

1 This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be  
2 placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to  
3 be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive  
4 record.

5 **IN THE COMPETITION**  
6 **APPEAL TRIBUNAL**

Case Nos:1304/7/7/19 1305/7/7/17,  
1425/7/7/21

7  
8  
9 Salisbury Square House  
10 8 Salisbury Square  
11 London EC4Y 8AP

12 Wednesday 27<sup>th</sup> September 2023

13  
14 Before:  
15 The Honourable Mr. Justice Roth  
16 Mr. Simon Holmes  
17  
18 (Sitting as a Tribunal in England and Wales)

19  
20  
21 **BETWEEN:**

22  
23 **JUSTIN GUTMANN**

**Class Representative**

24  
25  
26 v

27  
28 **GOVIA THAMESLINK RAILWAY LIMITED & OTHERS**

**Respondents**

29  
30  
31  
32 **A P P E A R A N C E S**

33  
34 Philip Moser KC, Stefan Kuppen & Alexandra Littlewood (Instructed by Charles Lyndon &  
35 Hausfeld) on behalf of Justin Gutmann.

36  
37 Paul Harris KC & Michael Armitage (Instructed by Freshfields Bruckhaus Deringer) on  
38 behalf of LSER and GTR & their parent companies.

39  
40 Tim Ward KC & James Bourke (Instructed by Slaughter and May) on behalf of First MTR.

41  
42 Jonathan Scott (Instructed by Dentons) on behalf of Stagecoach.

43  
44  
45 Digital Transcription by Epiq Europe Ltd  
46 Lower Ground 20 Furnival Street London EC4A 1JS  
47 Tel No: 020 7404 1400 Fax No: 020 7404 1424  
48 Email: [ukclient@epiglobal.co.uk](mailto:ukclient@epiglobal.co.uk)

(10.30 am)

**Opening remarks**

**THE PRESIDENT:** Good morning. I start, as always, with the warning that some of you will have heard many times but there may be others who have not. That is to say that these proceedings are livestreamed, as are all proceedings in the Competition Appeal Tribunal. An official transcript of the proceedings is being made but it is strictly prohibited for anyone to make any recording or take any image of the proceedings and to do so is punishable as a contempt of court.

May I also raise one preliminary matter which doesn't, perhaps, directly relate to the parties here but we noticed that in the bundle for this hearing is a confidential document, a confidential version of the Secretary of State's intervention. We assume that no one, from what we can see, is intending to refer to that document in this hearing but as we understand it, no non-confidential version has been filed. Now that's clearly not the responsibility of those here but we will direct the Secretary of State to file a non-confidential version and we'd also like to just alert everyone that if there are going to be confidential documents from any of the parties by way of, particularly, anything in a witness statement or skeletons, (a) it is essential that the confidential bits are highlighted so we can see what they are, and, secondly, that a non-confidential version is produced, if it's a witness statement or a submission.

So please would you note that for the future. As I say, that is not a criticism of anyone here today but we will make sure that there is a non-confidential version of the statement of intervention.

Thank you all for your skeleton arguments. A bit of repetition on certain points from some of the defendants, we'll come back to that in due course, but we have, of course, looked

1 at those. I think the first issue we have to address is funding, in the light of the  
2 *PACCAR* judgment.

3 So it's Mr Moser and can I just ask, for the purpose of the transcript, when counsel first speak  
4 would you identify who you are and whom you represent. Mr Moser, where are we on  
5 funding?

6 **Submissions by Mr Moser**

7 **MR MOSER:** I am grateful, sir. I am Philip Moser and I represent Mr Gutmann, along with  
8 Ms Littlewood.

9 We've dealt with this at paragraphs 2 following of our skeleton. The first point that we make  
10 is that we consider that the LFA is still enforceable as it stands, on the basis that the  
11 unlawful damages-based aspects can be severed under the terms of the existing LFA  
12 which contains at clause 35, an express clause for severance in such circumstances.

13 **THE PRESIDENT:** Is your funder willing to continue to fund without those provisions?

14 **MR MOSER:** Well, the answer to that is a procedural one, if I may. Certainly at the moment,  
15 you may take it that nobody is appearing unfunded today.

16 **THE PRESIDENT:** Yes.

17 **MR MOSER:** We have also behind our letter of 20 September, produced a proposed revised  
18 version. What the other side, what the defendants have proposed and we have  
19 agreed, and this is news to the Tribunal because it happened this morning --

20 **THE PRESIDENT:** Yes.

21 **MR MOSER:** -- is that we produce any amendments that we seek to rely on by 4 October and  
22 that there then be the timetable produced by -- I think it's First MTR who have in their  
23 skeleton, quite a useful, if I may say so, table, comparative table of proposed dates.  
24 At the end of their --

25 **THE PRESIDENT:** Yes.

26 **MR MOSER:** -- skeleton, we'll see page 20, "Draft timetable."

27 **THE PRESIDENT:** Yes.

1 **MR MOSER:** And on page 20, they've suggested a series of dates for filing and serving any  
2 amendments and then any submissions -- see if it's agreed; if it's not agreed, we may  
3 need to ask the Tribunal to rule either in writing or orally, and that's agreed.

4 **THE PRESIDENT:** That's agreed, so you are content with that timetable. Presumably  
5 First MTR is content with it because they've put it forward?

6 **MR MOSER:** Yes.

7 **THE PRESIDENT:** And can I just ask, are the other two groups of defendants content with  
8 that timetable?

9 **MR HARRIS:** Sir, Paul Harris, appearing on behalf of LSER and GTR. We are content with it  
10 as a timetable, but there is a submission I would like to make to you which is that this  
11 should all be done on an unless order basis, for reasons that I would like to elucidate  
12 in a moment. This is a serious stage in this case. Funding is a –

13 **THE PRESIDENT:** Before you do that, can I just come back to you in a minute but –

14 **MR HARRIS:** On the dates themselves.

15 **THE PRESIDENT:** Yes, the dates themselves. For the third group, Mr Ward?

16 **MR WARD:** We proposed it.

17 **THE PRESIDENT:** You proposed it. I am sorry, I have it the wrong way round, haven't I?  
18 Yes. So it's Mr Scott, isn't it?

19 **MR SCOTT:** My Lord, yes, Jonathan Scott appearing for Stagecoach. Yes, we agree those  
20 dates as well.

21 **THE PRESIDENT:** Right. So the dates, we are content with those dates, it seems sensible,  
22 it's quite a tight timetable. Right. Now, Mr Harris, you want it as an unless order.

23 **MR HARRIS:** Yes. I don't wish to take up unnecessary time but can I just remind the Tribunal  
24 respectfully of one or two background points to how we've reached today without an  
25 enforceable funding agreement. I take Mr Moser's first point first. He says that there  
26 is an enforceable funding agreement here today but we can't, with respect, see that at

1 all. He says that it could be cured by severance. Well, that may or may not be right  
2 but it hasn't been cured by severance.

3 **THE PRESIDENT:** Anyway, can I interrupt you. Even if it is technically correct, it's clear that  
4 Mr Gutmann and Woodsford are seeking to amend it.

5 **MR HARRIS:** It's not clear. With respect, sir, that's not clear. What has happened today is  
6 that the CR, so Mr Gutmann alone has put forward proposed draft amendments. There  
7 has been no response, at least in the bundle from the funder, Woodsford. So these  
8 are unilateral proposed amendments and no more.

9 Secondly, they are put forward on the basis they are not even the final proposal from the CR.

10 To the contrary, the CR has expressly reserved in writing his ability to change these  
11 proposed draft amendments that are only unilateral to begin with.

12 So what we have as at today is a document that cannot really form the basis of any serious  
13 discussion because it's only from one side and it's a moving feast in any event. What  
14 you see, we say, is more serious about this, as Mr Moser understandably tries to skate  
15 over, is that the Class Representative has had plenty of time to put forward an actual  
16 draft revised set of arrangements with the input of the funder, for approval either by us  
17 and/or by the Tribunal. He's had plenty of time to do that since the *PACCAR* judgment  
18 at the end of July. Other people in other cases have managed to do it perfectly  
19 sensibly. Only on the 15<sup>th</sup> of this month there was ordered to be provided in another  
20 case, the *C/CC* collective proceedings case, the provision of actual revised draft  
21 amendments and that was done. It's with a view to, then, the question of enforceability  
22 of the new arrangements being determined by the Tribunal prior to taking any further  
23 steps in that litigation. That's important because what has happened today, because  
24 we say due to the irresponsibility, I put it that highly, on the part of the  
25 Class Representative, is we are all busy spending money on the other matters for  
26 today, including this CMC generally, in circumstances where this Tribunal does not  
27 even know whether there is a potentially lawful set of funding arrangements in this

1 case, or whether there is even capable of being one. Because you have not been  
2 presented with something that you could have taken a look at and said: oh well, on the  
3 face of it, it looks as though that might be capable of being lawful. You have not even  
4 been presented with that.

5 This is all entirely down to the CR. That's why I am trying to make more of this and put it on  
6 an unless order basis. The Tribunal – we've written no less than five letters since  
7 *PACCAR*.

8 **THE PRESIDENT:** We saw that from your skeleton.

9 **MR HARRIS:** There's no excuse either. So that's my next point. What has been said in one  
10 of the letters on behalf of the Class Representative is that: "The holiday period has not  
11 helped". Even the holiday period is not put forward as a reason why this irresponsible  
12 course has been taken. And even if that were the only reason, it's the only reason  
13 that's been advanced, that wouldn't be good enough. Plainly the holidays have to be  
14 dealt with on a matter of this serious moment and in any event, it's been dealt with,  
15 despite the holiday period, in the other cases.

16 Worse, my Lord, sir, what I emphasise is that so far as we are aware, the  
17 Class Representative has not corresponded with you, the Tribunal, about this matter.  
18 It became clear to the Class Representative it must have been at least some weeks  
19 ago, not least of all because we'd written several letters on this topic. It must have  
20 been clear at least some weeks ago they were not going to be in a position to provide  
21 for the Tribunal's approval today or at least directions to assess the approval of some  
22 new actual arrangements put forward, it must have been clear weeks ago and they  
23 never told the Tribunal that there was, therefore, going to be a CMC, where all of this  
24 money is going to be spent, in circumstances where there are no enforceable funding  
25 arrangements. And we take exception to that. We say there was a clear duty on the  
26 part of the Class Representative to inform the Tribunal that as at today, on the face of

1 it, their class proceedings should not continue. They do not have enforceable funding  
2 arrangements and that's a prerequisite for a collective proceedings order.

3 So technically today, you would be in a position to revoke. Now I am not urging you, obviously,  
4 to revoke and we've agreed that it will have to be dealt with.

5 **THE PRESIDENT:** Just one moment. If there should eventually be an order your costs are  
6 paid, that comes out of the insurance, doesn't it?

7 **MR HARRIS:** But I have some more points about the insurance because this is also unclear.  
8 You are right but there are a number of points about that. If you don't mind, I will briefly  
9 address you on them.

10 **THE PRESIDENT:** Yes.

11 **MR HARRIS:** What we are saying is against that background, it should and could have been  
12 done but it has not been, and we have not had a proper reason for why it's not been,  
13 it has been done properly in other cases before expensive steps are taken and they  
14 should and could have corresponded with you, at least to give you the opportunity to  
15 say: you know what, I don't want to have a CMC with all this expense, I don't want to  
16 be potentially making orders for further expense. On the agenda for today are things  
17 like orders for expert evidence, orders for survey, orders for disclosure. They are all  
18 expensive steps. They should have written to you and we were urging this and  
19 said: look, well, actually, we just need a little bit more time to come up with something  
20 on the funding front. At least given the Tribunal the option to say: it's more efficient  
21 and more protective of the Tribunal's resources and the defendants' resources for this  
22 CMC to have been put off to a time when they can produce these new funding  
23 arrangements. It's aggravated by the fact that what we are now told, by dint of  
24 Mr Moser agreeing to 4 October, they actually only need a couple more weeks.  
25 Apparently notwithstanding we had to write five or so times and we said: it must be  
26 done in good time for this CMC, when all this money is going to be spent, apparently,  
27 all of a sudden, we are now told there will be revised agreed funding arrangements in

1 only two weeks' time. They should have told you that. What we say is that that is  
2 directly at their door and it's against that background that I say: okay, realistically, they  
3 have to be given one more chance. They have to be given a chance to actually put  
4 something forward but it should be the last chance. They've had the opportunity,  
5 they've missed it, they've behaved irresponsibly and it should now be on an unless  
6 order basis. Unless they put forward a revised proposal, by which I mean, obviously,  
7 jointly proposed by the funder as well, by this date, then either you should order that  
8 the CPO be revoked because they won't have in place funding arrangements, or, as  
9 a minimum, everything should be stayed, including the ongoing expenditure for what  
10 I apprehend might be further orders of the Tribunal today.

11 There's a lot of money that has to be spent on disclosure and potentially expert evidence and  
12 on the survey and we say that's not acceptable, in circumstances where they haven't  
13 even put forward proposed jointly revised arrangements and it's all at their door.

14 Just quickly to finish off, you asked me about the insurance. There are two points. The first  
15 one relates to the indemnity principle and the second one relates to the insurance. We  
16 have asked squarely whether, as matters stand and given that the *PACCAR* judgment  
17 has rendered the current funding arrangements unenforceable, we have asked  
18 squarely whether Mr Gutmann is still liable to pay his own lawyer's fees. The reason  
19 we've asked that is because it seems to us a very odd arrangement that on a true  
20 construction of all of the interlocking agreements that Mr Gutmann must have (many  
21 of which, of course, we've not seen), it seems to us a very odd arrangement that he's,  
22 nevertheless, personally liable on an ongoing basis or possibly even a historic basis,  
23 to pay his lawyers, in circumstances where he doesn't have an enforceable right to  
24 obtain funding from his funders. Mr Gutmann, with great respect, doesn't have the  
25 deep pockets for litigation of this type and we suspect the true construction of the  
26 arrangements he has with his lawyers and funders must be or could well be that he's  
27 not liable to pay them unless there's enforceable funding. But if that's right and we've



1 asked about this and we've been shut down - "we are not telling you", we've been told  
2 - we say that gives rise to a very profound potential problem which is if the indemnity  
3 principle is not and has not been engaged, then we are never due to pay any cross  
4 order to them but we've already been told to pay and we've paid. LSER alone has  
5 paid just a shade under £350,000 to date.

6 **THE PRESIDENT:** Mr Harris, if you are saying there's something in the existing arrangements  
7 that offends against the indemnity principle, that would have been a matter to be raised  
8 when those arrangements were approved. That's not a new matter, is it?

9 **MR HARRIS:** No, sir, it arises from the fact that we now know that the funding arrangements  
10 are unenforceable. This didn't arise at a point in time when they were enforceable.  
11 Because if they were enforceable, I wouldn't be suggesting that there would be -- there  
12 would be no logical reason why, when he had access to an enforceable right of access  
13 to funding - Mr Gutmann wouldn't have been liable to pay his lawyers. What I am  
14 saying is though, there's a big question mark. Now it turns out he's never had an  
15 enforceable right to funding, on a true construction of the arrangements, is he,  
16 nevertheless, as a single, loan individual, liable to pay, potentially, millions of pounds  
17 to his lawyers?

18 **THE PRESIDENT:** But how does that affect the insurance?

19 **MR HARRIS:** It doesn't, I am not talking about the insurance.

20 **THE PRESIDENT:** I thought you were on insurance.

21 **MR HARRIS:** No, I am going to come on to insurance.

22 **THE PRESIDENT:** We have a lot to get through. Can you -- it seems to me one question is,  
23 are you covered for your costs at the moment under the insurance? That's what I want  
24 to know.

25 **MR HARRIS:** I will move on to that. So there is a distinction to be drawn. In the LSER case,  
26 we've been told in a letter that there's "adequate ATE insurance", and we have to take  
27 that -- it's a solicitor's letter -- as being accurate, in which case, at least our potential

1 costs exposure today, if there is any, will be covered in that case. But in the GTR case  
2 there's no ATE insurance. Instead, we are told there's something called a deed of  
3 indemnity. We've never been provided with a copy and it's not even described in the  
4 recent correspondence as being adequate. That word doesn't appear. There's  
5 a further question about that. Doing our best under the redacted LFA that's been  
6 eventually provided only four working days ago for the purpose of this hearing,  
7 somebody has to pay for the deed of indemnity. There's something called an adverse  
8 costs indemnity fee.

9 We can't work out exactly who is paying for that but it's presumably a meaningful number  
10 because there's vast redactions in the agreement.

11 **THE PRESIDENT:** The deed exists, does it?

12 **MR HARRIS:** We are told there is a deed of indemnity. We've not been provided with it.

13 **THE PRESIDENT:** So it's been paid?

14 **MR HARRIS:** No, it may not have been paid. We don't know, we can't tell.

15 **THE PRESIDENT:** If the deed of indemnity is given in consideration --

16 **MR HARRIS:** Because it may be, we can't tell, it may be that the idea is that the fee for the  
17 deed of indemnity is payable out of the damages at the end. We just don't know. But  
18 that would give rise to potential *PACCAR* issues. We just don't know.

19 **THE PRESIDENT:** Sorry, this is a deed of indemnity for your costs?

20 **MR HARRIS:** That's what we understand it to be.

21 **THE PRESIDENT:** So your costs potentially arising if Mr Gutmann loses. He'll have a big  
22 liability for costs.

23 **MR HARRIS:** That's right.

24 **THE PRESIDENT:** How can the fee be paid out of damages because you won't get any?

25 **MR HARRIS:** We don't know, there is a big question mark.

26 **THE PRESIDENT:** Mr Harris, it just doesn't make sense, what you've just said, does it?

1 **MR HARRIS:** My Lord, we are shooting in the dark as well because the point is, my Lord, in  
2 the LFA that's finally been provided, we don't know how our costs are going to be  
3 covered. We're told there's a deed of indemnity, we haven't been provided with it, it's  
4 not described as adequate, we don't know how it's being paid for. I put these points  
5 all together and it leaves an unsatisfactory state of affairs and that's why I say this  
6 needs to be taken, with respect, more seriously than Mr Moser is taking it.

7 It's not a question of: oh, this is just pure case management, let's have a timetable, let's deal  
8 with it another day;. It should have been dealt with today and it's --

9 **THE PRESIDENT:** Yes, well we've got that point.

10 **MR HARRIS:** Thank you, my Lord.

11 **THE PRESIDENT:** Anyone else from the other defendants. Mr Ward?

12 **MR WARD:** Thank you, sir. Tim Ward for First MTR. I want to make a slightly more granular  
13 point about the proposal the Class Representative has made for the amendments of  
14 the LFA and we can find it, please, under tab 64 of the correspondence bundle and  
15 I would like to go to page 469 --

16 **THE PRESIDENT:** Bundle B?

17 **MR WARD:** I don't have that numbering.

18 **THE PRESIDENT:** You say tab 64?

19 **MR WARD:** Tab 64 of the correspondence bundle.

20 **THE PRESIDENT:** Just a moment. That is a letter from Mr Gutmann's solicitors dated  
21 20 September. Is that right?

22 **MR WARD:** That's right, sir. You'll see at paragraph 3 he says:

23 "For the above purpose only, [in other words this CMC], we enclose a non-confidential version  
24 of a draft amended and restated LFA which contains the CR's proposed amendments."

25 You heard Mr Harris already make the point we've got no reason to think -- or any information  
26 about what the funder themselves thinks about it. But I was very struck, listening to  
27 Mr Moser a few moments ago, that when you asked if the funder is willing to continue

1 to fund the litigation, he gave an answer which was not clear to that and referred to  
2 matters of process.

3 But what I want to show you briefly is that this draft doesn't even provide an answer to what  
4 the proposed funding arrangements will look like. May I take you, please --

5 **THE PRESIDENT:** Can I interrupt you. Given that this draft is going to be superseded by the  
6 actual amendments to be served by 4 October --

7 **MR WARD:** Yes.

8 **THE PRESIDENT:** -- next week, is there any point spending time on this draft?

9 **MR WARD:** The only point, sir, is we are here -- really, I am echoing Mr Harris' points that we  
10 are here, arguing about very expensive matters, such as disclosure and the proposal  
11 that's been provided, in an attempt to head off this complaint, contains a giant gaping  
12 hole in it. So we are in a situation of very radical uncertainty about what this will end  
13 up looking like. I make these points in support of Mr Harris' application that there  
14 should be an unless order.

15 **THE PRESIDENT:** Yes.

16 **MR WARD:** This will only take one minute, if I may. If you think it's a waste of time, sir, of  
17 course that's the last thing I want to do.

18 **THE PRESIDENT:** If you say it takes a minute and it really does --

19 **MR WARD:** It really does. If you turn, please, to page 469, you can see that there is a red  
20 crossing out which was the damages-based component of the fee. In other words,  
21 percentage of proceeds.

22 **THE PRESIDENT:** Yes.

