IN THE COMPETITION APPEAL TRIBUNAL

Case No.: 1404/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Thursday 12th October 2023

Before:
Sir Marcus Smith
(President)
Eamonn Doran
Professor Anthony Neuberger
(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 Limited;
(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 (On behalf of Govia Thameslink Railway Limited, The Go-Ahead Group Limited, Keolis (UK) Limited

Ms Anneli Howard KC, Mr Nicholas Gibson (On behalf of Secretary Of State for Transport)

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(10.30 am)

MR JUSTICE MARCUS SMITH: Good morning, both of you.

MR HOLLANDER: My learned friend Mr Harris is standing up as well, and I will ask you in a minute how you want to proceed. Before that can I just mention as a matter of courtesy Mr Boyle was intending to be here today. Unfortunately he has been stuck on a train. I am told it is one of the Defendants' trains but I am not taking a point on that. I just mention that as a courtesy.

MR JUSTICE MARCUS SMITH: I am grateful.

MR HOLLANDER: The next point is how I want to proceed this morning. It is very much a matter as to what would assist you most.

MR JUSTICE MARCUS SMITH: That's extremely helpful, Mr Hollander.

Let me begin by making the usual live stream warning and then I'll say a few words that will hopefully be more helpful.

These proceedings are being live streamed on our website and an official recording and authorised transcripts are being made and produced. It is strictly prohibited for anyone else to record either by audio or visual means, photograph or transmit the proceedings and any breach of that would be a contempt of court punishable as such. So please don't do it.

More helpfully and in response to the invitation both orally and written to provide some sort of indication as to how we proceed. We have read the papers and in particular the expert reports and the list of points articulated, Mr Harris, by your clients.

The state of play, as we see it, is this. These proceedings have already been

certified as class proceedings, but on the basis of three expert reports that have been superseded. Even if they have in part been adopted by Dr Davis, they have been superseded effectively by a new expert. We have gone round the houses to why that happened. I will not repeat that now.

The reason we put this hearing into the diary was because it seems to us, given the understandable and inevitable transition to Dr Davis by the Class Representative, that it was only right and fair for the Defendants to have their day in court to register any issues that they might have. That is why we're here. The Defendants have done it, and we have looked at the list of points with great care, and we are very grateful to you, Mr Harris, for doing this.

The question is, and, Mr Hollander, you have asked it, what do we make of these points and how do we deal with them? There is no application to strike out before us. We can understand that, and there does not appear to be a failure to articulate a blueprint to trial point before us. If there is, then it's a somewhat nuanced one, because I don't think -- and, Mr Harris, you might want to correct us on this -- I don't think the Defendants are contending for wholesale decertification.

Rather, what we have is a series of points which, whilst clearly significant in a micro context, seem to us to be less material in the macro context of decertification.

So, for instance, in an ordinary case – and I appreciate this is not an ordinary case – amendments pre-defence would be allowed without much issue.

Now the approach of the Supreme Court in Merricks would suggest exactly the same approach should be followed through here, subject to the certification process, amendments ought to be permitted unless there is prejudice to the Defendant that cannot be addressed by way of a costs order.

So we don't want to minimise the importance of the points articulated by the Defendants through Mr Harris, but we are concerned about the level of cost build-up

in what is after all an interlocutory stage.

It seems to us there is a risk that the Microsoft Pro-Sys approach, as articulated by the Tribunal, is causing significant additional costs to no real benefit.

So at the moment, looking at where we stand, we have no less than six expert reports from the Class Representative. Now it may be we can substantially discount three, the earlier three, but they are relied on by Dr Davis and we can't discount them completely. They are still being used even if the expert has changed. We have no expert response from the Defendants. Not a criticism. They are entitled to do that, but we are only hearing from one side. We have a series of points, which may or may not be significant to the conduct of these proceedings, but no real way of assessing their significance, which means we are either at the risk of dismissing points that are material or of allowing them when they should be dismissed, and neither of those courses is particularly satisfactory.

We have, as I said already, the most enormous costs build-up and we are not progressing to trial. Now that's not satisfactory and we blame no party, nor do we think the Tribunal is particularly to blame. We are feeling our way in what is a new jurisdiction, and we, the Tribunal, have articulated the Microsoft Pro-Sys test, not the parties.

So we are where we are, but it would be I think irresponsible for us not to consider the broader picture. So we've got a proposal, which we would be grateful if both sides would consider, and we think there are serious matters of disadvantage to both sides, which they do need to consider, and we are anticipating objections rather than immediate harmony saying what a good idea this is. So we are expecting debate, but here, for what it is worth, is our proposal.

We continue the certification of this case and we permit the amendments that have been framed by the Class Representative and the adduction of the expert reports,

undeleted, of Dr Davis.

However, instead of obliging the Defendants to respond to this case in any way, shape or form, we direct that the Class Representative file by no later than 29th February 2024, all evidence in final form that the Class Representative proposes to rely upon at trial. That must include a final report from Dr Davis and any other material on which the Class Representative proposes to rely. The Tribunal will, in the period up to 29th February 2024, afford every assistance to the Class Representative including in regards to the disclosure from the Defendants, which will be expert-led, to enable this to be done.

If Dr Davis needs help from other experts, for example -- and I am picking an example at random -- a rail ticketing expert, then the Tribunal again stands ready to assist, but all of that needs to be articulated subject to the control of the Tribunal in the run-up to the end of February 2024.

Now at that stage we will have the Class Representative's case and in late March or early April 2024 we would propose to have what we would call an interim trial review or a pre-pre-trial review. The main purpose of this hearing would be to calibrate precisely what the Defendants need to rebut the Class Representative's case. There might need to be reply evidence after that, but this would be the time at which the Defendants would have their go at saying "Well, we now know exactly what the Class Representative is saying. We have seen their case. It is the case they are going to put at trial. There is not going to be any further addition except by way of reply. We are now going to have a go at killing this case off on the merits", subject to this:

given that we will have the Class Representative's cards on the table, their hand fully disclosed, we would be prepared at this stage to entertain either a formal strike-out or a contention that the case as so framed as at the end of February was not triable,

in other words, the Microsoft Pro-Sys test is not satisfied. Now that would be on the basis of an articulated case by the Class Representative, the Defendants' case yet to be articulated.

Were either of these two applications to succeed then, and here is the point, Mr Hollander, that you might want to think about, then the Class Representative would have the certification revoked forthwith and would be obliged to pay the Defendants costs on the indemnity basis, and, subject to any appeal, that would be it. So on this basis we either kill the case off in April next year or in April next we are heading for a trial either in very late 2024 or in early 2025, but we get a delta at that point in time and I want to establish, if the parties don't persuade us otherwise, I want to establish that delta now; in other words, we don't argue about peripheral matters. We argue about trialability and what needs to be done for trial after we have the Class Representative's full case.

Now that's an awful lot to throw at you and we can anticipate objections, as I said, on both sides, but even if you are both ready with your objections now, and I don't expect you to be, we would like you to take some time to consider. What we are proposing, but we will hear from you now, is that we rise for 30 minutes for you to consider the implications of this and we can then discuss what's going on. Obviously if you have any initial reactions, I am not going to shut you out, but I would perhaps urge that you think first and speak later. I can see nodding.

MR HOLLANDER: I am not going to express a view on that. For exactly the reasons you have identified we need half an hour to think about it. Can I just limit it to understanding exactly what you have in mind?

MR JUSTICE MARCUS SMITH: I think it is important you understand what I am proposing.

MR HOLLANDER: It may be my fault. I think what you are envisaging on this

proposal is that we put in all the evidence that we would put in at trial, at least by way of first instance, by the end of February.

MR JUSTICE MARCUS SMITH: Yes.

MR HOLLANDER: The effect of that is going to be -- I think you are envisaging there will be a disclosure process before then, as I understand it. I don't know whether you were envisaging that there would be expert discussions and whether -- maybe that's a matter for discussion, but it seems slightly odd if there's no discussion at all in that period between experts. I think at that stage what you are suggesting is that the Class Representative has put forward his case. That then gives an opportunity to the Defendants, should they wish, to say that on the basis that we have all the case, this should be either struck out or isn't strong enough for certification or something of that nature, or to continue certification, that, therefore, the Tribunal, if asked to rule in respect of that as to whether the matter goes for trial and takes a decision at that stage based on where we are, at that stage the Defendants have put forward nothing by way of evidence, and I think you are envisaging that there is no right for them to put in evidence at this stage in the sense that -- again correct me if I have got this wrong -- I think my understanding was that the evidence would all at that stage be one-sided and there was no opportunity for the Defendants to put in evidence at that stage.

MR JUSTICE MARCUS SMITH: That's very helpful, Mr Hollander.

MR HOLLANDER: That was by way of questioning --

MR JUSTICE MARCUS SMITH: Much appreciated, because the details do need to be worked out.

To start with your first point, the potentiality for expert meetings, that, as it seems to me, is a matter that we would want to work out, depending on the Defendants' take on how this works. What we are envisaging, to be clear, is if the Defendants want to

play it long, in other words, they want to wait and see what your case is, then their obligations will be limited to providing the material that the Class Representative through their expert needs in order to make their case. If the Defendants want to keep their powder dry and not disclose the expert they've instructed and not participate in expert discussions, then I think on the proposal we've got that would be their right.

If, on the other hand, Mr Harris was to say "Well, we don't want to do any work, because part of the point is to avoid incurring additional costs on the Defendants' side whilst the Class Representative puts forward their case", if Mr Harris were to say "Well, we are not going to do any work, but we will enable discussions between the experts so at least the experts are on the same page come the end of February", then we would obviously encourage that.

MR HOLLANDER: I think what you are saying is it is the Defendants' choice in respect of that.

MR JUSTICE MARCUS SMITH: Defendants' choice indeed.

MR HOLLANDER: I understand.

MR JUSTICE MARCUS SMITH: Obviously we can debate the way it works.

MR HOLLANDER: No. I am just trying to understand. Absolutely right.

MR JUSTICE MARCUS SMITH: The model is very much as you articulated it, which is you are in the typical claimant's position of having to make the running.

MR HOLLANDER: Yes.

MR JUSTICE MARCUS SMITH: And the extent to which the Defendants are obliged to engage is to the extent that they have material that you need which it is either agreed should be provided or which, if it isn't agreed, is dealt with at ideally a remote hearing simply in front of me, at which one can argue about what should or should not be provided. To be clear, we would envisage this working as a short

series of remote hearings, which would deal with points as they arise in order to knock them on the head very quickly, so one does not have the kind of three or four month hiatus between a dispute being articulated and it being resolved. We need to have the dispute articulated on the Monday and resolved on the Tuesday and actioned on the Wednesday. That's how these things need to work.

MR HOLLANDER: Are you talking about the pre --

MR JUSTICE MARCUS SMITH: I am talking about the pre-February process.

MR HOLLANDER: My fault. Understood.

MR JUSTICE MARCUS SMITH: In other words, if Dr Davis asks for the kitchen sink unreasonably, and Mr Harris says "This is just disproportionate and wrong", then we would need to resolve that very fast. I would hope that we don't have too much by way of dispute but I think we should proceed on the basis that there is likely to be, but, subject to that obligation to provide data, it is an asymmetric process until one gets to the end of February, when you will have had every opportunity to put your best case forward, and Mr Harris can look at it and then say "We disagree with it, but unfortunately this is a trial", or it is so bad that they think they have a shot at strike-out or Microsoft Pro-Sys, in which case we hear that and deal with it accordingly. To be clear, we don't expect that to happen, but we don't know what you are going to produce.

MR HOLLANDER: No. I understand.

MR JUSTICE MARCUS SMITH: I hope that's clear, but if there are any other questions about the mechanics, please do ask them.

MR HOLLANDER: I am not clear why -- I appreciate costs will be for debate, but I wasn't entirely clear why it should lead to an indemnity costs order.

MR JUSTICE MARCUS SMITH: Well, I think the point is that we are deferring temporarily the decision that is normally at the outset of certification of whether

a blueprint to trial has or has not been framed, and because we are delaying it and because the Defendants are going to be put to significant expense on a case that will have been dismissed at an interlocutory stage very early on, it seemed to us that the appropriate response if a strike-out or a Microsoft Pro-Sys application were to succeed at the end of February, that holding the Defendants harmless against the costs they have incurred throughout the entire process is an appropriate response, but we are up for discussion.

MR HOLLANDER: I am a little surprised by that, because that wouldn't certainly in my submission be in accordance with normal rules on costs but perhaps that is not a matter for today.

MR JUSTICE MARCUS SMITH: No. It is something which we can certainly debate, but the thinking is if we were to have two days of Microsoft Pro-Sys discussion now, then you would probably expect a costs order if you lost to be made against you. That would not be indemnity costs. That would I think be costs on the standard basis.

MR HOLLANDER: But that wouldn't mean that when we carried on and accepted what you, sir, were suggesting that we were acting so unreasonably that indemnity -- I think it is difficult to fall within the interval of costs. I think that would be very appealable, if I might say so.

MR JUSTICE MARCUS SMITH: We can have a discussion on it.

MR HOLLANDER: Not a debate for today.

MR JUSTICE MARCUS SMITH: No, it may not be, but the creation of this delta is giving you something which is avoiding the two-day battle we have today.

MR HOLLANDER: No. We are ready.

MR JUSTICE MARCUS SMITH: We know you are. We just don't want to hear it.

MR HOLLANDER: That's the point, isn't it?

MR JUSTICE MARCUS SMITH: Well, the point is we think that if we hear and resolve it, the chances are pretty high we are going to get a number of decisions wrong. We are not sure which way we are going to get them wrong but there are too many uncertainties in terms of how things work. So we are articulating a new regime, and that is why there are a number of points that are a little bit unusual, including the costs process, but these are things to debate, but I think we're a little bit running ahead of ourselves, because the more important question --

MR HOLLANDER: I just want to put down a marker that I don't think it follows in any sense. I mean, we are very happy to have the two-day fight. I completely understand why the Tribunal think, and I've very much got on board with the logic of the proposal, and I have obviously not taken instructions, nor have my learned friends.

MR JUSTICE MARCUS SMITH: No, of course.

MR HOLLANDER: I have to say I cavil at that suggestion, because I don't think it in any sense complies with the rules on costs. Anyway that's not for today.

MR JUSTICE MARCUS SMITH: Mr Harris, any questions by way of --

MR HARRIS: Yes. Thank you. We will take the 30 minutes gratefully. A couple of short points just for now. Is the proposal that it be the Class Representative's case on trial one as opposed to the questions of causation and quantum that were split off, or is the proposal that it be the Class Representative's case on everything, lock, stock and barrel?

MR JUSTICE MARCUS SMITH: I think we would initially stick with the way in which we have parsed the case to date. So the answer tentatively is trial one, but given there has been a lot of movement about whether the split that we ordered continues to be desirable, I think the Class Representative has moved on on that rather than the Defendants, we certainly would not want to have that off the agenda for debate.

So if this proposal works better with everything in; in other words, disregarding the split, then we would certainly be prepared to consider that.

That being said, we did consider very carefully how the trial should be split off, and I would be inclined to say that what we have ordered procedurally in terms of splitting the case made sense at the time. It seems to me it continues to make sense, and what I am proposing, subject to what you gentlemen have to say by way of pushback, is confined to trial one, and we will consider the proposal in that regard, but I don't think either of you should be shy of saying, "In light of this proposal we want to revisit the way in which we are structuring things but we don't want to do it for the sake of it".

MR HARRIS: That's helpful. That leads me on to the next point, which is it strikes us immediately that even if it is just trial one that comes out in all its glory at the end of February, let alone if it is trial one plus, then March or April for us to have a shot at killing it off, to use your phrase, strikes us as a little bit too soon. One imagines there is going to be further expert evidence and who knows what else, but that's a detail that we could resolve in due course.

MR JUSTICE MARCUS SMITH: No. That's certainly right, and I think the reason entirely provisionally -- and we would certainly be very inclined to hear what your clients in particular had to say about the timing -- our thinking behind the tightness of the deadline was that it is either going to be so blindingly obvious that an application to kill it off should be made that you will be able to move quite fast, because they won't be small points. They will be big picture points that will be needing to be articulated.

On the other hand, if they are small points, they really go to the trial rather than the immediate killing off, but there may be a grey area in the middle where certain points just need to be dealt with, even though they don't kill the case off, but they do

narrow, for instance, the issues at trial. So I wouldn't want that third category necessarily to be lost.

