSER:** No, but you addressed quantum a moment ago, which is why I picked up on it.
22 But on abuse, our answer is -- certainly on our case and if dominance is established -- then
23 the survey, as such, ought not to be affected. We have not particularly focused on the
24 survey as being an element that was going to be influenced by any split.

25 **THE PRESIDENT:** Yes.

26 I ask you that because we are quite concerned about the delay in this case. You say you are
27 concerned about the delay.

1 **MR MOSER:** Yes.

2 **THE PRESIDENT:** We are perhaps even more concerned than the class representative
3 seems to be. Because we think putting everything off until late May 2025 is really
4 unsatisfactory. What we've been considering, as a proposal -- and we wanted to hear
5 what you say about it -- is whether one could not have a staged trial, where we have
6 abuse as the first trial, next year. We would have thought it could be tried in a year
7 from now, so the summer, June/July 2024, on the basis that we also fix a quantum trial
8 for May/June 2025. So, there is no question of downing sticks on quantum. The survey
9 goes ahead, disclosure goes ahead on quantum, so one doesn't lose time, but one
10 actually gains some time in dealing with abuse. And if it is dealt with in the trials in
11 June, we would have thought -- if the suggestion is six weeks for abuse and quantum
12 on the defendants' side -- you say that's too long, indeed -- abuse alone, we would
13 have thought, about three weeks. Three defendants, slightly different facts and some
14 law.

15 It would even mean that as abuse is really the one aspect of the case most likely to
16 appeal -- because clearly there is quite a bit of law involved -- whoever is unsuccessful,
17 we can envisage there might be an appeal -- then even that could be heard with
18 a favourable wind before the quantum trial.

19 But leaving appeals aside, it would mean that we get on with this case and we deal with what's
20 clearly an important part of it next year and not kick everything off until the middle of
21 2025. So that's what has been going through our minds. Obviously, we have had
22 a discussion about it. But as I say, that would not be on the basis that there's no
23 disclosure on quantum. Disclosure on quantum continues. The survey should
24 certainly be conducted. The later that's left, the harder it is.

25 **MR MOSER:** Yes.

26 **THE PRESIDENT:** But we were quite attracted by the idea of dominance being postponed to
27 a later trial. It's very fact-sensitive. You have all quoted the relevant authorities, but

1 they all say it's pragmatic, it's case management, it's common sense and so on, and
2 each case is different. But in this case, we can see that market definition is going to
3 involve elaborate economic evidence, which it seems to us abuse doesn't in this case
4 because it's an exploitative abuse. We don't really see that expert evidence on abuse
5 is going to be relevant. It's not an economic question, it's a factual and legal question
6 here.

7 So that's the way we are thinking about it. Now I don't know if any of you have thought about
8 this. It's clearly not a proposal either side or any side has put to us, so we would like
9 to give you an opportunity to take instructions on it and see. But that is very much on
10 the basis that that's going to be a trial next year and, therefore, we actually move even
11 faster than you had envisaged.

12 **MR MOSER:** Yes.

13 **THE PRESIDENT:** Bearing in mind your concern that you want to get on.

14 **MR MOSER:** Now I understand the context of the question. We are very concerned to get
15 on.

16 **THE PRESIDENT:** Yes, exactly.

17 **MR MOSER:** So far as the survey is concerned, it may be helpful if I say this -- because I am
18 not sure it emerges clearly from any of the papers -- we hope to be ready with the
19 design of the survey really very shortly to contact the other side and I hope get
20 cooperation. At least one -- I think it is my learned friend Mr Ward's clients -- have
21 already agreed that we can have access to the stations. That's very helpful -- well it
22 it's essential -- and I hope the others agree as well. It has been suggested by LSER
23 that we must do that by 8 September. We hope to do that considerably in advance of
24 8 September, but that can be a long stop, I don't care. But that's where we are on the
25 survey. So, we are getting on with that. We hope to have that.

26 **THE PRESIDENT:** That's very good to hear. Shall we just leave you to just take instructions
27 on this suggestion. Ms Abram, do you want to say something now?

1 **MS ABRAM:** I will just ask a question --

2 **THE PRESIDENT:** Yes, of course.

3 **MS ABRAM:** -- Just to make sure I have understood it. I think on the Tribunal's provisionally

4 indicated proposal, market definition or relevant market would go with dominance at

5 the very end and there wouldn't be a trial listed at this stage, of those issues.

6 **THE PRESIDENT:** Correct.

7 **MS ABRAM:** I am grateful.

8 **THE PRESIDENT:** There would be a trial listed for abuse and a trial listed for quantum.

9 **MS ABRAM:** I am very grateful.

10 **THE PRESIDENT:** Mr Mason --

11 **MR MASON:** Just before you continue, a specific question to consider -- if you have

12 a response now, that would be good, but later would be fine also -- is there anything

13 about the analysis that Mr Holt is going to do that will speak to issues of abuse? Or

14 will the analysis purely be quantification?

15 **MR MOSER:** If I may, I will take up your kind invitation to give you the answer after we have

16 taken instructions on the rest.

17 **THE PRESIDENT:** How long would you like to go? If we come back at 12, is that enough or

18 do you need longer? 11, I mean. 11, not 12.

19 **MS ABRAM:** Half an hour, until 20 past 11. Would that be okay?

20 **THE PRESIDENT:** Half an hour.

21 **MR MOSER:** Half an hour, yes. 12 did seem a little excessive.

22 **THE PRESIDENT:** I meant 11. Yes, 20 past 11.

23 (10.48 am)

24 (A short break)

25 (11.20 am)

26 **THE PRESIDENT:** Yes, Mr Moser.

1 **MR MOSER:** We and the class representatives, with whom we have had discussions in the
2 short break, for which we are very grateful, we understand the Tribunal's concern and
3 indeed we share it. We have been keen to avoid unnecessary delay throughout and
4 Mr Gutmann has been keen to avoid unnecessary delay throughout. If you allow me
5 a few words on, simply thinking out loud, what the nature of our concerns are, in
6 relation to the Tribunal's otherwise helpful suggestion.

7 **THE PRESIDENT:** Yes.

8 **MR MOSER:** The class wants finality. Having, effectively, three trials, with three times the
9 fixed costs, will not allow the finality in the short to medium term that we ideally require.
10 Leaving out quantum in particular, which was -- you will recall -- the Tribunal's first
11 instinct at the last CMC, clearly quantum will have to be part of trial 1.

12 **THE PRESIDENT:** Yes.

13 **MR MOSER:** It is a one-way saving. I can see how it is attractive for my learned friends'
14 clients. They never say that they might concede dominance, for instance, so the split
15 trial really only has a potential benefit if the class representative fails at the first trial. It
16 has significant downsides in the form of delay and potential duplication if we succeed.
17 So, we do think that it's not an entirely fair break-up, because then they would go and
18 fight us, if we succeed on the next one and the next one. So, it is a one-way --

19 **THE PRESIDENT:** It doesn't always -- I think we all know that while, in theory, that's correct,
20 in practice it's not quite how the world works, is it? Because all the evidence and,
21 indeed, jurisdictions where these class actions are much better established than here,
22 we haven't had any trials yet, we have not had any settlements yet, we are at the
23 beginning, but other jurisdictions which have had class actions for a long time, is that
24 the overwhelming majority -- and it really is overwhelming -- settle. So, getting to
25 a stage which improves the party's potential for settlement can be of great assistance
26 to both sides. So, if you succeed on abuse, which is something the defendants take

1 a very strong position on, your leverage, if I can put it that way, is considerably
2 enhanced.

3 **MR MOSER:** It is enhanced, we see that.

4 **THE PRESIDENT:** So the notion we are bound to have three trials -- and, indeed, some of
5 the cases that have been referred to in the skeletons, where splits have been ordered,
6 where the claimant, obviously not a class action in those cases, has succeeded on
7 abuse -- I am thinking of, I think, Purple Parking was a split trial -- the case then settled,
8 although the defendants had never conceded dominance. But they then thought: well,
9 the realities are, it is better to come to a deal than go to another trial.

10 So, I think it's rather more nuanced is what I am saying, than the sort of stark idea that we are
11 bound to have three trials and, therefore, we are pushing everything back until 2026
12 or something.

13 **MR MOSER:** It is more nuanced. I am not going to say that there is not that possible
14 advantage, but there are disadvantages to be weighed in the balance. Without
15 quantum, if it is not only dominance that's outstanding, it may be hard to reach
16 settlement. The driver for settlement may not be there, because nobody knows what
17 financial quantum universe we are operating in.