23 **MR WARD:** There are two different tables, depending on exactly how and if the CAT awards  
24 costs. The new mechanism is over the page at 471. It talks about what will happen.  
25 You can see it in red:

26 "If the costs exceed what's described as the original costs limit figure of 6 million ... "

1 And you'll be aware that by August 2021, the claimants had already spent over 2 million on  
2 certification alone, so that's a foregone conclusion, especially now we have three trials.

3 At the bottom, it says in red:

4 "If the costs limit is so increased, the fixed fee will increase by X pounds, to be agreed with  
5 the funder, for each £100,000 tranche."

6 That's a matter of great concern: (a), we don't know the figure and (b), the fee seems to be  
7 structured in a way that will be difficult to square with the overriding objective. But at  
8 the moment, the point is only the critical information is missing, both as to what even  
9 the Class Representative is proposing, never mind what the funder thinks about it. Sir,  
10 that's all I wish to say.

11 **THE PRESIDENT:** Yes. Mr Scott, do you want to say anything?

12 **MR SCOTT:** No, I have nothing further.

13 **THE PRESIDENT:** Yes, just one moment.

14 Mr Moser, can you just clarify two things. One is as regards the defendants' costs and the  
15 coverage of their costs, including the costs of today, which may be -- say we order,  
16 say, costs in the case or whatever and then for some reason, no funding agreement is  
17 ever concluded, the ATE insurance, that policy is in place, as I understand it?

18 **MR MOSER:** It is, yes.

19 **THE PRESIDENT:** That will, as I understood it at the time of the initial hearing, that will cover  
20 the costs of the litigation which is the subject to that policy; is that right?

21 **MR MOSER:** Nothing has changed in that respect and that's in our letter of 20 September --

22 **THE PRESIDENT:** Yes.

23 **MR MOSER:** -- at tab 64.

24 **THE PRESIDENT:** And that policy is in which -- because we've got two cases here, haven't  
25 we, or three cases, I think, together? Which cases does that cover? Because in the  
26 skeleton, you say it's the SE SW proceedings, so it's the first lot; is that right?

27 **MR MOSER:** It's 1304 and 1305 of 29.

1 **THE PRESIDENT:** So Southeast and Southwest Trains and various people?

2 **MR MOSER:** Yes.

3 **THE PRESIDENT:** What about the GTR proceedings? That's something different. That's  
4 a deed of indemnity; is that right? I am looking at your skeleton at paragraph 5.

5 **MR MOSER:** Forgive me, the skeleton at paragraph 5. Yes, that's right.

6 **THE PRESIDENT:** The deed of indemnity which -- has that deed been disclosed to GTR?

7 **MR MOSER:** If you cast your mind back, what happened was that there was already a deed  
8 of indemnity in the first two cases and then at some point it was backed by an ATE as  
9 well and that deed of indemnity was -- I don't think -- again, that was provided at the  
10 time of filing, so they've seen that deed of indemnity. Then in relation to Trains Two --

11 **THE PRESIDENT:** Was it extended to cover the second group of --

12 **MR MOSER:** No, there was a separate deed of indemnity given in relation to Trains Two.

13 **THE PRESIDENT:** Yes, that's the one I am asking about.

14 **MR MOSER:** Yes.

15 **THE PRESIDENT:** Has that separate deed of indemnity been disclosed?

16 **MR MOSER:** It hasn't but it can be. Nobody has ever asked for it until today.

17 **THE PRESIDENT:** You've not been asked for it?

18 **MR MOSER:** No.

19 **THE PRESIDENT:** I think probably it should be disclosed. It's in existence.

20 **MR MOSER:** It's absolutely in existence, yes.

21 **THE PRESIDENT:** So it's not something, therefore, whatever the payment arrangements are,  
22 that falls away, as I understand it --

23 **MR MOSER:** No.

24 **THE PRESIDENT:** -- whatever happens to the funding.

25 **MR MOSER:** Not as I understand it. I can't say I have its terms at the forefront of my mind  
26 as I speak but I would be very surprised.

27 **THE PRESIDENT:** I think it ought to be disclosed if there's --

1 **MR MOSER:** It's been signed as a deed, so it exists.

2 **THE PRESIDENT:** Yes. That was my understanding. I don't see how, therefore, it can be  
3 revoked by one side. Yes.

4 **MR MOSER:** Like so much of this, sir, we are slightly surprised -- well perhaps one shouldn't  
5 be surprised in this case by the submissions being made, in particular by Mr Harris,  
6 because when I said that we agreed to the defendants' suggestions, it wasn't just -- this  
7 may be a mistaken impression that has arisen -- Mr Ward's clients who had put forward  
8 this suggestion. Slaughter and May wrote to us on 25 September on behalf of all of  
9 the defendants, including Mr Harris --

10 **THE PRESIDENT:** Yes.

11 **MR MOSER:** -- with these complaints and at the end of that letter which is at tab 84 of the  
12 bundle, after going through all of the complaints that we've just heard rehearsed again,  
13 they say:  
14 "This situation must be resolved without further delay. We have proposed directions to this  
15 effect in the enclosed timetable."  
16 They enclose the timetable that now forms the tail end of Mr Ward's skeleton argument. That  
17 was on behalf of all of these defendants and we've agreed to it.

18 **THE PRESIDENT:** Yes.

19 **MR MOSER:** So for us to be ambushed now with a whole new series of requests for unless  
20 orders and goodness knows what is not only unnecessary but also, if I may say so,  
21 quite improper.

22 **THE PRESIDENT:** Was the unless -- you'll appreciate we have not read the correspondence.

23 **MR MOSER:** No.

24 **THE PRESIDENT:** Was that application for an unless order made in correspondence?

25 **MR MOSER:** No:  
26 "We've enclosed an alternative draft timetable. It addresses the concerns outlined above."

1 "Addresses the concerns outlined above", and that's exactly what we are going to do. When  
2 this draft comes back on 4 October, it will be express that it is the draft being put  
3 forward following the ongoing negotiations with the funders.

4 **THE PRESIDENT:** As I understand it, it is a draft agreed by Woodsford.

5 **MR MOSER:** Exactly.

6 **THE PRESIDENT:** I think we'll interrupt you for a moment. Just give me a moment.

7 **MR MOSER:** So any amendments by then would be agreed amendments.

8 **THE PRESIDENT:** Yes, I think we'll stop there.

9 **MR MOSER:** There we are.

10 **THE PRESIDENT:** We've got a lot to do. We are not going to make an unless order. If a party  
11 seeks an unless order which is a draconian order, they should do so in correspondence  
12 before the hearing and I am told you didn't.

13 **MR HARRIS:** No, sir, we went further. Can I show you in tab 49. This is not a surprise at all,  
14 we've written multiple letters. It doesn't use the phrase "unless order" but it says at tab  
15 49, paragraph 7, on page 383 of the bundle --

16 **THE PRESIDENT:** Yes.

17 **MR HARRIS:** This is probably --

18 **THE PRESIDENT:** Revocation of the CPO.

19 **MR HARRIS:** Exactly which is even more extreme. So what we are saying now we said: stay  
20 or revocation. All I am saying now is something that's far less draconian than that.  
21 They've been clearly on notice.

22 **Directions**

23 **THE PRESIDENT:** We are not going to make an unless order, as I have just said. Thank  
24 you, Mr Harris. We think that, while matters possibly could have been done more  
25 quickly, the real concern of the defendants is that their own costs are covered. That,  
26 as we understand it, remains the case for the Southeast, Southwest proceedings, with  
27 an insurance policy that has been there all along; and as regards the Govia



1 proceedings, there is a deed of indemnity. That deed has been signed. It cannot,  
2 therefore, be unilaterally revoked. Mr Harris said his clients have not seen it. We have  
3 now been assured by Mr Moser that his clients will disclose it and that they would have  
4 disclosed it earlier if they had been asked for it. So that should be disclosed and the  
5 legitimate concern of the defendants is for their own costs.

6 As regards the funding arrangements, the timetable is very tight and while, of course, it is  
7 important to ensure that the Class Representative has funding to take the proceedings  
8 forward, the fact that they have agreed to a timetable whereby the agreed  
9 amendments -- and by agreed, I mean agreed with the funder -- will be put forward  
10 next week, suggests that they are very close to agreement and that, therefore,  
11 a funding proposal is imminent and there is a tight timetable for agreement.

12 We do not agree that it would have been appropriate for the Class Representative to seek to  
13 re-fix this CMC. Fixing a CMC with this many parties' representatives, as we all know,  
14 is not straightforward. There are always problems on dates and delay in dealing with  
15 the various matters that we have to do for a trial that is due to take place next summer  
16 would have been extremely undesirable.

17 So we think the Class Representative was quite right in not seeking to adjourn this hearing.  
18 We will direct that the timetable is followed, as set out in the draft provided to us and  
19 just to make clear that the Class Representative is to file and serve any amendments  
20 to the LFA, as agreed with the funder, so we all know where we are. There will not be  
21 a proposal. We also understood from the Class Representative's skeleton argument  
22 that there has been liaison with the funder. The documents put forward to date are not  
23 simply a unilateral proposal, albeit, as Mr Ward pointed out, one of the key elements  
24 of the proposal is still unspecified.

25 So that is how we will deal with the funding point.  
26

1 **THE PRESIDENT:** I think then we move on to -- and I think it's sensible to consider the  
2 survey, perhaps, first before we get into the -- sorry, the list of issues, the second item.  
3 We are grateful for the draft agreed list that we've received and I have no doubt quite a lot of  
4 toing and froing went on into the production of that document. We note that there are  
5 only two points outstanding. The first one is at paragraph 10(a).

6 **MR MOSER:** I have good news on that which is that 10(a) is now agreed.

7 **THE PRESIDENT:** Good. It wasn't.

8 **MR MOSER:** It wasn't.

9 **THE PRESIDENT:** We are not surprised and we are left with a significant point which is  
10 concerning the sale of boundary fares by third parties which really starts at  
11 paragraph 12 --

12 **MR MOSER:** Yes.

13 **THE PRESIDENT:** -- and involves also paragraph 17. That's the second trial. We have  
14 considered this between Mr Holmes and myself and I will tell you where we've got to  
15 in our thinking on it.

16 We are not attracted by the defendants' proposal at 12(d). That seems to us to consider  
17 a matter in the abstract without factual findings and that is most unsatisfactory because  
18 the way it turns out may be affected by the factual findings.

19 We are also not very attracted by, Mr Moser, your client's formulation at 12(d) which again  
20 makes certain assumptions such as "widely available". What does that mean?  
21 Suppose they are not widely but could be more available, and loss of sales and so on.  
22 It seems to us that the correct formulation is the defendants' formulation at issue 17.  
23 That is the issue.

24 The real question is: should that issue come into trial one or trial two? And if it shouldn't come  
25 into trial one, then we shouldn't have either of these 12(d)s. So that's our thinking at  
26 the moment and what we would like to hear you on, and we haven't formed a view,  
27 even provisionally, is whether it works better in trial one or in trial two. We've read

1 what you say about it but we'd like to hear submissions on that. If you want to push  
2 back on that and we say: no, we think our 12(d) would work as a compromise, of  
3 course you can seek to address that but I think you will understand where we are  
4 coming from.

5 **MR MOSER:** I do. I seek to address it, I hope, as pragmatically and constructively as I can.

6 The phrasing of the list of issues, as, sir, you pointed out at the last CMC, is only  
7 a guide. It does not replace the pleading. So perhaps the exact wording is to some  
8 extent moot, provided it's clear what we are talking about.

9 **THE PRESIDENT:** Yes.

10 **MR MOSER:** What we are talking about is the sort of effect that you, sir, described as  
11 "umbrella type" effect.

12 **THE PRESIDENT:** Yes.

13 **MR MOSER:** Therefore, if we look at our pleading that underlies this -- that is at bundle A, so  
14 core bundle, tab 6, page 23, we see at paragraph 69 on page 23 --

15 **THE PRESIDENT:** This is in the First MTR?

16 **MR MOSER:** This is in First MTR.

17 **THE PRESIDENT:** It's similar in all of them?

18 **MR MOSER:** It's very similar in all of them, yes. 69, so abuse, section 18(2), not exhaustive,  
19 and there's reference there in the penultimate sentence to "directly or indirectly  
20 imposing unfair purchase or selling prices or other unfair trading conditions." If we turn  
21 on to page 28 at paragraphs 84(d) and 84(e), that's the issue we are really addressing  
22 here:

23 "The defendants are also liable for any losses caused by the failure of third-party suppliers,  
24 such as Trainline, to make boundary fares sufficiently available, on the basis that such  
25 third parties act as the TOC's agents."

26 That's point number 1 but the second point, 84(e):

1 "Further or alternatively, any losses arising out of such failure by third parties fall to be  
2 attributed to the defendants' conduct in any event."

3 There's a reference in that 84(e) to the case of Kone --

4 **THE PRESIDENT:** Yes.

5 **MR MOSER:** -- v OBB.

6 **THE PRESIDENT:** Umbrella pricing, yes.

7 **MR MOSER:** A well known case:

8 "If boundary fares had been widely available and offered from the defendants' own outlets,  
9 this would have influenced the behaviour of competing third-party sellers and customer  
10 demand ... "

11 And so on. So that's what was reflected in our wording, taken simply from the pleadings. I  
12 accept that it has a certain amount of advocacy, I suppose, but if I can just remind  
13 you -- I don't think you need turn it up -- but in Kone itself, the relevant paragraph is  
14 paragraph 34. It's at tab 9 of the authorities bundle but it's the analogy with umbrella  
15 pricing:

16 "... and the victim of umbrella pricing may obtain compensation for the loss caused by the  
17 members of the cartel, even if it didn't have contractual links. Where it is established  
18 that the cartel at issue was, in the circumstances of the case and in particular the  
19 specific aspects of the relevant market, liable to have the effect of umbrella pricing  
20 being applied by third parties acting independently and in those circumstances, the  
21 specific aspects could not be ignored. It's for the referring court to determine whether  
22 those conditions are satisfied."

23 **THE PRESIDENT:** Basically, what you are saying is that this issue is the paragraph 84(e)  
24 issue.

25 **MR MOSER:** Yes.

26 **THE PRESIDENT:** Yes, I think --

1 **MR MOSER:** Provided we are all -- we have all heard this. Provided we are all aware and  
2 content that the words at issue 17 are the paragraph 84(e) words in list of issue form,  
3 we don't have a principled objection to whatever the words on the page say.

4 We, of course, don't want to be told later: ah, no, it's only some form of strict causation. It's  
5 not. It's Kone umbrella causation.

6 **THE PRESIDENT:** Yes. Well if one said at the end of that, "as alleged in paragraph 84(e)",  
7 or whatever the equivalent is in the other pleadings, that would cover the point, wouldn't  
8 it?

9 **MR MOSER:** That would cover the point, yes.

10 **THE PRESIDENT:** Yes, so that's -- I mean I think that's a point on the wording which, as you  
11 say, is not the key point. The key point is what is the best course. We can see there  
12 are arguments both ways.

13 **MR MOSER:** I can see there are arguments both ways. We've put in our skeleton argument  
14 what we have to say about that. We think that it's better to have this heard in the first  
15 trial because the first trial is supposed to be for the consideration of liability and the  
16 defendants' liability for what happened by way of either their agents which will have to  
17 be considered anyway in the first trial or the related umbrella type effect is, by  
18 definition, a matter of liability.

19 The defendants themselves use the term liability when they write to us and they say -- they,  
20 in their suggestion, does this make the defendants liable for the third parties' conduct.

21 **THE PRESIDENT:** Mr Moser, I don't think we are terribly interested on the sort of taxonomy,  
22 whether it's classified as liability or causation. What we are really interested in is what  
23 is the most sensible thing to do. This is an issue in the case. It will come up either in  
24 trial one or trial two. Where can it most sensibly be accommodated. Sensibly, in terms  
25 of timing, in terms of what's involved and in terms which we do bear in mind and several  
26 have alluded to, of potentially assisting in the settlement, should you win in trial one,  
27 at least on some points. Indeed, you'll then know whether you've succeeded or not on

1 this point. So those are the considerations, the practical considerations rather than  
2 whether this is to be classified as liability or causation.

3 **MR MOSER:** Indeed, and settlement is probably one of the two most important aspects. I will  
4 come to the second one in a moment. If we are talking about settlement, that must be  
5 on the assumption that we've won at least something in trial one. If we've won at least  
6 something in trial one, then a substantial part of the potential damages will relate to  
7 the third parties.

8 **THE PRESIDENT:** Can you remind us what proportion, in very headline terms, of tickets are  
9 sold by third parties. I think it was in one of the reports originally but I've not gone back  
10 to have a look, but how significant is it?

11 **MR MOSER:** It was surprisingly significant. I hear mention behind me about a third. I had  
12 20 per cent in mind but someone is going to check that.

13 **THE PRESIDENT:** 20 to 30 per cent.

14 **MR MOSER:** 20 to 30 per cent, so it's not insignificant at all. So it could affect, potentially  
15 fatally, the chances of successful settlement between the first and the second trial  
16 which was the principal factor that motivated the split, according to your findings on  
17 the last occasion.

18 The second point that's interrelated with this is this question of experts. It may well be that  
19 I have to address you on experts and you'll have to hear the arguments on experts  
20 before you can conclude which trial to put this issue into.

21 The other sides have said: oh -- they say they need an economics expert for 12(d), because  
22 you do a fairly standard sort of umbrella type analysis of how this works and, therefore,  
23 that speaks to it being better dealt with in trial two.

24 It is certainly true we say an economics expert in relation to 12(d), so quite a confined area of  
25 economic expertise and expert evidence is going to be of assistance. We also say --

26 **THE PRESIDENT:** Just to be clear --

27 **MR MOSER:** Yes.

1 **THE PRESIDENT:** -- you agree that -- forget 12(d), we've reformulated issue 17 to say "as  
2 alleged in paragraph 84(e)."

3 **MR MOSER:** Yes.

4 **THE PRESIDENT:** That issue legitimately justifies, on that issue, an economist?

5 **MR MOSER:** I don't agree it, in the sense that nobody has yet agreed with me on that but --

6 **THE PRESIDENT:** You say the defendants have made the point.

7 **MR MOSER:** The defendants --

8 **MR WARD:** The claimant is replying for us.

9 **THE PRESIDENT:** What I am asking is if it were in trial one, would you want permission to  
10 call an economist on that issue?

11 **MR MOSER:** Yes, absolutely, and if Mr Ward is happy to agree, I am certainly happy to agree  
12 it.

13 **THE PRESIDENT:** Right, that's all I wanted to know.

14 **MR WARD:** I am not happy to agree it --

15 **THE PRESIDENT:** Never mind. You say you would wish to have an economist, so there  
16 would be an economist on that. I understand that. That's all.

17 **MR MOSER:** Indeed. They, of course, want to have it both ways. I can see --

18 **THE PRESIDENT:** Never mind that. You tell me why you think this should be in trial one?

19 **MR MOSER:** In trial one. The other aspect of this application on experts which I am going to  
20 come to is that we are saying it will also be useful for the Tribunal to have an industry  
21 expert on some of these issues. And the issues that we mention and I come to that  
22 are 8, 9, 11 and 12(d). So if we have -- the other side of the experts' coin is if the  
23 Tribunal agrees with me that it would be useful to have an industry expert to talk about  
24 how ticketing works and so on, then that expert is going to attend trial one, come what  
25 may, because there is certainly no possibility of hiving off all of those issues to trial two  
26 because then you don't have a trial one.

27 **THE PRESIDENT:** Yes.

1 **MR MOSER:** So if that happens, it would be convenient to have that expert speaking to 12(d)  
2 in trial one as well and that expert probably doesn't have to come back for trial two.

3 **THE PRESIDENT:** Well, yes, but I mean -- yes, I see that. It's a distinct question.

4 **MR MOSER:** It is.

5 **THE PRESIDENT:** The one is looking at, as I understand it and you'll come back to it when  
6 you deal with the experts, the industry experts, about how tickets can be sold and what  
7 can be done and what is feasible.

8 This is dealing with something rather different which is the competitive effect. If the TOCs  
9 were all selling boundary fares more widely, what would be the effect on third parties  
10 like Trainline.

11 **MR MOSER:** Yes.

12 **THE PRESIDENT:** So I mean, if the industry experts had to come back for trial two, they  
13 would be doing something quite different and distinct.

14 **MR MOSER:** They would be doing a discrete job on 12(d), absolutely, but they would be  
15 doing that discrete job. At least they'd be there in one go, there would be less  
16 duplication, inevitably, so that's why we say this really belongs in trial one, otherwise  
17 trial one is only about a certain percentage of the claim in relation to liability and that,  
18 I submit, wasn't the intention because liability as to third parties would remain  
19 unresolved, unless of course, we succeed on agency.

20 **THE PRESIDENT:** Yes, well -- or if you fail on abuse.