MR HARRIS: Thank you. Next point, again related, is: is the proposal that although the Class Representative puts in all of his evidence, including expert or multiple types of expert evidence, that the Defendants would not be permitted even to put in, say, expert evidence? What occurs to me is that let's say we take the view that there's a conceptual flaw or a methodological flaw that is fatal for the sake of argument, but the better way in which to present that, particularly if the Tribunal has to decide it, is for us to advance expert evidence as well and you may then want to hot tub or some cross-examination. I appreciate we are a long way from formulating how it might be a decertification, a Microsoft Pro-Sys or it might be a strike-out, and I recognise that there are issues of fact, difficult ones, but nevertheless is the proposal that we were not going to be permitted to put in any evidence?

MR JUSTICE MARCUS SMITH: That's quite closely related to Mr Hollander's point about engagement between the experts. I don't think that we are going so far as to say that we are prohibiting you, because that is, if nothing else, counter-productive. It would be extremely unfortunate if there was a curable defect in the claimant's case which, had you been permitted to engage, could have been avoided, because then the remorseless logic is that if it's curable you don't strike it out and you cure it, but if, for instance, by the articulation of your expert's viewpoint you can say "Look, Dr Davis, this is not going to work. I am not sure how it does work, but this is not going to work for these reasons", well, that is something which I think it is beneficial to have out earlier.

So what we are envisaging is not an absolute bar on the Defendants doing nothing. What we are really saying is that in terms of the Defendants' defence, they don't have to do anything until we've gone past this delta about whether we're going to trial

to control costs, but we are certainly not saying that the kind of cooperation in order to make trials manageable, in order to get agreement on points, that's an engagement we would obviously welcome.

MR HARRIS: That's helpful. Thank you. That leads me on to the next point, which is, my learned friend for understandable reasons is envisaging, and I think the Tribunal, a disclosure process between now and obviously when he has to put in his entire case. In that process what we had hitherto envisaged, or certainly the Tribunal had, was expert-led, but that's definitely --

MR JUSTICE MARCUS SMITH: We do not want the usual framing of disclosure, factual witnesses, expert reports.

MR HARRIS: Yes. Understood.

MR JUSTICE MARCUS SMITH: What we want is one package of material deliverable on 29th February next year and that I think implies, as most of these cases do, the centre piece being the expert report of the economist.

MR HARRIS: Yes.

MR JUSTICE MARCUS SMITH: The economist says "In order to do my job I need this data". That data may be, as I mentioned earlier, a particular expert, in which case we will want to work out whether that can be a joint expert or whether that can be multi-party experts, and whether it's appropriate to have that order, but again that will be framed by the economist, and the disclosure absolutely, we are not going to have a process where the listed issues are framed by reference to the pleadings and by the lawyers. Instead, it will be Dr Davis saying "I need this stuff or it would be desirable to have this stuff from the other side", and then there will be a debate as to how it is produced. To be clear, if one wants, for instance, a schedule of data, we don't want battalions of gigabytes of data being sent of the original documents. We think a schedule should be produced. There will be costs in that, but it will be

a saving of costs if one is creating an agreed data set, which can then be used by Dr Davis rather than making him sift through millions of documents on rail timetables or whatever it is.

So we are envisaging a process that is not actually disclosure. We are envisaging a process of provision of information, data, in whatever form is most helpful to the expert so the expert can do his or her job.

Now it may be that there needs to be a process of auditing of data. Suppose you are required to produce or volunteer to produce a schedule of passenger numbers over a given month. Now Dr Davis would be perfectly within his right to say "I need to understand just how reliable this is". Now we would certainly be inclined to say "Well, let's do a deep dive into a couple of days' data, make sure we understand whether there are errors there" and if it turns out there are massive errors in those days, we may have to look again because the data won't be helpful. If, on the other hand, you get material which seems to be reliable, then we are not going to want a wholesale disclosure exercise showing that each and every entry is right. We will cut our cloth according to the proportionate sense of the data that is needed.

So I think it is best to see this as a process that has no disclosure at all in the traditional sense. What it has is a process where the expert is saying, "I need this to produce what I'm being told to produce by the end of February next year".

MR HARRIS: On that basis, these expert-led parts of the disclosure process will have to commence immediately.

MR JUSTICE MARCUS SMITH: Yes.

MR HARRIS: Understood.

Two other remarks then, which I hope are helpful. The first one is just so that you know, lest we get into this later after the adjournment. Although we don't, as you know, seek decertification or revocation across the board, there are two senses in

which it can be said that we do seek revocation, and they are both discrete. One is small and discrete. The other is larger, but nevertheless discrete. The first small one is as regards penalty and excess fares; that claim we say is unsustainable. So lest we get into this later, that's our position, that that part could go.

Then the other one, as you know, which is discrete but larger, is we essentially say that the so-called service level claim, head of loss, abuse, connected with amendments, that that should also not proceed. Whether you call it decertification or revocation does not matter for us. That's how we characterise it. That's just so that you know that's how we sort of see it. There is no suggestion that the entire case should be decertified made by us. We have not made that ...

MR JUSTICE MARCUS SMITH: No, indeed. I am grateful for that clarification. I was a little more tentative than that, because you always want to give yourself a little bit of room for manoeuvre, but thank you.

MR HARRIS: Then --

MR JUSTICE MARCUS SMITH: Just to respond to that before you make your final point --

MR HARRIS: So sorry.

MR JUSTICE MARCUS SMITH: -- it is very helpful I think to have those points articulated by you now, because at the moment the debate is: can these points squeak by the interlocutory test that we are looking at inevitably at this stage? If we park those questions, then the way in which they are framed, come next February, will be very different, because it won't be, are these arguable or can we squeak them past so that we get them certified in the way you have been suggesting? It is: are they robust enough to win at trial? That is an altogether different question. It is a question we are much keener to move on.

So we anticipate that the arguably flaky aspects of the Claimant's case -- and I say

that entirely without prejudice as to how flaky or not they are -- but those will be assessed through a different lens by the Claimant's own team, because they will be saying, "It is not what's arguable that matters. We are past that. It is what is going to win at trial that matters and we need to think things through in that way", and frankly we don't expect, as I said earlier, there to be much of an argument at whatever hearing we have in terms of an *in limine* strike-out or Microsoft Pro-Sys. What we are looking for is creating momentum through to trial at which these difficult issues can be resolved. So that I think, but I interrupted your final point.

MR HARRIS: That leads to my final remark. Let's assume after the short adjournment we proceed with something along these lines after having debated and heard any objections. Would the proposal be for the remainder of today to deal with some of the other discrete issues which are on the agenda? So, for instance, there are some relatively minor, but nevertheless important, issues about costs. There is some housekeeping to do with a revised litigation funding agreement and matters of that type. We could still deal with them as part of this CMC.

MR JUSTICE MARCUS SMITH: Oh, indeed. I mean, we would want I think, first of all, to have as much clarity as we can achieve in terms of the way forward, and then we would want to deal with as much as we can in terms of anything that actually arises for decision, because we've got the day. In fact, we have got two days, but it would be nice if we could save tomorrow for other things.

MR HARRIS: Yes.

MR JUSTICE MARCUS SMITH: We have the two days and we will use them to push things forward as swiftly as we can.

MR HARRIS: Well, sir, that's very helpful. Thank you, members of the Tribunal. Unless I can assist further at this stage, those are my remarks, save only on a slightly more light-hearted note to record for the transcript that we had no idea that

Mr Boyle was travelling on one of our trains today.

(Laughter.)

MR JUSTICE MARCUS SMITH: Thank you very much for all of that, Mr Harris. Mr Hollander, do you have anything to say by way of response?

MR HOLLANDER: I don't at this stage. It is probably simplest if we take the hard line (inaudible).

MR JUSTICE MARCUS SMITH: Very good. It is 11.10. We will resume at 11.45. If you need more time, do say so. Thank you very much.

(Short break)

MR JUSTICE MARCUS SMITH: Who is going first?

MR HOLLANDER: Well, I was going to just set out our thoughts, if I may.

MR JUSTICE MARCUS SMITH: I am grateful, Mr Hollander.

MR HOLLANDER: We understand what the Tribunal is trying to do but we really see an awful lot of problems with it. So the Tribunal's jurisdiction is obviously to reach decisions at trial. On the road to that there is the strike-out possibility. There is the Pro Sys test in terms of certification. There are possibilities, I suppose, of preliminary issues, but there is no other jurisdiction to make decisions. So the Tribunal is going to have, if making decisions, to do one of those. What the Tribunal -- there has already been -- the Tribunal has certified this on the basis of Harvey 1 to 3. It now has vastly more information and expert material than it did at that time last year, and what we are concerned that this process would be doing would be effectively putting off the decision they are asked to decide today. They are being asked to put off the decisions they are being asked to make today to sometime next year. We can't see what that achieves other than to delay the resolution, because, with respect, it is neither fish nor fowl. If the Defendants don't put in evidence, then we are not really in a further position to decide anything on that today. If they do put

in evidence, then that really gets into a mini trial, and that doesn't really have the purpose.

It also raises the question as to exactly what we need to deal with, because there are a number of issues raised now in the defences where one would have thought the Defendants, in a sense, bear the burden in terms of the exemptions, their arguments, that competition law doesn't apply, that they fall within the exemptions and the like, which one would have thought the Defendants are going to need to make the running on in respect of that. I don't see how we can deal with that in the abstract.

So we struggle to see, with great respect, what the Tribunal is trying to do, that actually we are not -- all this is really going to do is delay this by an extra year. If we passed the Pro-Sys test, and, as I understand it, the challenges to that at this stage are fairly limited and narrow, then what is the Tribunal deciding other than -- I mean, if the Defendants want a strike-out, they have always had that opportunity.

Sir, as you know, many of these cases where the defendant puts in detailed expert evidence at the certification hearing, they have taken the decision for their own reasons not to do that.

So we can't see what this is going to achieve, with great respect. There are further problems in terms of timing. So if it is envisaged that disclosure will take place before this, disclosure -- the idea of doing it in this time with great respect is not going to work. Disclosure inevitably in this sort of case is an iterative process in this sense. You ask for information and data, but when you get it then you have to look at it and see whether it is sufficient for your purposes or whether you need more. If it is not sufficient, you ask for more. So it's iterative in that sense and needs to be done in stages.

When you have got effectively all the data you are going to be able to get, you have

to take a decision as to what models, etc to use, how to create models, what you are going to do it with. If you have not got enough on a particular point, you may have to do surveys and the like and look at other ways of doing things.

Now that inevitably is going to take a lot of time, and the idea that - that at that stage -- Dr Davis is not going to be able to prepare a comprehensive report along the lines that the Tribunal suggest until that is done and that is going to be a lengthy process. We are -- I mean, you are not going to get into disclosure today obviously, and no-one is suggesting you should, but we are -- we don't think that what we have been provided with at the moment does very much more than scratch the surface.

Now that may be right or wrong, but there is a lot more to come we think. That will take some time to obtain. Once we have obtained it, then we are going to have -- then decisions are going to have to be made as to exactly how to use that material and what further surveys or other models need to be created.

We had a preliminarily discussion with Dr Davis, who thinks that that timing is just simply impossible for that essential reason.

So I think -- so there are major timing issues which are -- if it is the case that we are going to have this one-sided process, which is going to finish at some stage in the first half of next year -- leave aside the dates for the moment -- we are then going to have a possibility of some form of strike-out or decertification hearing.

With great respect, we are just wondering what is going to be achieved other than delay and what is going to be possible then that is not possible today. As I say, in circumstances where I appreciate it was certified with Mr Harvey on the basis of Harvey 1 to 3, but Dr Davis essentially is saying "I agree with Mr Harvey but I have provided in the light of the indication of the Tribunal in the March hearing an awful lot more detail and explanation", and therefore the Tribunal has got not only the basis on which it was certified. Whilst he is essentially and largely agreeing with

Mr Harvey, he has provided an awful lot more detail. So exactly what it is going to achieve for the Tribunal's benefit to have a further hearing? In our submission, it is simply going to cause delay.

MR JUSTICE MARCUS SMITH: I think there is a bit of misunderstanding here. Let me clarify what we were proposing and see if that makes a difference. So, first of all, Rule 85 provides that we can stay, desist or revoke at any time.

MR HOLLANDER: Of course.

MR JUSTICE MARCUS SMITH: That's all we are saying about the end of February or post end of February hearing. I think you are misunderstanding the thrust of our proposal, that we are trying to build in a six-month delay into the process. To be clear, we are not expecting a Microsoft Pro-Sys or strike-out application. It has not been made in full this time round and we don't expect it to be made next time round. What we are expecting is the Class Representative, who has been certified, putting together everything that he needs for trial.

MR HOLLANDER: Yes.

MR JUSTICE MARCUS SMITH: That's the main deliverable. Now if you say it can't be done by end of February next year, well, we are very keen to listen, but all this disclosure, serving evidence, all this stuff has to be done. What we are saying is we want you to do it and tell us when you can do it by.

MR HOLLANDER: Yes, but normally in these cases, and I appreciate you have case management responsibilities and can do things differently and no-one is doubting that, but normally it is done on mutuality. We have the position where the Defendants have decided to keep their powder dry, which is their prerogative, but will it not help and assist in respect of this if one actually has the usual debates between experts that you expect in the normal way rather than do it in this somewhat artificial way?

The trouble with this is that normally the parties are preparing for trial mutually. I think why this is going to cause delay is because you are envisaging that this period, which I think will have to go on quite a lot longer than 29th February, is all unilateral and therefore the Defendants are not preparing in their turn and that's bound to cause delay.

MR JUSTICE MARCUS SMITH: Not unilateral. What we are saying is that this is your case.

MR HOLLANDER: Yes.

MR JUSTICE MARCUS SMITH: You are articulating it to a great deal of specificity, but at an interlocutory stage we have six reports which we really don't want to read again. What we want is one report which sets out your case.

MR HOLLANDER: Yes.

MR JUSTICE MARCUS SMITH: Now if there are points that are not for you to prove but are for the Defendants to prove, well, then they don't go in your case.

MR HOLLANDER: Sorry. With respect, the whole point about preparation for trial and trial timetables is that both parties are working towards it. What you are envisaging --

MR JUSTICE MARCUS SMITH: Why?

MR HOLLANDER: Otherwise it causes delay if one party is doing it and not the other.

MR JUSTICE MARCUS SMITH: Okay.

MR HOLLANDER: I am sorry. Why should -- let's assume we get past today with whatever changes the Tribunal may decide. So be it. We are then moving towards a trial and it's a question about what the trial will include and what it will not include in terms of issues. I understand those issues are potentially for discussion. Then both parties are preparing their case for trial.

I think what the Tribunal is envisaging is that this is a unilateral exercise in the first instance, where the only party preparing for trial is the Class Representative. That surely just simply causes delay, because at a time when both parties should be doing it, we should be having expert engagement with a view to both parties putting in their reports, it is only being done by one party. I don't understand why that doesn't cause delay.

MR JUSTICE MARCUS SMITH: Well, the reason it doesn't is because, let's take the instance where you both produce expert reports by, let's say, a date next year. Let's push it off a bit and say you can do it by 31st July, and if you can't do it by then, then we will want to hear why. Let's put that in. Not the end of February, but the end of July. Let's suppose we have ships passing in the night. We have your way of doing it and we have Mr Harris's way of doing it and they will not meet, because we have you saying "This is the way we are going to win our case" and Mr Harris saying "Once we have understood how you articulate the way you win your case, we will explain how you lose it", but the starting point for Mr Harris's response has got to be your evidence.

MR HOLLANDER: Isn't that -- I am interrupting you. Isn't that just simply sequential reports?

MR JUSTICE MARCUS SMITH: No. It is sequential cases. I mean, this has worked before. A year ago -- more than a year ago now I did the FRAND case in Optis v Apple. That was a case where both sides were actually articulating a case as to a FRAND right. What we did there was we said "Right, you are each actually Claimants here. You produce your case. The other side then responds and you then reply". The processes ran in parallel. That is not the case here. Mr Harris doesn't actually want anything from you except for you to go away. That's what he says. It is actually asymmetric. We say "Right, Class Representative, you have

been playing in the shallows to date. You have been articulating expert reports which are intended to simply to get you past the first stage. Well, you are past the first stage. Don't worry about it. Forget about it. We are now interested in trial. What we want is your case".

MR HOLLANDER: I see that but -- sorry.

MR JUSTICE MARCUS SMITH: Normally the problem is you say "We can't get our case together because we need all this information from other parties". Well, of course you do. That's why we are saying it's not quite open season because we are going to control you quite tightly, but Mr Harris is obliged to provide whatever stuff your expert needs to enable your expert to do the job that he is supposed to do on his own.

