



IN THE COMPETITION
APPEAL TRIBUNAL

B E T W E E N :

Case No.: 1304/7/7/19

JUSTIN GUTMANN

Class Representative

– v –

(1) FIRST MTR SOUTH WESTERN TRAINS LIMITED

(2) STAGECOACH SOUTH WESTERN TRAINS LIMITED

“SW Defendants”

– and –

SECRETARY OF STATE FOR TRANSPORT

Intervener

Case No.: 1305/7/7/19

JUSTIN GUTMANN

Class Representative

– v –

(1) LONDON & SOUTH EASTERN RAILWAY LIMITED

(2) GOVIA LIMITED

(3) THE GO-AHEAD GROUP LIMITED

(4) KEOLIS (UK) LIMITED

“SE Defendants”

– and –

SECRETARY OF STATE FOR TRANSPORT

Intervener

Case No.: 1425/7/7/21

JUSTIN GUTMANN

Class Representative

– v –

(1) GOVIA THAMESLINK RAILWAY LIMITED

(2) GOVIA LIMITED

(3) THE GO-AHEAD GROUP LIMITED

(4) KEOLIS (UK) LIMITED

“GTR Defendants”

– and –

SECRETARY OF STATE FOR TRANSPORT

Intervener

ORDER (DIRECTIONS)

UPON the Order of the Tribunal of 18 January 2022 granting a Collective Proceedings Order (“CPO”) in Cases 1304 and 1305/7/7/19 (the “**SW Proceedings**” and “**SE Proceedings**” respectively)

AND UPON the Order of the Tribunal of 3 July 2023 granting a CPO in Case 1425/7/7/21 (the “**GTR Proceedings**”)

AND UPON the Order of the Tribunal of 5 April 2023 directing that the SW Proceedings, SE Proceedings and GTR Proceedings shall be jointly case managed and tried together (together, the “**Proceedings**”)

AND UPON the Order of the Tribunal of 7 July 2023 directing that the trial of the issues arising in the Proceedings shall be split, with issues relating to the alleged abuse of dominance being

determined first (the “**First Trial**”), followed by a determination of the issues relating to causation and the quantification of damages (the “**Second Trial**”), with the issues of market definition and dominance to be adjourned to a third trial

AND UPON the Order of the Tribunal of 7 July 2023 listing the First Trial to commence on 17 June 2024 (with a time estimate of 3 weeks and with 1 additional week in reserve) and listing the Second Trial to commence on 23 June 2025 (with a time estimate of 2 to 3 weeks)

AND UPON the Order of the Tribunal of 7 July 2023 directing the parties to seek to agree a list of issues for determination at the First Trial and to seek to agree their disclosure proposals in the format of sections 1A and 1B of the Disclosure Review Document (“**DRD**”) as contained within Appendix 2 to CPR Practice Direction 57AD (“**PD57AD**”)

AND UPON reading the submissions of the parties filed in advance of a case management conference (“**CMC**”) as to the appropriate timetable for the Class Representative to file amended funding arrangements in light of *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] UKSC 28 (the “**Amended Funding Arrangements**”)

AND UPON the Class Representative’s application for permission for survey consultants acting on his behalf to carry out a survey, including a pilot survey, which seeks to ascertain the extent of the overlap between in-scope journeys and Travelcard holding (the “**Survey Application**” and “**Survey**” respectively)

AND UPON the GTR Defendants setting out certain access conditions applicable to the Class Representative’s request to carry out the Survey at the stations within their control in a letter from Freshfields Bruckhaus Deringer dated 22 September 2023 (the “**Access Conditions**”)

AND UPON the SE and GTR Defendants’ application for a direction that the Class Representative’s survey consultants shall record the names and addresses of respondents to the Survey and disclose those names and addresses to the Defendants (the “**Survey Respondents Application**”)

AND UPON the Class Representative undertaking that any names and addresses of respondents to the Survey that are collected by the Class Representative's survey consultants shall not be provided to the Class Representative nor to his legal representatives, but shall be retained by the Class Representative's survey consultants

AND UPON the Class Representative's request for permission to adduce expert evidence at the First Trial

AND UPON the SE and GTR Defendants' application to amend their Defences in respect of joint and several liability (the "**SE/GTR Amendment Application**")

AND UPON hearing Counsel for the parties at a CMC held on 27 September 2023

AND UPON the Order of the Tribunal of 19 October 2023 directing the filing of Additional Funding Information and any submissions on challenges to the Class Representative's Funding Arrangements (the "**Funding Order**")

AND UPON the Order of the Tribunal of 13 November 2023 in respect of the deadlines set out at paragraphs 3 and 4 of the Funding Order

AND UPON agreement being reached between the parties to the Proceedings and communicated to the Tribunal on 14 November 2023 in respect of deadlines for the section 2 DRD process.

IT IS ORDERED THAT:

FUNDING

1. By 4pm on 4 October 2023, the Class Representative shall file and serve the Amended Funding Arrangements (as agreed with the funder) for consideration by the Tribunal as to their enforceability and their adequacy for the purposes of the Proceedings.

2. By 4pm on 18 October 2023, the Defendants shall file and serve any submissions in relation to the enforceability and adequacy of the Amended Funding Arrangements or confirm that they raise no challenge to those arrangements.
3. By 4pm on 14 November 2023, in the event that one or more Defendants challenges the Amended Funding Arrangements, the Class Representative shall file and serve any reply submissions.
4. By 4pm on 21 November 2023, in the event that one or more Defendants challenges the Amended Funding Arrangements, the parties will indicate to the Tribunal whether they seek an oral or written determination of any issues in dispute.
5. The Class Representative shall disclose the Deed of Indemnity between the Class Representative and his funder, in respect of adverse costs, that is in place in the GTR Proceedings.