18 Dominance also, to be frank, works both ways on settlement. If there is an imminent hearing
19 on dominance which is something the train companies obviously don't want, that will
20 be a driver for settlement of its own. If it is put off to a third trial on the never-never,
21 that driver is then wholly absent, so while we're being frank about settlement, that is
22 another aspect of it.

23 And you have other cases which have gone the other way. Very recently, it's in the bundle,
24 you have JJH v Microsoft, where the Tribunal did not order a split trial, precisely
25 because the defendants were being so cagey around what their case on market
26 definition and dominance was. And there has been no indication whatsoever from
27 these defendants that they would not fight on all points.

1 So, what we say about this is why not bring forward the whole thing? Why not bring forward
2 the trial date of what we say is a six-week trial to, say, the autumn of 2024? If we are
3 going to have disclosure and surveys by February of 2024, then ten months must be
4 doable, if you look at the numbers of people on the other side who can prepare. And
5 there is a costs issue. There is a budget in this case. The budget was for one trial.
6 Split trials inevitably increase costs, even if it is only the fixed costs of each one.

7 So that is our counter proposal that we would like to throw into the mix.

8 **THE PRESIDENT:** You say the whole thing can be tried in six weeks (inaudible).

9 **MR MOSER:** Yes.

10 **THE PRESIDENT:** And you say it will be possible to be ready for that, including all the expert
11 evidence on market definition and so on, by the autumn of 2024, Michaelmas 2024?

12 **MR MOSER:** Sir, yes. The other side against us say -- well some say may take ten weeks.
13 I think one, they don't commit themselves. Well, six to ten weeks, that's still the
14 autumn.

15 **THE PRESIDENT:** Yes.

16 **MR MOSER:** So far as the question about expert evidence is concerned, where I didn't want
17 to commit myself without taking instructions -- it may be that Mr Holt's reports will not
18 include any evidence on abuse, although it might. We haven't yet settled, of course,
19 on the nature of experts. There might be some behavioural and/or market experts on
20 certain issues that do go to abuse that would be thrown into the mix. Then again, that's
21 better dealt with in one.

22 So that's our starter for 10, sir.

23 **THE PRESIDENT:** Yes. I am just a bit surprised you say that you would be ready for trial for
24 everything by Michaelmas 2024, because you came here agreeing to a trial in May
25 2025.

26 **MR MOSER:** Well, it was an agreed position.

27 **THE PRESIDENT:** Yes. But you didn't have to agree it.

1 **MR MOSER:** We didn't have to agree it. We were content with it, even though I understand
2 the class representative thought it was a long way off.

3 **MR MASON:** I think you asked for it, as I understand it.

4 **MR MOSER:** Be that as it may. If the choice is between three trials and one trial, then we
5 would prefer to accelerate matters of our own volition.

6 **THE PRESIDENT:** Yes. That's very clear, thank you.

7 Who goes next?

8 **MS ABRAM:** May I start by addressing Mr Moser's submissions and then address the
9 Tribunal's provisional indication?

10 So far as Mr Moser's points in respect of the Tribunal's provisional indication are concerned --

11 **THE PRESIDENT:** Yes.

12 **MS ABRAM:** -- Two points on that. The first is that we respectfully agree with the Tribunal's
13 indications and provisional view in relation to the outcome of previous cases and
14 experience of splitting trials and what then happens.

15 The second point, the idea that one would, instead, have a single trial of all issues in around
16 October next year, we regard, with respect, as wholly unrealistic and, of course,
17 something that the class representative himself, until today, was not proposing or not
18 regarding as at all realistic. That can be quite readily illustrated by looking at the class
19 representative's proposed timetable to a trial of all issues. That is in the
20 correspondence bundle. In my version of the bundle, it is on page 233 of the
21 bundle-page numbering, the business end of the trial timetable. Perhaps one ought to
22 pick it up at page 232.

23 **THE PRESIDENT:** Which bundle?

24 **MS ABRAM:** I am sorry, the correspondence bundle, sir.

25 **THE PRESIDENT:** Yes, I see, the correspondence bundle.

26 **MS ABRAM:** I think in the PDF version, it is the penultimate tab now.

27 **THE PRESIDENT:** The 4 July letter, is it?

1 **MS ABRAM:** That's it.

2 **THE PRESIDENT:** Page 229, under tab 25.

3 **MS ABRAM:** That's it, sir.

4 **THE PRESIDENT:** Yes.

5 **MS ABRAM:** Then the actual timetable that's annexed to it. So, this is the class
6 representative's proposal. It starts on page 231. You will see, sir, that the class
7 representative set out a list of proposed dates for scoping for disclosure exercise, and
8 that was to culminate in a CMC at the beginning of November this year. So just to start
9 with that, the idea that you would have a full trial of all issues 11 months after the
10 process of scoping disclosure has finished, let alone the disclosure itself has
11 commenced, is, in my submission, just not a realistic starting point for a trial of all
12 issues.

13 Then if you flick through the next stages --

14 **THE PRESIDENT:** Just one moment.

15 **MS ABRAM:** Of course.

16 **THE PRESIDENT:** So it is disclosure by 5 February.

17 **MR MOSER:** Sir, for what it is worth, this has since been overtaken by a more agreed
18 timetable behind the letter of 11 July which is not in the bundle. It may not matter for
19 my learned friend's forensic point, but I would not want these dates to be taken as the
20 latest dates.

21 **MS ABRAM:** I am super grateful to Mr Moser, because I don't think the class representative
22 had actually indicated it agrees with our proposed timetable. That's a really helpful
23 indication.

24 So, we can go to the version that's agreed, if that's helpful, sir. It's in the final tab of your
25 bundle, I think, if your bundle has been updated.

26 **THE PRESIDENT:** Yes, 7 July.

1 **MS ABRAM:** Yes, 7 July. There is a proposed timetable with multicoloured tracking annexed
2 to that. I am grateful to Mr Moser for indicating this is now agreed. What you see is
3 paragraphs 1 to 5, a disclosure scoping process to start in July, to end in October.

4 **MR HOLMES:** Just so I am certain I am looking at the right version, is point 5 saying by 4 pm
5 on 27 October?

6 **MS ABRAM:** 27 October.

7 **MR HOLMES:** Thank you.

8 **MS ABRAM:** Then we see, at paragraph 8, at the bottom of that page, that it is agreed, has
9 been agreed overnight, that there would be a further CMC not before 6 November to
10 set out directions for disclosure. You have seen what we said about disclosure and
11 expert evidence and the issues in that CMC. And then after that, the position is not
12 agreed because we came to this hearing saying: actually, let's set directions to trial at
13 the next CMC.

14 **THE PRESIDENT:** Yes.

15 **MS ABRAM:** But if one goes forward to the rest of the timetable, that's the same as the
16 previous draft which is disclosure by February 2023. Factual evidence, paragraph 13,
17 13 weeks, three months later. So that would be March 2023. Reply evidence, May.
18 And reply evidence a month after that, so June 2024, by that stage.

19 Expert evidence over a five month or so schedule, running forward from June. Then a trial --

20 **THE PRESIDENT:** Yes.

21 **MS ABRAM:** -- in May. In May 2025. So, in my submission it does sit rather ill for Mr Moser
22 to suggest that somehow all of those stages could be compressed to enable that trial
23 of all issues six months/seven months or so earlier than the class representative has
24 been proposing.

25 **THE PRESIDENT:** Yes. Obviously, these dates were put working back, as it were, from a trial
26 date.

1 **MS ABRAM:** That's a fair point, sir. But, of course, if one is the claimant, one always seeks
2 to get the earliest trial that one thinks is realistically achievable.

3 **THE PRESIDENT:** I take your point. You say even if 13 weeks is reduced to 8 weeks or
4 whatever --

5 **MS ABRAM:** It is just too tight.

6 **THE PRESIDENT:** It's too tight to get all of this done for an October/November --

7 **MS ABRAM:** It can't be done, sir. That's my negative point. But I also make a positive point
8 which is the point set out in my skeleton argument for this hearing. Look at all the
9 benefits of having a split trial, where you hive off abuse, causation and quantum in
10 some articulation of issues and then separate out market definition and dominance.
11 Actually, there is a lot of common ground about that proposed split between the parties
12 in this case, unusually. It's common ground that it is early enough to do the split without
13 there being wasted work.

14 **THE PRESIDENT:** Yes.