Now if Mr Harris wants to engage in a manner which will enable expert methodologies to be agreed in advance, well, that will be very helpful, and it may be if that is something that the Defendants want to do, that a pre-delivery of the evidence hot tub takes place so that we can hear how the experts propose to do it so that Dr Davis's job can be made easier, but at the end of the day, isn't it for you to do the running?

MR HOLLANDER: With great respect, I completely understand you have a case where -- I referred to sequential reports. What you are putting to me, sir, is actually not just reports but actually the whole --

MR JUSTICE MARCUS SMITH: The whole lot.

MR HOLLANDER: I understand that. In a case where -- of course we all know plenty of cases where the reports when they came in were ships that pass in the night, and one looks at them and thinks "If only there had been proper engagement beforehand, if only the other side had understood what we had said, we would not have had those wastes of cost and time". I completely understand those cases.

However, in this case we have produced six reports already. They know what our case is. They know in huge detail what our case is. This is exactly the case where we have actually set out our case. Of course, there is room for change in the light of quotes that are taken, additional disclosure, additional comments from their experts, but essentially this is completely different from the case where there are going to be ships, because they have seen six reports.

MR JUSTICE MARCUS SMITH: All right. You can't have it both ways, Mr Hollander. Either you have articulated your case fully and let's go to the response and we will have a trial next year, or you haven't and there's vast amounts of work to be done by your expert, surveys and all that stuff, in which case you need to do it, but you can't say "On the one hand it is so clear that the Defendants can respond and on the other hand it is so unclear that we need reams of disclosure and everything else".

MR HOLLANDER: No, no.

MR JUSTICE MARCUS SMITH: We either go that this is the last word. You have done your six reports. Off we go to trial.

MR HOLLANDER: No, I am not saying that at all. You are putting to me, sir, the concern that the expert report or cases would be ships that pass in the night. I am taking on board that point. As I have said, we are all familiar with cases where the reports -- the cases when you see the evidence, the various cases are ships that pass in the night.

Now the point I was putting to you was that this is not that sort of case because they have had six reports. I am not saying that the reports will look exactly the same at trial, because by that stage there will have been disclosure and there would hopefully have been some sort of expert engagement whereby the experts will feed off each other and decide which points are perhaps good, bad or whatever.

What is so different from the ships that pass in the night case, and this is all I am saying, is we have had six reports and the Tribunal are sick to death of seeing the Class Representative's expert's reports in this case. There have been an awful lot of them at a very early stage, in which case one would have thought this was exactly the sort of case where one cannot say they are ships that pass in the night, because to a pretty large degree the Defendants are in a position to have seen what we are saying already in huge detail.

MR JUSTICE MARCUS SMITH: Okay.

MR HOLLANDER: It is not --

MR JUSTICE MARCUS SMITH: Let's suppose -- I am not sure this is right, but let's suppose that your case is sufficiently clearly articulated to respond --

MR HOLLANDER: Sorry. I don't want to pigeon --

MR JUSTICE MARCUS SMITH: What do you want the Defendants to do before your final case that will make things move more quickly? What orders would you want us to make? Leave certification and Microsoft Pro-Sys out of the way.

MR HOLLANDER: Yes.

MR JUSTICE MARCUS SMITH: How do you see this running to trial? What directions ought we to be making for a trial?

MR HOLLANDER: The Tribunal will have to decide -- obviously the first stage is the Defendants' attempts to say we have not provided blueprints, sufficient --

MR JUSTICE MARCUS SMITH: Leave that. Let's say we are binning Mr Harris's list. We are just not interested.

MR HOLLANDER: Right.

MR JUSTICE MARCUS SMITH: So what do we do to move this on to trial?

MR HOLLANDER: We will then in the light of that have to decide what the scope of the trial is.

MR JUSTICE MARCUS SMITH: Right.

MR HOLLANDER: Then there will have to be disclosure in respect of at least that scope and the Tribunal will in the normal way want to make directions in terms of any factual and expert evidence. It may be that most of the factual evidence, if there is to be any, is on the Defendants' side. One would have thought that were one to see that before the expert reports go in -- it is the Defendants I suspect and it is obviously a matter for them to decide -- to put in factual evidence which would support, if at all, some of the points they are making particularly about data but also about justiciability, the involvement of the Secretary of State and all the exemptions, the non -- to the extent those require factual evidence, one would have thought one needed that evidence. At that stage one would need expert evidence.

Now it is perfectly possible to deal with it on the basis of sequential reports. You might come to the conclusion that is the appropriate case. I would have thought, and you have this point already, that this was not likely to be a case for that because one would have expert engagement, and I have no difficulty. The more expert engagement before reports, so much the better. If the Tribunal -- I mean, I think you said a moment ago, sir, one might have some sort of preliminary hot tub.

In principle if that narrows the issues at an early stage, I mean, I've got no difficulty with any of that. That may be a sensible course. It does seem to be a very different case where you have the position where you have already one side has articulated in very significant detail its expert evidence.

MR JUSTICE MARCUS SMITH: Just again parking Mr Harris -- Mr Harris, do excuse me for binning your list. It is only *pro tem* and to explore the feasibility of what Mr Hollander is exploring -- you are submitting that the conventional way of trying this case is the quickest way to deal with it. So let's stick with the parsing of the issues, the trial one / trial two split that we have opted for. Let's stick with that for

the moment.

MR HOLLANDER: Yes.

MR JUSTICE MARCUS SMITH: So we are only talking about trial one. What you are saying is "Let's go for disclosure. Let's go for factual evidence. Let's go for expert reports and then we go for trial", with bells and whistles like expert hot tubs and things like that.

MR HOLLANDER: I am very amenable -- we all want to keep the costs down and keep the interlocutrices down so far as possible. Once one has decided the shape, one has to deal with disclosure on any view.

MR JUSTICE MARCUS SMITH: Right.

MR HOLLANDER: Disclosure is essentially going to be one-sided. So that in a sense should not be controversial one would have thought. Then the question is you would have thought that it would be helpful to have factual evidence next.

MR JUSTICE MARCUS SMITH: Right. Disclosure defined by reference to the pleadings.

MR HOLLANDER: Well, with whatever -- I mean, you referred to expert-led disclosure.

MR JUSTICE MARCUS SMITH: I agree, but you are pushing back on that I think.

MR HOLLANDER: I am not. Nobody wants to spend more costs on this. It is a question of -- I think you had indicated that you thought expert-led disclosure was probably the way forward.

MR JUSTICE MARCUS SMITH: Yes, of course I have, but that was in the framework of the proposal which you are quite properly pushing back against. So I am not quite sure how expert-led disclosure operates when the expert in question isn't very clear about what it is that they are seeking in order to articulate what it is that should be provided by the other side.

You know, the problem with the conventional process where you say "Okay. It is disclosure, but the expert report follows the factual evidence", the usual way of doing things, which works, let's be clear, extremely well in ordinary litigation, what you end up with in this type of litigation is the expert saying "I have been given lots and lots of documents. Frankly I wouldn't start from here. I would rather have had something else". That's what I mean by expert-led disclosure. I mean Dr Davis is put in the driving seat for a period of time. Now I suggested end of February. That may be too soon. That's a matter on which we will certainly be led by Dr Davis's views, but he is forced at a very early stage to articulate what he needs to make good your case and that will be all kinds of material. Whether it be disclosure, factual evidence of another sort or supportive expert evidence, that's all articulated by him, but because you're the Claimants, that's why we are handing that power and responsibility to him.

Now we can do it the other way. We can say "Okay. We have got the issues framed so far as you are concerned. We have the pleadings, the application and six expert reports. Great. Let's get Mr Harris to put in a full response, including perhaps something from his expert". We then go to disclosure. We then go to factual evidence. We then go to expert reports and we then have a trial.

Now that's certainly the way it would normally proceed in the ordinary case in the Rolls Building, but what I'm pressing you on is when would you have disclosure by? When would you have your factual evidence? When would you have the expert reports? What is the shape of the trial going forward, and when will we have a trial one trial?

MR HOLLANDER: I understand. So the first stage I think is disclosure.

MR JUSTICE MARCUS SMITH: Right.

MR HOLLANDER: I mean, we have not formulated exactly what, but let me do my best. We have made some preliminary requests. What I was envisaging -- the

trouble is -- in a sense we would ask for what we want. The Defendants would give us what they think we are entitled to and the Tribunal can rule if there's a dispute. Now there will obviously be a significant amount of input from Dr Davis in order to get to that. Whether it's fair to describe it as expert-led I think probably is semantic. I mean, we would be asking for what we think in the light of discussions with Dr Davis we need and the Tribunal would be ruling if there's a dispute about it. So, I mean, to call it expert-led perhaps is the wrong term.

MR JUSTICE MARCUS SMITH: Yes.

MR HOLLANDER: But that's what I had in mind. I was not envisaging that there would be traditional CPR disclosure in the sense that the Defendants just simply, you know, look at, that there would be some form -- there would be some form of engagement about what searches were necessary for what purposes, that it would be, as it were, solicitor-led, but obviously taking into account what Dr Davis views are and what he says he needs and why.

MR JUSTICE MARCUS SMITH: You are absolutely right, Mr Hollander. One needs to frame the ambit of the disclosure obligation of the Defendants, and I think it is accepted that this is an asymmetric division, that the flow of material would be one way and not the other. So how is one going to control the flow? How is one going to articulate the dispute? Are we going to have a disclosure schedule with lists of issues and with a level of search responsibility in respect of each issue? Is that how it's going to work?

MR HOLLANDER: I think the parties were before the March hearing discussing lists of issues at the time. So there will be a list of issues. There would be a discussion about what has been, as you know, some preliminary disclosure already.

MR JUSTICE MARCUS SMITH: I appreciate two and a half thousand documents --

MR HOLLANDER: There has been some engagement in respect of that some while

ago now. Exactly how it would be done, we have made some requests in advance of that in addition to that. I am not clear that there needs to be anything much more formal than that other than if what we ask for is not acceptable, then you, sir, are going to have to decide it.

MR JUSTICE MARCUS SMITH: By how? By reference to what do we decide it?

MR HOLLANDER: Well, you know the issues. I mean, there will be a list of issues.

MR JUSTICE MARCUS SMITH: Right.

MR HOLLANDER: You will know what the case is -- you know, you are more familiar than anyone as to what the case is concerning. I mean, I don't see it -- maybe I am being naive -- as being any different from any other case that's in this Tribunal that's going to trial. We're not -- on the one hand we obviously need to get what there is and what we need for our purposes. On other hand, we don't want to waste costs.

MR JUSTICE MARCUS SMITH: And when would the surveys be carried out? I think you would be relying on surveys.

MR HOLLANDER: We may be. The difficulty with surveys is, in a sense, if you have data, often that is better than a survey. Experts can debate that but, I mean, often your first choice is data. So you have to know what data you are going to get or might get in order to -- and press as far as one can for that, before one really takes a view that one is going to have to do a survey. So I think survey is going a little bit down the road.

MR JUSTICE MARCUS SMITH: Right. We need a list of issues. When can that be produced by?

MR HOLLANDER: Well, the parties have already done that.

MR JUSTICE MARCUS SMITH: Okay.

MR HOLLANDER: Things have moved on obviously in terms of the debates that we

are having. We will have to review that, but that can be done pretty shortly. A couple of weeks.

MR JUSTICE MARCUS SMITH: 14 days, 21 days?

MR HOLLANDER: I would have thought so, 14, 21 days.

MR JUSTICE MARCUS SMITH: 21 days for the list of issues. Disclosure following that. How would that work? We would have disclosure produced -- I mean, Mr Harris, if, and I want to stress I'm playing a test on how this would work out, but if you were presented in 21 days with a list of issues and you were told "I want this produced", how fast could you do that?

MR HARRIS: The honest answer is it depends on how much is requested but we are very keen --

MR JUSTICE MARCUS SMITH: It sounds -- I know you -- all I am asking is how we go about this.

MR HARRIS: The answer is we will very quickly do everything that we can because the case has to move forward. What we see as being a sensible approach is the one already adumbrated by the Tribunal, which is insofar as things can't be agreed, we have, if needs be, weekly remote hearings on disputed disclosure issues. That will resolve the difficulties expeditiously. You may take against me. If we take objection you may say "That's wrong". Likewise you may, we apprehend, say very much to Mr Hollander "That's not required. It is not proportional. It is not reasonable. You don't need it". The point is the tie-break mechanism you have already suggested and we agree with that.

MR JUSTICE MARCUS SMITH: The problem I have got is, how the tie-breaker mechanism works is very dependent upon how one is framing the process. So if we have a list of issues and an articulation of how far in respect of each issue you are obliged to search, then we have a traditionally framed series of disclosure disputes

and one asks oneself just how far you have to search for this particular set of data. Of course the experts will be involved, but it's very much a traditional disclosure exercise with the traditional sort of disclosure arguments so that you get a pool of data which can then be used to create the necessary factual and expert evidence after that. So it's disclosure first, expert evidence later.

What one will have therefore is a series of disputes which clearly will have to be resolved in the way you are suggesting, but I am just trying to get a feel for if you lose every dispute and the list of issues is extremely wide and we say "You just have to produce this", as a matter of practicability how long are we talking about? Is it four months? Is it four weeks? I appreciate it is a slightly impossible question, but what I want in a sense is are we talking about electronic material? Are we talking about paper material? Just what is the temporal question?

MR HARRIS: I can answer that. Three points. The first is we do not see this as being your conventional, traditional disclosure process, as Mr Hollander suggests. That has never been the approach of the Tribunal since day one. We don't think it should be for all of the reasons that have been advanced by the Tribunal. It should revert now somehow to a different process. That is the first point.

It should be expert-led, not, if you like, CPR style disclosure by reference to a list of issues. We thought that debate had already been heard and resolved. Mr Hollander, it seems, wants to reopen it.

The second point is this. If you wouldn't mind opening bundle 2 of the core bundle. It wasn't just that this Tribunal directed that there be expert-led disclosure requests in due course, but it also directed what was at the time given the label voluntary disclosure. At tab 24 this considerable exercise that you directed we diligently complied with. So February 24 2023 letter. If you skip through to the end it deals with other matters. You will see there's a heading on the bottom of page 827 of the

bundle. Do you see the heading "Defendants' voluntary disclosure exercise"?

CHAIRMAN: Yes.

MR HARRIS: This is a handy reference point, because it recites what the Tribunal said about there being, what was described as a rather light touch regime -- that's at the top -- with the aim of ensuring that the question of what is and what is not disclosed is as full as it can be with minimal cost, which was an important and, we say with respect, correct direction of the Tribunal. Then we go on to describe what we have done. So we have, in fact, complied with the voluntary disclosure exercise pursuant to the direction that was put in the order. At 45 we say:

"It has been an extremely fulsome voluntary disclosure exercise in a very short period of time at some not inconsiderable cost."

At 46, tranche one and tranche 2 disclosure, they were given in January and I believe February this year. One was in January, one was in February. That was when we were going to trial this year, which had to be abandoned because of what happened with my learned friend's case.

Then we said even further for your note, if you look at 47, we say:

"In an effort to respond constructively to your letter we set out in annex 1 responses to the comments and questions raised with regard to the voluntary disclosure exercise."

Then if you just skip over several pages, you see annex 1. Plainly we don't want to go through that page by page now, but just to look at it you will see the comprehensive nature of what has already been done by reference to the direction that was given for so-called voluntary disclosure. So a very sensible set of custodians and we have identified exactly how. We have identified what we have done with privilege. We identified things over the page about what's in annex 1 to the tranche 2 disclosure and what have you.

Then over the page again we talk about the search terms. Then, just as you would expect, we talk about de-duplication. These are the subheadings. Then finally in the pair documents that's a side heading at 834. Then there is a market-leading electronic disclosure analytics platform that was used called a CMML model. That's 835. Details are given there.

In other words, exactly what you would expect from a leading firm such as Freshfields engaged in a case like this, has taken a very responsible and fulsome approach to the disclosure exercise.

So that's why I put this point second. We agree. We continue to agree this should be disclosure-led but it doesn't come against a vacuum or a background of nothing. To the contrary, a very responsible approach has been taken. Months and months and months ago this was provided. We can absolutely now carry on with the expert-led disclosure.