21 **MR MOSER:** If we fail on abuse --

22 **THE PRESIDENT:** In which case you don't need to explore third-party --

23 **MR MOSER:** There is that. That's something I don't envisage.

24 **THE PRESIDENT:** No.

25 **MR MOSER:** Naturally it's something that the Tribunal wants to take into account.

26 **THE PRESIDENT:** Yes. I mean one is looking, as I say, at a sensible way forward in terms  
27 of trial management.



1 **MR MOSER:** Yes, but settlement leverage and possibilities would be greatly reduced and,  
2 therefore, we say in a world where the inclusion of 12(d) would not, in my submission,  
3 lead to disproportionate extra time or cost, it would be --

4 **THE PRESIDENT:** Yes, apart from your economist, would you have any factual evidence on  
5 this?

6 **MR MOSER:** Well, no. There would be perhaps the opinion evidence, also, of the industry  
7 expert.

8 **THE PRESIDENT:** Yes.

9 **MR MOSER:** That would be quite discrete.

10 **THE PRESIDENT:** The economist would be quite -- it wouldn't be extensive economic  
11 evidence, would it, on this?

12 **MR MOSER:** No, it ought to be quite brief.

13 **THE PRESIDENT:** Just a minute, how much extra trial time do you think this issue would  
14 involve?

15 **MR MOSER:** The legal arguments would be relatively terse.

16 **THE PRESIDENT:** Yes.

17 **MR MOSER:** I almost made them today.

18 **THE PRESIDENT:** The legal arguments are probably not the major part of it, it's the factual  
19 causation.

20 **MR MOSER:** There would be some evidence from the other side and we don't know, we are  
21 not in control of that, what evidence they would be leading on this.

22 **THE PRESIDENT:** Yes.

23 **MR MOSER:** Our evidence, I imagine, would be relatively short. I would have said less than  
24 a day. My learned friend Ms Littlewood conservatively suggests a day.

25 **THE PRESIDENT:** Yes. Yes, thank you. Is there anything else?

26 **MR MOSER:** No.

27 **THE PRESIDENT:** You will have a chance to reply, obviously. Yes, good. Mr Ward.

1 **MR WARD:** Thank you, sir.

2 **THE PRESIDENT:** As I said, our view on the formulations is that a halfway house doesn't  
3 particularly work and that either what we are talking about is the pleaded issue at  
4 paragraph 84(e) and either it's in trial one or it's in trial two and that's really the essence  
5 of it.

6

7 **Submissions by MR WARD**

8 **MR WARD:** Of course, sir, and I have taken on board your indication and I want to make  
9 points under a couple of different heads --

10 **THE PRESIDENT:** Yes.

11 **MR WARD:** -- starting with what is this issue really about? It has a liability element -- a breach  
12 element and a causation element as well because the defendants have joined issue,  
13 both in terms of causation but also in terms of whether there is any liability in any event  
14 under this head, as a matter of the law of abuse of dominance.

15 If I may just show you First MTR's defence on that, it's under tab 9 of the core bundle at  
16 page 169.

17 **THE PRESIDENT:** Sorry, paragraph?

18 **MR WARD:** 112 and 113. So this is pleading to 84(d) and 84(e) which you've just seen,  
19 Mr Moser has just shown you. What we say is:

20 "First MTR is not obliged under the law of abuse of dominance to ensure such third parties  
21 take any particular steps to market boundary fares or, indeed do so at all. Nothing in  
22 the law of abuse of dominance requires First MTR to assert control over the manner  
23 in which they do so, or to provide any particular instructions."

24 Then 84(e) in particular which, of course, was the paragraph added after your observation, sir,  
25 about umbrella claims, so it's very much an add-on to the main claim:

26 "For the reasons given in paragraph 112, it's denied any losses arising out of the conduct of  
27 third parties fall to be attributed to First MTR."

1 Then (c), we address the umbrella claim more specifically:

2 "It's denied that circumstances are materially analogous."

3 Then about five lines down is the causation point:

4 "Without prejudice to the foregoing, the existence of any such umbrella effect is an empirical  
5 matter, and the CR is put to strict proof that the third-party sales arrangements were  
6 caused by alleged failure to make boundary fares sufficiently available."

7 So there is -- I will call it a breach element and a causation element. The formulation that we  
8 put forward was intended to capture that. I hear what you say, sir, so I am not going  
9 to try to persuade you to adopt it in the form that it is.

10 However, when we look at paragraph 17 of the list of issues in isolation, it doesn't, in my  
11 respectful submission, quite capture our case on its own. If I could ask you to turn  
12 back to that under tab 28, page 691.

13 **THE PRESIDENT:** Sorry, turn back to?

14 **MR WARD:** The list of issues.

15 **THE PRESIDENT:** Yes.

16 **MR WARD:** Tab 28, page 691.

17 **THE PRESIDENT:** Yes, I see.

18 **MR WARD:** The formulation there is all about causation. Our rationale was the liability issues  
19 would be tried in trial one anyway but I hear what you say, sir, about of course, it  
20 requiring a hypothetical set of facts and, indeed, as I think you were alluding to, the  
21 Class Representative's own formulation in a sense is premised on a set of facts about  
22 what widely available and so forth might mean. You've heard us complain repeatedly  
23 about how imprecise that is.

24 **THE PRESIDENT:** So what you are saying is your formulation is, irrespective of how -- to  
25 what extent it caused this response, in no circumstances could the abusive dominant  
26 company be liable.

1 **MR WARD:** Yes, exactly. That's exactly the point. The formulation may be infelicitous but  
2 that's precisely the intention, to capture the liability issue on, in a sense, assumption  
3 of causation, while leaving over the empirical issue to the second trial.

4 **THE PRESIDENT:** Yes, I see. I had not fully appreciated that.

5 **MR WARD:** I am glad I was able to help, sir.

6 Then if I can come on to what this empirical issue would really involve. We have heard some  
7 quite striking submissions from Mr Moser about that a moment ago. The first thing to  
8 appreciate is that the Class Representative is not proposing to call any factual witness  
9 evidence at all. The directions they have advanced make no provision for it, so the  
10 only evidence would be expert evidence and, of course, what we don't have is any kind  
11 of developed proposal for what this economic evidence would look like. There's just  
12 an illusion to there being an economist.

13 Now Mr Moser said rather breezily he imagined the evidence would be relatively short, all be  
14 done within less than a day but with respect, there's nothing before the court at all to  
15 show that that would be the case and one might think the intuition points rather the  
16 other way. Because what we are talking about here is measuring the competitive  
17 effects on a market-wide basis of this alleged infringement. Just looking at that, as it  
18 were, from afar, one might think that the way that one would approach that might be  
19 through some data-intensive exercise, possibly a regression analysis, that seeks to  
20 identify those effects, not a sort of 12-page report from an economist saying: well at  
21 a high level, I would expect some such umbrella effect may take place.

22 But, of course, we don't know because, regrettably, the Class Representative has not come  
23 forward with properly formulated proposals for this expert or any other but to say: well  
24 it can all be done very quickly, as a kind of light touch add-on to trial one, which in our  
25 respectful submission, is very unlikely to be the case. What motivates our approach  
26 is the idea that undoubtedly we are going to have economists before the court in trial  
27 two, assuming the Class Representative succeeds in trial one. They are going to be

1 looking at heavy data-intensive exercises, undoubtedly, as part of the methodology for  
2 aggregate damages. We all know in this room how extensive economist analysis can  
3 become and it makes sense, in our respectful submission, if there is to be an  
4 economist, that they deal with all of these questions together.

5 There may even be senses in which the same datasets are useful for both exercises, I don't  
6 know but that's partly because I am facing an application made very much in the  
7 abstract and without the kind of details that would allow any of us, including the  
8 Tribunal, to know what would really be involved.

9 The suggestion that it's somehow more efficient because it would avoid the industry expert  
10 coming twice, if permission is granted for that, is, in my respectful submission, unreal  
11 because whatever that person is going to be doing, if permission is granted, it's not  
12 going to be regression analysis or data-intensive exercises.

13 So if I may then come back to your indication --

14 **THE PRESIDENT:** I find it quite hard to see how this question is susceptible to regression  
15 analysis.

16 **MR WARD:** Sir, I just don't know, I am just doing my best as --

17 **THE PRESIDENT:** It would be odd.

18 **MR WARD:** -- as a layman, to think how they are going to try and prove this alleged umbrella  
19 effect, quasi umbrella effect and we know they have no factual evidence. They say it  
20 will be an economist. Economists can do two things. They can do qualitative analysis  
21 and they can do quantitative analysis, with respect, but simplifying it a great deal, and  
22 how this can be done through qualitative analysis, I don't know. If the  
23 Class Representative had come with a properly formulated proposal that explained  
24 what the methodology would be that would be used, then one could have a better  
25 sense of what the scale of the task would be. But just to anticipate very lightly the  
26 submissions I am going to make about their expert application more generally, the  
27 problem they have is the time is now because the Tribunal is here to make directions

1 to trial, a trial that they pushed hard for and, indeed, wanted a trial of all issues next  
2 summer and alas, we are here without adequate preparation on the part of the  
3 Class Representative to enable the Tribunal to understand what is fully involved. But  
4 there is no practical choice, in my submission, but to make orders to trial today, if those  
5 behind me are going to have a chance to execute them in an orderly manner.

6 So if I may just come back to the issue of formulation, sir --

7 **THE PRESIDENT:** Yes.

8 **MR WARD:** -- and your initial indication that perhaps issue 17 would do on its own. And when  
9 you were speaking, I wrote down next to it at the end, after it says, "Does it cause",  
10 "It's a little bit backwards to say 'and are the defendants liable for it', if it was all going  
11 to be dealt with in that composite way." However, then the drafting gets a bit  
12 complicated because on page 689 at the beginning of paragraph 12 which deals with  
13 tickets sold by third parties:

14 "Insofar as the defendants' conduct did infringe section 18, are the defendants liable?"

15 Then:

16 "The issue shall include consideration of the following."

17 So it's quite properly a liability question --

18 **THE PRESIDENT:** Yes.

19 **MR WARD:** -- which is why we have put in a liability alternative as our version of 17(d).

20 So if we went with some sort of amended 17 that allows for the liability question and that's put  
21 into trial two, it will have to somehow be carved out of issue 12 but that's not beyond  
22 the wit of a whole roomful of lawyers to think of a way to do that.

23 **THE PRESIDENT:** So just to understand your liability argument, you are saying that for  
24 abuse, an abuse case, this is different from a cartel case. Even if it was foreseeable  
25 that this conduct would cause third parties to behave similarly, the dominant party is  
26 not liable.

27 **MR WARD:** Yes, I mean it's a question --

1 **THE PRESIDENT:** That's your position, is it? Because we need to understand.

2 **MR WARD:** Yes, I mean I'll have to think about your words "if it's foreseeable", because I  
3 think -- if I may put some silent parenthesis round that because how foreseeability  
4 plays out in the law of abuse of dominance isn't completely intuitive or whether we're  
5 using common law concepts of foreseeability. But if I may put it in my own words, the  
6 issue is really as an undertaking that's assumed to be dominant for the purpose of trial  
7 one --

8 **THE PRESIDENT:** Yes.

9 **MR WARD:** -- then there are special responsibilities, that's axiomatic. Do those special  
10 responsibilities really extend to ensuring that *ex hypothesi* independent third parties  
11 enter into a certain type of detailed sales arrangements about this particular ticket?  
12 Because if Mr Moser is right --

13 **THE PRESIDENT:** I am not sure that's how the defendants put it. I don't want to get into the  
14 advocacy of it.

15 **MR WARD:** Of course.

16 **THE PRESIDENT:** What I am trying to see is whether, really, one can have an abstract  
17 question of law that does not depend on the factual findings on the causation  
18 influencing the way the question of law is decided and whether, really -- that's what's  
19 going through -- that's why I raised the question.

20 **MR WARD:** I completely appreciate the concern. Let's not forget that the primary case or the  
21 original case for the Class Representative was: that the Defendants are agents here  
22 anyway.

23 **THE PRESIDENT:** Yes.

24 **MR WARD:** This is an afterthought, following observations by you, sir.

25 **THE PRESIDENT:** It may be but it's now there.

26 **MR WARD:** The point I am making is not just a sort of cheap shot about process it's, rather,  
27 that if they succeed in their agency point anyway, this will all fall away and that's going

1 to require a sort of factual examination of the relationship between the defendants and  
2 the third parties.

3 It's, of course, possible that if you were to adopt our formulation, it's possible that in the end,  
4 the Tribunal will say: well we just don't feel able to answer that question on the basis  
5 of what we've heard but then it's not difficult, given we have a second trial ordered, to  
6 say: well in those circumstances, we are going to reformulate these issues and we will  
7 answer what we think we properly can on the evidence that's available to us. If you  
8 accede to our approach, there's going to be, if trial two takes place, a trial on umbrella  
9 effects in any event and one can be pragmatic and reformulate.

10 **THE PRESIDENT:** Yes.

11 **MR WARD:** In a sense, the most important reason why this arises today is because of the  
12 need that it apparently triggers to have expert evidence.

13 **THE PRESIDENT:** Well I think it's just generally important today we know what trial one is  
14 about.

15 **MR WARD:** That's definitely a good idea.

16 **THE PRESIDENT:** That's the fundamental reason it arises today and we need to know what  
17 everyone is going to work towards over the next ten months or so. So it has various  
18 implications, disclosure and so on.

19 Yes, I think that is very helpful. Anything else you want to say?

20 **MR WARD:** Only to say if, in fact, an ingenious solution would require some more drafting by  
21 lawyers, we will gladly take up the task.

22 **THE PRESIDENT:** Yes, thank you. Any other counsel for defendants? No need to repeat  
23 what Mr Ward has said. Mr Scott? No. Mr Moser, would you like to respond to that.  
24 We'll hear your response. We are passed about the time we'd take our break, so we  
25 will hear your response. We'll then rise for 10 minutes.

26 **MR MOSER:** I can be quite brief.

27 **THE PRESIDENT:** Yes.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

**Submissions by MR MOSER**

**MR MOSER:** My learned friend Mr Ward hazards that there may be a different regression analysis. He does not know, of course. It seems very unlikely but that's not for today but he seeks to lay all that at our door and that's what I must push back against. We are still seeking permission in principle at this stage. We're not yet at the stage of producing draft expert reports or any content and so I reject the suggestion, importantly, that this is, somehow, either too late or too early, I am not quite sure which one he settled on.

We are trying, as you say, to work out exactly what trial one will be about and what the evidence is going to be that's going to be required and then we'll provide that evidence in due course.

I can only repeat the points I made about the desirability of having liability dealt with in the first trial. I won't labour those points by repetition. Mr Ward and I are simply making the opposite arguments, two sides of the same coin.

One thing that did emerge, perhaps usefully, from your exchange with Mr Ward, is that there is an element here whereby their defence is making a more fundamental point around the question of law in relation to agents. And I will say as a fallback argument that I agree to that extent with Mr Ward, which is that if we don't have the full fat question on third party umbrella in trial one, then my fallback is to have the legal question in trial one, by whatever ingenious drafting Mr Ward and I can come up with, with the participation of others.

**THE PRESIDENT:** Yes, that's very helpful.

**MR MOSER:** Thank you.

**THE PRESIDENT:** Yes, thank you. We'll take 10 minutes and return at five to 12.

**(11.44 am)**

**(A short break)**

1 (11.57 am)

2 **THE PRESIDENT:** Yes, Mr Moser, you are on your feet. Do you want to add something?

3 **MR MOSER:** No, I don't. I will sit down.

4 **Ruling**

5 **THE PRESIDENT:** We found those submissions very helpful. As so often with these choices  
6 in case management, there is no absolute right answer and it is a question of what we  
7 think works best in the circumstances and under the constraints of these proceedings.  
8 We are very conscious of the fact that the trial is due to start in mid-June which is not  
9 that far away and of the amount to be done between now and then and we have, in  
10 the end, come to the view that the expert analysis of causation would be potentially  
11 problematic to be completed in time and accommodated within trial one and that,  
12 accordingly, the factual or empirical causation as regards tickets sold by third parties  
13 should be left to trial two.

14 But having listened to Mr Ward speaking for all the defendants and to Mr Moser, we now agree  
15 that it does make sense to have the legal question in trial one, which is outlined in the  
16 draft issue 12(d), the defendants' version, that is before the Tribunal. It is not for us to  
17 redraft in the course of the hearing and it may not need any extensive redrafting. It  
18 clearly goes forward on the assumption that the defendants' conduct in relation to  
19 boundary fares caused the third-party sellers' conduct in relation to their sale of  
20 boundary fares. Are the defendants liable as a matter of law? I suggest it is just  
21 a matter of law, not competition law, for the relevant third-party's conduct and that it  
22 will be valuable to have that matter resolved. That will not require, clearly, an  
23 economist, so there need not be economic expert evidence in trial one because as we  
24 understand it, there is no suggestion that it will be needed on any of the other issues  
25 in trial one and depending on how that question is answered, if it is answered in the  
26 way the defendants urge, then of course, the causation aspect of that drops out of trial  
27 two. If it is answered in the way the Class Representative urges, then that will have

1 resolved one issue that might block any discussions, so that it is certainly worth getting  
2 it out of the way, as we understand all parties are urging us to do. So that is our  
3 decision with regard to that issue.

4 I think then we move on in our agenda because that completes the list of issues. It might be  
5 sensible to look at the survey evidence question before disclosure. We do think, and  
6 quite firmly, that the survey should proceed and should not wait for the outcome of trial  
7 one. That is what the Class Representative wants. Clearly the Class Representative  
8 is at risk of costs. These do not involve costs of any significance from the defendants  
9 and if the Class Representative fails in trial one, those costs will have been thrown  
10 away and he has to bear them in any event. But we think it should proceed.

11 As we understand it, draft questions have been circulated for comment. There is going to be  
12 a pilot survey. We think it is important that the results of the pilot are disclosed and  
13 that, based on the results of the pilot, the defendants should have the opportunity to  
14 comment, if they wish, on what amendments should be made to the questions, as  
15 a result of the outcome of the pilot.

16  
17 **THE PRESIDENT:** As regards the timing of the survey, I don't know where we are, Mr Moser.

18 There's a question of you getting permissions and you have most of them, I think, but --

19 **MR MOSER:** We have.

20 **THE PRESIDENT:** I don't know if that has been resolved, has it?

21 **MR MOSER:** Almost everything in relation to permissions and so on has been resolved. In  
22 fact, the survey has been a very happy story of agreement, subject to two points. The  
23 first point is the point that you've just mentioned. I won't labour it now because you've  
24 been very clear, if I may say so, as indeed you were on the last occasion, in the  
25 transcript, that the survey must proceed swiftly.

26 As I recall, on the last occasion in July the defendants also were keen to press on, in the sense  
27 that I remember, in an echo of some of what we've heard today, I was being told: why

1 haven't you given us a draft survey? Where is it? It should have been before today,  
2 etcetera, etcetera. You may recall.

3 **THE PRESIDENT:** Yes, anyway.

4 **MR MOSER:** I suggested August and they said no later than 31 July, so by 31 July we did  
5 produce what is behind tab 24 in the correspondence bundle B --

6 **THE PRESIDENT:** Yes.

7 **MR MOSER:** -- the letter of the 31st, with all of our questions and details in relation to timing  
8 and so on. The timings that were suggested have slipped slightly because now we  
9 are in October. The timings were at page 193, at paragraph 39 of that letter.

10 **THE PRESIDENT:** Yes.

11 **MR MOSER:** However, we've proposed further timings in our skeleton argument and that is  
12 at paragraphs 42 to 47. It sets out where we are in our skeleton. Progress has been  
13 made. The defendants have kindly provided their consent in principle to Yonder  
14 accessing their stations, subject to adherence to certain conditions which I'll come back  
15 to in a moment. We've also written to SE Trains, Southeast Trains, who have owned  
16 and operated Southeastern since October 2021. They are considering our request.  
17 They wrote a further letter today. That letter is not yet in the bundle. In the letter they  
18 wrote today, they said:

19 "While we think about this, we are not sure that the CAT has in fact ordered that a survey take  
20 place."

21 So whatever the outcome of today is, as a matter of drafting, it would be my particular request  
22 that it's clear in the directions issued today that the CAT directs that such a survey  
23 shall take place.

24 **THE PRESIDENT:** We would normally give permission for survey evidence to be introduced.  
25 If you didn't want to do so or nobody wanted to, we wouldn't normally direct it as such,  
26 so it would be a slightly unusual order.

1 **MR MOSER:** It would be slightly unusual but it seems to be one that would assist Southeast  
2 Trains in giving their permission. So perhaps slightly unusually, I ask for that slightly  
3 unusual formulation. We are definitely doing it.

4 **THE PRESIDENT:** Yes, well they have to grant you entry to the stations and I mean --

5 **MR MOSER:** Yes.