15 **MS ABRAM:** It's not suggested that it is going to lead to duplication, for example, in the need
16 for lots of factual witnesses to appear twice. There have been points about the
17 cleanness of the split, which I can address but, interestingly, they have not been
18 pressed --

19 **THE PRESIDENT:** I think we are minded to have the split. The question is what split? We
20 would like to hear you about whether it should be -- there was the proposal that was
21 put by the defendants which was abuse and quantum in this May trial, and there is now
22 our proposal of abuse earlier.

23 **MS ABRAM:** I am really grateful. So, the bottom line is that we, certainly from Stagecoach's
24 perspective, strongly see the advantages of the split that the Tribunal has provisionally
25 indicated. We are really grateful to the Tribunal for that lateral thinking in suggesting
26 that order of issues.

1 So, we are strongly in favour of abuse first, followed by causation/quantum. I make five points,
2 if I may, about how that might be done.

3 **THE PRESIDENT:** That would be -- fundamental to that -- that abuse could be tried in 2024.

4 **MS ABRAM:** In 2024, sir. So that was going to be my first point. Which is to say that we
5 would ask for a trial in the autumn of 2024, instead of in May/June of 2024. The reason
6 for that goes back to some of the points that I have just shown you by reference to the
7 timetable.

8 We haven't even got to the point of agreeing what the issues for disclosure will be yet, let
9 alone started doing any searches for disclosure. It was agreed, was contemplated,
10 that there would be another CMC at which the disclosure process would be kicked off,
11 in November this year. It's not going to be realistic, sir, to have a trial six months after
12 that CMC. The difficulties sound with particular force for my client. I am conscious
13 I make the point at every hearing in this litigation, my client has not been operating
14 a TOC for six years. We don't have access to the documents that we held while we
15 were operating the TOC because when we passed over the franchise, the documents
16 passed with them to Mr Ward's clients.

17 The documents are held on a range of repositories. We have been looking into where they
18 are held. They are, in particular, held to some extent on magnetic tapes. We have
19 written to the class representative about this and our position is that it may be
20 disproportionate for us to seek to obtain documents off those magnetic tapes, but, sir,
21 you are as familiar as I am with the time that that kind of exercise takes.

22 **THE PRESIDENT:** Yes.

23 **MS ABRAM:** And so, I say that we don't see how we could go from a CMC in November to
24 a trial on abuse in May next year. We just think --

25 **THE PRESIDENT:** We were thinking more not May but more like July, a year away.

26 **MS ABRAM:** I am grateful. Certainly, July would be an improvement on May. But I would
27 seek to persuade the Tribunal that a trial in October would be more appropriate. The

1 reason for that, if I can just map out the steps that we think we will need to take between
2 here and there, if we have a CMC in the middle of the Michaelmas term, say, and we
3 set the issues for disclosure then, we think we will need four months to do the actual
4 disclosure process because of the technical challenges that we will encounter. So that
5 will take you, perhaps, to the beginning of March.

6 Then there will have to be factual evidence. It's clearly a case where it's appropriate to have
7 two rounds of factual evidence. Or at least provision for that. So that might take you
8 to, for example, dates in June and July, or May and July, for initial and responsive
9 factual evidence. You are then at the end of term.

10 **THE PRESIDENT:** Yes.

11 **MS ABRAM:** So it will be sensible to have a trial date in October.

12 To be clear, we are really not looking to push this out. That's not what we are motivated by at
13 all.

14 **THE PRESIDENT:** I understand that. You agree that expert evidence -- I mean, whether
15 there is some behavioural evidence, but the sort of complex economic expert evidence
16 would not be appropriate or --

17 **MS ABRAM:** For my part, I don't seek any permission for that. May I just make a point about
18 behavioural evidence though, just to be sure that I have put down this marker with the
19 Tribunal: at the present time I don't know where my clients' factual evidence for this
20 case is going to come from, because we don't still have any employees who worked in
21 the TOC at the relevant time.

22 I don't know if I am going to be able to find factual witnesses who worked in our TOC at the
23 relevant time, who for example, might still work at First. We say we don't have control
24 of those employees, so it may be that my client will have to take a slightly different
25 approach to evidence and to the line between factual and expert evidence from other
26 defendants. I just put that down as a marker now.

27 **THE PRESIDENT:** Yes, thank you.

1 **MS ABRAM:** That's what I say about the timing of the trial.

2 The second point I wanted to make was about the time estimates for the trial. I hear what the
3 Tribunal says about three weeks. What I respectfully ask is that the current listing is
4 for four weeks, to give the parties an opportunity to work out what the scoping of the
5 trial will be. A listing can always be made shorter --

6 **THE PRESIDENT:** Yes.

7 **MS ABRAM:** -- but it is very difficult to expand it.

8 **THE PRESIDENT:** Yes.

9 **MS ABRAM:** So, I would be grateful for that.

10 **THE PRESIDENT:** And a full trial of everything, you say ten weeks; is that right?

11 **MS ABRAM:** We say ten weeks.

12 **THE PRESIDENT:** Yes.

13 **MS ABRAM:** For everything, yes.

14 And we say you just have to compare those two possibilities to see the manifest advantages
15 of the Tribunal's proposed approach.

16 A point I might make about that in response to what Mr Moser said, if I may. Mr Moser said
17 this is all advantage to the defendants and no advantage to the class representative.
18 But, of course, there is a real advantage, as we all know from having done split trials,
19 to winnowing down the issues as you get through the case --

20 **THE PRESIDENT:** Yes, we have that well in mind.

21 **MS ABRAM:** The first point I wanted to make on the nature of the split and the consequences
22 is the way that disclosure would need to work. If there is to be, effectively, a trial in
23 short order of the abuse allegations, we will work constructively with the class
24 representative on the scope of disclosure but we will need the class representative to
25 work with us as well, in identifying targeted issues in the way that you envisaged, sir,
26 in your disclosure ruling in *Ryder v Dawson* group a few years ago.

27 **THE PRESIDENT:** Yes.

1 **MS ABRAM:** And in particular, wrapped into that pragmatic approach on disclosure is that
2 we would anticipate disclosure on causation and quantum will be database based
3 rather than documents based. In the same way as we have seen, for example, in the
4 Trucks litigation. So, if we can disclose information rather than trying to find original
5 documents, that's something that we would envisage to be looking for.

6 **THE PRESIDENT:** Well, there may be requests for some documentation on how you planned
7 or considered what ticketing arrangements you should have. There might have
8 been -- I don't know -- a management committee or something that considered these
9 things. No doubt they would want disclosure of those documents.

10 **MS ABRAM:** That's understood. I am not seeking to close that out, I am just putting down
11 a marker that there will be a limit to what can be done in the time. There may also be
12 scope for considering the articulation of the process on abuse and on causation and
13 quantum. This is my final point. Consideration will need to be given, if one starts with
14 an abuse trial and then has causation and quantum, to how the timetables for the two
15 should interact with one another. So, for example, one would not necessarily need to
16 give disclosure on causation and quantum at the same moment as giving disclosure
17 on abuse, provided the two were proceeding in parallel.

18 **THE PRESIDENT:** Yes.

19 **MS ABRAM:** We would also need to think, sir, about how the directions beyond the abuse
20 trial on causation and quantum would work, when you are thinking about the gap
21 between those two trials. Because I think you have in mind that disclosure will be on
22 all of those three areas of the case. Factual evidence, in the first instance, will just be
23 on abuse. Obviously, there will then need to be a separate strand on factual evidence
24 and expert evidence which will be quite heavy, and we would like to think a bit about
25 how we could make those timetables work.

26 **THE PRESIDENT:** Yes. But in principle then, you are content that a quantum trial would be
27 listed for -- well, we can go with the date you've agreed on or we could say it's June

1 2025 or July 2025. But before the end of the summer of 2025, we would have the
2 quantum trial.

3 **MS ABRAM:** May I just make the point that that would, to some extent, depend on when the
4 Tribunal would expect to give its judgment following the abuse trial.

5 **THE PRESIDENT:** Yes.

6 **MS ABRAM:** Because it will be much easier to prepare for the causation and quantum trial
7 once we have that first judgment. I see the point about the prospect of appeals, but
8 nonetheless --

9 **THE PRESIDENT:** Yes, but we want it listed because if we don't list it now, but we only list it
10 after giving judgment, no doubt another year goes by and disclosure will be going on.
11 So, we want to be in a position to then say -- depending how the abuse comes
12 out -- there is no hold up because you say, "Now we are starting disclosure from
13 scratch".

14 **MS ABRAM:** No.