What we apprehend -- you said to me "How long will this take?" We say against the background of that with sensible and mature and responsibly thought-out requests for what Dr Davis actually needs, that ought not to be a huge exercise. If it turns out that we say that he has overdone it and he's asking for too much, then we will have a Friday hearing or a remote hearing. We say that could be done in order to give rise to the Claimant putting forward its entire case, like you suggested, by the end of February.

In that regard I invite you to note, with respect, that this is a Class Representative who has attended here today to say that he absolutely has an impeccable blueprint to trial in every respect as at today. Not a single criticism can be levelled against him. Blueprint to trial. That comes against the background of you having said to them in March, this Tribunal, "You must do this. You must do it properly because actually we have just lost a trial date because of what has happened with your case.

You must now do this properly". They say they have done that.

What I do not understand is how the Class Representative can attend here today against the background of this considerable voluntary disclosure that they have had since the beginning of this year with what they say is an absolutely complete and impeccable blueprint to trial. Suddenly when you say "Do it then. Implement your blueprint to trial", all of a sudden "Oh, we can't do that. That's far too difficult".

We respectfully contend that your suggestions that the Tribunal obviously gave some thought to before coming in today, is a sensible approach. We don't say that it is one-sided. There is something in it for everyone. There are disadvantages to us just as there are some disadvantages to Mr Hollander.

Critically what has happened is this Tribunal has taken a step back and thought two things. How can we move this case forward to trial? That's what we have always been about. We thought we were going to have a trial, as a matter of fact that it might even have been this month the trial we were supposed to be having. It had to be abandoned through no fault of our own. We want a trial. We entirely endorse, if I can respectfully put it like that, this feeling on the part of the Tribunal that we must move forward to trial. We say "You say you have a blueprint. Implement it and do that quickly".

We also endorse again, if that's not the wrong term, the suggestion on the part of the Tribunal that it would be potentially problematic to move forward the Defendants' applications today because of the danger of getting it wrong, and so what you are trying to do is cut through, and we say responsibly cut through. We understand the difficulties that are faced by the Tribunal. Your suggestion about moving forward to the Class Representative's case being set out in full by the end of February -- I appreciate there may be a debate about the date -- that notion is the sensible one, because it is plainly right the Tribunal has to move the case forward to trial and

avoid, if it can, the prospect of doing the wrong thing. That is what we say your suggestion does.

In that regard we say that one of the other elements that you've suggested is very sensible. We say that the notion that the Class Representative should be potentially exposed to indemnity costs, if it turns out in February, March next year it fails in X respect, Y respect or Z respect is a very salutary lesson going forward. It imposes a discipline. No doubt this is why the Tribunal thought it was a sensible suggestion to raise. It imposes a discipline upon the Class Representative in deciding what it's actually going to take to trial.

Let me give you an example. As you know, we think not much of the penalty and excess fares case. We may not be having that debate today. It may be with that salutary disciplinary level about a possible indemnity costs order, the Class Representative, particularly if he is saying to himself "Crikey. There's a lot to do". He might think "I had better jettison some of the weaker parts of my claims, some of the weaker or flakier parts of the claim."

We endorse that suggestion as well. What we do say is that your suggestion that come several months after whatever the date is for them to put forward their whole case, there should be this opportunity for us to say, if so advised, either it or some of it should be struck out if we think that's a sensible course, because there is going to be a car crash otherwise, or it doesn't meet the Pro-Sys test, or there should be a preliminary issue.

I apologise because this was probably in the mind of the Tribunal when it came up with the suggestion. This case, of course, both of the two principal ways in which my learned friend seeks to put it forward are critically dependent on what they say is a breach of the regulatory regime. They say ipso facto that leads to an abuse. We deny that. Another way they put it, if the service level claim does go ahead as well,

there has to be a breach of the regulatory regime, but if that is not enough ipso facto, then it gives rise to an anti-competitive effect and we want to take that forward.

My hope for just today is that one can easily see a situation in which, them having put their case forward, including on this alleged regulatory breach in full, this Tribunal might say "Oh, well, actually, that's a good thing for us to do before we take all the other extensive measures to move forward to trial, because if you fail on that, you are dead". I am not saying you will do that but that is an obvious possibility. That will save a great deal of money.

What we say is against the background -- with respect to my learned friend and his team, against the chaotic background that has led us to today, that is an opportunity that should be grasped by the Tribunal somewhat along those lines. When I say somewhat, I mean along the lines subject to the dates that it has put forward. What we can't have in this case par-excellence is more chaos. My learned friend talks about six reports. There are six reports but he wants a 7th. A 7th one is being put in for today if he is allowed to rely upon it. Enough is enough. You are quite right we respectfully contend to say "This is your chance. Do it properly. Do it fully, and if it doesn't stack up come end of February/March, that sort of period, we will say we were not taking it to trial". That must be the overriding criterion through this trial. How is this Tribunal actually going to try this case or is it going to be a car crash.

One more slightly more discrete point. You mentioned surveys and Mr Hollander engaged with that. I can update the Tribunal by reference to a hard copy example. In the Gutmann trains case, where I also act for the defendants, that was in the court at the end of the corridor only the week before last, that, in fact, won. Mr Gutmann is going to proceed with surveys -- surveys cover a far greater range of issues than are proposed as even possibilities in this case. He says he is going to be able to do it and that's what he asked for, permission to proceed to do three one-week blocks, all

of which will be completed by Christmas or shortly thereafter and that was by reference to a direction that was given a short while ago.

So what I am saying is there's no particular difficulty even with the surveys in this case. If my learned friend's team against the background of what he says is this great deal of expert evidence and this impeccable blueprint, if he wants surveys, right, get on with it. Then we will see, come February/March, whether they stack up or whether the Tribunal says "Enough is enough. You are not going to trial with that. That's not good enough".

MR JUSTICE MARCUS SMITH: That's very helpful, Mr Harris. Two points before we go back to Mr Hollander. Ms Howard, you are on your feet.

MS HOWARD: If I could have a word after Mr Harris, I would just like to express the Department's views as well. Thank you.

MR JUSTICE MARCUS SMITH: Of course.

First of all, in terms of disclosure I think you were enthusiastically endorsing the notion that we put the burden on Dr Davis. We give him the power and the burden. So he is articulating what he needs. Doubtless he will be able to differentiate between that which is necessary and that which is desirable and that which is clearly fluff that, if it can be produced easily, you would like to have. We can grade the importance of the material, but that is how the disclosure requests are framed, and you or your solicitors are in the happy position of having sufficient control over the material that you hold to be able to respond to those requests. If you agree to them, quickly, but if you disagree with them the Tribunal has the means of articulating the extent to which it is prepared to accommodate Dr Davis by reference to what he says he needs. Generally speaking given that he is an expert with all the obligations that that entails, what Dr Davis says he needs he is likely to get, subject to the usual proportionality questions of, you know, how much it's going to cost. So there will be

a cost benefit analysis, but essentially we are in the ball-park of saying "It's your case. You choose how to run it and we recognise that you don't have the information. Well, we are here to assist you getting it". You are happy with that (inaudible) ruling rather than in the usual way of having a list of issues that we argue about in the traditional way?

MR HARRIS: Yes, sir, especially against the background --

MR JUSTICE MARCUS SMITH: I understand that.

MR HARRIS: I would just add this, which is very much inherent in the Tribunal's remarks, that there has to be a discipline on the part of the Class Representative here. We can't have all the nice to haves and the fluff, because there will be pushback against that, but if it is plainly essential then it will have to be provided, assuming it exists and assuming there's not an issue about proportionality in the usual sort of way.

MR JUSTICE MARCUS SMITH: I mean, I think the way we see this working, and it is very helpful to be able to articulate this for everyone, is that the usual criteria when one has, as it were, lawyer-generated requests for disclosure, anticipating what the expert might need, is the virtue of the process as we are trying to articulate it. What we want is we want to have fewer advocates saying this might be necessary according to a list of issues that have been legally compiled. What we would like to do is go to the person who bears the burden of pulling together the evidence, the economic expert, and saying "What do you need?" and attaching considerable weight to what they say, partly because they are bearing the brunt and partly because they are subject to the obligation to the Tribunal to assist it in trying the case. Doubtless it would be helpful in that process to have not a legal pushback but an economist pushback.

MR HARRIS: Yes, we agree.

MR JUSTICE MARCUS SMITH: Where your economist says "Well, look, I've looked at the data. It doesn't exist in this form. Maybe we can do it this way" or "What you are asking for is simply impossible or what you are asking for is simply unnecessary" and have that debate at the expert level.

MR HARRIS: Absolutely, sir, we agree. Some progress has already been made in this regard. Although you probably have not had a chance to turn it up, because the expert reports are so voluminous in other instances, I think Ms Howard might even show you this in a moment, but Dr Davis has already put forward in writing a whole series of, if you like, expert-led disclosure requests. So we can get on with this immediately.

That takes me on to another point, which is we think this can be done by the end of February/March, because of this impeccable blueprint, and because of the fact that Dr Davis says in his report he has read all the disclosure that has been provided and it is significant. So let's get on with it. If that is really your case, you have an impeccable blueprint with your six existing and now your seventh pending report. Okay, let's get on with it.

We don't accept that there's any good point that my learned friend Mr Hollander can make about delay. He seemed to -- his biggest point seemed to be when he was on his feet a moment ago, that the suggestion by the Tribunal will introduce delay, but we don't accept that for the reasons that were articulated by you, sir, Mr Chairman, that this will actually give an opportunity to set out the case at an early stage and then see if it can go forward to trial. Of course, the delay in this case was introduced by the fact that my learned friend's team did not keep Mr Harvey and the trial had to be abandoned as a result. That's where the delay has come in.

Your suggestion, if I may respectfully put it like this, actually moves us forward quickly. We agree with that and we find it a bit disappointing as well on this issue of

delay, and in particular the dates, because we think end of February/early March is perfectly doable and sensible. For my learned friend to say "Dr Davis, who for some reason hasn't attended today is saying "I need a lot more time"", you would have thought -- if I had been representing the Class Representative today where there was going to be a whole series of points taken against the expert report, you might have thought that the expert might have attended, but be that as it may, we do pushback against any big extension of time.

MR JUSTICE MARCUS SMITH: That is something we will revisit with Mr Hollander. One final point. Surveys. It is very easy to talk about surveys but in a sense the ability to understand their weight and their worth is really only possible if you've actually seen what the survey actually says. So that's something where talking about them is not really going to move the case further forward. What you need to do is understand how it has been done and how valuable the output is.

My question to you is: to what extent do you consider it is possible to agree the terms of the survey and how far does really something which is so embedded in the way parties put their case that it is really for each party to produce their own surveys and for the Tribunal to see and have the benefit of two sets?

MR HARRIS: There are two answers to that. We very much see this as the Class Representative's case upon which the burden lies on him and, therefore, if he chooses -- because his case, as we understand it today, is not even necessarily "I am definitely going to do surveys". He has to make up his mind. Is he going to do them? If he is going to do them, he should get on with them. It is no part of our role to seek to assist with or collaborate with or come up with any kind of joint or agreed survey.

I say that because of the second part. It is possible that another candidate for why, come end of February, early March, this case shouldn't be allowed to go to trial,

because we say it will be a car crash, a candidate might be that the surveys are so badly done that they are of nil probative value or insufficient probative value for them to be able to be amenable to a decision by trial. We say that's our right. We say that if the Class Representative really wants to do it, no problem. They can do it. They should get on with it, but if they mess it up, we reserve the right to come and say "You can't go to trial with this. It is hopeless."

So those are I hope my clear answers.

MR JUSTICE MARCUS SMITH: Thank you very much.

MR HARRIS: Thank you.

MR JUSTICE MARCUS SMITH: Ms Howard, we will hear from you, because this has been a rather extended interruption in Mr Hollander's submissions.

MS HOWARD: I just have four short points and it might be useful to make them because then Mr Hollander can reply to them. That's what I was thinking rather than going (inaudible). I am conscious of the time. I am not intending to speak for very long.

MR JUSTICE MARCUS SMITH: Do go on.

MS HOWARD: It is just that a debate has been going on between the two main parties, obviously we are an Intervener and we have to take the case as we find it. The Department obviously has a very unusual position, because of the costs provisions in the franchise agreement. So the Secretary of State, regardless of the outcome of this litigation is at significant cost exposure and so therefore does have an interest in the proportionality of the case management. We understand the predicament that the Tribunal is in.

You could either try and be muscular today and throw parts of the case out and dissect points now. We can see that you find that difficult on the basis of the information you've got to date. If you are allowed to proceed, we are concerned that

the case should proceed rapidly because it is a drain on everyone's resources, not least the department, who has been sucked into this litigation beyond its will and beyond its control with significant resource and costs implications for it.

Now in terms of going towards we would also support your proposal that we move quickly and that we have this proposal, for whether it is March/April or July of a quick fire approach to taking the case forward or not.

Some short points on that. Firstly, we think the case can proceed quickly. Parties have already agreed a list of issues for the phase I trial. That is at tab 2 of the bundle, which they debated quite extensively between themselves. If you look at that, there are the issues that are set out.

What is more, the annex to Davis 2, and I would be grateful if you would just quickly turn that up. It is at bundle --

MR JUSTICE MARCUS SMITH: First of all, just remind me where the list of issues is.

MS HOWARD: The list of issues is at tab 2 in bundle 1.

MR JUSTICE MARCUS SMITH: Thank you.

MS HOWARD: Again this was according to the stage 1 trial that we agreed initially at the first CMC I think in 2022.

MR JUSTICE MARCUS SMITH: Yes.

MS HOWARD: The issues start on page 23 of the bundle. You will see they are quite comprehensive, because they deal with the relevant exemptions, they deal with market definition, dominance. Over the page on 24 we go into abuse, whether there is a breach of the TSA, a breach of the NRCOT, again whether there's dominance, and then whether there is objective justification and lastly, whether there are any anti-competitive effects. It may need re-tweaking in the light of the Davis 3 and Davis 2 proposals, but the skeleton, the backbone is there.

Then if I could take your Lordships to the annex to Davis 2, which is at tab 14 of the bundle.

MR JUSTICE MARCUS SMITH: Yes.

MS HOWARD: You will see it starts at page 640, appendix D. That is the expert-led disclosure requests that have been made specifically by Dr Davis and helpfully he has compiled the requests in the Harvey reports together with his own. Now he starts with general search terms. That is from page 640 to 646. The Tribunal may decide whether you want to go down that route, but interestingly from 646 for the next 20 pages there are a series of issue-led disclosure requests that Dr Davis has articulated, which you'll see run through market definitions. All the details he needs on costs, data from GTR. Then he goes on to costs and margins. Then on page 653 there's a series of requests for GTR on dominance. He then goes into the strength of the market competition and existing competition, potential competition on 656.

Then you will see on 658 he goes into abuse and over the page into the counterfactual and then extensive requests on 660 on pricing tools and price setting policies and fair harmonisation.

Then on 661 he goes into counterfactual and so continues.

So I think there's a total of 23 requests with detailed sub-requests that are made of GTR. Then in section D.3 he also makes extensive requests for information from the Department of Transport as well. You will see that there's a further eight requests with sub-requests made from the Department with details of existing competition, demand substitution and costs and pricing tools.

So we say there is a comprehensive request. We are not going into whether it is proportionate at this stage. There is certainly a starting point for expert-led disclosure-that the Tribunal have seen.

MR JUSTICE MARCUS SMITH: How much of this would be contentious? I mean, let's look at 394, page 642 as an example. Here he is saying:

"It is difficult for me or the Class Representative to design the right search terms without access to the underlying pool of documents as it is hard to evaluate the performance of key word searches in the abstract."

Then we get to a bit more articulation of key word searches in 395.

Now this is just a traditional disclosure --

MS HOWARD: I don't think you are necessarily minded to go down that train of thought process.

MR JUSTICE MARCUS SMITH: No. I am testing the Class Representative's preferred approach and just the extent to which it assists in a speedy trial. So my question is let's say we say "Okay. We'll do what Dr Davis says". Just how much pushback are we going to get, and maybe Mr Harris needs to assist on this as well, how much pushback are we going to get from the Defendants, including therefore the Intervener, to this type of request?

MS HOWARD: I think it's a question of timing and proportionality and expense. We would need to take it back and get instructions on individual -- we note from the body of the report where he said he will need data and he will need (inaudible) to feed into the --

MR JUSTICE MARCUS SMITH: No one disagrees that he needs data. It is a question of how one moves it from those who have it to those who don't.