6 **THE PRESIDENT:** -- we can't order that they give permission without hearing them, if they  
7 are minded to say: we are not going to allow you to do this on our property.

8 **MR MOSER:** They haven't given such an indication.

9 **THE PRESIDENT:** Can you show me their letter?

10 **MR MOSER:** Yes, which I had this morning and has now disappeared. Apparently it's been  
11 put in the back of the correspondence bundle. I am grateful.  
12 So at the very end of the correspondence bundle should be tab 87 which is empty.

13 **THE PRESIDENT:** It is indeed.

14 **MR MOSER:** Yes.

15 **THE PRESIDENT:** No, we've got a letter from Addleshaw Goddard.

16 **MR MOSER:** Yes, I have found my copy.

17 **THE PRESIDENT:** "We note" -- yes, that's the letter.

18 **MR MOSER:** That is the letter:  
19 "We write further to your letters ... Having considered the order, we note the Tribunal has not  
20 ordered that a survey be carried out ...(Reading to the words)... your client provides  
21 the defendants with the proposed specification."

22 **THE PRESIDENT:** Yes, I see "has been ordered", yes.

23 **MR MOSER:** "We note there's a further case management conference listed for today. It's  
24 not clear to us whether your client's survey proposal is due to be considered. We  
25 would be grateful for further clarification, if and when the proposed survey has been  
26 ordered by the Tribunal. In the interim, we are considering the further details of the  
27 survey with our client and taking instructions."

1 Now they don't say that's a condition but it does appear that it would help the process, if I may  
2 put it that way, if the Tribunal indicated that this is something it wished to happen.

3 **THE PRESIDENT:** If we were to grant your application that a survey be carried out, would  
4 that be an order to that effect?

5 **MR MOSER:** That would, in my view, suffice.

6 **THE PRESIDENT:** Yes. I mean we can't make an order that you have permission to go on  
7 their station.

8 **MR MOSER:** No, you can't and that's not what they seek.

9 **THE PRESIDENT:** I don't think they are suggesting that.

10 **MR MOSER:** No.

11 **THE PRESIDENT:** No. So that means that that block should be -- not block but that hurdle  
12 is overcome.

13 **MR MOSER:** Yes, that seems a low hurdle and, happily, the defendants, who are in  
14 occupation are broadly content.

15 So forgive me for that segue but returning to paragraph 46 of our skeleton argument, the  
16 timings I promised are set out at 46: "We plan to conduct the survey over three one-  
17 week periods between October 2023 and January 2024. Ahead of that, we will conduct  
18 a one-week pilot."

19 And we've heard what you've said about informing the other side about that and that, I am  
20 sure, will not be a problem.

21 **THE PRESIDENT:** But my concern is I don't know how the pilot from this, how long the pilot  
22 will take. Is it a one week --

23 **MR MOSER:** One week.

24 **THE PRESIDENT:** Then they analyse the results and then they disclose it to the defendants  
25 and the defendants can come back with comments. So it may be that you slip a month  
26 or a week, a couple of weeks.

1 But I mean it doesn't specify -- I see it's three one-week periods between October and  
2 January. It doesn't say "starting in October". So it can be that -- the one week can be  
3 in November.

4 **MR MOSER:** Yes.

5 **THE PRESIDENT:** Yes. So that's all right.

6 **MR MOSER:** I will just take instructions. Someone is trying to get my attention.

7 **THE PRESIDENT:** Yes, sure. I mean the important thing is that you adhere to the Whitford  
8 Guidelines on surveys, in terms of what has to be disclosed and that provides the  
9 defendants with the protection that the courts have sort of developed with regard to  
10 survey evidence.

11 **MR MOSER:** Yes. Well I will come to that in a moment. It's largely unproblematic, subject to  
12 two aspects I will address. I am told that what we can do in relation to your suggestion  
13 of sharing is that we share the outcome of any changes wrought by the pilot with the  
14 other side before we proceed. We weren't proposing to, if that were suggested, have  
15 the defendants somehow part of the discussion of the pilot and the necessary revisions  
16 because that's something that Yonder are planning to do internally.

17 **THE PRESIDENT:** Yes. What I am saying is you disclose the result of the pilot.

18 **MR MOSER:** Yes.

19 **THE PRESIDENT:** That's what you have to do and it's in your interests to -- if they have  
20 comments, not that they design it together, but that you give them the opportunity to  
21 comment because then if they wish subsequently to criticise the survey, it may assist  
22 you or them if that happens at trial.

23 **MR MOSER:** Yes. Well in fairness, which is probably not the right word, they have already  
24 advertised they object to the survey in a number of ways --

25 **THE PRESIDENT:** Yes.

1 **MR MOSER:** -- and reserved their position generally, so they are welcome, of course, to  
2 comment, as long as we are not obliged at that stage to engage and somehow give  
3 them a role in reshaping the survey.

4 **THE PRESIDENT:** No, it's your survey.

5 **MR MOSER:** Yes.

6 **THE PRESIDENT:** They can conduct their own survey if they want to.

7 **MR MOSER:** Exactly.

8 **THE PRESIDENT:** But it's sensible to give them an opportunity to submit any comments and  
9 you take them into account as you think appropriate.

10 **MR MOSER:** Now we are there.

11 **THE PRESIDENT:** They should have that opportunity and to do that, they need to see the  
12 result of the pilot.

13 **MR MOSER:** Of the outcome, yes, any changes to --

14 **THE PRESIDENT:** Not just changes to the question but the result of the pilot.

15 **MR MOSER:** Yes.

16 **THE PRESIDENT:** As I say, I think if you follow the Whitford guidelines, that will really give  
17 you a template of what has to be provided.

18 **MR MOSER:** Yes. So the nature of the carrying out of the survey is there has been a letter  
19 which is from Freshfields, at tab 83 of the correspondence bundle. That's bundle B, at  
20 page 729.

21 **THE PRESIDENT:** Tab?

22 **MR MOSER:** Tab 83.

23 **THE PRESIDENT:** 83, thank you.

24 **MR MOSER:** This letter came in after hours on Friday. I make no criticism, I just comment  
25 on that for now. They essentially agree to the carrying out of the pilot and the survey.  
26 There are access request conditions on page 730, however, and at six:



1 "As detailed in our letter of 1 September, the GTR defendants are principally content to grant  
2 the survey team, consisting of Yonder and Critical Research, access to GTR stations,  
3 pursuant to the access request. Further to the information enclosed within your letter,  
4 GTR requests confirmation that the CR survey team will comply with the following  
5 additional conditions."

6 Then they've given us five additional conditions. We have checked with Yonder and Yonder  
7 have confirmed that that is all fine and the team are happy to follow those conditions.

8 So that's page 730 which is, happily, no problem.

9 If we turn the page, however, to page 731, there is one potential problem and one strict "No",  
10 I'm afraid, and that is -- if we read on in paragraph 8:

11 "The defendants reserve their right to instruct their own survey expert to shadow Yonder and  
12 Critical Research while they conduct surveys as part of survey proposal."

13 Now while as, sir, you've just mentioned, they are free to conduct their own survey, we've  
14 consulted with Yonder -- and I am sorry, because this has come so late, there's not  
15 a further letter but it can all be made good if necessary -- about the proposal at 8 and  
16 around shadowing, I am afraid it's a "No". I am told that first, having an additional  
17 person standing around next to the interviewer while they try to find respondents, will  
18 make it a lot more challenging and will likely negatively impact response rates, thus it  
19 will create a more off-putting scenario and it's not something Yonder have done before  
20 or would wish to do.

21 **THE PRESIDENT:** Yes.

22 **MR MOSER:** And there is the extra factor that having someone standing over the shoulder of  
23 the interviewer who is from the train company is likely to make the respondents feel  
24 uncomfortable, as the observer will have to be introduced and we are concerned that  
25 this will distract from the survey. If someone from Thameslink is there, say, they may  
26 decide they want to use this moment to complain about strikes or ticket prices or  
27 whatever it is.

1 In-person interviews always work best when there's a neutral person interviewing and that's  
2 it.

3 **THE PRESIDENT:** Yes.

4 **MR MOSER:** So I'm afraid it's a polite "No" to 8. It is then suggested at 12 on page 731 that:  
5 "The LSER [and this is the second sentence] and GTR defendants consider it to be unjust and  
6 inappropriate for the CR to submit evidence from --"

7 **THE PRESIDENT:** Yes, well I saw that in the skeleton. So we'll hear from counsel on that.  
8 You need not address that at the moment.

9 **MR MOSER:** I need not. Well I am grateful.

10 So leaving that aside, we are broadly fine to go ahead. The last wrinkle is perhaps getting  
11 Messrs Addleshaw Goddard's clients also to agree but we hope that is going to happen  
12 in early course and they do promise to revert once they've received a response to their  
13 query which we hope to be able to answer today.

14 **THE PRESIDENT:** Yes.

15 **MR MOSER:** Thank you.

16 **THE PRESIDENT:** Thank you. Right, who is going to speak to -- Mr Harris, yes.

17

18 **Submissions by MR HARRIS**

19 **MR HARRIS:** Sir, there is a handful of points, the first two are extremely short. The first one is  
20 we don't object to them carrying on with the survey. You've ordered it, they take the  
21 costs risk, that's clear, so we move on.

22 Second point. Obviously, I don't act any longer for Southeast Trains, so we stay neutral as  
23 regards that part of the interchange with Mr Moser concerning the form of the order, if  
24 that's what Addleshaw need on behalf of their client, not my client.

25 **THE PRESIDENT:** Yes.

1 **MR HARRIS:** The third point is, I think we are *ad idem* about this, is that the  
2 Class Representative is providing us with a draft survey, providing us with the results  
3 of the pilot and providing us with an opportunity, if we so wish, to comment.

4 **THE PRESIDENT:** Yes.

5 **MR HARRIS:** I make it clear now, just for the record because this is a candid discussion on  
6 this topic, we don't want to comment, we will wish to criticise. We say the survey is not  
7 capable of providing probative evidence at all and it's their survey.

8 **THE PRESIDENT:** Yes.

9 **MR HARRIS:** So I just don't want there to be any surprises to anybody if we criticise later and  
10 we say: it's your survey and you've messed it up. I recognise, of course, that it may  
11 be said against me: well we've provided you with an opportunity to comment and you  
12 decided not to do it.

13 **THE PRESIDENT:** Well the expectation is that if you say: well this question is unfortunately  
14 worded, it should have been worded this way, you should do that now and not at trial.

15 **MR HARRIS:** I hear you, sir.

16 **THE PRESIDENT:** You are not ordered to do that.

17 **MR HARRIS:** Yes.

18 **THE PRESIDENT:** But it will reflect on you if you criticise the way questions are formulated  
19 at trial, when you've had an opportunity to do that.

20 **MR HARRIS:** I understand that, sir. I understand that entirely but, nevertheless, that's our  
21 position. As you know, right from day 1, we've taken the stance, all the defendants,  
22 that these surveys are not fit for purpose.

23 **THE PRESIDENT:** No.

24 **MR HARRIS:** If anything, we take that view even more stridently now we've seen the draft  
25 but there we go, I am not sure we need to say much more about that.

26 **THE PRESIDENT:** No.

1 **MR HARRIS:** The third point is that objection is now taken, and I had not appreciated there  
2 would be any objection to this, to what's called in our letter that was read out, tab 83,  
3 to a shadow and it's said to be a firm no and then Mr Moser gave what seemed to be  
4 some expert evidence from the bar and he said:

5 "In-person interviews always work best when it's neutral."

6 That's what I jotted down.

7 Well we don't accept that as a criticism. Indeed, I have in front of me the current guidance  
8 from the CMA. Mr Armitage will give me the reference to the document in a moment  
9 so that it can be read into the record but it contains the following paragraph:

10 "It is also good practice for the agency project executives [they are the people carrying out the  
11 survey] to continue to monitor a proportion of interviews. Monitoring of interviewer  
12 performance in the field for face-to-face surveys is time-consuming."

13 Then it explains why:

14 "But the CMA's experience is that it plays an important role in ensuring high standards of  
15 interviewing are maintained."

16 **THE PRESIDENT:** It's a bit difficult for us to take in a document, we've got a lot of paper,  
17 which is not before us. I mean if you want to rely on something, I think we need to see  
18 it.

19 **MR HARRIS:** Well I take that point, sir, but I hadn't appreciated -- we'd never had a letter  
20 saying: no, absolutely not, we object to this. All we've done is we've said we reserve  
21 our right to instruct. But what Mr Moser appears now to be saying, as I understood his  
22 submission, is that you should direct today -- this is essentially an application for  
23 a direction by him -- that we don't have permission to do this. All we've done is reserve  
24 our right.

25 **THE PRESIDENT:** It's not unusual for surveys, when adduced in evidence, that the court  
26 allows that sort of thing.

1 **MR HARRIS:** Sir, that's not our understanding at all. I am not in a position to give expert  
2 evidence from the bench either.

3 **THE PRESIDENT:** No, I am thinking -- as you know, there's a lot of authority now from the  
4 courts on what is required and the obligations when conducting survey evidence.

5 **MR HARRIS:** Yes, but my understanding is that this is an orthodox practice, to have a shadow  
6 and it leads to a more robust survey that can't then be criticised. It's actually in the  
7 CR's interest and this is -- the people -- without giving away anything that's privileged,  
8 we have survey consultants, as you would expect at this stage -- whether or not we do  
9 a survey, I can't say -- and they have done this.

10 What's more, the CMA, in this document, talks about it being -- what was the phrase?

11 **THE PRESIDENT:** Can we have the document produced to us, please.

12 **MR HARRIS:** Yes.

13 **THE PRESIDENT:** I said to you it's not very satisfactory to have a sentence from a document  
14 read out. We don't know the context and we haven't got the document. Can it be  
15 provided by 2 o'clock?

16 **MR HARRIS:** Absolutely. It's called:

17 "Good practice in the design and presentation of customer survey evidence in merger cases,  
18 updated 23 May 2018."

19 A CMA official document. So I will definitely do that. It may be we have to reserve any  
20 directions --

21 **THE PRESIDENT:** It's not in the Purple Book, is it?

22 **MR HARRIS:** We can find out. I don't know off the top of my head. One way or another, we'll  
23 get copies of the document.

24 **THE PRESIDENT:** We'll park 8, shall we?

25 **MR HARRIS:** Yes. So that's the fourth issue.

26 Then the fifth issue is the one to which we refer in paragraph 12, page 731, about the naming  
27 of the survey respondents. This gives rise, in my respectful submission, to a novel

1 issue in the context of collective proceedings and it's a fairness issue, as I characterise  
2 it. It's really this. The CR does not propose to call any class members or adduce any  
3 factual evidence about what's going on in the class.

4 **THE PRESIDENT:** Can I just be clear, Mr Moser, the survey is -- as I understand it, you are  
5 not proposing to ask people to give their name and address; is that right?

6 **MR MOSER:** As I understand it, names and addresses are collected but never passed on to  
7 either us or certainly third parties.

8 **THE PRESIDENT:** They are collected, are they? They do ask them for names and addresses  
9 or they don't?

10 **MR MOSER:** I believe so, yes. Because what they do produce and what is routinely given is  
11 data, suitably anonymised data, which allows the other side to test the robustness of  
12 the survey. That is something we can provide them with.

13 **THE PRESIDENT:** The other thing is, are you going to use the survey for what is sometimes  
14 termed in some of the many cases on survey evidence, witness collection exercise,  
15 are you going to seek to identify respondents to the survey you want to call as  
16 witnesses?

17 **MR MOSER:** Absolutely not.

18 **THE PRESIDENT:** No, so there's no witness collection exercise?

19 **MR MOSER:** No. We made that clear at the certification stage and this case was certified on  
20 that basis and the Court of Appeal, paragraph 62 of the Court of Appeal's judgment,  
21 approved of that. In fact, they discouraged -- that may not be a strong enough  
22 word -- use of selective witness statements.

23 **THE PRESIDENT:** No. I appreciate that but I just want to know what your plan is.

24 **MR MOSER:** Yes.

25 **THE PRESIDENT:** No, that answers the questions, yes.

26 **MR HARRIS:** That's an important development because we'd hitherto understood the names  
27 and addresses were simply not going to be collected but for the record, Mr Moser has

1 said that the name and address, as I understood him, of each survey respondent, will  
2 in fact be collected, so there will be that data.

3 **THE PRESIDENT:** But not passed to his client or their solicitors; yes?

4 **MR HARRIS:** Well that, with respect, can be a battle for another day.

5 **THE PRESIDENT:** That was what I was told. That's the basis on which the respondents  
6 asked for it, that it will not be passed on.

7 **MR HARRIS:** If that's what he meant, then that does give rise to a problem which I am about  
8 to elucidate. The issue that arises -- there are really two things. One is rather more  
9 limited than the other. The slightly more limited one is my understanding and my  
10 instructions are that it's perfectly standard survey practice that at least some names  
11 and addresses are collected and that there can then be what's sometimes called an  
12 audit or a verification process, so that these people can then be contacted to ascertain  
13 whether, for instance, they properly understood the questions, they were giving the  
14 answers to what they properly understood.

15 That's part of verifying and robustly auditing the survey. So that's the more limited point. So  
16 we say this is orthodox in any event and that's certainly what we've been told by our  
17 survey consultants.

18 **MR MOSER:** Can I just interrupt, with respect --

19 **THE PRESIDENT:** No, listen to Mr Harris. You'll get your chance. You are giving evidence.  
20 We don't have any evidence of this. You say that's what you are being told by experts.

21 **MR HARRIS:** Yes, and I accept that's as far as it goes but this is what I am told is orthodox  
22 and standard practice. That's the more limited point.

23 The more expansive point is, we say, unprecedented and it requires some serious thought by  
24 this Tribunal because it gives rise to an issue of fairness in the conduct of the trial. It  
25 is this. That given that my learned friend's team does not -- in particular, given that my  
26 learned friend's team does not propose to call any members of the class and adduce  
27 any factual evidence and he, on behalf of his client, is going to rely upon nothing but

1 the survey, we say that we might need to contact some of those survey respondents  
2 and that's for two reasons.

3 The first is it seems highly likely to us that some of these respondents to the survey are  
4 themselves going to be class members. So that will be, if you like, by the back door,  
5 Mr Moser's client adducing evidence from class members who have a vested interest  
6 in the outcome of the answers to the survey, they stand to gain financially, and then  
7 that evidence being put forward, albeit he says on an anonymised basis, in  
8 circumstances where we are simply disabled, unless the names and addresses are  
9 collected, from taking any step we may be advised to take by reference to that  
10 evidence.

11 So let me give you a for-instance. I am not saying for a moment this would definitely happen  
12 but let's say we say that the survey is so confused and confusing or was conducted in  
13 such a manner that the outcomes cannot be trusted. They are unreliable.

14 **THE PRESIDENT:** Yes.

15 **MR HARRIS:** And I would then want, on behalf of my client, or the team behind me would  
16 want to contact that respondent to say: actually, now you are not in a rush, for example,  
17 on a train platform and now you've got a better appreciation of what the context is, did  
18 you really understand? Or: what did you really mean? Or actually, conceivably, not  
19 giving away any privilege: now you think about it more and you really think about what  
20 the answers are and you really think about the overlap, which is the point of the survey,  
21 what's your true evidence? We are disabled from doing that, notwithstanding that's  
22 the only evidence that's put forward against us.

23 It gets worse if you think about these people being class members. They would be, in fact,  
24 class members being put forward by my learned friend but in circumstances where  
25 I can never, on behalf of my client, get any access, never even having the hope of  
26 getting any access to them.



1 We say that that is not fair. The way to resolve it is to collect the names and addresses so  
2 that if so advised, we can, if need be, approach them or perhaps communicate with  
3 them. I appreciate if and insofar as they are class members, that would likely have to  
4 be done with the permission of the Tribunal and I accept that as a burden but some of  
5 these people are likely not to be class members, so in other words, they are simply  
6 potential witnesses.

7 So to put it this way, there will be some respondents who are potential witnesses who are  
8 being asked, essentially, to give their evidence, albeit in a confined survey format, to  
9 the Tribunal but then nobody knows who they are. But I want to know who they are  
10 because I might want to contact them. There's no property in a witness.

11 **THE PRESIDENT:** Mr Harris, before you go on about this, there's now a lot of authorities on  
12 survey evidence and the requirements for litigation. Where, in any of the authorities,  
13 is there any such requirement to disclose the identities of participants?

14 **MR HARRIS:** Sir, there's no authority in this context of a CPO where this problem arises.

15 **THE PRESIDENT:** Not in collective proceedings but they are in cases where the evidence is  
16 relied on to prove a major part of the claimant's case and the courts, as you know,  
17 have been over this. It's fairly strict restrictions now on what's required and the points  
18 you make arise in all those cases: ah, they might have answered in a rush; oh, they  
19 might want to think about it more carefully; oh, they are effectively witnesses. It's never  
20 been a requirement in all the strict requirements laid down, now approved by the Court  
21 of Appeal and *Interflora*.