15 **THE PRESIDENT:** Yes, I appreciate disclosure on quantum doesn't have to be on the same
16 timetable as disclosure on abuse, but it will be going on over the same period and we
17 would like to fix the quantum trial.

18 **MS ABRAM:** We do totally accept that. I just ask the Tribunal to give some consideration to
19 how far in advance of the quantum trial one would need to have the judgment on abuse,
20 to be of maximum use.

21 **THE PRESIDENT:** That was one reason we were hoping for the summer of 2024 for the
22 abuse trial.

23 How long would a quantum trial, do you think, be?

24 **MS ABRAM:** So, we have said we thought six weeks for abuse, causation and quantum.
25 I think I would ask for the quantum trial to be listed for four weeks, on the same basis
26 as we are asking for the abuse trial to be listed for four weeks.

27 **THE PRESIDENT:** If the two together were --

1 **MS ABRAM:** I do see that point, sir. On the other hand, it goes to this point about the scoping
2 of what is going to be in issue and the difficulty of extending listings. I don't press the
3 point strongly.

4 **THE PRESIDENT:** I would have thought it should be two to three weeks. But we can hear
5 from others.

6 **MS ABRAM:** May I suggest that two to three weeks is a bit tight. If one thinks about what
7 one already knows is going to be in it, we are going to have this survey evidence which
8 is going to be a lot of material for the Tribunal to consider. And then four sets of expert
9 economists.

10 **THE PRESIDENT:** That is a question that we will come back to, whether, actually, there
11 should be four sets of experts. But we will come back to that.

12 Right, I think we have your points. Thank you.

13 Who is next? Mr Ward?

14 **MR WARD:** Thank you, sir. I gratefully adopt Ms Abram's submissions and I just make five
15 short points, hopefully, in support of what she said.

16 Firstly, we also gratefully endorse the Tribunal's suggestion. Mr Moser's attempt to lop a year
17 out of the timetable for a combined trial is totally unrealistic. But we also respectfully
18 suggest that summer is really very tight, even for an abuse trial. The real issue is
19 disclosure, because at the moment, we don't know what the scope of the claimant's
20 disclosure requests of the defendant are going to be. We have a process that you
21 have seen, Ms Abram took you to it a moment ago, by which to try to determine that
22 by November, when the Tribunal can rule as to what the scope of disclosure should
23 be and the appropriate searches and so forth. Of course, on any timetable of this kind,
24 it is going to be necessary for the class representative to be pragmatic about what they
25 are asking for, and maybe even circumspect in what is sought.

26 But it wouldn't be unusual for that to turn out to be quite a contested matter. I don't need to
27 prejudge that. We don't know what they are going to ask for. Also, it isn't impossible

1 that there might need to be some disclosure by the class representative. Because we
2 have seen that their directions for trial envisage that they will be serving witness
3 evidence of fact and my solicitors intend to write about that rather than seek any orders
4 about that today.

5 But the disclosure process is itself a substantial exercise that will have to take place before
6 the trial can progress. We have taken on board what you have said about quantum
7 disclosure going on in parallel, perhaps on that slightly slower track, but obviously, that
8 is a very substantial workload on the defendant's side. That's my first point.

9 Secondly, regarding expert evidence, like Mr Moser, we would like to at least keep the door
10 open for now. Evidently, that would be a matter the Tribunal could address at the next
11 CMC. I hear what you say, sir, that it's not likely to be the kind of heavy, data-intensive
12 expert evidence one might find in, for example, a cartel case or doing a market
13 analysis, but it would be, with respect, premature today to rule definitively that there
14 could not be expert evidence.

15 Thirdly, like Ms Abram, we think four weeks would be a sensible listing, on the basis that, of
16 course, it can always be compressed but it will be difficult to find an extra week in
17 anyone's diary at a later stage.

18 Fourthly, we would say the same about any potential quantum trial. Presumably, it will be
19 causation and quantum. As you know, causation here is a strongly contested issue by
20 the defendants.

21 That leads me to my fifth point which is about identifying exactly what issues will be in play in
22 this first trial.

23 You will have seen that we have a proposed mechanism by which there will be a list of issues
24 for disclosure. We would respectfully suggest that in parallel to that, the parties should
25 liaise on a list of issues for the first trial, obviously under the head of "abuse", but we
26 would need to be clear on both sides exactly what was going to be litigated in that trial,
27 and if necessary, of course, the Tribunal could rule.

1 **THE PRESIDENT:** Yes.

2 **MR WARD:** So those are my short points, sir.

3 **THE PRESIDENT:** Just on the length of a quantum trial --

4 **MR WARD:** Yes.

5 **THE PRESIDENT:** -- causation/quantum, how long do you think?

6 **MR WARD:** Well list for four weeks, sir, would be our respectful submission.

7 **THE PRESIDENT:** That one also?

8 **MR WARD:** We can keep that under review, of course, as things crystallise.

9 **THE PRESIDENT:** And that could be for June/July 2025?

10 **MR WARD:** It could. But I echo Ms Abram's point about the timing of the judgment. If I can

11 just be anecdotal about last year's Trucks case, which was a trial of about ten weeks

12 and the Tribunal produced a very full and detailed judgment, and it came out, I think,

13 approximately eight months after the trial, which was entirely understandable --

14 **THE PRESIDENT:** Yes.

15 **MR WARD:** -- just in time for the pre-trial review, in what would have been Trucks 2, which

16 as you know, eventually settled. So, the timing issues were quite important there.

17 Here of course, if the defendants are successful on the abuse case, no second trial

18 will even take place.

19 **THE PRESIDENT:** Yes. But I think we want to fix -- the longer the trial, of course, the longer

20 it takes to produce the judgment.

21 **MR WARD:** Of course.

22 **THE PRESIDENT:** In the first Trucks trial --

23 **MR WARD:** It was a trial of ten weeks. And it was a trial, of course, on all issues.

24 **THE PRESIDENT:** Yes. So, I think an abuse trial, I would hope -- without fixing a date, as it

25 were -- judgment can come much quicker.

26 **MR WARD:** Of course, that is a matter for --

1 **THE PRESIDENT:** So, I appreciate what you say, but it is quite clear to us we want to
2 fix -- trials can always be re-fixed and put back, but if you don't fix them, suddenly we
3 are told nobody is available.

4 **MR WARD:** We welcome that, of course.

5 **THE PRESIDENT:** Yes, thank you.

6 Mr Harris?

7 **MR HARRIS:** Sir, as you know, I represent two sets of defendants in two cases that are being
8 jointly case managed, so the LSER defendants and the GTR defendants. You will be
9 pleased to hear that we, like the other defendants in one of those jointly managed
10 cases, we also agree at the high level with the Tribunal's proposal for a potential
11 three-way split. So, a trial one, two and three.

12 We differ slightly with the other defendants on some of the more detailed bits about dates.

13 I will come on to that. But certainly, at the highest level, we agree with your proposal
14 and to that extent, we are ad idem with Stagecoach and First MTR. So, to that extent,
15 I adopt the submissions made by Ms Abram in support of that as a conceptual split.

16 The difference is relatively minor, but since we are talking case management, I will develop it
17 now. We also agree with the Tribunal's provisional indication that stage 1 should be
18 before, should be June/July 2024 rather than October 2024, which has been put
19 forward by Ms Abram and Mr Ward. We have a number of reasons for that.

20 They are not in order of priority, but they are essentially, if you like, three reasons: one of them
21 you have heard a little bit about, which is the time for a judgment after the stage 1 trial,
22 before having stage 2. So, if we are going to have a stage 2 trial in May/June 2025,
23 we think it's actually essential that the first trial be over by the end of summer term
24 2024. Because the facts of life are as they are. No doubt, even if it is just on relatively
25 constrained issues, it will take some months and the parties will need -- in order to
26 make trial 2 maximally efficient for all concerned, we will need to have that judgment.
27 If the trial doesn't even start until October/November 2024, and we may not get

1 judgment before Christmas, entirely understandably, before you know it, you are into
2 January/February and, realistically, that's not enough time to take stock for a trial on
3 quantum that would start, potentially, in May 2025. So that's one reason.

4 The other reason -- as I say, I represent two sets of defendants. And we are, with respect,
5 convinced we are going to win on abuse and we want to have that abuse trial. We
6 want to have it sooner rather than later so we can be shot of this litigation. So that
7 would militate in favour of having a trial in June/July 2024 rather than, say, October
8 2024.