MS HOWARD: In terms of timing, the point I was trying to make, we don't need a long interval now to sort of agree the list of issues and then set up the expert-led disclosure requests, because we have already got it there. I know -- it is one-sided, because I note that in the litigation plan that's not before the Tribunal in the bundles today that paragraph 101 of the litigation plan makes clear that the Class

Representative doesn't intend to provide any disclosure of their own.

MR JUSTICE MARCUS SMITH: No.

MS HOWARD: So there is no reason why this cannot be progressed effectively in the meantime. The precise timing is a matter ...

So that is the first thing on the timing. The second point is the extent of the Secretary of State's involvement, because you will recall that we do have an unusual role as an Intervener. We have been given robust rights of intervention. So, you know, if there is going to be a rapid turnaround for the response to all this information, the Secretary of State has to be involved in that. Whether that is additional -- if there is any expert -- not expert -- witness evidence that the department needs to give, but also we will need to liaise with GTR to avoid duplication. So that does need to be built into the timetable.

I have two other further points.

MR JUSTICE MARCUS SMITH: That's on the assumption that we take a traditional route. Am I right of right in thinking --

MS HOWARD: It is also for the drop dead route.

MR JUSTICE MARCUS SMITH: Why?

MS HOWARD: Because if you say in the March or April there is going to be a short hearing to determine whether the case proceeds or not, the Secretary of State may want to put points in.

MR JUSTICE MARCUS SMITH: Well, look, I think you are, like Mr Hollander, approaching the thinking from the wrong end. We don't see, whenever it takes place, the March or April date as being a time when there will inevitably be an application to remove the case. I don't think that is the way you should be seeing it. What we are seeing is a way to get this thing to a trial.

Now I am assuming that the Class Representative is not so irresponsible as to be

pushing all this cost in a case that is ultimately not going to be on trial. I'm expecting a triable case next year to be articulated, not an un-triable case and not one that is demurrable. The presumption is not that there's going to be an application to strike out for whatever reason or say it is un-triable for whatever reason. What we are talking about is how we get this case in a courtroom so that we are trying the substance and not the interlocutory battles which are causing extraordinary expense. Maybe things go so badly wrong that we have to have it, but we don't see that as the object of this process. It's not a two-stage process. It is, we have had enough faffing around with the interlocutory stuff. We want to have a trial, because that is going to enable the Claimants to work out what they need to win at trial. That's the mindset we want people to adopt.

Now maybe things are so bad that the case needs to be put out of its misery next year, but that should be something which we would really only contemplate in an extremely clear-cut case, which is what strike-outs are supposed to be. If we are talking about an issue that is peripheral, which may or may not win at trial, well, unless it's adding a huge amount of volume to the trial, we will let it run.

MS HOWARD: I think -- you made reference to killing the case off or to having these different layers. I do think we need to be clear what standard everybody is working to for next year, because obviously if we are over the certification standard and we have multiple thresholds that are being thrown, there is arguability on the one hand. There is Pro-Sys. Everyone talks about the Pro-Sys test. It is clear it means different things to different people. It applies to the evidential burden. It applies to the methodology. What standard, if we are coming to a head next March or whenever it is, we need to have clarity of what standard is being applied there, whether it is just the low strike-out threshold or whether there is some other intermediary threshold --

MR JUSTICE MARCUS SMITH: We are not going to have that debate, because that is clear. Strike-out means strike-out. Merricks is absolutely clear about that. There is no elevated merit standard and no one is talking about strike-out now, and I anticipate no one will be talking about strike-out next year. We keep it in there because theoretically speaking it's open.

Microsoft Pro-Sys is about a blueprint to trial, and that is what we are actually demanding. We're saying "We want your case", and frankly if you can't show, having been asked to produce your evidence at trial, how are you going to try the case, then something has gone very badly wrong. So again we don't think there's need to talk about the standard. All we are talking about in Microsoft Pro-Sys is about a means of assuring at the beginning of the process how you're going to try it at the end. Now what we are saying is we think there's enough for that. What we are doing is we are talking about things which we can't resolve which aren't actually determinative of whether the case goes to trial or not. They are determinative about how one tries it, and the way one tries it is by having the evidence to try it.

MS HOWARD: Yes.

MR JUSTICE MARCUS SMITH: So do, please -- you are sticking with the "We would like to kill this off" mindset before trial. Our mindset is we will determine it at trial and we want to get there as quickly as possible.

MS HOWARD: Well, I think the Secretary of State would agree with that.

I would like to put a marker down for costs and our position on costs because we have -- you talk about indemnity costs and you have talked about the parties' costs. I don't think you need to frame it as indemnity costs. I think it is just the reasonable level of costs, but obviously the Secretary of State has this unusual position where it may end up with liability for everyone's costs but also has its own costs when its role in these proceedings is very different to that of an ordinary intervener. So I wanted

to put a marker so you know that we may need a different costs rule applicable to the Secretary of State's costs.

MR JUSTICE MARCUS SMITH: Ms Howard, I am beginning to think that you are right. You are not an ordinary intervener. I think you may need to start considering whether your role is not an intervener at all and instead as someone who the Defendants and their solicitors need to listen to, because you bear the economic cost of an adverse outcome. So it may be that if all that is happening is that you are violently agreeing with the best defence to a case where you bear the economic cost, that you perhaps shouldn't be running up the costs by being here at all.

MS HOWARD: Well, we are only here to try to assist the Tribunal with the (inaudible) you have.

MR JUSTICE MARCUS SMITH: Indeed.

MS HOWARD: Obviously when the disclosure requests are framed against the Department as well, otherwise we would be a third party.

MR JUSTICE MARCUS SMITH: Indeed. Maybe that is a better configuration. I don't say more than that but I do think that's something to bear in mind, because actually all you are saying, and I understand why you are saying it, is you are here because you are protecting the Department's back, but perhaps the better way of protecting the Department's back and keeping costs lower is by ensuring that you are acting in harmony with the Defendants.

MS HOWARD: Yes.

MR JUSTICE MARCUS SMITH: Which I strongly suspect you are anyway.

MS HOWARD: As we set out at the very, very first CMC there are areas where our interests are divergent as well because we also have public interest in mind and there are wider considerations that the Secretary of State has to protect, not just exactly the same as the train operating company.

MR JUSTICE MARCUS SMITH: I put my own marker down about that, but thank you very much.

MS HOWARD: Thank you.

MR JUSTICE MARCUS SMITH: Mr Hollander.

MR HOLLANDER: I cannot ignore what my learned friend Mr Harris says about the chaos.

MR JUSTICE MARCUS SMITH: No. Please do respond.

MR HOLLANDER: I have to say with great respect that's just simply outrageous and I don't say that lightly. Just to remind the Tribunal briefly what happened, there was a three-day, fully contested hearing last July where the Tribunal in the face of the Defendants taking pretty well every point they could think of decided to certify this on very much less expert material than is available to them now. So that is last July.

What then happened, as you know, is that Mr Harvey decided he did not wish and, you know, whether he was ill or not we don't know, because he won't tell us, but there is no possible fault on the part of the Class Representative.

MR JUSTICE MARCUS SMITH: I think in my speaking note and it will be on the transcript, we were quite careful to say that we were not allocating blame to either party, including to yours, and we are quite appreciative of the fact that the derailing of the trial and the additional three reports that we have received from Dr Davis are due to the fact that, through no fault of the Class Representative and for reasons that I don't think we want to go into to do with Mr Harvey, because we don't know enough, and I think we have said all we want to say about Mr Harvey, you had to go to another expert and that involved obviously, because it's an expert with very particular and very onerous obligations to the Tribunal, involved something of a change of direction. Of course, Dr Davis has tried to keep what he can of

Mr Harris's (sic), work, but it would be irresponsible of him to adopt it unthinkingly, and that's precisely what he has not done. So we are not really interested today in beating any party up about why it is we are here.

What we are interested in is the most efficient process to trial, and I have picked up I think all three of you in saying "Don't focus on the killing off of the case in an interlocutory phase. Focus on the winning or losing at trial phase."

That's where we are really engaged. We don't expect, as I said to Ms Howard, there to be either a strike-out application because, as you rightly said, there is none pending now, and you really would expect it now rather than later, and we think that the argument about Microsoft and process will evaporate because once you have -- if we go down this route, an articulated case that is the Class Representative's case in full, you can't argue about blueprint because, in fact, you have got something beyond the blueprint. You've got the case.

Now I quite understand that there is a timing question about how quickly things can be done, but looking at Dr Davis's disclosure requests, what we've got is it looks like months of to-ing and fro-ing about key word search terms. Frankly I had hoped we would be well beyond key word search terms. What we want is not the creation of a pool of documents once and for all which Dr Davis can dip into but can't go beyond. What we want is Dr Davis to think "How am I going to do this? I'm going to be in the witness box in a year, 18 month, two years' time. I am going to have to defend a report. How do I do that? What materials do I need in order to do it?" We are proposing not a one process of disclosure. We are saying "Start writing. Work out what it is you need. Work it out for whom you need it and, subject to questions of proportionality, this Tribunal will help".

So I think the key question is by what date can Dr Davis do it by and what exactly is he doing? Is he going to be doing just the trial one issues or is he going to be doing

the whole thing so that, come next year when we have this hearing we are debating which particular issues out of the corpus of evidence adduced by the Class Representative, assuming we go down this route, we then try in the following year. So it's how long will that take.

MR HOLLANDER: I understand that completely. First of all, it seemed to me that in the light of the comments made by my learned friend Mr Harris I simply could not let those go without responding.

MR JUSTICE MARCUS SMITH: No, I understand.

MR HOLLANDER: It may be that he has spent a lot of time before juries. I don't know. Really that's just totally inappropriate.

Anyway I have made those points and I move on. Now I completely understand that you, sir, are keen to have some form of route critical path, route map towards a trial. So let's start with disclosure.

A list of issues can be done. It was done -- there has been a sort of partial stay ordered by the Tribunal since March pending this hearing, so working on the assumption that that stay effectively is lifted after today and, therefore -- there were some disputes about the list of issues and it will need to be updated in light of where we are now. Essentially everybody is quite right that most of the work is done in respect of that. It will not take very long to agree. That's stage one.

Stage two is disclosure. I don't think there is that much dispute really. The Tribunal is not determining exactly what it is. I think everybody accepts this is not a case where CPR part 31 or what used to be called the disclosure part is going to apply. Of course not. Therefore what is needed is that the disclosure requests -- I slightly cavil at the word "expert-led", but I think that's purely semantics. I think what you, sir, are envisaging and everybody else is envisaging is that Dr Davis has a pretty heavy involvement in what the requests are in the light of exactly what you say, sir,

in terms of, you know, "What do I need to make this good?"

You will have in mind -- I am sure you have read the various -- the points being made and all these micro applications being made by the Defendants. They are all -- they are looking at the detail of this and there's an awful lot of them, and, therefore, Dr Davis is going to have to look at each of those and a number of them are saying there is not the data or there may not be the data or he can't show there's the data. There's going to be quite a lot of those. As you know, at least some of the work has already been done on a preliminary basis in terms of making requests.

Exactly how one frames it in terms of an order I don't think really matters. There will be requests made in the light of it. The Defendants and the Intervener will respond. If there's a dispute about it we will come back to the Tribunal and you, sir, will have to decide whether what is sought is proportionate, whether Dr Davis needs it and whether it's appropriate. I am not sure there is much of a --

MR JUSTICE MARCUS SMITH: Let's test it. Let's go back to the example I put to Ms Howard, bundle 1, page 643, paragraph 395 of one of Dr Davis's reports. What we have got here is Dr Davis framing the search terms. Are you envisaging disclosure being done on that basis in that way?

MR HOLLANDER: I think some of it will need to be done by the search terms. The disclosure, although I completely understand why you want to understand what disclosure will involve, I don't think any party was seeking to make an application today in exactly how one does it. I mean, I think he is suggesting that he needs search terms, but it may be exactly what it is he needs, one needs to be able to justify it to the Tribunal, and whether one can justify all this I don't know. I mean, one would need to go into this. To some extent it depends on how onerous the obligation is, in other words, what -- normally when one actually -- when you ask for a request,

the other side come back and say "We can give you A, B, C, D and E. F and G will cost £100,000 to get and we actually think you would be much better off going for something else which is much narrower which we can now suggest".

So that sort of iterative correspondence to try and identify exactly what -- it is not unilateral. As you know, sir, the disclosure process is the Defendants coming back and saying "We can't give up this because, but we can give you this instead, which we think would actually meet what you are looking for at a fraction of the cost" or whatever.

MR JUSTICE MARCUS SMITH: Indeed, but looking at 394 and 395, we actually get no idea this search is being carried out. I am quite sure that Dr Davis could explain it to us, but what I don't want to have is for this to be regarded as an expert-led disclosure process, because it isn't.

MR HOLLANDER: Well, it would be if -- let's assume for a moment, and I take on board your point, and I don't express any view at all about these particular paragraphs, but if there was -- if it came before the Tribunal there would be a witness statement either from my solicitor or from Dr Davis saying "This is why I need to do this". In order to form a view (a) you would need to know that, (b) to know from the Defendants why it is onerous to give them, what the cost or difficulties would be and (c), as is usual in these, the usual answer is where there's a difficulty, "but we can give you this instead, which will provide the information and we can do it easily".

So one needs that sort of discussion.

MR JUSTICE MARCUS SMITH: Well, indeed, but this, 395, is emphatically the wrong place to start, because what you're doing is you're arguing about process whereas what we need to be doing is arguing about data that the expert needs. So what I would expect is let's say Dr Davis needs passenger numbers on trains on certain routes on certain dates at certain times, and the question is: how can that

information be provided? I would not expect the lawyers to say, "Well, let me frame the best way in which to capture in an aggressive way that data set". Rather, I would expect Dr Davis to say, "I need a schedule of passenger numbers".

For that to be conveyed to the economist expert on the other side I think we would need involvement of an economist expert to say, "Right. Here we've got the data that the Defendants have. We can provide you a schedule of data in this way and it will take us six weeks to do it, but this is the most efficient way, given the way our data is constructed to provide it".

Now that is what I regard as expert-led processes. You don't go into key words. What you do is you say to the Defendants, "I need this. You are going to have to search for it. Please adopt the most efficient way of producing not the documents, but the information".

Obviously when a schedule -- let us say a schedule of passenger numbers according to my example -- is produced, why then you will want to be assured that it is actually accurate and there will have to be a way of testing for the accuracy of that, but that is involving an assessment of the Defendants in this case's methodology for the producing of that particular schedule, and no doubt if that is the way the process works, the Defendants will be ready to explain what they have done, how they have compiled the schedule, and what you get is not a preliminary argument between lawyers about what should be provided in a hostile process but a cooperative process beginning and ending at the expert level. So I do see this as intrinsically not expert-led. I see this as lawyer-led and in most case it works.

Now if you are advocating that, great. We can debate whether that is the best way to proceed, but don't call it expert-led, because it really isn't.

MR HOLLANDER: The Defendants' initial disclosure, as I understand it, was by key word searches. We thought those were planned. They actually did the disclosure

initially by key word searches. So the idea that one shouldn't look at key word searches may not be right.

I think what you are saying, sir, is that you want a measure of circumspection in the way that the disclosure process is done both in terms of requests and the responses in that one doesn't want to have billions of documents which are unnecessary. One wants to have it targeted and one wants to have expert involvement in respect of that. Exactly how to do it I think you would probably need to have -- I mean, I take on board what you are saying. Exactly what is appropriate or not appropriate, I think one needs to have a certain amount of evidence about the process in order to be able to form a view, but I take on board what you are saying. There will have to be disclosure, and, I mean, I am not sure how much one needs -- if you are looking at the way forward for today, I think in the light of the comments you've made all one needs to have is disclosure or further disclosure by reference to the list of issues through requests being made, and I am not sure one needs to say much more at this stage about it.

We all know that -- I mean, we have heard your comments and everybody else will have heard your comments as well, and if the matter comes on a contested application, then we will obviously, you know -- we will have to do that in the light of recognising that if what we are asking for is not proportionate or justifiable, we will not get it. I am not sure how much more one needs to do today in the absence of any evidence of any detail about a process that was happening many months ago.

MR JUSTICE MARCUS SMITH: Well, thank you, Mr Hollander. I see the time. We will resume at 2.05, but in that time I think it would be helpful if you could have a word with Dr Davis and ask him this question: if, he is taking the lead and having swift orders of documents that he needed according to his specification from the Tribunal, holding the Defendants' feet to the fire, how much time does he need to

render for the Tribunal's benefit a complete articulation of the Class Representative's case -- and I am not just saying trial one; I'm saying the whole thing -- how long would he need?