22 So what is the basis of this as a matter of --

23 **MR HARRIS:** The basis --

24 **THE PRESIDENT:** -- (inaudible due to overspeaking) law --

25 **MR HARRIS:** The basis --

26 **THE PRESIDENT:** -- when, as I say, the courts have a lot of experience. I've more than  
27 a decade as a Chancery judge and we've not had that.

1 **MR HARRIS:** I beg your pardon, I am sorry to interrupt. The basis of this is this a distinct and  
2 novel and unprecedented environment in which my learned friend proposes to call no  
3 evidence from class members who can be identified and yet proposes to introduce  
4 evidence from class members who have a vested interest in the outcome and how  
5 they've answered the survey and that, we say, gives rise to an unfairness.

6 **THE PRESIDENT:** That's exactly what happens in the passing off and trademark context.  
7 They don't call evidence from individual consumers.

8 **MR HARRIS:** They don't. They don't, that's their prerogative. I am not suggesting they have  
9 to do it.

10 **THE PRESIDENT:** No, but they say exactly the same point arises and it's never been  
11 a requirement you have to disclose and that's before the second big problem which is  
12 GDPR.

13 **MR HARRIS:** Well.

14 **THE PRESIDENT:** You know they cannot pass on the information without express consent.  
15 Every individual would have to be told: do you agree to your name being passed, and  
16 address, to the Tribunal? Do you agree, if the Tribunal agrees to it being provided to  
17 the train companies? Otherwise it would be unlawful.

18 **MR HARRIS:** But, sir, on the second point, if that's the corollary, so be it.

19 **THE PRESIDENT:** That would effectively end the prospect of a realistic survey.

20 **MR HARRIS:** Sir, what has to be weighed up against that is the fact we then face an  
21 unfairness in the conduct of the trial.

22 **THE PRESIDENT:** Why is it more unfair than, as I say, the confusion allegation in passing off  
23 and trademark?

24 **MR HARRIS:** Well I beg your -- the unfairness is that this is a novel and unprecedented  
25 context in which the other side is trying to prove a case that you might have thought  
26 would require actual evidence from actual class members who have this vested  
27 interest in the outcome and he does, in fact, obtain that, what he says is probative

1 evidence going to that very issue, in circumstances where then my clients are disabled  
2 forever from seeking to ascertain whether that is being done on a fair basis by  
3 contacting these people.

4 **THE PRESIDENT:** But you can do your own survey.

5 **MR HARRIS:** We can do our own survey but that's not the point. One of things we anticipate,  
6 we've been clear about this all along, is that, come the trial, we'll be saying: this survey  
7 is not fit for purpose and it would be very important in that regard if it transpired that  
8 having contacted either a witness or a class member who was a respondent to the  
9 survey, that that person says: ah, now it's been explained to me what the context is,  
10 now I'm not in a rush on a train platform, actually that's not at all the true position. That  
11 would be fatal to the survey and --

12 **THE PRESIDENT:** We've got the point.

13 **MR HARRIS:** -- (inaudible due to overspeaking) my defence.

14 **THE PRESIDENT:** Yes. What else?

15 **MR HARRIS:** No, sir, those are the points on that issue.

16 **THE PRESIDENT:** Yes. Mr Ward.

17 **MR WARD:** Sir, I only wanted to say, insofar as the Tribunal orders or Mr Moser consents to  
18 the grant of any conditions, in terms of the way the survey is conducted, we'd like that,  
19 of course, to extend to my client as well and their premises. A letter was alluded to  
20 that was written by Freshfields on behalf of LSER and GTR and we welcome Mr Moser  
21 accepting a large number of the things that were requested would happen.

22 **THE PRESIDENT:** Yes, in particular, I am not sure I've --

23 **MR WARD:** The letter was at tab 83, bundle B.

24 **THE PRESIDENT:** I mean the point at paragraph 7.

25 **MR WARD:** Yes, those points Mr Moser was happy to consent to.

26 **THE PRESIDENT:** Yes.

27 **MR WARD:** We'd welcome the same treatment. It probably goes without saying --

1 **THE PRESIDENT:** I don't know if we need it, do we, in an order, if it's been agreed?

2 **MR HARRIS:** No, we welcome that. If anything further --

3 **THE PRESIDENT:** We'll assume -- we'll ask Mr Moser to confirm that applies to all the  
4 defendants.

5 **MR WARD:** Yes.

6 **THE PRESIDENT:** I understand that.

7 **MR HARRIS:** Sir, can I just be clear, I do ask for a direction that the names and addresses of  
8 the survey respondents be recorded. I appreciate you may not be with me on that but  
9 that's what I --

10 **THE PRESIDENT:** I understand that. **(Pause)**

11

12

### **Ruling**

13 **THE PRESIDENT:** Yes, we think the appropriate order that you -- if we make an order that  
14 you may carry out a survey by your independent survey consultants, provided that the  
15 conditions set out in paragraph 7 of the letter from Freshfields of 22 September are  
16 complied with, I think that takes account of the defendants' point on that.

17 As regards the shadowing question, we will put that back until we have seen the document  
18 and you have seen the document and had a chance to address it after lunch.

19 So far as names and addresses are concerned, we will not order that they be provided, on  
20 your undertaking that they are not provided to your solicitors or client either, but they  
21 are retained by the survey consultants.

22

23

### **Ruling**

24 **THE PRESIDENT:** We think there are two fundamental objections to what is being proposed.

25 First, there is now, as everyone knows, an established body of authority setting down  
26 the requirements for survey evidence in courts, and the provision of names and  
27 addresses, so that the party against whom the survey evidence is to be adduced can

1 contact individuals, has never been part of those requirements. The points made by  
2 Mr Harris, that it may be that when individuals are contacted and given more time to  
3 consider their answers, they might answer differently, would apply, it seems to us, just  
4 as much in a passing off or trademark case, where the evidence of confusion brought  
5 by the claimant is through survey evidence and it has never been found that this is  
6 required as a matter of fairness. Of course, the defendants can criticise the  
7 methodology or the way the survey is carried out and we would expect that someone  
8 from Yonder will be able to be called to give evidence about the way the survey was  
9 conducted at trial and to be cross-examined.

10 Secondly, and indeed, since some of those decided cases, including the well-known *Raffles*  
11 case, where the Whitford guidelines were set out, we have GDPR, that would require  
12 consent by each individual to their identification details being passed on to each person  
13 or each body to which it is passed on and as a matter of practical reality, we know that  
14 people are very concerned, once they are told that their personal details are being  
15 passed to a number of third parties and we think that would, effectively, make the  
16 proper conduct of the survey impossible.

17 We note further that the survey questions do not ask about whether the individual would have  
18 bought a boundary fare if it had been more available and that kind of subjective  
19 questioning. The questions, as we understand it, are seeking to establish the extent  
20 of what has been described as the overlap and the size of the effective class and not  
21 more direct purchasing decisions like that.

22 So for all those reasons, we refuse the application that the Class Representative must obtain  
23 and pass on names and addresses.

24  
25 **MR MOSER:** Yonder are positively precluded from providing them to us by their code of  
26 conduct.

27 **THE PRESIDENT:** Yes, and again, GDPR would prevent them unless they got permission.

1 **MR MOSER:** Yes.

2

3 **MR MOSER:** Can I just -- I tried to rise earlier --

4 **THE PRESIDENT:** Yes.

5 **MR MOSER:** -- to clarify if what I said led to a misunderstanding. They can and do collect  
6 contact details.

7 **THE PRESIDENT:** Yes.

8 **MR MOSER:** They don't generally do that for every person they stop and the purpose of the  
9 collection is to check the quality of data. So some people are contacted, asked two or  
10 three questions from the survey they completed to make sure it matches and then  
11 there's an aggregated and anonymised dataset setting out the robustness of the  
12 survey.

13 If it had been understood they collect the names and addresses of every person they ask as  
14 a matter of routine, then that would be going too far. They can collect people's contact  
15 details. In any event, they cannot share them. So whether they are collected or not,  
16 we're not going to see them, they're not going to see them and, of course, as you say,  
17 it would wreck the survey because you'd have to share -- you've already made your  
18 ruling but in a sense to -- further to agree, respectfully, you would have to share not  
19 only the fact that you would be passing it on but you would have to share the purpose.  
20 And that would be: oh, we are going to pass it on to some legal representatives of the  
21 train companies, who will then contact you potentially --

22 **THE PRESIDENT:** You don't have to address us on this.

23 **MR MOSER:** No, thank you.

24 **THE PRESIDENT:** I see documents being passed around, so we will look at this over the  
25 lunch adjournment.

26 **MR MOSER:** Yes, I hope to have a copy as well.

27 **THE PRESIDENT:** We've got to deal with disclosure.

1 **MR MOSER:** Yes.

2 **THE PRESIDENT:** Then we've got to consider the timetable and more particularly, the  
3 question of industry expert evidence.

4 **MR MOSER:** Yes.

5 **THE PRESIDENT:** I think those are the matters that remain. Can you just tell us -- it might  
6 be sensible if we rose and took our lunch break slightly earlier -- on disclosure, has  
7 there been, as sometimes happens, some movement or are we left where we were  
8 when the skeleton arguments were filed?

9 **MR MOSER:** There has been a modicum of movement, I think. Possibly not since skeleton  
10 arguments, no.

11 **THE PRESIDENT:** Right. So we know what is -- well, perhaps we should make a start, on  
12 reflection, on disclosure.

13 **MR MOSER:** On disclosure.

14 **THE PRESIDENT:** We've got the section 1(a) and section 1(b) --

15 **MR MOSER:** Yes.

16 **THE PRESIDENT:** -- of the disclosure review, which is at --

17 **MR MOSER:** Tab 34 of bundle A, page 762. This document is largely agreed.

18 **THE PRESIDENT:** Yes, and again, may I formally say that we are grateful for the work that  
19 has gone into agreeing this and we don't underestimate the amount of work that  
20 probably went on for that purpose.

21 Just one moment. So I think -- am I right that the in section 1(a), the first point is at page 5  
22 within the document, page 766 of the bundle; is that right?

23 **MR MOSER:** That's right.

24 **THE PRESIDENT:** It's --

25 **MR MOSER:** So that --

26 **THE PRESIDENT:** Yes.

1 **MR MOSER:** -- is the first issue where the document indicates that there is a disagreement  
2 and having said largely unchanged since the skeleton arguments, we have in fact now  
3 agreed to the defendants' proposed wording on this issue. So the insertion of the  
4 general approach to fares and that is agreed because we say it's proportionate on this  
5 one and that's -- maybe it's actually in our skeleton already. I am told it's at  
6 paragraph 20 of our skeleton argument. That is because for marketing and promotion  
7 for every fare, we accept that would be a lot of documents and so --

8 **THE PRESIDENT:** Yes.

9 **MR MOSER:** -- to be reasonable, we agree.

10 That is because we say it wouldn't be proportionate.

11 **THE PRESIDENT:** I am slightly puzzled by the second "generally", the "general approach to  
12 fares generally". One would have thought it's the general approach to fares, isn't it?

13 **MR MOSER:** It's trying to make the difference between generally and in particular.

14 **THE PRESIDENT:** Yes, I see.

15 **MR MOSER:** One might say each defendant generally: in relation to the general approach to  
16 fares and in particular: in relation to boundary fares. But I think we all understand  
17 where we are on that.

18 **THE PRESIDENT:** I see. Well, if you've agreed that wording and you understand it, we won't  
19 interfere with it. Yes.

20 **MR MOSER:** It's important to note that why we've agreed here, the point on proportionality  
21 I mention, is because it's relevant to the next point which is our position on issue 4 --

22 **THE PRESIDENT:** Yes.

23 **MR MOSER:** -- at page 767. It may look exactly the same and you may say to me: well, why  
24 haven't you agreed that one, "general approach to the retailing of fares generally".

25 **THE PRESIDENT:** This is about training, isn't it?



1 **MR MOSER:** It's about training. The defendants say that training and guidance in relation to  
2 fares generally is not a pleaded issue. They also say it would be disproportionate. We  
3 say they are wrong on both counts.

4 First, the approach to training is pleaded. I don't think we need turn it up but it's at  
5 paragraph 80, for instance, of the claim form we've been looking at in tab 6 at page 26  
6 of the core bundle. We plead the defendants' conduct in the counterfactual, including  
7 steps the defendants could have taken to remedy the abuse could have included, for  
8 example, better staff training.

9 So we've pleaded this. In order to articulate what that better staff training would involve, we  
10 need to understand the steps the defendants took in terms of training and guidance in  
11 relation to other fare types, where, as far as we know, there was no abuse, so we can  
12 compare.

13 **THE PRESIDENT:** Yes, I see. But there are quite a lot of other types of fares, aren't there?

14 **MR MOSER:** There are, but we think it's unlikely that the training and guidance would vary  
15 from fare to fare, or at least very greatly. On that basis, we think the material they hold  
16 on training and guidance ought to be relatively limited.

17 **THE PRESIDENT:** Remind me, what is the claim period?

18 **MR MOSER:** Oh, someone will remind me. I don't want to get it wrong.

19 **MR WARD:** I think the claims begin with the class action in October 2015, not against my  
20 client, but are acceded to the franchise in 2017.

21 **MR MOSER:** But it ends at different times for different defendants.

22 **THE PRESIDENT:** Yes, but I just want a sense of how many years it is.

23 **MR MOSER:** I suppose it's a maximum of 8 years but it will be less for most.

24 **THE PRESIDENT:** There will be different fares introduced at different times. They might have  
25 some promotional -- some are holiday child fares, and the point they make, as  
26 I understand it, is that they'd then have to give disclosure of the actual training given

1 for each of those various fares that they came in and that could be a large volume of  
2 material.

3 **MR MOSER:** It could be. We would have thought it would be relatively limited. Of course  
4 that sort of material is going to be a useful comparator because we'll say: well, look  
5 what you did for the child fares, why didn't you do it for the boundary fares, that's the  
6 point.

7 **THE PRESIDENT:** Yes.

8 **MR MOSER:** I think it's my learned friend Mr Ward's skeleton where they say: well, look in  
9 principle they've accepted Model C. But you see the fact that we've accepted Model C  
10 we say mitigates their concerns that the request is disproportionate because they will  
11 only have to give disclosure that responds to these specific document requests, so it  
12 shouldn't be that onerous.

13 **THE PRESIDENT:** Yes.

14 **MR MOSER:** I am reminded the claim period is set out for each claim in the list of issues. So  
15 that is helpful.

16 **THE PRESIDENT:** Yes.

17 **MR MOSER:** There is a definitions section --

18 **THE PRESIDENT:** Yes. No, I see it.

19 **MR MOSER:** Page 687.

20 **THE PRESIDENT:** No, I've got it. Yes, thank you.

21 **MR MOSER:** So 2 years, 6 years, 8 years.

22 **THE PRESIDENT:** Yes.

23 **MR MOSER:** So that's what I say about that.

24 There is a related dispute in section 1(b). It might be useful just to turn it up, sort of keeping  
25 this one in mind, and just looking at page 775, issue 4. There are four -- sorry, five  
26 requests in relation to issue 4, (a) to (c) on that page. Over the page, 776, is (d).

1 Now (a) to (d) are agreed in principle. It's request 3(e), page 776, which is not agreed. It's  
2 the same point, "the general approach to". As with the approach to the wording of the  
3 issue, they propose to include "the general approach to" and, for the reasons I have  
4 explained, I make all the same submissions in relation to this as I make in 1(a).

5 **THE PRESIDENT:** Yes. Well, that tracks the wording.

6 **MR MOSER:** Do you simply want me to plough on through --

7 **THE PRESIDENT:** No, I think it's sensible to deal with these item by item and to hear from  
8 the defendants and then -- that tends to work best.

9 Mr Ward.

10 **MR WARD:** Yes, that pleasure and privilege falls to me on behalf of the defendants. If I may  
11 just take a couple of minutes to try and put these disputes into context. As you have  
12 observed already, sir, the defendants have actually consented to very extensive  
13 disclosure in this case, as can be seen from parts 1(a) and 1(b) and the very narrow  
14 issues that are in dispute.

15 It's also right though that the burden of disclosure is entirely asymmetric. So the costs and  
16 the time that this will take are of course very substantial but principally for the  
17 defendants. The Class Representative doesn't have a direct concern about that  
18 because he says he has ATE insurance against those costs. But then of course the  
19 Class Representative is going to spend large sums of money reviewing the disclosure  
20 that is given. I have already mentioned this morning, but can't help myself mention  
21 again, that by March 2021 they'd already spent £2 million on certification alone.

22 The claim is very wide and diffuse.

23 **THE PRESIDENT:** They did have to go to the Court of Appeal as well, didn't they?

24 **MR WARD:** Well, he did, but it's an awful lot of money, sir, and a lot more money is going to  
25 be spent and disclosure is of course a very expensive stage. So the remaining  
26 objections, which are few and narrow, are based on a combination of proportionality  
27 and relevance. But, as you'll have seen, there are no disputed categories outright

1 where the defendant has just dug in and said: we won't provide anything there. The  
2 issues are narrow and about the details of what is to be searched for.

3 In our respectful submission, what we are trying to do is inject some proportionality into the  
4 process and the proposed disclosure will be ample to ensure that there is reasonable  
5 and proportionate disclosure in accordance with the issues.

6 I do respectfully think that's important framing because of course one focuses on the small  
7 areas where there is dispute as if that is all there is, but there is in fact going to be an  
8 ocean of material provided or at least searched for.

9 So if I can be forgiven for that preamble and start then with issue 4 and the words "general  
10 approach". Mr Moser rightly anticipated our submission that it is actually puzzling that,  
11 having correctly conceded that this is an appropriate addition on issue 3, they still dig  
12 in over issue 4. The idea here under issue 3 which concerns -- sorry, it's page 766.  
13 Issue 3, which is conceded, was about marketing and promotional materials and we've  
14 suggested the additional words in red that have been accepted which talk about  
15 general approach. So those would be relatively high level documents, relevant to the  
16 approach overall but will therefore capture something about boundary fares at least  
17 potentially.

18 The wording that's objected to under issue 4 is identical but the point is the same, which is  
19 detailed chapter and verse going back to 2015, at least in some cases, on training and  
20 guidance for every single fare category, is just not reasonably necessary to litigate this  
21 case which is about boundary fares.

22 Of course it's right, as Mr Moser says, that he has pleaded a counterfactual which talks about  
23 training and marketing and the like, but it's of course put in positive terms. In other  
24 words, it says:

25 "In the counterfactual" -- maybe it's helpful to read it, sir. It's tab 6, page 26 --

26 **THE PRESIDENT:** This is in bundle A?

27 **MR WARD:** It's the core bundle.

1 **THE PRESIDENT:** The claim form, yes.

2 **MR WARD:** Tab 6, page 26.

3 **THE PRESIDENT:** Yes.

4 **MR WARD:** If you have it, you'll see it's amended because we complained about lack of  
5 specificity of the counterfactual and this is what we got back.

6 "Boundary fares would be available for purchase through all sales channels, offered both to  
7 enquiring customers and easy to locate and clearly labelled. There would be consumer  
8 facing information. They could have had better staff training, amended procedures,  
9 increased customer facing information", about boundary fares, not about off-peak  
10 returns or first class one-way tickets.

11 So of course if one was going to take the ultimate scorched earth approach to this case one  
12 could carry out an intricate analysis over time of different approaches to the training  
13 for different ticket types. But in my respectful submission that's hopelessly  
14 disproportionate. Mr Moser can obtain the material about the fare category that his  
15 claim is concerned with. He can look at it and see if he has any criticisms of it. But it's  
16 not reasonably necessary to disgorge a large volume of material, or potentially large  
17 volume, about all manner of other fares over time, as you say, sir, that may well have  
18 changed over the eight-year period that we are talking about.

19 So in our respectful submission the answer to this is Mr Moser was right to concede it under  
20 head three, it should have been conceded under head four. It's just a proportionality  
21 issue.

22 Sir, that's all I was going to say under this head.

23 **THE PRESIDENT:** The paragraph -- my mistake, I have the wrong paragraph. Which  
24 paragraph is it in the pleading?

25 **MR WARD:** It was paragraph 80 I was reading from.

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

1 **MR WARD:** Where he specifies his counterfactual. In fairness, he goes on at 88 to say  
2 off-peak fares were a useful example.

3 **THE PRESIDENT:** That's what I was looking at.

4 **MR WARD:** Yes.

5 **THE PRESIDENT:** So there is --

6 **MR WARD:** There is a comparator there, and our pleading back to that of course is off-peak  
7 fares are one of the most prominent and popular types of fare that are bought by all  
8 consumers whether or not they have a Travelcard.

9 But the idea that that somehow justifies this wholesale audit of our training policies over time  
10 across all ticket types is, in my respectful submission, a failure of proportionality. Not  
11 that one cannot identify some logical link that would make it worth Hausfeld paying  
12 people to read these documents, it just fails the proportionality test.