9 The other thing is we say we can perfectly adequately do a first stage trial by June/July 2024.

10 I have listened very carefully to what Ms Abram says about the amount of time required
11 for disclosure. I respectfully put forward what I contend is the answer to that, which is
12 we need to have focused disclosure, not some wide-ranging disclosure exercise. She
13 can get comfort for her client as to whether it be database disclosure and as to what it
14 is that her client needs to put forward, given that they are six years away from having
15 operated a particular TOC. And that's precisely the sort of issue that if it can't be
16 agreed between the parties, if you were to order a June/July first stage trial for next
17 year, would be resolved at the CMC which is to come. I turn to that now.

18 A more minor reason but I suppose, technically, a fourth reason, is that the more time that
19 goes by, the more memories fade on issue of abuse. As it happens, my LSER clients
20 are also no longer in operation as a TOC. You may recall that, that has moved back
21 now to, essentially, a government run TOC and it therefore means that we also have
22 greater difficulties as time progresses, with access to people who were in situ at the
23 time. That's a slightly more minor reason but it militates in favour of a slightly earlier
24 trial than a slightly later trial.

25 As to the CMC, we think that if the trial is to be listed in June/July 2024, then actually, the CMC
26 shouldn't be what was proposed when we walked in today, namely November, but it
27 should be September. In any event, it should be earlier than November. If it were to

1 be earlier, then we see that the relevant disclosure issues can perfectly adequately
2 and appropriately be dealt with, to lead to a June/July trial.

3 **THE PRESIDENT:** Presumably, it is a one-day CMC?

4 **MR HARRIS:** It is a one-day CMC. There would have to be directions, probably today, about
5 at least attempting to agree certain things. I will pick up Mr Ward's list of issues point
6 later in my submissions because I do agree with him that that is critical.

7 **THE PRESIDENT:** Yes.

8 **MR HARRIS:** So where does that take me? We think that -- subject to a point I am going to
9 make in a minute -- that a three to four week listing for June/July 2024 for stage 1 is
10 sensible. And we do agree that May to June 2025 for the stage 2 trial, for two to three
11 weeks, is also sensible. So, to that extent, my clients seem to be, I think, completely
12 ad idem with the provisional indications of the Tribunal.

13 So, turning to some slightly more granular issues and picking up Mr Ward's list of issues point,
14 we agree that's very important. We think that the CR should be directed today to
15 produce very promptly that list of issues, as he sees the world for a stage 1 trial. And
16 we think the parties should be then greatly encouraged or directed to seek to agree
17 that list of issues much sooner rather than later, and then we see the CMC as being
18 pretty early, September-ish next year, so that all the issues about the list of issues can
19 be thrashed out by no later than that CMC, and that will define the scope, if you
20 like -- the issues-based scope -- for the disclosure. Then if the parties haven't agreed
21 the mechanics of the disclosure by the time of that CMC, they can also be resolved.
22 Any issues that haven't been agreed about mechanics can actually be resolved at that
23 CMC.

24 That ought to leave enough time for a June/July 2024 trial, in my submission.

25 One thing that I do want to make clear -- or at the very least, ventilate extremely clearly
26 today -- is we see the three to four weeks trial in June/July next year. That's to say the
27 LSER and GTR defendant, as not being necessarily limited or hermetically sealed to

1 non-causation issues. I think both Ms Abram and Mr Ward and to some extent the
2 Tribunal, have used the phraseology of, well, stage 1 would be abuse and stage 2
3 would be causation/quantum. But we see that as not being quite as clear cut.
4 Because as we see it, there may well be arguments about causation and counterfactual in
5 stage 1. That's partly why we say that should be three to four weeks. And I say that
6 because depending upon whether there hasn't been causation or the counterfactual is
7 X instead of Y, that bears upon whether there has been an abuse, in our submission.
8 I don't want to go any further than that today because it's exactly the sort of thing that ought
9 to be addressed, in my submission, in the list of issues, but I wouldn't want the
10 impression to be created -- at least on behalf of my clients today -- that it is necessarily
11 something that one can do in a stage 1 trial on abuse and have no references at all to
12 counterfactual or causation. That then takes me to the next --

13 **THE PRESIDENT:** Well abuse does involve a counterfactual in one sense.

14 **MR HARRIS:** Yes.

15 **THE PRESIDENT:** Because one is asking: what did you do, what should you have done?

16 **MR HARRIS:** Exactly so.

17 **THE PRESIDENT:** And to that extent there is a counterfactual. But in terms of causation and
18 saying: well, how many people were affected? Once you get into that sort of causation,
19 you are getting into quantum and then everything gets blurred together. And if that
20 couldn't be separated, then the breakdown doesn't really work.

21 **MR HARRIS:** I think we see this very similarly, if I may respectfully put that, sir. Agreed.
22 Causation, insofar as it is trying to identify the amount of people that fall into a certain
23 category and, therefore, what the quantum is because that category is 50 per cent or
24 80 per cent or whatever, agreed. That's a stage 2 quantum trial.

25 But I can see a situation -- you will recall, for example, I know the Tribunal was not terribly
26 impressed at the certification stage, but you will recall that all the defendants take issue
27 about how, in the counterfactual world, loss, conceptually, might not have been caused

1 for various reasons. For example, people don't take their travel card, people don't pay,
2 or people don't price optimise. I just give a few --

3 **THE PRESIDENT:** Yes.

4 **MR HARRIS:** And one can see how those might properly fall within the conceptual scope of
5 abuse, because conceptually, it's right to say that in the counterfactual, causation
6 might not have operated for this, that and the other category, well there's no abuse.

7 **THE PRESIDENT:** Yes.

8 **MR HARRIS:** That's the only point I make --

9 **THE PRESIDENT:** Yes, we understand.

10 **MR HARRIS:** But it very much falls into that list of issues. I think it is critical, I think we all
11 see that as critical, that that be put forward and resolved as soon as possible.

12 **THE PRESIDENT:** Yes.

13 **MR HARRIS:** As for the last part, yes, we agree that dominance and market definition be put
14 off and we agree with the nuanced comments.

15 **THE PRESIDENT:** Thank you.

16 **MR HARRIS:** Sir, unless I can assist further?

17 **THE PRESIDENT:** No.

18 Mr Moser, do you want to respond?

19 **MR MOSER:** Yes, sir, I am grateful. I would not say very much on split because I can take
20 the hint, that the Tribunal does not want further submissions on it. I would just say,
21 increasingly forlornly, that the potential difficulties of a clean split have been illustrated
22 by listening to what my learned friend Mr Harris said a few moments ago in relation to
23 causation and the counterfactual.

24 So, we do reiterate the concerns we expressed in our skeleton argument as to the difficulty of
25 a split at all. The other point I would make about what we say about splits and cost
26 and time, is that if one listens to all of my learned friends carefully, you will see that
27 what was, in our terms, a six week trial and in theirs, a ten week trial, must have

1 ballooned into something more. Because now we are told it is four weeks for abuse,
2 four weeks for quantum and we know that they say -- they claim -- that dominance is
3 very complex, so perhaps another four for that. And we double our estimate by going
4 the three-way split instead of doing it in one. But there we are, sir. So that's what I say
5 about split.

6 If there is to be a split, may I say that we respectfully agree with Mr Harris KC, that it is
7 essential that if there is to be any advantage to bringing forward an abuse case, it be
8 heard in June/July 2024, for all the reasons Mr Harris gives which I gratefully adopt.

9 It can perfectly well be managed. My learned friend Ms Abram has held against me the agreed
10 proposed timetable, but I will respectfully remind her and the Tribunal, if one looks at
11 page 216 of the correspondence bundle, where we started, until we were bid up, on
12 the basis that, I suppose, perfectly fairly, sir, as you say, the parties were all working
13 backwards from an agreed trial date in May 2025.

14 **THE PRESIDENT:** Yes.

15 **MR MOSER:** So, on 216, you see that we suggested, at 5, that by 8 September, we provide
16 notice of expert witnesses and so on.

17 **THE PRESIDENT:** Yes.

18 **MR MOSER:** 29 September, a listing of the CMC3 for the directions, and by 29 December,
19 the defendants would give disclosure. That seemed to us to be perfectly achievable.
20 They then pushed that eventually to February but it can, of course, be pushed forwards
21 again.

22 I don't detect that any of my learned friends have made a particularly desperate plea in relation
23 to disclosure, apart perhaps from Ms Abram who makes the point about the magnetic
24 tapes. We have had correspondence about the magnetic tapes. Of course, because
25 that is the rule in these matters, that is the one letter that is not in the correspondence
26 bundle, but there was a letter of 27 June from my learned friend's instructing solicitor,
27 Slaughter and May, to Charles Lyndon and Hausfeld for the class representative,

1 making the point that the tapes are preserved in a specialist environment and so on,
2 and it will be terribly difficult and all the rest of it.