Now he needs to build in what are a series of significant uncertainties: what service he might or might not need, how long it will take to produce responsive material from the Defendants, how long it will take him to frame those requests, but I want a sense of just how much longer than the end of February that will take, because it seems to us that that is the most important question to how we are going, because there is a -- I am not quite sure how far the ships are passing in the night between the Defendants and the Intervener in the Tribunal, but certainly what you are articulating is not what we envisaged by way of disclosure in this case.

It may be you are right or it may be you are wrong and I think we will have to reserve and make a ruling on this, because the parties are entitled to clarity, but I think it is important that we put down a marker that what you are proposing is not what we envisaged at the beginning of the morning.

Really this is an invitation to you to push back as hard as you like about that. We will not I think make a ruling today, but we will produce in short order a ruling as to how this goes forward, and you, therefore, should be ready to ensure that every point against what we articulated as a proposal this morning is taken, because we will want to rule on it so that everyone has by early next week a clear direction of travel, but it does seem to me that Dr Davis must, because he has written three reports, have a very clear understanding of what it is he needs and how long it is going to take him, assuming a swift response and provision of information, how long it's going to take him to put something into apple pie order for trial.

Now we are never going to say this is an absolute date set in stone, but we do want an indicative sense of how long it's going to take him, accepting that there's a degree

of uncertainty going forward, but we must be able to get a better than ball-park figure, and if it is not the end of February, is it the end of July, the beginning of September; the end of the year? We want a sense of just how long this is going to take to do, given the assurance of a swift interaction between the parties and the Tribunal to ensure that any disputes are resolved extremely swiftly. So that would be helpful from our point of view.

MR HOLLANDER: I think if one is looking at the timetable -- perhaps I should do this after the adjournment -- I also was going to just deal with questions I think I have touched on already about witness statements, possible agreement of data sets --

MR JUSTICE MARCUS SMITH: Indeed.

MR HOLLANDER: -- in the light of that, but let me do that after the adjournment.

MR JUSTICE MARCUS SMITH: We would welcome that, because it is I think important that we understand the differences in terms of timing between what the Tribunal is envisaging and what you are submitting. The key point is not is there going to be a killing off of a case next year? I would really like the parties to not think about that, because that's not where I see this case going. What we want to know is what is the swiftest and most efficient in terms of costs route to trial?

My sense is that this is not the way. I am looking at 643 and 644 of the bundle, but that's why we have these hearings. You tell me why that instinct is wrong.

MR HARRIS: Sir, might it be sensible to ask Dr Davis not just how long it would take for him to produce a report on everything, but also how long it would take to produce a report on the matters that are currently in trial one? Two dates.

MR JUSTICE MARCUS SMITH: Two dates. No, that is fair. The reason I articulate it as widely as that is because we wouldn't want to lose without thinking about the opportunity of reconfiguring the shape of whatever trial one might be, and I have well in mind the dangers of imposing an artificial limit on an expert, because he may very

well think that there are points which probably naturally belong in trial two, but which he could articulate in trial one. One then gets an unfortunate cut-off in terms of how the expert is dealing with things.

So I wouldn't want Dr Davis to be producing something which has all the bad signs of a bifurcation between quantum and liability, where you get a bleed across between the two and an unsatisfactory splitting of the issues. So I am not saying we are not going to split, but actually I do want a sense of just how much work is involved and how long it's going to take him. He must have thought about this, because that is inherent in a blueprint to trial, the identification of the work that needs to be done and how one is going to do it. So I would expect that to be a date that is in the not too distant future and one that he can provide with a degree of reliable assurance. I say no more than that, because things go wrong. Things take longer. They rarely go more quickly, but things take longer than one expects, and, of course, any timetable that we lay down will take that into account, but we do want a sort of sense of timing.

MR HOLLANDER: I will take instructions. Can I just ask you what would your intentions be in terms of this afternoon and/or tomorrow, because, I mean, one possibility is that we do actually -- you have made some comments already on the various points made by the Defendants. My learned friend Mr Harris has said that he is going to have a shot at the penalty fares and also in terms of the service levels claim. Are you envisaging that you may hear those arguments and, if so, would that be today, tomorrow, just to get an idea as to --

MR HARRIS: I don't think that is quite right in any event. I think your suggestion --

MR JUSTICE MARCUS SMITH: Our suggestion is to side step those.

MR HARRIS: Precisely so. There would be some housekeeping issues that we could sensibly deal with like, for example, what timetable to use for determination of any issues about the revised cost funding agreement. There are some discrete

costs points. There is a couple of minor things, but if you proceed with the suggestion that you put forward, then all the rest is overtaken, all those major points.

MR HOLLANDER: I understand that, but that begs the question. I completely understand that the Tribunal may in light of the debate this morning have in mind some possibly modified version, but, I mean, we would be suggesting that you should proceed to hear the matters which are in issue between the parties today, notwithstanding the -- whatever happens I think you will be setting some form of timetable today, but I don't see why certainly in my submission -- you may not agree with this -- one should side step those today.

MR JUSTICE MARCUS SMITH: Well, indeed, that's a very good point. I am very grateful to you for raising it. Let me be clear. We regard the approach of the Class Representative and the approach articulated by the Tribunal, and I think endorsed by the Defendants and the Intervener, as not quite but very much at opposite ends of the spectrum, and we think it is important to get that point right, and we are minded to have as full an argument as possible about the modality of trying these questions, because these are not easy questions. We have already had one lost trial at which we attempted to deal with these matters. We have now got, through no one's fault, a large body of evidence that is, as we see it, directed to issues that ought not to be debated further, and I say that because what we are envisaging is a process by which we cut away from the interlocutory tail-chasing to the proper chase of a trial, and that is what we want to get right. So if we are doing it the way we have proposed, Mr Harris's points fall away, probably forever, but certainly until next year.

MR HOLLANDER: That's what we -- sorry. Go on.

MR JUSTICE MARCUS SMITH: It is, therefore, much more important that we get the shape of the trial process right. So I think you should proceed on the basis we will not be hearing either today or tomorrow Mr Harris's points about the

amendments that he objects to and the parts of the reports of Dr Davis that he objects to, because we want to work out whether we can avoid that debate altogether and we want that resolved properly.

We do want to resolve anything that is collateral to the modality of trial that can be dealt with properly either today or tomorrow. Speaking entirely personally, it would be useful to finish today, but I think that's unlikely, because we are, I think quite rightly, taking all the time we need to get this very important question of process right. There is clearly a very wide disagreement in how to do this between the parties and the Tribunal's approach.

One only departs with a degree of assurance that it is the right course from the traditional way of doing things. So you really, Mr Hollander, should have as long as you need to articulate your defence of the usual way of doing things in light of the indications you received from the Tribunal that we feel that that is a process that is not, when one has this level of articulation from the expert of the Claimants' side, the most efficient way to proceed. It is that that we are very keen to resolve properly.

MR HOLLANDER: Okay. What time shall we sit again?

MR JUSTICE MARCUS SMITH: We've spent another ten minutes. We will resume at 2.10.

(1.25 pm)

(Lunch break)

(2.10 pm)

MR JUSTICE MARCUS SMITH: Mr Hollander, good afternoon.

MR HOLLANDER: Good afternoon. I want to make two points at the outset before dealing in more detail with the proposal from the Tribunal.

MR JUSTICE MARCUS SMITH: Of course.

MR HOLLANDER: The first one is just picking up your comment about ships that pass in the night. It seems to us that what you are proposing maximises, not minimises, the chance of ships that pass in the night. The ships that pass in the night arise because one party produces a report or a case which reflects what it thinks it has to deal with, but doesn't properly take into account what the other side are actually saying. So when you get the reports, and we all know -- we have all had this happen -- they actually don't meet in the centre because they are dealing with different issues.

Now the problem here is that the Defendants have a very good idea of what we are saying, right or wrong, because they have seen the myriad expert reports that we referred to this morning. We have very little idea of what they are saying. We have seen their pleadings now obviously, but we have not seen anything more and there's not been any engagement.

So if what you are doing is seeking to progress the Class Representative's side of things without a compulsory engagement on behalf of the Defendants, you are perpetuating that by a situation where already all the work has been one-sided rather than actually getting to a position where the Class Representative is meeting the case from the Defendants, the Class Representative is doing still more work in the absence of engagement with the Defendants.

That's the first point which seems to us fundamentally wrong. The second point is, of course, with the Tribunal's case management responsibilities the Tribunal will want

to seek to manage the case efficiently and to the extent that that involves a new or somewhat novel procedure, then, of course, in principle there's nothing wrong with that and that's within the power of the Tribunal.

However, there are at least to an extent, tried and trusted procedures which have been used many, many times. If one adopts a new or a different procedure, particularly if one party is saying "We have grave doubts about whether this is an efficient way of doing things", the risks are all the greater. That in our submission is the two very general points about what is being put forward.

So let me move on to the more specific. I think on what the Tribunal was envisaging there would be a list of issues to start with, 14 days and that's all manageable and that's easy.

Disclosure. Now we dealt with this in our skeleton in paragraphs 9 to 16. What happened was that there was -- first of all, there is a -- it is not just expert-led in terms of data, this case. There are also a number of issues about regulatory breach and about exactly what happens on the ground, and there are factual issues as well. So one has to take that into account, but what happened was that the Defendants gave voluntary disclosure. What they did was they searched for some terms voluntarily. They did not consult us on which terms they were going to search for, and when we got what we received from them we thought it was entirely unsatisfactory.

Now we may be right or wrong about that, but it's perfectly appropriate when they use search terms that we come back and say "We think you've used the wrong search terms or inadequate search terms", and there is nothing to be criticised in us coming back and saying that in circumstances where one might have hoped the search terms would have been agreed or discussed. On the contrary, they did them unilaterally and we say we are not happy with them.

Now if the first stage and the search terms can be sorted and there can be some form of engagement and discussion or agreement about it, or you can rule, if necessary, then one can get on to the second stage which is the more expert-led requests.

So the way it has been portrayed and the way I think you, sir, were suggesting before the adjournment that actually what was being put forward was in some way inappropriate, because it was all about search terms, not expert-led, I mean, that arose simply because of the way they had given unilaterally voluntary disclosure, and that was an inevitable consequence of the way they had done it.

Now this is not a matter for criticism at the present hearing. It is one of those things that will be sorted out in due course, but that's why it happened in that way.

MR JUSTICE MARCUS SMITH: We don't need to continue doing it that way, do we, as we have done it in the past?

MR HOLLANDER: I think we need -- well, I think what we would envisage, because it's not just -- certainly there will be Dr Davis saying "This is what I need to see for this" or "What have you got".

MR JUSTICE MARCUS SMITH: How is he going to define that, what he needs?

MR HOLLANDER: He is going to produce -- we will have a list of issues. He knows the issues he's got.

MR JUSTICE MARCUS SMITH: Are the issues going to be in the disclosure protocol form?

MR HOLLANDER: I think what we have is a list of issues, which need a bit of modification because things have moved on since February. We can start with those. It can be amended and agreed. There wasn't very much disagreement between the parties. There was a little bit. We can look again at those between us in the light of where we are now.

MR JUSTICE MARCUS SMITH: But the list of issues defines what's going in and what's going out of trial one.

MR HOLLANDER: Yes.

MR JUSTICE MARCUS SMITH: But it doesn't provide a test for the Tribunal to resolve a dispute about disclosure. So when a dispute comes to the Tribunal, by reference to what do we resolve that?

MR HOLLANDER: Well, because, what is a proportionate document request in terms of the issues in trial one. I am not sure one needs more than that. I mean, they are established principles.

What I am actually concerned about is -- I mean, I take on board the points you are making and we will look at those, of course, and I understand what you're saying, and nobody wants to spend a fortune on disclosure or any other part of this.

What I am actually concerned about is that you don't make any ruling on disclosure today which effectively restricts us. The reason for that is the detail of it is simply not before the Tribunal told. I mean, if it was said we have adopted the wrong approach we would have actually wanted to put in evidence explaining what we have done and why we have done it. This is all nine months ago.

MR JUSTICE MARCUS SMITH: Evidence on what?

MR HOLLANDER: Explaining why we want certain things or not. I think there is a difficulty --

MR JUSTICE MARCUS SMITH: Even on our proposals we are not shutting you out. We are opening the door.

MR HOLLANDER: I want to make absolutely sure of that, because I don't want it being said "You can't have this disclosure because of an order of the Tribunal". Sorry. Maybe I am being unnecessarily cautious.

What I think we were envisaging would be that, you know, the voluntary disclosure --

I mean, if you get told by the Defendants "We have done the following searches with the following search terms", and you review those and you see that they don't cover a whole range of things that on the face of it, given the issues in the case, they ought to cover, it is not surprising one goes back saying "You have used the wrong search terms" or "You have not used adequate search terms".

I mean, moving forward, some of it is not expert-led because some of it is factual material, but a lot of it is expert-led.

MR JUSTICE MARCUS SMITH: Factual material not coming from you, coming from the other side.

MR HOLLANDER: That's why we need disclosure from them.

MR JUSTICE MARCUS SMITH: Yes, of course you do. I think that's the one thing that we are all agreed on. What we are talking about is how one frames that which you get.

MR HOLLANDER: Yes. I see that.

MR JUSTICE MARCUS SMITH: Yes.

MR HOLLANDER: I am not quite sure how one can do that in a vacuum today. I mean, you know, once the Tribunal has determined the shape of the trial, then we will look and we will look again in the light of the comments today, as to exactly how we go about requesting that. I am not quite sure how much further than that one can go today. If we do something which the Tribunal thinks is disproportionate, over the top, unnecessary, I'm sure at the first disclosure hearing you will say so in spades. You know, we would not expect to do that, but I think it is slightly hard to debate that in a vacuum. So I am not quite sure what I can -- I mean, other than to make sure that the disclosure is to be at least largely expert-held, and if that's -- I mean, I think the indication I'm having from you, sir, is that you expect at least much or most of it to be expert-led. I don't think anyone has any problem with that, but I don't think that

would be all of it.

That is disclosure. I think the other problem on disclosure is it needs to be an iterative process. We have not had that so far. Iterative in two senses. One is that, as I put to you before the adjournment, one party needs to say "We think we need A, B, C and D" and the other party comes back and says "You can have some of that. The other is difficult, complicated, costly, etc, but what about giving you this instead?". That's how you expect in these data heavy cases to actually get through an engagement between the parties, between the solicitors, maybe between the experts. I would very much hope that we have would have some of that, because that is the most efficient way.

I mean, you know, cases such as Trucks, for example, where there have been endless disclosure applications where exactly that sort of process has been happening. Anyway, iterative, two stages. One is that one needs engagement between the parties. Also once an expert sees what's coming up in terms of disclosure it makes it much easier to form a view as to whether more is needed, once one looks at what has been given as to whether more is needed on to a particular point and how to deal with it. I think that's a point I made before the short adjournment.

I think that is disclosure and I made some comments on disclosure this morning. We would have thought that it was sensible to have an agreement of some sort of data sets, again often done, as you know, sir.

MR JUSTICE MARCUS SMITH: Yes.

MR HOLLANDER: Some sort of procedure at this stage, because what the Tribunal will not find helpful is if both parties are proceeding on the basis of different data, and therefore some form of direction which involves agreement of data sets we would have thought would be helpful. So that's that.

Witness evidence. I am not sure whether the Tribunal were assuming -- I mean, we cannot anticipate the defences put forward in detail.

MR JUSTICE MARCUS SMITH: No one ever does.

MR HOLLANDER: No, but if we are putting in in our case expert evidence, we are actually doing it on the basis of the absence of information and detail about the way that the Defendants are putting their case.

MR JUSTICE MARCUS SMITH: No, no. There are two questions here. One is the information you need for your case and the other is the way the Defendants kill your case off through their defence.

Now the two are necessarily sequential.

MR HOLLANDER: Well, are they, with respect?

MR JUSTICE MARCUS SMITH: Do push back, yes. That's how we see it.

MR HOLLANDER: We are saying that these arrangements were anti-competitive. They are saying they are pro-competitive. So they are the other side of the coin. It doesn't seem efficient, with respect, to look at one without the other, in which case actually having one party doing it and not the other is not in our submission an efficient way of doing it. We have the regulatory material. Presumably the expert can't be dealing with -- I mean, we would expect witness evidence to come before -- again we are unlikely to be calling witness evidence, but presumably the Defendants may well do, in which case -- I am struggling to see the disadvantage in having that in advance of an expert report, because it actually enables the expert to see what is being said by way of factual evidence and to deal with that in the report.