13 I do reiterate that one must contextualise this against the very large volume of material that is  
14 being voluntarily given.

15 **THE PRESIDENT:** Yes.

16 **MR WARD:** Sir, that's my submission under this head.

17 **THE PRESIDENT:** Yes, thank you. Just one moment. **(Pause)**

18 (Inaudible due to microphones being muted) you want more than the general and you want to  
19 look at, as you explained, how they trained for some other kind of fares.

20 But to have everything over this long period does seem to us quite burdensome. You have,  
21 as we understand it, engaged an industry or ticketing expert. It does seem to us that  
22 you should be able to, with his or her assistance, identify three to five other kinds of  
23 ticket or promotional fare that you can specify and then seek, as well as the general  
24 approach, in particular those as a comparison.

25 The defendants of course may say: well, that is not a fair comparison, in which case they are  
26 free to disclose more. But that would give you, it seems to us, something, rather than  
27 having the entirety of this exercise which does seem to us disproportionate.

1 Now I don't know how soon you can do that. Obviously it would have to be done fairly rapidly.

2 But anyone with experience of ticketing will know the sort of fares involved.

3 Now can you reflect on that over -- I won't say that is a specific ruling -- it is 1.05. If you can

4 reflect on that and take instructions between now and 2.05. Equally, the defendants

5 may wish to comment on that when we come back. But we can see the problem about

6 having to do this for every fare over these, for some defendants, very many years. But,

7 equally, we see the force of what you say that you do want to look at what they did for

8 some other particular fares to say: well, contrast that with the boundary fare, and that

9 you should be entitled to do that but to a limited extent that is proportionate.

10 So that is our reaction to what we've heard and we will hear from you further at 2.05.

11 **MR HARRIS:** Sir, can I save you some time?

12 **THE PRESIDENT:** Yes.

13 **MR HARRIS:** In the section to the document which the learned referendaire has helpfully

14 circulated -- it's very short -- it's page 19 to halfway down 22, but the key paragraphs

15 are only four -- and Mr Moser may wish to note this as well -- 2.42 on page 19.

16 **THE PRESIDENT:** Yes.

17 **MR HARRIS:** 2.50, which is the one I read from.

18 **THE PRESIDENT:** Yes.

19 **MR HARRIS:** Then the last two, 2.53 and 2.54 on page 22.

20 **THE PRESIDENT:** Thank you. That's very helpful.

21 **MR HARRIS:** I am most grateful, thank you.

22 **THE PRESIDENT:** Thank you. 2 o'clock -- no, sorry, I said 2.05.

23 **(1.08 pm)**

24 **(The luncheon adjournment)**

25 **(2.08 pm)**

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

1 **MR MOSER:** Where we left it before lunch, sir, was that we would mull over the idea of  
2 identifying two or -- two, three or four types of ticket and we respectfully agree that that  
3 is a good idea. We'll speak to our team and come up with some -- I would suggest  
4 that that be dealt with as part of the drafting of the order. If it can't be agreed, that it be  
5 simply decided on paper --

6 **THE PRESIDENT:** Yes.

7 **MR MOSER:** -- if that's acceptable. I think that disposes of the issue --

8 **THE PRESIDENT:** And apart from that -- so it will be the general approach --

9 **MR MOSER:** The general.

10 **THE PRESIDENT:** -- the defendants' wording and we are in relation to generally and then  
11 there will be boundary fares and so on in particular and also these other fares in  
12 particular.

13 **MR MOSER:** Yes.

14 **THE PRESIDENT:** That's what is being suggested. It's right, I have left this for everyone to  
15 consider and you said you are happy with that approach and it's right that any of the  
16 defendants can be heard on it.

17 **MR WARD:** Sorry, sir.

18 **THE PRESIDENT:** Yes, Mr Ward.

19 **MR WARD:** The only pleaded comparator is off-peak fares.

20 **THE PRESIDENT:** Yes.

21 **MR WARD:** So if Mr Moser had stood up and said: well we want off-peak fares, I would have  
22 been bound to say that's at least rooted in the pleading. I am conscious though, that  
23 we are facing a battle later this afternoon about the timetable for disclosure and we are  
24 obviously concerned that -- I had half hoped he'd come back with a concrete proposal  
25 we could consider and whatever other categories he has, other than off-peak fares,  
26 are certainly not grounded in the pleading.



1 So an alternative approach, sir, would be for you to order off-peak fares which we would not  
2 seek to oppose.

3 **THE PRESIDENT:** Yes.

4 **MR WARD:** Then if Mr Moser really wants to write to us about other categories, we can have  
5 a reasoned debate in correspondence which, if necessary, can come back before you.  
6 But we do respectfully question the utility of any of this. For the reasons I have already  
7 advanced, I don't intend to repeat any submission from this morning.

8 **THE PRESIDENT:** Yes.

9 **MR HARRIS:** Can I just add a different point on behalf of my client which is that I am in both  
10 cases, SE/SW and the GTR and so that increases the burden upon us. Secondly, in  
11 my case, the client's time frame does go right back to the very beginning in both cases.  
12 I appreciate SE Trains, as of about a year or two ago, became a government company  
13 and it stopped then, but it does go a long way back in time. So the disproportionality  
14 that Mr Ward was talking about generically, particularly bites upon my clients and we  
15 are concerned there shouldn't be too many comparators that aren't pleaded.

16 **THE PRESIDENT:** Yes.

17 **MR HARRIS:** So I adopt his submissions.

18 **THE PRESIDENT:** We are not impressed by the pleading point. It's not saying it must be like  
19 this one or must be like that one. It's just looking at what reasonably can be done by  
20 way of training and for that purpose, seeing how you train for all other fares could be  
21 relevant but disproportionate. So we are seeking to limit it.

22 But there is a point about timing, Mr Moser. How soon can you come back? Because  
23 I assume you've got your expert you are seeking permission to call already, do you?  
24 Or?

25 **MR MOSER:** We do in this sense. I was going to return to this when we talk about experts.

26 **THE PRESIDENT:** Yes, we're coming back to that. How soon can you identify the three  
27 additional ones?

1 **MR MOSER:** I envisage the same time as the drafting of the order but by, say, a day after  
2 tomorrow, say.

3 **THE PRESIDENT:** Well, yes. So do it by the end of Friday.

4 **MR MOSER:** Certainly.

5 **THE PRESIDENT:** Yes.

6 **MR WARD:** Can I just ask Mr Moser to clarify what he meant when he said "We do in this  
7 sense", in answer to the question "You've got your experts."

8 **MR MOSER:** Gladly, if it's convenient.

9 **THE PRESIDENT:** Yes, we are coming back to the expert and we'll ask you lot about the  
10 expert at that point, so we need not deal with it now but we will come back to that  
11 Mr Ward, about the expert. But at the moment I just want to get a date by which you  
12 will produce those. By the end of Friday which is, what is it, the 29th and if that's not  
13 agreed, then it can come back to the Tribunal in the middle of next week. So we'll give  
14 you a few days to go back and forth if you want to.

15 I think it's your choice but if not agreed, then any submissions to the Tribunal about it by  
16 5 October.

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

18 **THE PRESIDENT:** So that is that one.

19 **MR MOSER:** That's that one. There was then also the question of the CMA document.

20 **THE PRESIDENT:** I think let's deal with disclosure and then we'll come back to that. Those  
21 are the issues in part 1(a), is that right, section 1(a)? Disclosure document.

22 **MR MOSER:** Section 1(a). Sadly, there is at least one further issue.

23 **THE PRESIDENT:** On 1(a)?

24 **MR MOSER:** On 1(a). In fact, there seem to be two further issues on 1(a).

25 **THE PRESIDENT:** On the model?

26 **MR MOSER:** I will be as brief as I can. Yes, the model. So issue 5, starting at page 767,  
27 that's the question of whether Model C or Model D should be adopted as the model for

1 disclosure. Putting it as briefly as I can, we say this is a clear candidate for Model D  
2 and we refer to PD57AD which is at authorities bundle 13. The reason we say Model  
3 D is because of the nature of Model C as there described.

4 **THE PRESIDENT:** Sorry, which tab?

5 **MR MOSER:** Tab 13 of the authorities bundle, page 478.

6 **THE PRESIDENT:** Yes.

7 **MR MOSER:** Page 478 has paragraph 10. By the second hole punch it's 10.4 and it says:

8 "Where Model C is proposed for any issues for disclosure, these should be ... limited in  
9 number, focussed in scope and concise, so that the responding party may be clear as  
10 to the particular documents or narrow classes of documents relating to particular issue.  
11 Broad and wide ranging formulations, such as any or all documents relating to, should  
12 not be used and shouldn't be used in a tactical or oppressive way."

13 We've cited in our skeleton the case of Lonestar. For your reference, I don't propose to turn  
14 it up, it's at authorities bundle 16 and there, Model C says:

15 "These documents have to be capable of precise description."

16 As we've explained in our skeleton at paragraph 23, we cannot identify with any precision the  
17 documents or categories of document relevant to the question of customer awareness  
18 of boundary fares and boundary point-to-point fares because we simply don't know  
19 what the relevant documents are that the defendants hold on this.

20 We say Model C is not appropriate and that's very clear from the defendants' own Model C  
21 proposals and they are at 776 of the DRD. So that's 776. You'll see request four under  
22 issue 5, "Any internal reports or reports by third party consultants." Now we agree that  
23 wording but not Model C because once you start saying "Any internal reports or reports  
24 by third party consultants", you are using the sort of wide ranging language that the  
25 authorities deprecate.

26 **THE PRESIDENT:** Well --

27 **MR MOSER:** It won't be sure which documents are responsive.

1 **THE PRESIDENT:** Well, that language, are you -- I am not quite clear what you are saying.  
2 Are you saying you are content with that language in the first box on page 776 under  
3 point 4?  
4 **MR MOSER:** Yes.  
5 **THE PRESIDENT:** Or are you saying internal reports and reports by third party consultants  
6 or analysis is not enough, you want certain other documents, you want a trawl to see  
7 if there is some email somewhere saying something about this?  
8 **MR MOSER:** It seems to us if you are looking for analysis of customer awareness, that ought  
9 to be captured by that, if you are looking at model D.  
10 **THE PRESIDENT:** Well --  
11 **MR MOSER:** If you are looking at Model C, it seems likely they will only look at reports and  
12 similar.  
13 **THE PRESIDENT:** They make clear what they will look at but Model D was generally designed  
14 for a rather wider search. Once you've agreed what documents by generic description  
15 are going to be provided, it's a slightly arid debate, isn't it?  
16 **MR MOSER:** Ms Littlewood correctly reminds me that once we agree Model D, the first  
17 column falls away, so that --  
18 **THE PRESIDENT:** Right.  
19 **MR MOSER:** -- we are not so constrained.  
20 **THE PRESIDENT:** So if you accept that that is the category, really that is a Model C.  
21 **MR MOSER:** Yes, but as is pointed out to me and forgive me if I laboured under the same  
22 misapprehension, the restriction to reports will not apply if we say Model D is  
23 appropriate because you won't be using the narrow document descriptor.  
24 **THE PRESIDENT:** That is what I was endeavouring to say.  
25 **MR MOSER:** Yes, you are right.  
26 **THE PRESIDENT:** If you are content with that as the category of documents, then you don't  
27 need Model D.

1 **MR MOSER:** No. It's entirely my fault and you are right and Ms Littlewood is right and we do  
2 want Model D precisely because, and I was hanging it on the, I thought, general word  
3 of analysis but precisely because there might well be emails or memos -- the problem  
4 with Model C is that you say: well we want reports and you get a nil return and you  
5 say: why is there nil return? You say: ah well, you wanted reports but we don't do  
6 reports.

7 **THE PRESIDENT:** Well they don't have to do reports on this.

8 **MR MOSER:** Or on --

9 **THE PRESIDENT:** Or analysis on this.

10 **MR MOSER:** But we might do memos or we might do PowerPoints or we might do Excel  
11 spreadsheets or there might be an email that says: customers are well aware of this.

12 **THE PRESIDENT:** Without getting too granular a debate, if there is a PowerPoint  
13 presentation, that seems to me it's a form of analysis. One can juggle with the wording  
14 and say presentation but what you won't get will be a communication by some  
15 individual to someone else within the train company, expressing their feeling or their  
16 reaction or their view, and I think the scope, therefore, of searches is vastly greater  
17 with Model D which is why Model D has to be very strongly justified.

18 **MR MOSER:** Perhaps the answer then is to have a clearer unpacking of the word analysis,  
19 in order to capture what you are putting to me.

20 **THE PRESIDENT:** Yes. Just a moment. **(Pause)**

21 Mr Moser, we think Model D is really going too far on this. It does become disproportionate.  
22 It involves, then, search terms going through every email within the company and on  
23 something that is, we think, unlikely. One cannot rule it out, one never can with  
24 Model D, but in terms of proportionality, we think that is really excessive in a case  
25 where we have some concerns about costs. We were willing, unless any of the  
26 defendants want to argue against it, to extend this to say "report or reports by third  
27 party consultants on", or "analysis of", or "presentations concerning customer

1 awareness", but we think it should be Model C. They don't have to start doing the sort  
2 of keyword search of every email across all their management over an extensive period  
3 which otherwise Model D would require.

4 Mr Ward, is that addition acceptable?

5 **MR WARD:** It is indeed, sir.

6 **THE PRESIDENT:** We are in Model C. Yes.

7 **MR MOSER:** Yes.

8 **THE PRESIDENT:** I assume -- Mr Ward, I only asked you because you said you, as it were,  
9 have custody of this for the defendants but I don't know if that's acceptable to your  
10 colleagues.

11 **MR WARD:** I will leave them to speak for themselves.

12 **THE PRESIDENT:** I don't know if, Mr Harris, you heard that. That is all right, is it?

13 **MR HARRIS:** Yes.

14 **MR SCOTT:** And for us.

15 **THE PRESIDENT:** Back in section 1(a), the other one I noted was 13.

16 **MR MOSER:** Yes.

17 **THE PRESIDENT:** But 13 is -- now is that relevant to the issues in trial one? Or is it that --

18 **MR MOSER:** Now that the question in relation to 12(d) has been refined, I submit it isn't  
19 relevant any more. It's going to become relevant in trial two.

20 **THE PRESIDENT:** I think that's right, isn't it? You are not going to argue agency on the basis  
21 of the way they marketed their tickets, are you?

22 **MR MOSER:** No, this was more about the likelihood of influence and so on --

23 **THE PRESIDENT:** So I think that goes off, doesn't it?

24 **MR MOSER:** I think that does go off.

25 **THE PRESIDENT:** Is that agreed by the defendants? It's not now.

26 **MR WARD:** I think it's for Mr Moser to decide how he's going to try and put his case in what  
27 is the issue left in trial one.

1 **THE PRESIDENT:** It's also for you, Mr Ward, because if you are going to say: oh, they can't  
2 be our agents because we can't influence the way they market their tickets, then it's  
3 relevant to trial one.

4 **MR WARD:** I hesitate because as Mr Armitage is rightly pointing out, we do still have issue  
5 12 which is about agency, the alleged relationship of agency.

6 **THE PRESIDENT:** Yes.

7 **MR WARD:** That's in here anyway. If we look at issue 12, just above here, this is supposed  
8 to be dealing with the relationship between the defendant and third-party ticket retailers  
9 which is --

10 **THE PRESIDENT:** And agents.

11 **MR WARD:** That's the contractual arrangements. Then this issue 13 is more about the  
12 question of whether -- the extent to which the defendants influence the way third-party  
13 retailers market and promote their fares. But we do, of course, have a pleaded issue  
14 that it's a matter for them.

15 **THE PRESIDENT:** Yes. Well, I don't know if that is going to be argued on the basis of the  
16 contractual arrangements between the defendants and the third parties.

17 **MR WARD:** Well I can see --

18 **THE PRESIDENT:** I have no idea.

19 **MR WARD:** I can see that for the purpose of arguing the question of agency, the contracts  
20 are important but also a wider factual matrix will be relevant.

21 **THE PRESIDENT:** Yes.

22 **MR WARD:** There's no question. But issue 13 looks more targeted at this question that has  
23 now gone off. But I wouldn't want the Tribunal to proceed on the basis that we will  
24 argue the agency point on the basis of the contracts alone.

25 **THE PRESIDENT:** Let's just look at how it's dealt with under 1(b), what the actual implications  
26 are of this. Well, I think the sensible course, Mr Moser, is to keep it at the moment as  
27 Model C, to stick to what has been agreed that you will get and to get that for this trial,

1 the minutes and so on, and when you have read all that and digested it, if you want to  
2 come back and say: well now that we've seen that, we want to make a further  
3 application for supplemental disclosure, you can argue it on a targeted basis. But not  
4 to keep this as a general -- roving disclosure exercise.

5 **MR MOSER:** That seems a good idea, if I may say so.

6 Can I just say --

7 **THE PRESIDENT:** I think then, obviously, as that has been agreed under item 8(a) and 8(b)  
8 in section 1(b), that's accepted by the defendants, as I understand it.

9 **MR MOSER:** Yes.

10 **THE PRESIDENT:** I mean there's always the possibility, obviously, when you get the  
11 disclosure, to say: well now we've seen this, that points to this and we want to request  
12 that. But rather than the problem with Model D it's the scope of the searching that has  
13 to be done.

14 **MR MOSER:** There is that possibility if there is time. So we are going to come to timing later.  
15 Obviously, they don't want to give disclosure until next February.

16 **THE PRESIDENT:** That will be affected, no doubt, the timing, by whether it has to be  
17 a Model D disclosure.

18 **MR MOSER:** Indeed, it all hangs together. Clearly, if disclosure were not to be given until  
19 that late, then the time for going back on supplementary disclosure would be very  
20 squeezed indeed, so we'll come back to that.

21 **THE PRESIDENT:** Yes, let's go to section 1(b) then.

22 **MR MOSER:** Let's.

23 **THE PRESIDENT:** Insofar as it's not covered.

24 **MR MOSER:** Insofar as it's not covered. So at 774, and we have dealt with it in part but at  
25 774, request 1(b), this relates to issue one which concerns the availability of boundary  
26 fares and boundary point-to-point fares for each ticket type and for each sales channel.  
27 And under request 1(a) which is agreed, the defendants will provide us with the fares



1 data for each fares round for boundary fares and boundary point-to-point fares from  
2 the product management service, PMS, and previous Worldline equivalent and they  
3 also intend to provide a guidance note which is welcome.

4 But at request 1(b), we seek what it says there, "internal management and other consultant  
5 reports, presentations" and so on, for each fares round from the PMS for boundary  
6 fares and point-to-point fares and they say it's disproportionate to provide this, given  
7 they've already disclosed the underlying data at 1(a). And they will also provide the  
8 LENNON data; that's LENNON as in the Beatles. LENNON is the latest evening  
9 network something -- what was it? Yes, it's basically the RDG sales data system and  
10 they say, look, we are going to provide you with that and the guidance note and that's  
11 fine and we've set out in our skeleton at paragraph 31.1, we think this isn't  
12 disproportionate because we think that the derivative reports, the contemporaneous  
13 analysis, are likely to provide us with important insights into the defendants' approach  
14 to the availability of boundary fares and they wouldn't be evident from the raw data,  
15 even with the helpful explanations.

16 **THE PRESIDENT:** Yes.

17 **MR MOSER:** So that's it.

18 **THE PRESIDENT:** Yes.

19 **MR MOSER:** The same applies to request 3(e) and really 5(c), (d) and (e). It's always the  
20 same points, derivative material or just LENNON. There's one other that's different  
21 but really 3(e) which is at page 15 and --

22 **THE PRESIDENT:** I thought 3(e) is agreed, it's just about the general approach point.

23 **MR MOSER:** I am sorry, yes, you are quite right. It's the same point as 1(a), forgive me.  
24 I was rushing ahead.

25 **THE PRESIDENT:** So it's 3(e) I think is now sorted, isn't it?

26 **MR MOSER:** Yes.

27 **THE PRESIDENT:** That relates back to section 1(a).

1 **MR MOSER:** Yes, it is.

2 **THE PRESIDENT:** But I think it's the same point as at 5 --

3 **MR MOSER:** 5(c).

4 **THE PRESIDENT:** -- isn't it?

5 **MR MOSER:** Yes, that's the same point 5(c).

6 **THE PRESIDENT:** 1(b) and 5(c) and 5(c) is dealing with the number of fares sold.

7 **MR MOSER:** Yes, and it's also 5(d) and 5(e). I rushed ahead slightly. But those are all the

8 same points in relation to what's on pages 777 and 778.

9 **THE PRESIDENT:** Yes. 5(c), (d) and (e). Yes, I see.

10 **MR MOSER:** And 6(d) at page 779. Then I think we've exhausted all of the points.