3 But I will draw the Tribunal's attention to paragraph 12 of that letter of 27 June which I will just
4 read out, which is:

5 "Given that the prospect of disclosure orders is the fundamental basis of the parties'
6 preservation obligations, the principles above are clearly relevant..."

7 And they have set out the principles:

8 "Further, (a), as noted above, the defendants do not consider that any data stored on the tapes
9 would be of primary significance in determining the claims. Data sources held centrally
10 by RDG (such as LENNON and Travelcard Diary Survey data) are more likely to reveal
11 passenger numbers, sales, fare availability, et cetera, and as such will be significantly
12 more relevant for determining these claims..."

13 And so on. And then (b):

14 "Even in the event of data degradation in the period covered by the tape backups, equivalent
15 data exists ..."

16 Equivalent data exists:

17 "... and will be accessible for the period since early 2018. Further, as noted above,
18 a 'snapshot' of the email data from the period prior to early 2018 (as it existed at the
19 time the snapshot back-ups were created) also exists on Amazon Web Services."

20 And they, in fact, intend to rely on that and that is a matter for discussion between the parties.

21 So, there will be a way through, in my respectful submission, with some goodwill on
22 both sides, even in relation to the magnetic tapes for one of the defendants. So, there
23 is that proposal, and as I say, disclosure can be brought forward.

24 As far as the time for an abuse hearing is concerned: two to three weeks, we say, should be
25 ample time. Of course, we have no objection to a week being held in reserve if the
26 Tribunal considers that sensible as Mr Ward KC suggests, but it really ought not to be
27 needed. Certainly, the defendants always say that they are terribly concerned about

1 our budget. Well, if that is so, then to some extent we are prepared to cut our cloth
2 and so should the defendants be.

3 In relation to Mr Ward's points, I have already dealt with most of them in relation to Ms Abram.
4 On the list of issues, we agree that that is very important. It has been put forwards
5 passionately by Mr Ward KC and Mr Harris KC as though we had somehow said no,
6 we would not want a list of issues. Of course, if there is going to be a trial in June of
7 next year, then we have to agree the list of issues not only for disclosure, which we
8 have already agreed to do by 19 July, but also certainly in good time before the third
9 CMC, a list of issues for trial. And we will do so, and presumably the Tribunal will order
10 it.

11 If there is going to be a split, I very much agree with Mr Harris again that there should be the
12 May 2025 quantum trial retained. And May rather than pushing it back again.

13 As I say, I have already agreed with Mr Harris on his three or four points -- three
14 reasons -- why there should be a trial in June and not a trial in October/November.
15 I also agree with Mr Harris on the CMC, that CMC3 should then be in September and
16 not in November. So, I agree with LSER on all of those points.

17 Other than that, sir, I have no response.

18 **THE PRESIDENT:** Thank you very much. We will just take five or ten minutes to consider
19 what we have heard.

20 **(12.11 pm)**

21 **(A short break)**

22 **(12.24 pm)**

23
24 **Directions**

25 **THE PRESIDENT:** We are very grateful for the submissions of all the parties, in response to
26 a proposal that they have not had a chance to consider before coming to the Tribunal
27 today; the question of whether to order a split trial and, if so, on what basis a split is

1 appropriate, is very fact-sensitive and varies greatly from one case to another. It's
2 a question of what makes sense, having regard to the nature of the case, the parties
3 and also bearing in mind the commercial realities of litigation, including the prospect of
4 settlement.

5 We recognise that having two or three trials rather than just one trial does, in aggregate, lead
6 to some additional cost, but in our view, that is greatly outweighed by the cost saving,
7 if not all those three stages in fact take place. Experience shows that, indeed, is what
8 sometimes happens and here, the way certain stages are resolved may, on the one
9 hand, end the litigation; or on the other hand, greatly improve the prospects of
10 settlement.

11 We are very keen to make progress with the case in the interests of the class. It's something
12 which Mr Moser, for the class representative, has understandably emphasised before
13 us. But we do not see that it is practicable to have a trial for abuse and causation and
14 quantum by Michaelmas 2024. Still, that would be too tight. Still less if dominance
15 and market definition were included as well.

16 We are entirely satisfied that postponing market definition and dominance in this case is
17 appropriate.

18 Having listened to the parties, we think that abuse is a very significant issue between them.
19 The defendants say they are very confident on that. It follows that if the defendants
20 succeed, the claim is over; but if the class representative succeeds, he is in a much
21 enhanced position for any negotiations and we think it is sufficiently segregable to be
22 tried separately. So, we think it is appropriate to have a stage 1 trial on abuse and the
23 precise issues to be included, then to be determined on the basis of the list of issues.

24 As to the date, we agree with the submissions from counsel that it is desirable to have
25 a judgment on the abuse trial, to assist in the preparation of the stage 2 trial. While
26 we bear in mind what Ms Abram said about the difficulties of her client in dealing with

1 disclosure, that is an exercise they can begin now. They don't need precise delineation
2 of the issues to realise what sort of material is going to have to be searched for.
3 So, we think that the summer of next year is doable, not onerous or not unreasonably onerous
4 for the parties, on the basis that that will be a trial listed for three weeks, with one week
5 in reserve. We have in mind, unless somebody gets very exercised by that date, that
6 it should start on 17 June 2024.

7 Several counsel have emphasised the importance of then making progress in terms of list of
8 issues, disclosure, disagreements and so on, and that the CMC that had been
9 provisionally proposed for 3 November would need to be earlier. We agree. The
10 dates, we would suggest for the CMC, are either 26 or 27 September. We need not
11 finalise which of those it should be, because you may wish to consult your diaries and
12 refer back to the Tribunal but those are two dates all three members of the Tribunal
13 can do.

14 Then we will hear from counsel shortly as to the timetabling of what has to be done before that
15 CMC. We have made very clear that having a first trial on abuse is not being ordered,
16 on the basis that no work is to be done for the stage 2 trial on causation/quantum. On
17 the contrary, the work for that must proceed, including the survey and disclosure. We
18 accept, however, that the timetabling of disclosure for causation/quantum does not
19 have to be the same as the timetabling for disclosure on abuse, for obvious reasons.
20 That is something, the details of which can be worked out as necessary, we hope by
21 agreement between the parties, if not at the next CMC.

22 But we think it's important to fix the date for the quantum trial and it be listed for two to three
23 weeks. The start date that we propose is 23 June 2025. That listing will enable
24 judgment from the stage 1 trial to be delivered, considered, potentially even appealed
25 in good time.

26 So that takes one then, I think, to the question of the list of issues which we think should cover,
27 really, all the issues in the case. We don't see why that needs to be broken down. It's

1 suggested that the class representative should do the first draft and Mr Moser's
2 question is how soon that can be done. But it's not a hugely onerous task. You have
3 recently had to plead a reply, so you have been through the statements of case in
4 some detail.

5 How soon could be that be done?

6 **MR MOSER:** May we suggest three weeks from now, which is 28 July?

7 **THE PRESIDENT:** Why does it need that long? The problem is, if it is not agreed -- if there
8 is no prospect of that being agreed before everybody going on holiday, then one runs
9 into difficulties. The date proposed by the defendants was the 12th. I appreciate that's
10 less than a -- about a week away, isn't it?

11 **MR MOSER:** Two working days.

12 **THE PRESIDENT:** Yes, so that may be too tight, but why can it not be done by, say, the 19th?

13 **MR MOSER:** We are happy with the 19th.

14 **THE PRESIDENT:** I think. And on that basis, then, I would hope the defendants, we can say,
15 seek to agree by 31 July.

16 It's not a binding document for the Tribunal. It's an understanding that the parties -- one knows
17 that these lists of issues, people get very exercised about precisely how it is worded
18 and drafts go back and forth, with corrections and counter-corrections. So be sensible
19 about it. We need to know what are the subjects we are going to be addressing but
20 precisely how it is worded is not going to make a great difference.

21 **MR MOSER:** No, indeed. There is often a sort of tedious game at that point, essentially trying
22 to win the case by the wording of the list of issues.

23 **THE PRESIDENT:** Yes, exactly.

24 **MR MOSER:** We will seek to avoid that.

25 **MR WARD:** Can I just interject with two additional points, sir, if I may. Firstly, you indicate
26 that the list of issues should cover all issues but we would respectfully ask that it should
27 also indicate which ones are proposed for the first trial.