So we would invite you -- and that would deal both with the breach questions. It would also deal with the pro-competitive aspects presumably.

So it also seems to us to be sensible if before one has an expert report that there is a proper engagement between the experts again, otherwise one is having the Class

Representative's expert setting out matters unilaterally. I have made this point already about engagement. The engagement means that each party actually understands much better the other's case and therefore saves costs because otherwise in the ships that pass in the night example parties are having to do additional work to revisit issues which could have been dealt with first time round. We would suggest that before one actually gets any expert evidence in writing there should be an engagement between the experts to maximise the possibility of each understanding what the other is saying. So that's that.

Now the question you asked me this morning. Expert evidence, when can it be done by? Assuming we are leaving aside their defences and can't deal with them, and I will deal with that subsequently, Dr Davis said that he would expect to be able to do it on stage one by the end of July, taking into account, first of all, the getting of disclosure and all the issues I have dealt with in respect of that.

Secondly, the possibility of surveys. One of the challenges of surveys is that you can't run them in the school holidays, for example. There are difficulties about that. The surveys need a degree of cooperation with the Defendants, because it's their trains, and if people are actually on the trains doing surveys, for example, then that needs cooperation with the Defendants, but that does take some time.

So that was what -- I think you were just asking about phase one, were you not?

MR JUSTICE MARCUS SMITH: Well, I think I asked about the whole thing and Mr Harris helpfully said he would like to know about phase or trial one.

MR HOLLANDER: We did ask Dr Davis and he says if you are covering the whole lot, he thought more like November next year.

So those are really our submissions in respect of that. We are concerned that the process that is being envisaged involves a lack of engagement and therefore additional costs and potentially wasted costs rather than saving of costs. We are,

with great respect, and I understand why the Tribunal is trying find a way through this to move it forward -- we think that actually it maximises the possibility of an inefficient process which wastes costs rather than saves them, because of the effectively -- I think you have my submission in respect of that.

Now finally in respect of this we would invite you actually, whether later or tomorrow, to hear my learned friend Mr Harris's applications that have been envisaged. You expressed some preliminarily views in respect of them. If having heard them on some or all of them you decide not to call on me in the light of those comments, that's a matter for you, but we would suggest that the appropriate course is actually to deal with those matters. It is always subject -- the Tribunal always has a right to decertify at some future stage if matters change. So that's not going to be something that is ever shut out, but we have got to the stage where a lot of applications have been foreshadowed. There's been a lot of detailed material. Our submission is that those are not well-founded. Whatever the position may or may not be at trial, those are applications which are seeking to shut out amendments and to effectively say that matters should not proceed in their current form because the blueprint has not been satisfied.

Now our submission is going to be those are pretty well all bad points and that the Tribunal should, we would ask, knock those on the head today, but that doesn't obviously affect -- I mean, the Tribunal has in any event to decide what it thinks appropriate in terms of a way forward to trial.

MR JUSTICE MARCUS SMITH: Yes.

MR HOLLANDER: Unless there is anything further I can assist you with?

MR JUSTICE MARCUS SMITH: Thank you very much, Mr Hollander. We are much obliged.

Mr Harris.

MR HARRIS: I have a number of very short points. Mr Hollander says that there should somehow be witness statements from us in advance of the expert's reports. That's misconceived, with respect. They have the burden of proof and all you are saying on the preliminary indication given by the Tribunal is that they set out their case as best they can and that doesn't require anything from us. It is their case. So that's the first point.

The second point is we don't understand the submission about ships passing in the night. On your proposal their ship will have set off, traversed its journey and reached port, but ours will not even have left port at the beginning of its journey. So there is no possibility of them passing in the night. Indeed, that's the virtue of your proposal that we can see and the Tribunal more particularly can see exactly the journey that their expert proposes to take. So the question of ships passing in the night, if the trial then goes forward, our expert will set off from port and deal with Dr Davis's report. So that's the second point.

The third point where there was a suggestion made that surveys may take a long time and indeed the Defendants have to be involved but, of course, we have some previous learning here. I remind the Tribunal within the Gutmann case where the survey is a great deal larger covering a vast panoply of routes all the way around London about boundary fares in contrast to this case, which is only about the Brighton mainline, that was capable of being done in three, one-week blocks before Christmas. There is absolutely no reason why, if my learned friend's team wants to do a survey, it can't be done in less time than that. That's not an objection. We do take issue with this suggestion now, notwithstanding they are said to have an impeccable blueprint for trial, all of a sudden when they are asked to move it toward they say "It is going to take until at the very earliest the end of July, and on the worst case scenario the end of November". That is not moving forward rapidly

which is what the Tribunal had in mind. That is far, far too late. If they are going do this they should be made to do this. We say the Tribunal's provisional suggestion was the right one, the end of February, but if you want to be slightly more indulgent than that then maybe the end of March. The end of July is far, far too late and the end of November is hopeless.

My learned friend finally, and this is my last point, makes the suggestion that somehow we should proceed in any event with the applications that are set out in our application notice. That's obviously misconceived. The whole purpose of the Tribunal's proposal is that a new way forward has been found.

If, once the Class Representative has set out, the case for which he says he has an impeccable blueprint today, once he sets it out with his experts then it may be that some of these points can be revisited. It may be that come the end of February or whenever the hearing is post closure of the Class Representative's case we still say, for instance, the penalty and excess fares case is hopeless, should be struck out, or whatever terminology one wants to use. Or we may say the service level claim that you have now proceeded with, be it because you will be allowing the amendments, it is hopeless for whatever reason. So, I mean, it is misconceived to say that we now proceed in the manner that the Tribunal is indicating with which we agree and the Intervener agrees, but nevertheless forget that and carry on with the Defendants' application.

Sir, unless I can assist further, those are ...

MR JUSTICE MARCUS SMITH: Just one point by way of clarification. You mentioned strike-out, and clearly that's something which we think needs to be envisaged, but needs to be proportionate. So if, for instance, we get to the situation where, assuming we go down this route, we have the Claimants' evidence in the round and it's just (inaudible). Obviously it makes sense to have that litigated and

determined pre-trial.

Equally there are points where you might say "Look this is a point that is actually hopeless but it is so enmeshed with the other points that are not hopeless, that you should leave it to stand or fall at trial because a strike-out brings no benefit."

So I think what I want to convey is a sense that we really only want a strike-out that wasn't an in limine totality strike-out if, for instance, a half day hearing saved a week at trial. That's something which would be up here, but simply having a strike-out on something which may or may not be hopeless but isn't getting us a suitable bang for buck at a trial is not something we would be very interested in dealing with, because it is just not a useful use of the Tribunal's time.

I mean, I just want to see whether that sort of accords with your references to strike-out and how the Defendants are seeing this.

MR HARRIS: Yes. I think we do agree with the Tribunal that, if there is a problem, however it would then be framed, whether strike-out, non-Pro Sys compliant or preliminary issue, there's a problem that has crystallised which means the case can't sensibly be taken to trial, then at that point if we think there is a proper bang for the buck in the reasons that you describe, then we will take that. It may be that there isn't and it may be that there is, but that is how we see it.

Let me give you a concrete example. You may or may not recall that in the Gutmann litigation there was an allegation about the fares that are sold on behalf of the TOCs by third parties, people like trainline.com, etc, etc. The Defendants took a point that that should be struck out. That went to the Court of Appeal and the Court of Appeal said "Well, we can see some difficulties. We have some sympathy with your submissions, Mr Harris, but one of the reasons we are not going to strike it out is because" -- I paraphrase, but the gist of it was "It is too bound up with the other claims".

So, yes, there is a recent manifestation of that in a case with these clients or some of these clients, and we are not likely to want to be met with, "Well, it's not going to cut out enough of the trial. It's too bound up with an issue that is going to go to trial". We are not likely to want to do that again.

MR JUSTICE MARCUS SMITH: We are grateful. Thank you very much.

Ms Howard.

MS HOWARD: No further comments.

MR JUSTICE MARCUS SMITH: Well, what we are going to do is we are going to reserve the question of how we propose to deal with this, because Mr Hollander has made in his two general points, two very good general points, that one does not depart from established practice without setting out very clearly why one is doing that, and equally we need to take on board the proposals that Mr Hollander has made for the traditional working and see which works first, but whichever route we go down, and we will set this out as quickly as we can in writing, so you get it either in the course of tomorrow or more likely early next week, but that's the timeframe. Either which way, however we go in terms of the modality of trial, we are not going to hear the strike-out questions, however you want to phrase them, now, because that is going to be an inefficient use of court time.

What we would want to have assistance on, though, is anything that is not to do with modality of trial that we can deal with this afternoon in order to reduce the number of outstanding matters that need to be dealt with. Mr Harris, you have alluded to a few things. There is a question which is troubling me slightly, because it is I think something which we would like to deal with, but I don't think we can.

With the departure of Mr Harvey and the entry of Dr Davis, the budget for the case went up. That is to an extent justified in the documentation and it arises out of the fact that we have a new expert looking at things.

I think that that is something which belongs in your camp of we can't really deal with it now, because in a sense if we say we are going to go down the route of properly expert-led proceedings I think we probably need to do that on the basis that we will look after the event at the reasonableness of the cost incurred, but we can't possibly constrain an expert in saying "Look, we are telling you that you have got a freehand in how this case runs, but we are going to tell you that there's a fixed budget in which to do it". We expect obviously a degree of efficiency, but how the job is done will have to be according to the expert. I mean, if we do it differently, if we do Mr Hollander's approach, then I think the ceiling becomes rather more hopeless, but for that reason we don't think that that's something we can go into today.

MR HARRIS: We agree. You can't in our submission do anything substantive about the ballooning cost budget today for the reasons that you have given, but there are, however, two matters that you can deal with, both of which are short in my submission.

One of them, if you were to turn up our skeleton argument for today, at page 6, paragraph 15. I don't think this will detain us long and indeed I had a helpful interchange with Mr Hollander before you came in about this. It is the fact that my learned friend's team has recently put forward a revised litigation funding agreement following on from the *PACCAR* case in the Supreme Court. It is paragraph 15 of our skeleton at page 6.

MR JUSTICE MARCUS SMITH: Yes.

MR HARRIS: To give you the headline whilst that document is being turned up, all that is required in my respectful submission is a direction from the Tribunal about how any issues that still arise in relation to the revisions, whether or not they are *PACCAR* compliant or there are any other issues, how it gets resolved. It is not for resolution today. My learned friend told me before you came in that he thinks his

agreement is fine, the revision, and if we want to make -- he didn't put it like this and I don't want this to be characterised as unfair, let alone outrageous -- but if we want to make a fuss about it then we should write and make our points, our objections and we agreed. We are quite happy with that.

So all we suggest is that a direction in something like 14 days from today my team writes, having had the opportunity to consider that which came relatively recently, including with specialist cost counsel and then we will write a letter saying "We have the following objections for the following reasons", and they are either agreed with or more likely they will not be agreed with, and then we'll get the response. Then if we want to press any of those to a decision by the Tribunal, we will write to the Tribunal saying "We hereby apply for the following reasons that these points that are still in dispute need to be resolved by the Tribunal".

So, in other words, it is what has been done in several of the other post-*PACCAR* CPO hearings already -- take *CICC* as one -- a direction that X happens within 14 days; the response 14 days later; 14 days later it is either resolved on the papers or at a hearing, and that's all really we are saying as regards that.

I just invite you to note, since Mr Hollander said that he thought on behalf of his client that we had plenty of time already to formulate these requests, what we say in paragraph 15, which is that as long ago as 1st September the Class Representative said that he would provide us and the Competition Appeal Tribunal with the revised LFA "well in advance of the next CMC", but in the end that didn't happen and the first time we got it was eight working days before today and we haven't had the opportunity fully to consider it. We have some concerns that we are still exploring and obtaining instructions on and specialist advice on but we are not ready today to enunciate them but we will be in writing within 14 days. So that's the first issue.

MR JUSTICE MARCUS SMITH: Yes.

MR HARRIS: It may be convenient whilst I am on my feet -- I am in your hands whether you want to hear from Mr Hollander on that or whether you want me to just deal with the short costs applications that we do have that we have set out in the skeleton argument.

MR JUSTICE MARCUS SMITH: Since they are quite separate, we will deal with *PACCAR* first. So, Mr Hollander, that seems very sensible. I think there's a growing corpus of decisions being handed down by the Tribunal on what is and what is not *PACCAR* compliant, and I think Mr Tidswell has either done or will recently do another one, but, of course, these things all turn on the agreement in question. So for our part there seems to be a lot in what Mr Harris says but, obviously we need to hear from you.

MR HOLLANDER: Well, the disagreement is very limited. I mean, the Tribunal will not want this to go forward with an unenforceable funding agreement.

MR JUSTICE MARCUS SMITH: No.

MR HOLLANDER: We don't want it to go forward with an unenforceable funding agreement. What is slightly disappointing is that, despite my learned friend's enormous team, they have had 14 days since 28th September and we have not had any articulation of any complaint. If there is a problem with it then it needs to be sorted out as soon as possible and they will write to us, and if there's a dispute about it, either we produce a new agreement or we disagree, in which case the Tribunal will have to rule on it, but I am not sure there is anything much more than that to be said about it.

MR JUSTICE MARCUS SMITH: We will say 14 days, Mr Harris. Clearly because we want this matter to move forward fast, if you can do it more quickly than that, that would assist, because Mr Hollander is absolutely right. Everyone needs a degree of assurance that there isn't a *PACCAR* point waiting in the wings. It is unfortunate that

we have had this derailment process which is affecting pretty much every case before the Tribunal. Our experience is that these things tend to be capable of resolution but, as I say, it does depend on the precise terms of the agreement in question and the precise amendment that is being negotiated, but I don't think we can say more than that.

MR HARRIS: Thank you. I am grateful. If we can do it sooner than 14 days, we will.

MR JUSTICE MARCUS SMITH: Very grateful.

MR HARRIS: Sir, I think on my list there is only one other issue, again quite short and discrete. You will have seen that in our application notice at item paragraph 1, sub-paragraph 7, where we itemise the orders that we seek at today's hearing. One of them is, if you like, to determine where the costs should fall as a result of historic issues. So they are not affected by the other matters we have been discussing today. It is an order we seek that the Class Representative shall pay the Defendants' costs thrown away as a result of the Class Representative's change of economic expert to be subject to detailed assessment, if not agreed. Then there is just the housekeeping reference to if a previous order needs to be varied, so be it.

Then at paragraph 8, allied with paragraph 7, is that we seek an order that the Class Representative shall make a payment on account -- it should say on account -- within 14 days when we provided a cost schedule. That costs schedule was provided to my learned friend's team under cover of a letter of 6th October. I've got copies here. For some reason, despite the big bundles, this one is not in it. I for my own part don't propose to go through the schedule and the reason for that is that -- perhaps if I could hand up three copies. There are some spares if Mr Hollander wants one.

MR JUSTICE MARCUS SMITH: Thank you very much.

MR HARRIS: The reason I don't propose to go through the schedule is because we are only seeking a payment on account. You will see from our skeleton argument that the payment on account we seek is a very reasonable 65%. In other words we are not coming along and saying "The interim payment should be some huge proportion". We are saying a 65% proportion.

What one gets -- this is in our skeleton argument at paragraph 13.8, which is at the top of page 6 -- 65% of the amount that's shown in this schedule comes to £359,580 I am told. That makes sense if you look at the first page of the Defendants' cost schedule. There's a summary table of the whole thing. The total in the bottom right-hand side is £553,201 and we seek 65% of that. I am afraid I have not done any of this maths myself, but it looks right. That comes to £359,580.

So that's what we seek. If you had regard to the cover letter to the schedule that I just handed up, the short one --

MR JUSTICE MARCUS SMITH: Yes.

MR HARRIS: -- what we say when we ask for this order of the costs thrown away by the change of expert, it comes into three parts. So there is (a) -- this is paragraph 2(a) -- what we have described as the Harvey costs:

"The Defendants' costs of reviewing Mr Harvey's first to fourth expert reports.

(b) Changeover costs.

(c) Davis 1 costs."

Just briefly if I can take them in turn, you will recall that Mr Harvey put in three reports at the stage of certification --

MR JUSTICE MARCUS SMITH: Yes.