11 Just to give you what LENNON stands for, it's Latest Earnings Network Nationally Over Night.

12 **THE PRESIDENT:** Yes, six -- eight-point ... the last one you mentioned, was it 8(d)?

13 **MR MOSER:** 6(d) on page 779.

14 **THE PRESIDENT:** Sorry, 6(d). Issue 8, 6(d), yes.

15 **MR MOSER:** Yes.

16 **THE PRESIDENT:** That's a slightly different -- that's to do with the revenue share under

17 Travelcards.

18 **MR MOSER:** Yes.

19 **THE PRESIDENT:** I mean that's not ...

20 **MR MOSER:** But it's a similar dispute.

21 **THE PRESIDENT:** It's a similar kind of dispute but a different kind of issue, isn't it?

22 **MR MOSER:** Different kind of issue, yes, but the same point.

23 **THE PRESIDENT:** Right. Is it Mr Ward again?

24 **MR WARD:** I'm afraid so.

25 **THE PRESIDENT:** Yes. No, don't be afraid. On 1(b) -- I think let's deal with 6(d) separately.

26 **MR WARD:** Yes.

27 **THE PRESIDENT:** 1(b) and 5(c), (d) and (e).

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

**Submissions by MR WARD**

**MR WARD:** 1(b) and 5(c) raise essentially the same point as Mr Moser says. In each case, the defendants are offering to disclose actual data that will answer the question and Mr Moser does not dispute that the data will answer the question. So in the case at issue one, the question is what is the availability of boundary fares through each sales channel? They are going to get the fares data and they are also going to get LENNON data which we are getting, in fact, under another head. Mr Moser does not say that will not answer the question. He says instead: we'd like to know something about the defendants' approach.

But this is objective and factual. Where are the boundary fares available? Similarly objective and factual is 5(c) which is issue 6, the number of boundary fares, etcetera, sold and through which sales channel.

But it's a paradox that we are providing definitive and specific data, together with guidance notes that will help interpret it, and what is wanted instead or in addition, I am so sorry, is derivative materials or commentary. Of course, if we'd provided those instead of the data, I am sure he would have said: but we need the underlying data because that will be more accurate and may be more comprehensive.

So in our respectful submission, the gold standard material is being provided. It goes, I hope without saying, that if it raises questions of interpretation, my clients will assist with that.

If it helps us to understand a little bit more, the data being disclosed is the product management service, "PMS", and its previous system Worldline, this is the so-called fares data about all published fares sold, and the LENNON data provides transaction-level sales data about where and how customers purchased tickets.

We do respectfully submit that, again, a question of proportionality enters here. Must we also carry out wide ranging searches in respect of every fares round which I understand is

1 quarterly, just in case Mr Moser's clients can find something else that helps them in  
2 some way? In our respectful submission, this is the answer to -- the material that will  
3 provide the answer to the issue that is raised.

4 Now 6(d) which relates to Travelcards, as you say, sir, is a similar but slightly different issue.

5 If we look at that now at 778, the question is, the issue is the basis upon which each  
6 defendant received a share of revenue from the sale of Travelcards and the way in  
7 which it was calculated and the amounts of such revenue received.

8 If we look at what is being offered, it's the various versions of the Travelcard agreement, the  
9 revenue allocation model and the in-boundary and out-boundary Travelcard diary  
10 surveys. You've come across these before, sir, I think. These are surveys which were  
11 conducted of passengers, asking them which journeys they had taken in a particular  
12 week.

13 These are the surveys that are actually used to allocate the revenue.

14 Why is this even an issue, you may ask, in this first trial, one? As far as we can tell from the  
15 references in Mr Moser's skeleton and our own understanding, the issue is that the  
16 defendants, as he puts it, must have been aware how few boundary fares were being  
17 sold relative to, essentially, potential demand. So in other words, it goes to the sense  
18 of how many Travelcard holders there were --

19 **THE PRESIDENT:** Sorry, this is still 6(d)?

20 **MR WARD:** 6(d), yes.

21 **THE PRESIDENT:** I thought this goes to how much money you were getting from Transport  
22 for London?

23 **MR WARD:** Yes.

24 **THE PRESIDENT:** One assumes, so you were actually getting paid for use and compared to  
25 what, in fact, was -- that it's not to the amount, it also goes to the amount of  
26 remuneration that you are getting.

1 **MR WARD:** Well I must confess, sir, you may understand it differently to me and the actual  
2 connection with trial one issues which are obviously only abuse, as opposed to  
3 quantification, is a little opaque because this head of disclosure will help to understand  
4 the basis on which the TOCs received revenue from Transport for London.

5 **THE PRESIDENT:** On an assumption of a certain amount of Travelcard use and if you are  
6 getting payment on an assumption of Travelcard use which may bear no relation to the  
7 amount of Travelcard use, that, I can see, could feed into ... abuse. That's how  
8 I understood it but I may have misunderstood.

9 **MR WARD:** It's slightly different to my understanding, I confess, sir, but I'll go to what I think  
10 is the important point anyway which is that (d) is a category of financial reports,  
11 calculations and other documents explaining the calculation of payment under the  
12 Travelcard arrangements agreement. So that's asking for, again, a very long trawl  
13 back in time of the actual details of the calculations performed, in order to distribute  
14 money under the agreements that have been provided, both the agreements and the  
15 copies of the surveys which give some sense of Travelcard usage. We simply can't  
16 see the basis for it, with respect.

17 Perhaps if Mr Moser clarifies the connection with the issues in trial one, then if I may, if I have  
18 the opportunity, make further submissions. I would be grateful.

19 **THE PRESIDENT:** Mr Moser, do you want to reply separately on the first group and then  
20 6(d)?

21  
22 **Submissions by MR MOSER**

23 **MR MOSER:** Yes. I really have nothing to add to what I said before on the first group.  
24 In relation to 6(d), it is right that this is different. First, just to explain why it's different. The  
25 Class Representative requests documents that explain the calculation of payments  
26 under the Travelcard arrangements. They say that they've already offered some  
27 documents and that allows us to understand that. We fear that those documents will

1 not be sufficient to understand revenue sharing and the documents we request at 6(d)  
2 will actually explain the revenue sharing calculations, making it far easier for the  
3 Tribunal to understand the revenue sharing model. And having to decipher the  
4 revenue allocation agreements and models and it shouldn't be burdensome, we say,  
5 for the defendants to produce.

6 **THE PRESIDENT:** How often is the revenue share? Does it take place -- is it quarterly or  
7 annually or ...

8 **MR MOSER:** I have no idea.

9 **THE PRESIDENT:** You have seen that agreement, haven't you?

10 **MR MOSER:** Sir, not personally.

11 **THE PRESIDENT:** No, but those instructing you have seen the Travelcard agreement?

12 **MR MOSER:** Yes. Somebody will have to look it up.

13 **THE PRESIDENT:** Presumably under the agreement, it is provided how often --

14 **MR MOSER:** It will be, I imagine, yes.

15 **THE PRESIDENT:** -- payments are made. Can someone enlighten us how often? Does  
16 anyone know here, of all the people in this courtroom?

17 **MR MOSER:** If only we had an industry expert.

18 **THE PRESIDENT:** Well, I think the clients will know.

19 **MR MOSER:** Yes.

20 **THE PRESIDENT:** The defendants will know, of course, and ... for the moment, we have no  
21 idea whether these payments are made quarterly or annually or, theoretically, weekly  
22 but I think it's most unlikely.

23 **MR MOSER:** I mean annually does seem the likeliest candidate.

24 **THE PRESIDENT:** I just don't know. I am in no position to say whether quarterly or  
25 annually -- does anyone know from the defendants?

26 **MR SCOTT:** I have some client instructions. It's every four weeks.

27 **THE PRESIDENT:** It's monthly --

1 **MR SCOTT:** (Inaudible due to overspeaking).

2 **THE PRESIDENT:** -- effectively, yes.

3 **MR MOSER:** That's very helpful.

4 **THE PRESIDENT:** So that is ... well, if you were to get that, if it's every four weeks for one  
5 year from each --

6 **MR MOSER:** Perfectly acceptable.

7 **THE PRESIDENT:** -- that ought to enable you to understand how it works.

8 **MR MOSER:** Absolutely.

9 **THE PRESIDENT:** That, it seems to me, I have not consulted Mr Holmes but it seems  
10 proportionate and it can be -- unless there are different versions of the travel  
11 agreement which were substantially changed in the period, it can be the most recent  
12 year, to make it -- well, it can be any year but it will be up to the defendants whatever  
13 is most convenient.

14 But, Mr Ward, if we were to say that it's provided for one year --

15 **MR WARD:** That would certainly be a lot better, sir, thank you. What I am a bit wary about --

16 **THE PRESIDENT:** (Inaudible due to overspeaking) specify which year, so one would imagine  
17 the most recent year is the easiest for you but if, for some reason, it isn't, it can be  
18 a different year.

19 **MR WARD:** Fine. Thank you, sir.

20 **THE PRESIDENT:** So that is 6(d).

21 **MR MOSER:** It would be, before we move on, probably more convenient to be one of the  
22 earlier years because of the change in use of Travelcards and Oyster cards and so on.  
23 So the likeliest incidence of the greatest abuse, I don't want to say that pejoratively --

24 **THE PRESIDENT:** You want to understand how the payments -- if you can't understand,  
25 then -- you are getting the model.

26 **MR MOSER:** Yes.

1 **THE PRESIDENT:** And if the model has changed over the time, then you might say: well you  
2 would like a copy of one year under the earlier version of the model but let's leave it at  
3 this for the moment.

4 **MR MOSER:** All right.

5 **THE PRESIDENT:** You can correspond if you think you need something more and if you don't  
6 get it, you can come back. But now we know it's every four weeks, that will be quite  
7 a lot of material.

8 Now, so we are left with then the earlier part which is, I think, rather different because that  
9 goes more to the disputed issues and we'll take just a moment to think about that.

10 **(Pause)**

11 Yes. As regards 1(b) and 5(c), (d) and (e), what is sought is expressly limited to -- in relation  
12 to boundary fares and boundary point-to-point fares. That's true under 1(b) for internal  
13 management or external consultants' documents and under 5(c) for the management  
14 information, for the management reports under 5(e). So on 1(b) and 5(c) and 5(e), we  
15 think there should be disclosure because they will also show the way in which the data  
16 was assessed internally at the time of the infringing conduct alleged.

17 5(d) seems to look at underlying data and records which is a bit different and at the moment,  
18 I am not clear, and, Mr Moser, you will have to persuade us, how that is something that  
19 you don't get from the database that you are seeking, what, actually, 5(d) is going for  
20 that is not in 5(a) and 5(b), particularly 5(a).

21 **MR MOSER:** Sir, I plainly failed to persuade you with the submissions I have made so far. It  
22 may be this is --

23 **THE PRESIDENT:** You succeeded on 1(b), 5(c) and 5(e).

24 **MR MOSER:** Indeed, but in relation to this point. And I am grateful for the others. I will just  
25 take instructions.

26 If I could take the same line that, sir, we took with one of the earlier points, just to see -- if what  
27 we get in 5(a) is enough, we'll be satisfied with that if there's some gap evidence --



1 **THE PRESIDENT:** You've asked for the number of tickets sold.

2 **MR MOSER:** Yes.

3 **THE PRESIDENT:** Mr Ward said you'll get that data, you'll get the raw data in 5(a) and 5(b).  
4 5(d) seems to be asking for more raw data.

5 **MR MOSER:** 5(d) was asking for more raw data but also for other documents that would  
6 explain the raw data. But as I say, if we find there's something obviously lacking once  
7 we've seen 5(a) and 5(b), what I was going to suggest is we take the same line as  
8 before.

9 **THE PRESIDENT:** The other point to bear in mind if you want to know overall passenger  
10 numbers, you don't necessarily have to do it by seeking disclosure and data.

11 **MR MOSER:** No.

12 **THE PRESIDENT:** You can do it by a request for information to be answered under  
13 a statement of truth, just saying: tell us how many passenger numbers you had on  
14 each service.

15 **MR MOSER:** Yes.

16 **THE PRESIDENT:** That might be a lot more efficient for everyone --

17 **MR MOSER:** Indeed.

18 **THE PRESIDENT:** -- rather than requiring a disclosure exercise. So ...

19 **MR MOSER:** I will let that rest there on that basis.

20 **THE PRESIDENT:** Not 5(d).

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

22 **THE PRESIDENT:** Anything else on the disclosure?

23 **MR MOSER:** No.

24 **THE PRESIDENT:** Anything from any defendant on disclosure?

25 **MR WARD:** There's an outstanding issue on section 2 of the disclosure report but it really  
26 goes to timing.

27 **THE PRESIDENT:** Yes, I haven't looked at section 2 (inaudible due to overspeaking) --

1 **MR WARD:** You certainly don't need to be troubled by -- (inaudible due to overspeaking).

2 **THE PRESIDENT:** -- it came in very recently.

3 **MR WARD:** There's no point on the detail of it at all. It's just about the process for trying to  
4 resolve any issues that arise out of it. Is this a convenient moment to address you on  
5 that?

6 **THE PRESIDENT:** Yes. You'll have to explain what the issue is.

7 **MR WARD:** It's just timing. So, as you say, sir, the defendants provided drafts of section 2  
8 of the disclosure report last week.

9 **THE PRESIDENT:** This is for trial two; is that right?

10 **MR WARD:** No, no, for trial one.

11 **THE PRESIDENT:** For trial one, sorry, of this disclosure, yes.

12 **MR WARD:** And, of course, the point of section 2 is to set out the scope and the methodology  
13 of search --

14 **THE PRESIDENT:** Yes.

15 **MR WARD:** -- the custodians, the sources of electronic files and the keywords. As  
16 I understand, speaking as someone who has never had to do this, that ordinarily, it's  
17 done in a somewhat collaborative way and certain datasets are obtained and then  
18 search words are tried and tested and the process is refined.

19 So the next step in the process, in substance, is for the Class Representative to comment on  
20 the section 2 drafts that have been provided. In their skeleton they say: well rather  
21 than commenting, it now falls for the defendants to provide an update. Of course, it  
22 will have to be updated in light of the limited additional categories that the Tribunal is  
23 going to order. But none of that stops the Class Representative from responding now.

24 Of course, part of the context here is that they are pressing for disclosure by 1 December and  
25 have asked for a kind of longstop date for the section 2 process of -- can someone just  
26 remind me of the date. 21 October. What I --

27 **THE PRESIDENT:** Sorry to interrupt you, Mr Ward, you provided the section 2 on the 22nd.

1 **MR WARD:** We appreciate it will lead to dialogue.

2 **THE PRESIDENT:** Yes.

3 **MR WARD:** Or it should be constructively and --

4 **THE PRESIDENT:** It's very recently arisen.

5 **MR WARD:** Very recently. I'm not criticising them for not being here today with their  
6 responses.

7 **THE PRESIDENT:** Right.

8 **MR WARD:** The right thing to happen now is for the Class Representative to respond and the  
9 only issue really called on to decide today is we are proposing a longstop date by which  
10 the parties should try and reach agreement of 1 November and the  
11 Class Representative is asking for 21 October which we think is unrealistically soon  
12 but we also urge, if not ask you to order, that the Class Representative responds as  
13 quickly as possible to the section 2s that have been served, recognising that's not the  
14 last word, it's the beginning of a dialogue.

15 **THE PRESIDENT:** You will serve the updated one on the points that have been resolved  
16 today by when?

17 **MR WARD:** A week, I am being told it could be done. But the bulk of it will be unchanged of  
18 course.

19 **THE PRESIDENT:** Yes, so everything else. So that's a week from today, so that is the 4th.

20 **MR WARD:** Yes.

21 **THE PRESIDENT:** So updated section 2 by 4 October and response by the  
22 Class Representative by -- and obviously, Mr Moser, those instructing you work on  
23 their response to everything except those few items, starting already earlier this week.  
24 When can you respond? You are the ones understandably wanting to advance  
25 disclosure. Why is it going to take until -- for you to respond?

26 **MR MOSER:** It's going to take some time to respond to the final version of it. The criticism --

1 **THE PRESIDENT:** The only thing that is going to change is with regard to those few items  
2 that we have resolved today.

3 **MR MOSER:** If that is so, then that's very helpful. There's no criticism of the defendants  
4 because, in fact, they were ordered only to serve a draft by -- I think it was last Friday.

5 **THE PRESIDENT:** Yes.

6 **MR MOSER:** The thing that was served on us late on Friday was draft and I think described  
7 as preliminary. So if they say that nothing is going to change apart from the things that  
8 have been dealt with and altered today, then we could start working on the other  
9 aspects but they'd have to give us that assurance, otherwise we'd be doing work twice.

10 **MR WARD:** With respect, that's not a correct characterisation of the process. Drafts have  
11 been served, work can begin on them now. The aspiration is then to have an iterative  
12 process. So of course the drafts will evolve but hopefully with the constructive  
13 feedback of the Class Representative.

14 **THE PRESIDENT:** Is it reasonable, on that basis, to say 27 October is a reasonable time? It  
15 seems that will give a month.

16 **MR MOSER:** What, for any final points?

17 **THE PRESIDENT:** Yes, for the matter to be resolved, you'd endeavour to seek agreement  
18 and insofar as you can't, you then submit written submissions a short time after that.

19 **MR MOSER:** Absolutely.

20 **THE PRESIDENT:** Would that not be reasonable, Mr Ward?

21 **MR WARD:** It would, sir, if you would also give a date by which the Class Representative  
22 should respond to the schedule they've already received because our concern is that,  
23 really, if nothing much happens until after 4 October, that will be inimical to an orderly  
24 and constructive process.

25 **THE PRESIDENT:** We should not really need to micromanage to that extent but if we say  
26 your first response is to come by -- what, Mr Moser, the 10 October say?

27 **MR WARD:** We think that's too late, sir. That gives 17 days.

1 **THE PRESIDENT:** Is that really not enough?

2 **MR WARD:** Experience tells us it's really not enough, if this is to be as effective as it  
3 reasonably can be.

4 **THE PRESIDENT:** Well --

5 **MR MOSER:** I'll remind Mr Ward of this when it comes to discussing when they are going to  
6 give disclosure. I wonder whether a compromise on 11 October would be --

7 **THE PRESIDENT:** For what?

8 **MR MOSER:** For us to respond to what they've given us on the 4th --

9 **THE PRESIDENT:** No, I --

10 **MR MOSER:** Then we've had a week.

11 **THE PRESIDENT:** So you've had it since the 22nd, except for the few things that will change  
12 by the middle of next week. Surely you can respond -- I said earlier the week after.  
13 One possibility is to say you should respond to everything by 6 October, except for the  
14 items dealt with today and on those items, you respond by 10 October so you can do  
15 your response in two goes. You've got to get a move on with this now because  
16 otherwise, we run into trouble later on.

17 **MR MOSER:** I mean I can say no more than repeat we think 10 October is safer, given what  
18 everyone is doing between now and then in this case and others.

19 **THE PRESIDENT:** No, I think as I say, you've got it on the 22nd. I know you've had to prepare  
20 for this hearing, but this is a task that falls more on the team behind you rather than on  
21 counsel.

22 So I think 6 October to those items other than the specific items that were addressed in this  
23 hearing.

24 **MR MOSER:** Right.

25 **THE PRESIDENT:** You've then got the rest of this week, all of next week. That should be  
26 time enough. You've got, I think, a well-resourced firm of solicitors. Then the longstop

1 date for agreements is the 27th. Insofar as things are not agreed by the 27th, then  
2 you've got to make submissions to the Tribunal by 3 November.

3 Then the question is the timetable for disclosure of matters that are not in dispute. As far as  
4 that is concerned ...

5 **MR SCOTT:** Sir, apologies, before we move on, there's just one point of nuance about the  
6 section 2s that I just want to make sure that we are on the same page about. There  
7 are, in fact, two things that need to be developed in the section 2s. One of them is that  
8 we need to respond to what has been decided today. Of course, we've had  
9 a discussion about that. You and Mr Ward and Mr Moser, at least, have done. There's  
10 a second thing that needs to go into the section 2s which is some proposals as to  
11 keyword search terms. None of the defendants have put those in yet and the reason  
12 for that is, firstly, of course, the keywords we are going to use will depend upon  
13 precisely what orders you make or have now made on sections 1(a) and 1(b). But,  
14 secondly, the best way to set keyword search proposals is to collect data and to test  
15 them and refine them and come up with proposals that are actually going to work.

16 And that is something that it may be helpful to spend a little more time on. So it may be that  
17 by 4 October we don't have those but we would, of course, have proposals that  
18 respond to the points you've decided today and we would, of course, still be targeting  
19 the longstop date of 27 October. I just wanted to raise that now, just because I didn't  
20 want to be ordered to provide keywords by 4 October.

21 **THE PRESIDENT:** Yes, well, I have not generally, Mr Scott, as it were, micromanaged the  
22 section 2 process to this extent.

23 **MR SCOTT:** Yes.