LIST OF ISSUES

6. The issues that shall be determined at the First Trial and Second Trial respectively are those set out in List of Issues for Trial at Appendix 1 to this Order.

DISCLOSURE

Section 2 DRD

7. By 4pm on 4 October 2023, the Defendants shall file and serve any updated drafts of section 2 of the DRD, reflecting the decisions made by the Tribunal at the CMC with respect to sections 1A and 1B of the DRD, which shall not be required to include proposals as to keyword search terms.
8. By 4pm on 6 October 2023, the Class Representative shall provide comments to the Defendants on their proposals set out in section 2 of the DRD, save in respect of updates made to section 2 of the DRD pursuant to paragraph 7 above.

9. By 4pm on 10 October 2023, the Class Representative shall provide comments to the Defendants on any updated proposals set out in section 2 of the DRD provided pursuant to paragraph 7 above.
10. By 5pm on 8 November 2023 in the SW and GTR Proceedings, and by 5pm on the 14 November 2023 in the SE Proceedings, the parties shall seek to agree the Defendants' proposals set out in section 2 of the DRD.
11. In the event that the relevant parties to the SW and GTR Proceedings are unable to reach agreement on the SW and GTR Defendants' proposals set out in section 2 of the SW and GTR Defendants' DRDs, the relevant parties shall file and serve written submissions on any outstanding issues by 5pm on 14 November 2023.
12. In the event that the parties to the SE Proceedings are unable to reach agreement on the LSER Defendants' proposals set out in section 2 of the LSER Defendants' DRD, the relevant parties shall file and serve written submissions on any outstanding issues by 5pm on 17 November 2023.

Provision of disclosure

13. By 2 February 2024, the SW and GTR Defendants shall undertake searches for the documents specified in Appendix 2 to this Order and provide disclosure of any documents located as a result of those searches.
14. By 14 February 2024, the SE Defendants shall undertake searches for the documents specified in Appendix 2 to this Order and provide disclosure of any documents located as a result of those searches.
15. The searches referred to in paragraphs 13 and 14 above shall be conducted according to the applicable Extended Disclosure Models as specified in Section 1A of Appendix 2 to this Order, in accordance with the definition of those Models in paragraph 8 of PD57AD.
16. At the same time as providing the disclosure referred to in paragraphs 13 and 14 above, the Defendants shall disclose any known adverse documents (as defined in paragraphs

2.6 to 2.9 of PD57AD), including but not limited to any documents arising from the searches conducted pursuant to those paragraphs.

17. The provisions of paragraphs 13.1 to 13.4 of PD57AD shall apply in relation to the production of any documents pursuant to paragraphs 13, 14 and 16 above.
18. The provisions of paragraphs 14.1 to 14.3 of PD57AD shall apply in relation to any claim by a party that they have a right or duty to withhold disclosure or production of any document, part of a document, or class of documents.
19. The provisions of paragraphs 16.1 and 16.2 of PD57AD shall apply in relation to the redaction of data by any party in documents disclosed by them.
20. At the same time as giving the disclosure referred to in paragraphs 13, 14 and 16 above, the Defendants shall serve:
 - (a) a Disclosure Certificate in the form set out in Appendix 4 of PD57AD, signed by the party giving disclosure, to include a statement supported by a statement of truth signed by the party or the party's legal representative that all known adverse documents have been disclosed;
 - (b) an Extended Disclosure List of Documents, as defined in paragraph 1.10 of Appendix 1 to PD57AD.

SURVEY EVIDENCE

21. The Survey Application is granted on the condition that the Class Representative's survey consultant complies with the Access Conditions at all of the stations at which the Survey is conducted.
22. The Class Representative shall disclose any instructions and guidance provided to interviewers ahead of the pilot survey, the results of the pilot survey and information on any monitoring and/or verification of the pilot survey to the Defendants within 7 working days of the completion of the pilot survey.

23. The Defendants may, if so advised, provide comments on the pilot survey within 14 working days of being provided with the results of the pilot survey.
24. The Survey Respondents Application is refused.

EXPERT EVIDENCE

25. The Class Representative and Stagecoach South Western Trains Limited ("SSWT") shall be permitted to adduce expert evidence (if so advised) at the First Trial from an expert in the field of ticketing practices in relation to issues 8, 9 and 11 in the List of Issues for Trial at Appendix 1 to this Order, save that the expert evidence shall be confined to consideration of the factual matters arising under those issues and not address any legal questions.

DIRECTIONS TO TRIAL

26. The Defendants shall file and serve factual witness statements by 22 March 2024. SSWT may file and serve expert reports instead of or in combination with factual witness statements in accordance with paragraph 25 above.
27. The Class Representative shall file and serve any expert report, in accordance with paragraph 25 above, by 22 March 2024.
28. The Defendants shall file and serve any reply factual witness statements by 19 April 2024. SSWT may file and serve reply expert reports instead of or in combination with reply factual witness statements in accordance with paragraph 25 above.
29. The Class Representative shall file and serve any reply expert report, in accordance with paragraph 25 above, by 19 April 2024.
30. A pre-trial review shall be listed for 9 May 2024.
31. The agenda for the pre-trial review shall include the issue of disclosure for the Second Trial.

PLEADINGS

32. The SE/GTR Amendment Application is granted.
33. The SE and GTR Defendants shall file and serve their Amended Defences by 5pm on 4 October 2023.

MISCELLANEOUS

34. The costs of the CMC be in the cases.
35. There be liberty to apply.

Mr Justice Roth
Chair of the Competition Appeal Tribunal

Made: 22 November 2023
Drawn: 22 November 2023