1 **THE PRESIDENT:** Yes.

2 **MR WARD:** I think that was implicit in what you were saying earlier. Secondly, as you've
3 seen, we have proposed directions for the list of issues for disclosure, as part of the
4 disclosure scoping exercise which is, I would suggest, a separate document that does
5 make sense to be done in parallel. And the directions you just indicated are very similar
6 but not identical to what we had for the first two stages of the disclosure scoping
7 exercise which is at the very back of the correspondence bundle.

8 **THE PRESIDENT:** I have a number of proposed timetables.

9 **MR WARD:** The best --

10 **THE PRESIDENT:** Are you talking about the disclosure review document?

11 **MR WARD:** If you go to tab 28 of the correspondence bundle -- Ms Abram took you to this
12 earlier.

13 **THE PRESIDENT:** Yes.

14 **MR WARD:** At the back of that is what we understand to now be agreed, save insofar as
15 where it indicates disagreement. And the first five steps will need some revisiting, in
16 light of the date of the CMC that you have indicated. But if you have that, you will see
17 that you mention 19 July for, if you like, the master list of issues which would be,
18 conveniently, the same date as proposed for the list of issues for disclosure.

19 **THE PRESIDENT:** Yes.

20 **MR WARD:** And then the parties were to seek to agree the list of issues for disclosure by
21 2 August. If I may respectfully say so, from our point of view, nothing turns on whether
22 it is 31 July or 2 August, of course.

23 Then we had slightly more leisurely directions than now might be appropriate, because we
24 had by 1 September, the class representative to determine if he seeks model C, and if
25 so, what searches? And then by 29 September, agreed 1A and 1B, and 27 October,
26 section 2 of the disclosure review document.

1 So, if all of that is to take place before a CMC on 26 or 27 September, it will of course have to
2 be at least steps three, four and five, somewhat truncated.

3 **THE PRESIDENT:** Yes. Step three, the problem, of course, is August, people are away.

4 **MR WARD:** Yes, that is the problem.

5 **THE PRESIDENT:** But I agree that steps four and five --

6 **MR MOSER:** If I may, I don't disagree with most of the things my learned friend just said. It
7 is all very sensible and I am grateful to him for pointing out that we ought to have it all
8 either on 31st or 2 August. I agree. And I don't mind which one.

9 However, two points. The first is, I think I heard Mr Ward say list of issues for disclosure on
10 all issues.

11 So far as I can recall, quantum is not going to be on that list.

12 **THE PRESIDENT:** If you confine your list -- given that we have to accelerate the timetable,
13 I think certainly you don't need a list of issues for disclosure on dominance and market
14 definition, which is actually quite difficult.

15 It would be desirable if it can cover causation/quantum as well as abuse, but if it can't, that
16 becomes too tight, then we can always have another CMC in November, late
17 November, to look at disclosure on causation and quantum.

18 The main thing is I think we should have a list of issues for the whole case, for which of course,
19 market definition is not a difficult issue to set out.

20 **MR MOSER:** No.

21 **THE PRESIDENT:** List of issues for disclosure on abuse and, if possible, causation and
22 quantum by 2 August or 31 July. As we say, it doesn't matter.

23 Now what about the next date?

24 **MR MOSER:** The time between 2 August or 31 July and 1 September is time that we do need,
25 simply for practical availability of certain key people needed to do these things.

1 **THE PRESIDENT:** I understand that. We will keep that. I think on that, let's say that you deal
2 with that -- as regards the 1 September, it's to do with the abuse issues, so that will
3 focus it much more narrowly.

4 On that basis, we obviously need to get step four and five much accelerated. I would hope
5 that that can be brought back by a fortnight to mid-September.

6 **MR MOSER:** It certainly can. To the 15th?

7 **THE PRESIDENT:** Friday, 15 September.

8 Then --

9 **MR WARD:** It is a bit hard to see how we can do the section 2 document before a CMC in
10 late September.

11 Step 4 will take us to 15 September which is convenient timing for a 26 or 27 September CMC
12 but not step 5.

13 **MS ABRAM:** May I respectfully differ from Mr Ward on that point. From my client's
14 perspective, the important thing is to get settled what we need to do and get on with it.
15 So, we would much rather put ourselves under increased pressure before 26 or
16 27 September and be able to press on afterwards.

17 **THE PRESIDENT:** Yes.

18 **MR MOSER:** If I may, I know it is not our job but the defendants', what they have to do under
19 step 5 is something that can be started now. You don't have to wait until step 4 before
20 you start thinking about step 5.

21 **THE PRESIDENT:** Certainly, it can be done after you get the issues for disclosure.

22 **MR MOSER:** Yes, certainly.

23 **THE PRESIDENT:** It maybe can't be done now, but it can be done from 2 August. So, I would
24 have thought -- I appreciate that we want -- there is a question of -- it is quite
25 compressed. We want to have skeletons. We might need, actually -- maybe the 15th
26 is even -- I think, actually, it can't be the 15th, it has to be a bit earlier. I think we have
27 to say it is the 11th or 12th for step 4.

1 Then we can have the 18th or 19th for step 5.

2 **MR WARD:** Sir, the suggestion from behind me as a way of saving time, would be to do 1A
3 and 1B at the same time, as indeed, CPR 57AD in fact ordinarily provides for.

4 **MR MOSER:** But that can't be done by 19 July, which is when we are currently doing the list
5 of issues for disclosure in section 1A.

6 **THE PRESIDENT:** But if we have the draft 1B by 1 September --

7 **MR MOSER:** Which we do.

8 **THE PRESIDENT:** -- which we do, can't we have step 4 by the 11th?

9 **MR MOSER:** Yes.

10 **THE PRESIDENT:** In which case, can we have step 5 by, say, the 19th?

11 **MR WARD:** I confess, sir, there is a great deal of anxiety behind me about that because of
12 the amount of detailed work needed to go into section 2. Recognising, as you say,
13 one need not leave it until 11 September to start, is there any scope in the Tribunal's
14 diary to push the CMC back by even a couple of weeks? That would really --

15 **THE PRESIDENT:** We were being urged to have it earlier.

16 **MR WARD:** We need not go back to mid November --

17 **THE PRESIDENT:** No, it has to be earlier. The first week in October, I think is out.

18 Just one moment.

19 **MR WARD:** Thank you. **(Pause).**

20 **THE PRESIDENT:** There are availability problems. We can't do the first week of October.

21 We can do 12 October. Would that -- I appreciate some of you said this has to be as
22 soon as possible, but perhaps sensibly, a bit more time to prepare your submissions
23 on disclosure does make sense.

24 Will 12 October work?

25 **MR HARRIS:** May I make another suggestion, sorry, sir. The problem is the 12th, my clients
26 are in another Trains class action on that day, before Mr Justice Smith, in the Boyle
27 one that you have --

1 **THE PRESIDENT:** (Inaudible).

2 **MR HARRIS:** But in any event, I am wondering whether the way forward is this: we take
3 27 September as the CMC, that's the later of the two days, and then we have step 5,
4 frankly, quite close to that date. That would either be Friday 22 or Monday 25, and
5 people will have to know that that's what is happening and then people will have to
6 know that the 25 and 26, we'll have to make the maximum degree of progress, in light
7 of what's happened on Friday 22.

8 It's not ideal because my clients -- and again, I represent two sets of defendants -- we share
9 the same anxiety as Mr Ward's clients. But it is what it is. We need to make these
10 things work. So, if we were to get step 4 done on 11 September, and then, say, Friday
11 22 September -- it's not ideal but we have to do what we can do.

12 And then we have the CMC on 27 September, as one of the two dates that the Tribunal has
13 proposed.

14 **THE PRESIDENT:** Yes. It will mean that any skeleton arguments will have to be prepared
15 pretty much overnight.

16 **MR HARRIS:** Well, all the other bits that are non-disclosure issues that hinge upon any
17 difference between step 4 and 5 -- and who knows, there may not be any parts of
18 that --

19 **THE PRESIDENT:** Yes.

20 **MR HARRIS:** -- All of that could be done beforehand. You could even set a deadline for the
21 skeletons for everything bar disclosure (inaudible) or whatever the case may be.

22 **THE PRESIDENT:** Given that otherwise, we almost end up with the CMC that was proposed
23 for a May 2025 trial, I think that probably is the best thing to do.

24 **MR MOSER:** We are very happy with Mr Harris' proposal --

25 **THE PRESIDENT:** I think that's what we have to do.