MR HARRIS: -- and then he put in a fourth report, which was to press the so-called loss of flexibility claim, and that fourth report, that claim wasn't allowed. So we say that we should have the costs of Harvey 4 come what may, because that was for

a claim that was not permitted by the Tribunal, loss of flexibility, but that we should also have the costs of dealing with Mr Harvey's reports, because they, to use your phrase from earlier on today, sir, have been superseded by no less than three expert reports from Dr Davis, and there are costs that have been thrown away, because Mr Harvey's reports are in very large measure no longer relied upon, and yet we have had to incur the costs through no fault of our own, as recognised on the last occasion. I am not suggesting here for a moment that this is necessarily the Class Representative's fault either, but that's not the point. My point is, whatever, they are not my fault, they are not my client's fault and yet we have incurred them and they are considerable.

In this regard I also remind the Tribunal with respect -- you don't need to turn it up -- if you were to turn up tab number 5 of the bundle, the multi-coloured Re-re-amended Collective Proceedings claim form, you would see in it that every reference to Harvey 1 to 3 has been crossed out. Properly so, but that's kind of my point. They are no longer part of the claim, yet we have had to incur the costs of dealing with them. Harvey 4 obviously isn't in, was never in, because it was advanced and no permission was ever given to it. So that's what I have to say about 2(a), why we have asked for it. Then the figures are in the schedule.

Then there were some probably more modest costs in the category 2(b) changeover costs. As you know, there was a hearing at which we had to deal with the consequences of the changeover, and costs were incurred, and correspondence was written, and points were taken, and there were arguments about timetabling and what have you, and it led to a CMC in March 2023, and that was the one at which the Tribunal essentially said, "Okay. You've got one more chance. So put in what became Davis 2 and make any amendments" and that incurred -- all we are saying here under 2(b) is that that involved some costs on our part.

Again we are not saying that this is necessarily the fault of the Class Representative, but we are definitely saying whoever is responsible, it is definitely not our fault and yet we have had to expend costs. So it is the same sort of submission.

Then, finally, what you will also doubtless recall is that when the Class Representative changed expert and brought on board Dr Davis and he made what we have characterised in our skeleton argument as the -- I lose track -- maybe the second, third or perhaps fourth bite of the expert cherry, he put in what became known as Davis 1, but, of course, Davis 1 was not satisfactory. Davis 1 itself has been completely superseded by Davis 2 and now Davis 3. Davis 1 was the one in which -- and I paraphrase for present purposes -- Dr Davis said, "Well, I haven't read the disclosure yet and I rely upon bits of Mr Harvey's 1, 2 and 3", but it wasn't clear quite which bits and to what degree, and in any event he said, "It is all totally preliminary and I reserve the right to change any and all aspects". Lo and behold, in Davis 2 it was all superseded. I am not suggesting for a minute that there was some complete divorce of approach, but that's not my point for a costs application. What I am saying is their case now doesn't rely upon Harvey 1, 2, 3, let alone Harvey 4, and it doesn't rely upon Davis 1. What it relies upon is the 251 page report, Davis 2, with the 7,000 pages of exhibits together with Davis 3, 81 pages and I think several thousand more. Don't quote me on the latter. I can't remember the number of exhibits for Davis 3. So that's really the application. What we do is we say, as we said in correspondence, "These are the costs that we say you should be responsible for. These are the categories. These are the overall amounts", and we say in a responsible manner we are just seeking an interim payment of 65% of those in the amount that I have identified.

Unless there are any questions, that is the costs application.

MR JUSTICE MARCUS SMITH: No. Thank you. A couple of questions. Let me

pose them to you and you can answer them in one go, because I think they are to an extent related.

First of all, it's not so much that Harvey 1, 2 and 3 have been jettisoned. It is that they have been necessarily deleted because Mr Harvey is no longer the expert, but my reading of Dr Davis's reports is that he has used material in Harvey and that there is some benefit to be derived from them remaining in play, albeit as satellites to Dr Davis's own work. So that's sort of point one.

Secondly, obviously Oxera have been looking at that which is produced by the Class Representative or the then-Proposed Class Representative, but in doing so they have been learning about the case. So is there a derived benefit from considering Harvey 1, 2 and 3 and Davis 1 in the sense that they are learning about the issues, which is something which ought to be costs considered at the end of the day?

Then, thirdly, suppose we were to go down the route of an expert-led process of the sort we have been debating this morning and this afternoon, and then there was what we would hope would be a completely fresh start in the sense that we would have a further Davis report, which would be the case for trial. You could then say, "Well, Davis 1, 2 and 3, all of them were redundant, because they have been superseded by that report". Yet they would have been necessary both to ensure certification and would feed through to educate the ultimate Davis report.

So those are all I think points that go either to the amount of costs or to their incidence. Before Mr Hollander rises I thought I would throw them out to you.

MR HARRIS: Can I take them in reverse order?

MR JUSTICE MARCUS SMITH: Please.

MR HARRIS: Thank you. So you posed to me, well, isn't there a parallel if, post Davis 1 to 3, there becomes a Davis 4 and that's the trial report, and would I be able to turn around and say, "Oh, well, they have all been overtaken, so why can't I have

the costs"?

The difference is this. There is a conceptual difference. There were extra costs unnecessarily incurred for us by reason of Mr Harvey leaving and therefore there being a duplication of effort and that marks it out from the usual case. I accept that in all cases there will be some expert reports in collective proceedings, some expert reports for certification that could later be said to be overtaken by the trial expert's reports.

What I am pointing out is a distinct set of circumstances that are sought to be specifically identified in this costs schedule as being the costs thrown away by dint of the unusual circumstances in this case, namely Mr Harvey's departure, and again whoever it is at fault, it is not us, and that is what this is designed to get at.

That also deals in part with your second point, so going in reverse order, about Oxera and their learning. This costs schedule is designed to get at the additional costs, the costs thrown away by reference to reports that have been superseded because of the unusual circumstances of this case. It is not the full complement of Oxera's costs that have been incurred to date by my clients in this case in order to deal with this case. It has been much more carefully compiled than that. So that's what we say as regards the second point.

On your first point, which was, if I can, I think not unfairly, paraphrase, "Well, is it right that Mr Harvey's reports have been completely jettisoned or, if you like, are they still partly relied upon?", in that regard what I say is it is clear in particular from Davis 2, which responded to our criticism of Davis 1, which was, "Well, hang on a minute. Are you relying on Mr Harvey or are you not relying on Mr Harvey? Which bits? What are you going to do more?", and the response to that was this voluminous report saying, "This is what I am going to do, Dr Davis. This is my report. This is how I am going to do it. These are my 7,000 pages of exhibits".

So what we say is, properly understood, that did supersede the Harvey reports, and that's what we object to in terms of costs, because what we say, therefore, is all of that time, money and effort spent by us digesting Harvey and they have been completely superseded.

If you are not with me on that, then I agree with you that that's a question of quantum, not conceptual objection. It would be -- for instance, you might say "10% of Harvey is still relied upon, notwithstanding the 251 page report and 7,000 exhibits. So, therefore, your point is a good one save for 10% of it".

So those are my answers to your three queries.

MR JUSTICE MARCUS SMITH: I am very grateful.

MR HOLLANDER: Sir, on the last hearing you made an order in respect of costs and it may be -- this is 13.4 of your ruling on the last occasion.

MR JUSTICE MARCUS SMITH: Where do we find that?

MR HOLLANDER: Shall we look at that?

MR JUSTICE MARCUS SMITH: Page 133, is it, of the first bundle?

MR HOLLANDER: I thought I had a reference and I don't. That's exactly right. 133. 13.4.

MR JUSTICE MARCUS SMITH: Yes.

MR HOLLANDER: "The costs of the revised claim form are to be the Class Representative's in any event. We say this in part because we consider the problems generated by Mr Harvey could have been handled and would have been less severe, had they been handled better. But, mainly, this is the usual order when pleadings are amended. Costs of and arising out of the amendment are for the amending party. How far this regime will apply as regards the Defendants' past and future costs is not a matter for this judgment. We want to consider it on a later occasion. All options open."

That was at a hearing when I think it is fair to say the Tribunal were somewhat critical at that stage of the way that matters had been dealt with.

Now what has happened since, so Harvey 1 to 4, and although part of 4 was disallowed -- was not allowed in relation to flexibility, if you remember back to July, and that was all taken into account in the Tribunal's orders in relation to the certification hearing, which have all been dealt with, in fact, part of Harvey 4 was allowed in. There were parts of it that were uncontroversial and it was only parts that were not allowed and that has all been dealt with already.

What has happened subsequently is that matters have moved on in the case very significantly. If you remember, at that stage the Defendants had kept -- at the stage of certification had kept their powder entirely dry. They had not responded substantively to the letter before action. They had not put in a defence, obviously not at that stage, and therefore that was at a stage before that.

Now what has happened is that Dr Davis has had to deal with a case at a very different stage when pleadings are in, and indeed he was asked specifically to deal with the discovery that had been given within certain limits in Davis 2.

Now exactly -- so he is actually dealing with something quite different in respect of Mr Harvey. The material that Mr Harvey used for certification has pretty well largely not been touched. Dr Davis has provided more detail and he's provided more detail and he's done a lot of the work, a measure of the work which he's going to be doing for trial because of his long reports.

What then happens is when he produces Davis 2, the Defendants come back with a long list of complaints, as you know, in their July applications, and have sought to say that Davis 2 did not provide a proper blueprint, the applications that you are not minded to deal with today.

Now our position is that in respect of those they obviously required a vast amount of

work, because they were all expert -- the points made are pretty well all expert-driven. Therefore, it is to be assumed that Oxera had been dealing with all those points and that what is said largely comes from Oxera. Those are matters that we would have said, if we had had those matters heard, that did not affect the blueprint and that actually were not appropriate to have been raised at the certification or the leave to amend stage and that we should have had our costs in respect of those matters.

Now that's not a matter you are being asked to decide today, and in the circumstances you are not dealing with that, but how does one unravel any costs where what Dr Davis is doing is something quite different from what Mr Harvey did on different material in circumstances where a lot of challenges have been made to those which have not been dealt with or succeeded, and which we would say would not have succeeded if they had been heard?

In any event, reading and working through Davis 2 and now Davis 3, which was occasioned by those comments, is something which will assist Oxera significantly in doing the work for trial. It is impossible at this stage to unravel exactly how one deals with these matters, in which case I would respectfully suggest these are all matters for later on when the Tribunal has a much clearer idea of what succeeds and what fails.

There is no disadvantage to the Defendants at all for these costs to be reserved so the Tribunal can deal with it, because otherwise I would suggest that -- I mean, this vast costs bill of £550,000 in circumstances -- I mean, I have no idea what it covers. It is said to cover Harvey costs, changeover costs and Davis 1 costs, but that begs so many questions as to exactly what is being done, whether there's a saving of costs in respect of the work that Oxera is going to be doing subsequently. It is completely impossible. There is so little information.

So it may be that some of the points made by my learned friend have some force, but it's not a matter we would suggest that the Tribunal is really capable of unravelling at this stage and that it does no prejudice to either party if those costs are simply reserved.

MR JUSTICE MARCUS SMITH: Thank you very much.

MR HARRIS: May I make five short points in reply?

MR JUSTICE MARCUS SMITH: Yes. Thank you.

MR HARRIS: First, our challenge to Davis 1 did succeed, contrary to Mr Hollander's submission just now. They weren't allowed to proceed with Davis 1. They had to come back with Davis 2 and some amendments. That's the first point.

The second point is that my learned friend talked about what Dr Davis has done in Davis 2. We don't seek any costs for Davis 2. That is not part of the application. Item (c) is Davis 1 costs. So that completely disposes of that point.

Closely related point 3 is we have unravelled the costs. He said, "Oh, it's difficult to unravel them", but that is why we have gone to the trouble of setting out an itemised costs bill that unravels them and partitions them according to the three subcategories that are in the 6th October letter.

That takes me on to my learned friend's next point, which we say, with respect, is thoroughly bad. He says, "I have no idea what it covers". It is all in here. That is exactly what it covers. There are pages and pages of cost schedule and it has never been challenged. This was sent under cover of a letter of 6th October, having been adverted to as long ago as the date of the application itself as coming, and yet we have not had a single point from Mr Hollander today. We have not had a letter back. There is no detailed challenge to any of this. It is just a, "Oh, crikey! I think, gee, I wish I had done that. So why didn't we reserve it?" He knew the application was coming. The application has been made. It has been made in good time. We

provided the cost schedule in good time. It's all been split out. It's all been separately identified for the reasons that I have given.

The penultimate point is he says there is no prejudice. There plainly is prejudice to be kept out of our money, the money to which we say we are entitled. We say the minimum we should get is an interim payment on account of that money. If you want to -- I will rephrase that. If the Tribunal judges that what I am seeking is too much, for instance, because it takes the view that some of Harvey 1, 2 and 3 is still relied upon, then the answer to that is to say "Okay. Well, 10% or, whatever, 20% of that is still relied upon" and the interim amount comes down.

Then the final point is my learned friend seeks -- perhaps does not seek; that's an unfair way of putting it -- does nevertheless confuse the costs of today with the costs application that I am making. The costs of today plainly should be costs in the case or costs reserved and we say the more sensible costs are costs in the case. I don't want to particularly die in a ditch about that, but I am not arguing about the costs of today. I am arguing about the historic costs that have been incurred by reason of the fact that Mr Harvey pulled out of the case and we were put to additional costs.

Sir, unless I can assist further, those are the reply points.

MR JUSTICE MARCUS SMITH: I am very grateful. We will rise for five minutes to consider this. We'll be back in five minutes.

(Short break)

MR JUSTICE MARCUS SMITH: We are very grateful for the parties' submissions, and what we are going to do is we are going to sweep up our response to those in the judgment that we will be handing down on modality. I am not sure how related the issues are. I think there is a degree of relationship, but we would rather deal with matters in the round than hand down a short ex tempore of a point that we can

equally easily deal with in a judgment which will be imminent. So we will reserve I suppose is the answer what we are saying, but that's what we will do.

MR HARRIS: I am most grateful. Sir, that only leaves two tiny housekeeping matters at least on my list.

I think we agreed to put in an objections list, if we have them, on the revised LFA within 14 days. Shall we say that the Class Representative, assuming we do put in some objections, responds within 14 days? In our letter should we say -- I am not sure we can say in that letter that we want a hearing or a decision on the papers, because at that point we will not know what the response is, but --

MR JUSTICE MARCUS SMITH: No. Let's keep it a reasonably light touch. So 14 plus 14, but if you can collapse it, better.

MR HARRIS: Yes.

MR JUSTICE MARCUS SMITH: Let's see what the nature of the dispute is. The fact is this is not a straightforward area and it is a fundamentally important one. So our sense that you can say as a default that these things are to be dealt with on the papers is probably a little dangerous. Obviously we would like to, because it is a little bit more efficient, but it may be that a remote hearing is easier. So we won't commit, but I think, for reasons given by Mr Hollander, we need to get this sorted out as soon as we can, consistent obviously with this difficult matter being appropriately aired between the parties.

MR HARRIS: Thank you. I take that under advisement.

Lastly, just the costs of today. As I said before, we suggest that they be costs in the case or costs reserved. We don't have a particularly strong view.

MR JUSTICE MARCUS SMITH: My gut reaction is in the case, but Mr Hollander, do you have a view?

MR HOLLANDER: Yes. It may well be it comes out that way, but we would

probably rather have them reserved, because we do take the view that all these many applications, which we have spent a lot of money on, are not appropriate. Therefore, I think we would prefer reserved. As I say, it may come to the same thing in the end.

MR JUSTICE MARCUS SMITH: Okay.

Mr Harris, anything to say in response?

MR HARRIS: In light of the way the hearing has gone we should suggest the sensible one is costs in the case, because the case has moved forward in light of everything that happened, but I don't -- I am not going to die in a ditch about it, no.

MR JUSTICE MARCUS SMITH: This is an ordinary case management conference. It's a matter in which we have helpfully been assisted by the parties in considering how we go forward. Happily there's no winner, no loser at this stage. So it seems to us that costs in the case is the appropriate ruling, which is the ordinary one in case management conferences such as this. That is what we'll order.

MR HARRIS: Thank you, sir. Nothing further from the Defendants.

MR JUSTICE MARCUS SMITH: Mr Hollander, is there anything more from your side?

MR HOLLANDER: No, sir.

MR JUSTICE MARCUS SMITH: Well, can I express my gratitude, as ever, to the parties for the assistance they have given us. As I indicated, we will want to get something out to you as soon as we practically can. That I think will mean an hour tomorrow to do some writing and you will get it as quickly as we possibly can get it to you, but thank you all very much. We are really much obliged to you for your help.

(3.22 pm)

(Hearing concluded)