26 **MR MOSER:** -- And they will have several weeks since 2 August --

27 **THE PRESIDENT:** We will say 22 September for step 5 and 27 September for the CMC.

1 Good. Then the question is what else we ought to direct now and not leave to that CMC.

2 **MR MOSER:** It seems to me, at the very least the expert evidence proposals, which are the
3 next section, would be sensible, so that we have in the diary a time by which the class
4 representative and the defendants also provide notice of a number of expert
5 witnesses --

6 **THE PRESIDENT:** This is experts for which trial?

7 **MR MOSER:** I don't see any reason why it shouldn't be for everything, so we know,
8 prospectively, where we are going with this.

9 **THE PRESIDENT:** I don't see any point in doing it for dominance and market definition. One
10 could possibly do it for the question of quantum. I think more relevant, actually, the
11 one to get going is on the survey. I think that's what we will want to consider at the
12 CMC so that that can kick off. You said you are in a good position on that.

13 **MR MOSER:** We are hoping to write imminently.

14 **THE PRESIDENT:** Yes. So, I think what was proposed was that you would write by -- is it on
15 this draft here --

16 **MR MOSER:** It isn't, I think, on the draft.

17 **THE PRESIDENT:** It is in some of the skeleton arguments we had.

18 **MR MOSER:** Yes. I think 8 September was mentioned.

19 I think that's in the skeleton argument and also possibly in yesterday's letter which is, I think,
20 behind tab 28. But maybe not. Maybe it is in our letter. Anyway, it doesn't matter
21 where it is.

22 **THE PRESIDENT:** Yes. But in any event, you can give information about the design and
23 timing of the survey by when?

24 **MR MOSER:** The 8 September date was meant to be that information as a longstop, although
25 I have indicated that we can write sooner. I just can't give a particular date as to how
26 much sooner yet because we are not ready to give that deadline.

27 **THE PRESIDENT:** If we said by 31 July, would that be reasonable?

1 **MR MOSER:** I will take instructions.

2 **THE PRESIDENT:** You have had a lot of time to think about the survey.

3 **MR MOSER:** Yes.

4 **THE PRESIDENT:** I think we should say that.

5 Then the parties can engage on that, so that if appropriate, we can have any submissions
6 about it at the CMC.

7 **MR MOSER:** I am grateful.

8 **MR HARRIS:** Sir, may I address you on that topic?

9 **THE PRESIDENT:** Yes.

10 **MR HARRIS:** We would respectfully ask for considerably sooner than 31 July. We have been
11 pressing on this for quite a long time. Weeks and weeks in correspondence. And
12 twice today, Mr Moser has said that he can write to us imminently.

13 We would like to see and receive as much as possible as soon as possible.

14 We don't mind if he sends us some further material later in July.

15 **THE PRESIDENT:** Mr Harris, in your skeleton argument, you said you "request that the
16 Tribunal order the class representative to provide by 8 September..."

17 **MR HARRIS:** It depends on what you mean by what they provide. Mr Moser has freely
18 volunteered that, imminently, he can provide some considerable information.

19 **THE PRESIDENT:** Yes.

20 **MR HARRIS:** If that's right, he should provide it imminently. If he then wants to provide more
21 material by the end of July, so be it.

22 It's important because as you know from the skeleton argument, sir -- the Tribunal described
23 this as the most challenging topic -- the danger is if we get nothing until the end of July,
24 there is then the problem of August. We need to make progress on what they suggest
25 in August, including potentially with third parties. Mr Moser tells us he's engaged
26 a third-party survey provider. We need to have that opportunity. August is a difficult
27 month, no doubt for them as well. We need to make as much progress before this

1 27 September CMC. That may involve taking what we receive from them, not only
2 taking stock with our own clients, but also potentially with third parties. Then there is
3 the problem with August and then there may need to be rounds of correspondence in
4 September to tee the issue up properly for the skeletons and the CMC.

5 What I don't quite understand is how what we were told was great progress was being made
6 so that they can provide us with that information imminently and all of a sudden, we
7 can't get anything until 31 July. This is against the background of us saying: please,
8 please tell us more than you have told us. For weeks we have been saying that.

9 **THE PRESIDENT:** I know that. But this survey, although it is important to get moving
10 with it -- I am just reading what you said in your skeleton.

11 Well, Mr Moser, can you do it any earlier? You heard what Mr Harris said.

12 **MR MOSER:** I am just nervous about promising it earlier because of the danger of some slip
13 in the negotiations.

14 I have to say, I don't completely recognise Mr Harris' urgent pleas. They were not evident
15 from the date he proposed in his skeleton argument. We did write in June, including
16 to Mr Harris' instructing solicitors, with our proposal that the survey be conducted
17 inside stations at the main termini and giving the reasons for it and asking them to
18 agree to permit the survey team to have reasonable and appropriate access and to
19 support the survey team's requests for access to stations owned, operated or managed
20 by third parties.

21 I think my learned friend Mr Ward's clients have responded in the skeleton at least, positively.

22 My learned friend Mr Harris' clients haven't yet responded.

23 **THE PRESIDENT:** Yes.

24 **MR HARRIS:** So --

25 **THE PRESIDENT:** Give us just a moment.

26 **MR HARRIS:** Sir, can I just show you a letter?

27 **THE PRESIDENT:** Just a moment. **(Pause).**

1 Yes, you wanted to show me a letter.

2 **MR HARRIS:** Yes, there are two short points. The letter is at tab 27 of the correspondence
3 bundle, the relevant passage is at page 231. It is paragraph 9, under the heading "The
4 CR survey". It recites the fact that the parties have been liaising about it in
5 correspondence. But the key sentence for my current submission is the penultimate
6 sentence of paragraph 9, this is from the CR solicitors:

7 "Accordingly, he intends to share details of the survey and the questionnaire shortly after the
8 July CMC."

9 That's entirely in accordance with what Mr Moser has told us now twice --

10 **THE PRESIDENT:** Yes.

11 **MR HARRIS:** -- which is that he's imminently able to provide a lot more detail. You don't
12 need to see all the others, but we specifically said: you need to make proper progress,
13 and we even said: ahead of the July CMC, tell us this. And we have not received it.
14 So that's really the --

15 **THE PRESIDENT:** Mr Moser, we think you should be able to do it by 24 July.

16 **MR MOSER:** Perhaps, sir, I think that it is prudent simply to have the extra week. If one asks
17 why Mr Harris is pressing for this, the answer he gives in his skeleton argument is until
18 they have seen it, they can't determine whether the proposals are workable and/or
19 whether they will need to conduct a separate survey of their own. But we are now
20 talking about a part of the case which is not going to come to trial until 2025. We have
21 established it's not going to be used for abuse. That was indeed your first question to
22 me today.

23 **THE PRESIDENT:** Are you saying that really, despite what was said there, you do think you
24 need that extra week, that's what your instructions are?

25 **MR MOSER:** Those are my most up-to-date instructions from some minutes ago.

26 **THE PRESIDENT:** Yes. Very well, it will be then, 31 July.

27 **MR MOSER:** I am grateful.

1 **THE PRESIDENT:** Whether we can address the survey at the CMC in September we leave
2 open. It may well be that that CMC will be wholly taken up with directions for the abuse
3 trial -- disclosure, timetabling of factual witnesses, PTR and so on -- and that we will
4 need to have a further CMC in late November to look at directions for the causation
5 and quantum trial, at which point one will look at the survey and any arguments
6 about it.

7 So, we say 31 July, because it's obviously important it is done properly and we don't want to
8 rush you on it, but it may mean that we won't be in a position to address that at the
9 September CMC. But we may well find we have quite enough to do in September to
10 address the abuse trial. As you point out, the survey is going to the later trial even
11 though it is clearly important the survey gets going.

12 **MR MOSER:** Sir, yes.

13 **THE PRESIDENT:** Right. That's that aspect.

14 We are not going to, I think, do timetabling for disclosure now, clearly, or factual witness
15 statements. But we will ask the parties to produce and seek to agree a timetable for
16 that now that we have the trial date next summer.

17 **MR MOSER:** Sir, yes, parties to agree.

18 **THE PRESIDENT:** Seek to agree.

19 Is there anything else that we then need to address today?

20 **MR MOSER:** Nothing from me.

21 **THE PRESIDENT:** Lots of heads being shaken. It is just gone 1 o'clock then. I think all
22 I would say then is I think costs in the case.

23 **MR MOSER:** Yes.

24 **THE PRESIDENT:** And we will see you in September.

25 **(1.02 pm)**

26 **(The CMC concluded)**