24 **THE PRESIDENT:** Usually one fixes, in my experience of CMCs, a longstop date and the  
25 parties go away and agree what's a sensible timetable to work towards and there may  
26 be, as you quite rightly remind me, different elements to what has to be agreed and  
27 they may be done on a different timescale. So as I am making an order or we are

1 making an order, we say that they be updated by 4 October but not necessarily  
2 including keywords.

3 **MR SCOTT:** Very well. Thank you, sir.

4 **THE PRESIDENT:** We can put that in the order and we trust you then to come to a sensible  
5 arrangement when that can be done.

6 **MR SCOTT:** Yes.

7 **THE PRESIDENT:** If you can't, you can always apply --

8 **MR SCOTT:** Yes --

9 **THE PRESIDENT:** -- to the Tribunal in writing and we will endeavour to give a ruling very  
10 quickly but thank you for that.

11 **MR HARRIS:** Sir, a minor point. My clients ask, on my firm instructions, for two more working  
12 days in the case of my clients to 27 October, to take us to the Tuesday of the following  
13 week because we have two sets of clients and in two cases and I am told that with one  
14 more weekend and two more working days, perhaps limited to our case, the longstop  
15 date for the section 2 of the DRD would be greatly appreciated and would facilitate  
16 a more efficient process.

17 **THE PRESIDENT:** Very well, Mr Harris.

18 **MR HARRIS:** Thank you.

19 **THE PRESIDENT:** But that's just for your client.

20 **MR HARRIS:** Thank you.

21 **MR MOSER:** Thank you. Can I just add a caveat or a codicil or whatever it is to that.  
22 Obviously, common sense will reign. However if the keywords don't arrive until  
23 9 October, we obviously won't reply to them by the 10th if they don't --

24 **THE PRESIDENT:** There's liberty to apply. You can be sensible about it. But if you can't be  
25 sensible about the process like this, we are going to have a lot of trouble and  
26 aggravation going forward.

27 **MR MOSER:** Indeed.

1 **THE PRESIDENT:** Right. Now the significant question, of course, is when then disclosure  
2 takes place and we have at the moment, the Class Representative's proposal of  
3 1 December and the defendants' proposal of 16 February.

4 **MR MOSER:** Yes.

5 **THE PRESIDENT:** Our preliminary view was 1 December really is much too early but  
6 16 February seems rather late. So one is, in our view, looking at somewhere in  
7 between and it's really a question of whether it can be done before Christmas or early  
8 in the New Year. We think, looking at the trial timetable, certainly if it's done by  
9 Christmas, there won't be any problem but, equally, it has to be realistic and it's  
10 a question of how soon it can be done.

11 Mr Ward, having heard that, what do you suggest?

12 **MR WARD:** I am going to bid for mid-January on the basis that, of course, people are away  
13 over the Christmas period. The scope of disclosure is very large indeed. It's worth  
14 bearing in mind that on the Class Representative's timetable, he got to a pre-trial  
15 review in mid-April which was two months before the hearing date. That suggests  
16 there is a little slack in there somewhere.

17 **THE PRESIDENT:** Yes.

18 **MR WARD:** If the request for disclosure had been more abstemious, it could have been done  
19 more quickly.

20 **THE PRESIDENT:** Yes. Well, Mr Moser, if we said 12 January --

21 **MR MOSER:** That would be very sensible.

22 **THE PRESIDENT:** -- would that be acceptable to the defendants? I mean, of course you  
23 want more time, we know that but ...

24 **MR HARRIS:** Sir, that's right. I have taken instructions. Can we have, in our case, at least  
25 one more week. This is a prodigiously expansive exercise and we want to be able to  
26 do it properly.

27 **THE PRESIDENT:** Yes. Well --



1 **MR WARD:** Sir, if that's the case, levelling up is the right approach.

2 **THE PRESIDENT:** That is what I feared you were going to say, Mr Ward. Just one moment.

3 (Pause)

4 **THE PRESIDENT:** Yes, Mr Scott (sic).

5 **MR SCOTT:** Apologies, before jumping to making a decision about this, can I make this  
6 observation. It might be perhaps preferable to resolve the question of expert evidence  
7 before going on to set any deadlines about disclosure.

8 **THE PRESIDENT:** I understand that. We have that in mind.

9 **MR SCOTT:** Yes.

10 **THE PRESIDENT:** But we are going to have to get disclosure in first before expert evidence.

11 **MR SCOTT:** Quite so.

12 **THE PRESIDENT:** We have in mind that we are coming on to expert evidence and I think we  
13 can fix this date, Mr Scott, before we deal with expert evidence.

14 **MR SCOTT:** We can certainly fix a date today, I have no doubt about that. The point, really,  
15 is this. If -- I think it's going to be Mr Ward leading on this. If Mr Ward is able to  
16 persuade you there should not be expert evidence at the first trial, that opens up a lot  
17 more time for other steps: disclosure, factual evidence to happen, whereas of course,  
18 if we have to fit in expert evidence and I would say squeeze it in, then we have to cut  
19 our cloth on other steps. So I was just wondering whether it might perhaps be sensible  
20 to resolve the question of experts in principle first and then come back and set some  
21 deadlines with the answer to that question in mind. That's all.

22 **THE PRESIDENT:** Yes, I see. Yes, that's a fair point. We can do that. So at the moment  
23 what we've got is the possibility of either 12 January or 19 January or a different date  
24 for different defendants.

25 **MR SCOTT:** Just to say we'd also very much like the 19th if those are only the two options  
26 on offer but if --

1 **THE PRESIDENT:** We will then turn to expert evidence and what I think we'll do is we will  
2 hear from you and then we'll take our break and then we'll come back and rule on  
3 expert evidence.

4 So, Mr Moser, this is, now that we have resolved the issues in trial one, as I understand it,  
5 there's no economist in trial one and the question is what you described as an industry  
6 expert. What we would like to know is a bit more about what exactly is the nature of  
7 the evidence that this person would be giving, going to the issues, and if you are able  
8 to, who that might be and what their expertise is.

9  
10 **Submissions by MR MOSER**

11 **MR MOSER:** Yes. I would like to start off by explaining something about our journey towards  
12 trying to get an expert and then it might help, unless you stop me, just to cast a glance  
13 at Kent v Apple and the nature of industry experts or perhaps you'll say to me you are  
14 entirely --

15 **THE PRESIDENT:** I don't think we need that. We just want to know what actually -- I mean  
16 we entirely understand that you can have -- I mean there are different kind of expert  
17 witnesses.

18 **MR MOSER:** Yes.

19 **THE PRESIDENT:** It was addressed by the Supreme Court not long ago. I think they referred  
20 to them as factual evidence from a skilled witness, as opposed to opinion evidence  
21 from an expert witness and there's a sort of spectrum, but we want to know what  
22 actually are the issues that this person is going to be dealing with and we are very well  
23 aware that there is a lot of expertise on the defendants' side and your client has none.  
24 So we are aware of that.

25 **MR MOSER:** So there is that. There's an inequality of arms.

26 **THE PRESIDENT:** Yes.

1 **MR MOSER:** And it's important, according to the rules, for the Tribunal to see that the parties  
2 are on an equal footing.

3 **THE PRESIDENT:** Yes, we've got that point. As I say, we fully understand that.

4 **MR MOSER:** In relation to the issues we've identified so far, which it seems to us that an  
5 industry expert is going to be of assistance to the Tribunal, we have issue 8, that's at  
6 page 688 of the first bundle, what's the appropriate counterfactual involving no abuse  
7 of dominance? Issue 9, the making available of boundary fares from other sales  
8 channels, discounted and promotional fares. Taking any particular steps. If so, which  
9 steps, to provide information to customers about the availability of boundary fares. To  
10 otherwise ensure customers are aware of availability of boundary fares.

11 Issue 11 – was the defendants' conduct in relation to the availability of boundary fares and in  
12 the way in which they were promoted, proportionate and/or objectively justified. Then  
13 issue 12, which we've discussed in some detail in relation to --

14 **THE PRESIDENT:** Well they can't give -- issue 12 is -- oh I see, yes. Well that's  
15 issue 12 -- well which bit of issue 12? I mean 12(a), "Agency", that's not going to be  
16 an industry expert, is it? "Economic unit", that's not going to be industry expert, is it?

17 **MR MOSER:** It may be that 12 -- it was 12(d) that we wanted --

18 **THE PRESIDENT:** 12(d) is now a pure issue of law.

19 **MR MOSER:** It may well be that one has fallen away.

20 **THE PRESIDENT:** I mean you say it may well be. I think we've got to decide, really, now,  
21 whether an industry expert should be admitted.

22 **MR MOSER:** Yes.

23 **THE PRESIDENT:** So we've got to know what your position is. You are not pushing for an  
24 expert on the reformulated 12(d).

25 **MR MOSER:** I am not.

26 **THE PRESIDENT:** Right. So it's 8, 9, (b) to (c) and --

27 **MR MOSER:** And 11.

1 **THE PRESIDENT:** And 11.

2 **MR MOSER:** Those are really the core issues and what we say is that the Tribunal, at the  
3 moment, is very likely to hear from the other side who have access to extensive insider  
4 knowledge, about what should happen in the counterfactual and they will explain their  
5 position.

6 The defendants have already relied on witness evidence in relation to documents, so not yet  
7 in relation to the issues but in relation to documents, from, you may recall, Mr Alex  
8 Cameron, who was a revenue professional and has his own company which provides  
9 consultancy services to First MTR. That's the sort of evidence they are producing and  
10 there's a list of custodians in section 2 of DRD, quite an interesting list that suggests  
11 that their staff will be explaining what their views are in relation to, shall we say,  
12 "expertise".

13 **THE PRESIDENT:** But custodians are custodians for the purpose of disclosure.

14 **MR MOSER:** Absolutely.

15 **THE PRESIDENT:** Not witnesses.

16 **MR MOSER:** Absolutely, but we have to think about the fact there will be witnesses from the  
17 other side. At the moment, we don't know who they are and that's not a criticism but  
18 we are going to have to be able to say something against the evidence.

19 So, for instance, in relation to issue 8, what is going to happen in the counterfactual. In the  
20 Court of Appeal, to take just one example, we had a very interesting discussion with  
21 the Court of Appeal about what could and couldn't be done in relation to the ticket  
22 machines.

23 **THE PRESIDENT:** Yes.

24 **MR MOSER:** They said: well you could have a page on the ticket machine. I recall my learned  
25 friend Mr Harris, I think was, saying: no, no, it's not so easy. Presumably they are  
26 going to bring their own witnesses, who are going to explain 100 reasons why this is

1           unrealistic. We'd like to have someone who is able, from their own industry knowledge,  
2           to say why it is realistic.

3 **THE PRESIDENT:** So is this an expert, really, on ticket selling?

4 **MR MOSER:** It is.

5 **THE PRESIDENT:** Not on the railway industry specifically; is that right?

6 **MR MOSER:** It's specifically railway tickets. So it is someone who is going to be a ticketing  
7           expert but with particular reference to the railways. So, for instance, you might have  
8           a discussion about how realistic is it; how effective is it to have posters in ticket office  
9           windows and they may say: not at all. And it would be useful to have someone,  
10          perhaps, to say: well it is or online ad campaigns, the sort of things we were talking  
11          about in disclosure, the training and advertising disclosure. Someone to put some  
12          flesh on the bones so it's not just me saying: well you can do this.

13 **THE PRESIDENT:** Or cross-examination.

14 **MR MOSER:** Yes.

15 **THE PRESIDENT:** So normally you have factual witnesses exchanged --

16 **MR MOSER:** Yes.

17 **THE PRESIDENT:** -- and then you have factual evidence in response --

18 **MR MOSER:** Yes.

19 **THE PRESIDENT:** -- replying factual evidence and then you have experts. So are you  
20          essentially saying, well you don't think you will have factual evidence in response?  
21          What you want is to respond to the factual evidence with an expert witness or to use  
22          the Supreme Court's formulation, factual evidence from a skilled witness?

23 **MR MOSER:** Yes, essentially. Although they don't rely on it any more in their skeleton  
24          argument, at the last CMC, counsel then appearing for Stagecoach called this  
25          a quasiexpert approach because she identified that her clients, Mr Scott's clients, are  
26          in a similar -- I mean they are in a better but not dissimilar position of no longer running  
27          the thing, so they might have to bring someone along.

1 As recently as just a couple of weeks ago, they still maintained that position in a letter they  
2 wrote to us and that's all in the bundle. So that is the sort of person we are talking  
3 about. In these sorts of cases, as we've seen in the Kent v Apple case, there is  
4 a different approach, particularly I suggest, appropriate to collective actions but  
5 sanctioned, as you point out, by the Supreme Court, where you bring along someone  
6 who is an expert, not so much someone who is the only person who can possibly  
7 understand a complicated scientific process but someone who knows the industry  
8 inside out and is able to give the appropriate assistance to the Tribunal. As you say,  
9 otherwise it's just me cross-examining and then I will hazard that this or that could be  
10 done in the counterfactual and the Tribunal will be left really --

11 **THE PRESIDENT:** Have you identified such a person, industry person?

12 **MR MOSER:** Yes, this has been a tortuous route. We've now identified such a person. The  
13 problem we have had is a David and Goliath problem in a way, which is that everyone  
14 we've approached has eventually discovered that they have some sort of conflict  
15 because they've been involved in one form or another with the defendants.

16 We believe we have now identified such a person. The reason I am not naming him today is  
17 because there is a second level of conflict check being carried out as we speak.  
18 However, we remain confident that we are now finally at journey's end and we've had  
19 preliminary meetings with this person. So, yes, we have someone, fingers crossed.  
20 I don't think it matters whether I say their name out loud today or later, in my  
21 submission. In Kent v Apple, the person wasn't identified by name or at all. It's the  
22 principle of the matter.

23 **THE PRESIDENT:** I can understand the difficulty that arises in a number of these cases.

24 But to be clear because I think it's very important we are clear, at the moment you are seeking  
25 permission to call an expert or skilled impartial witness, independent witness, to give  
26 evidence relating to issues 8, 9 --

27 **MR MOSER:** Nine.

1 **THE PRESIDENT:** -- and 11.

2 **MR MOSER:** Yes.

3 **THE PRESIDENT:** And it will be, essentially, in -- it will be, in particular, in response to such  
4 factual evidence as the defendants may put in. Is that right?

5 **MR MOSER:** We are not currently envisaging that, no.

6 **THE PRESIDENT:** So you are not currently envisaging any other factual evidence --

7 **MR MOSER:** Any other factual evidence, no.

8 **THE PRESIDENT:** -- in response.

9 **MR MOSER:** But we'd have our industry expert who would be there for that purpose also.

10 **THE PRESIDENT:** Yes. Thank you. Is there anything else? **(Pause)**

11 I think to be clear, as Mr Holmes rightly pointed out, we are talking about one individual.

12 **MR MOSER:** Yes, we've had enough difficulty finding one, so it will be one.

13 **THE PRESIDENT:** Yes, thank you. So that is the application.

14 Mr Ward.

15

16 **Submissions by MR WARD**

17 **MR WARD:** Thank you, sir.

18 The difficulty that we and the Tribunal are faced with is that we still don't know what the precise  
19 nature of this expertise will be. Mr Moser is right, we don't need to know the name  
20 today, that's understandable. But on the other hand, you are being asked to make  
21 expert directions in respect of a rather vague and imprecise form of expertise-  
22 obviously not, in the language of the case law, recognised expertise governed by  
23 recognised standards and rules of conduct. We respectfully agree, sir, that it sounds  
24 much more like factual evidence from a skilled witness and it's very hard to assess its  
25 relevance when we don't know the expertise. And when we talk about issues 8, 9 and  
26 11, what the Class Representative says is it will be in relation to some or all of those  
27 issues.

1 So if one contrasts that with a situation where directions are given for an expert economist,  
2 often there will be very precisely formulated questions and, indeed, in due course, an  
3 agreed methodology.

4 Now if the Tribunal is minded to grant this application, we respectfully submit the right way to  
5 treat it is factual evidence, that a primary witness statement should be served at the  
6 same time as the defendants' witness statements and then there should be a mutual  
7 right of reply. There's no reason why this should weigh into some sort of quasi expert  
8 process later on into the timetable. Whatever the Tribunal considers to be appropriate  
9 here, it's clear that the Tribunal will be assisted by any relevant factual witness on the  
10 defendants' side, having the opportunity to comment on what this skilled witness has  
11 said. Because if, just to go with Mr Moser's example, if the skilled witness says: well,  
12 it's perfectly possible to do such and such on a ticket machine, it may well be that, for  
13 example, the defendants' people say: well actually, no -- perhaps it's understandable  
14 you wouldn't know but in fact, there are these or other problems in trying to do what  
15 you say is so obvious.

16 So at the least there needs to be, in my submission, a right of reply for the defendants' factual  
17 witnesses to whatever skilled witness factual evidence is given.

18 **THE PRESIDENT:** Yes. Thank you. Mr Harris, Mr Scott?

19 **MR HARRIS:** We adopt Mr Ward's submissions, for those reasons.

20 **MR SCOTT:** I also adopt Mr Ward's submissions.

21 **THE PRESIDENT:** Yes. Well, Mr Moser, it seems to us that's clearly right, that they must  
22 have a chance to reply and it may be that it's by a factual witness using, as you said,  
23 their internal expertise or maybe for Mr Scott's clients it won't be internal because they  
24 are no longer running the railway but someone who had been involved and it's  
25 a question, really, of how that is put into the timetable and whether you are -- we will  
26 call him an expert but in inverted commas. He will be someone with knowledge and  
27 experience, he will be independent of the parties and he will owe, in that respect, a duty



1 to the Tribunal. But it may not be that it's, as it were, a recognised area of expertise  
2 because it's rather niche and specific to this case. It's more an experience and  
3 knowledge case.

4 I think we are of the view you should have permission to call that person but clearly the  
5 defendants must have a right to respond and if they wish to use an equivalent  
6 independent themselves, clearly they can but they may prefer to rely on their own  
7 knowledge and experience and really the first question is whether you should then just  
8 put in his initial evidence at the same time as the factual witnesses come from the  
9 defendants, so they can see what his initial views are, having had a chance, if he  
10 wishes to look at some of the disclosure, and then they respond, or whether we have,  
11 as it were, factual witnesses from the defendants, your expert witness and then factual  
12 witnesses in answer.

13 **MR MOSER:** Yes, that must all be right, sir. It's a function of the equal and opposite question  
14 that you asked me. I was asked: so you are not producing factual evidence?  
15 I suppose I ask rhetorically, Mr Ward, are you not producing any expert evidence? If  
16 they are not and this is really going to be, essentially, an exchange between different  
17 kinds of factual or quasi factual witnesses, then that's absolutely fine. If they want to  
18 call their own experts, that's also fine.

19 Looking at the timetable, I want to observe two things, which perhaps I ought to have observed  
20 right at the outset. Our initial estimate of producing witness evidence two weeks after  
21 disclosure was always too tight. That's just a mistake, I'm afraid, and I apologise.

22 **THE PRESIDENT:** That's not going to happen, clearly.

23 **MR MOSER:** That is not going to happen anyway. Now there isn't going to be disclosure until  
24 mid-January. So if one were to look at mid-March -- I might take instructions on  
25 whether there is a preference amongst those behind me for simultaneous or  
26 sequential, if I may be given a moment.

1 **THE PRESIDENT:** What I suggest we do, since we have not had a break for the purpose of  
2 the individual seeking to transcribe this --

3 **MR MOSER:** Yes.

4 **THE PRESIDENT:** -- is that we rise now. You can take instructions on that with a view to  
5 how this should take place. If you can agree a timetable, there will be witness evidence  
6 in reply, assuming -- whichever way it's done, so there will be a reply to your expert.  
7 So we either need, as it were, two dates or three. And you can give some thought to  
8 that. If you can agree, all well and good. If not, we will hear from you and deal with  
9 that. We'll come back for that reason at 3.50. We'll give you a little longer.

10 **(3.34 pm)**

11 **(A short break)**

12 **(3.51 pm)**

13 **MR MOSER:** The parties have had a go, for the avoidance of doubt, at trying to agree all of  
14 this now. It's not been possible in the minutes that we spent doing that, to agree it  
15 entirely. We are not going to be a million miles apart, subject to the basic structure.

16 So we, for the Class Representative, are strongly of the view that it ought to be sequential.  
17 They ought to go first, then our witness, then their response. The reason for that, if it  
18 helps, is they are obviously going to have most of the facts, most of the information.  
19 So, again, as a matter of equality of arms and ensuring the parties are on an equal  
20 footing, we'd like our witness to be able to see all of that before, as it were, opining into  
21 the blue. Also, as far as they are concerned, we would have thought they'd like the  
22 opportunity to respond to our response to their evidence, so that they go first, then us,  
23 then them again. That means that they have a chance to react to what we say. If there  
24 are just two iterations, everybody once, everybody the second time, the second time  
25 our witness is likely to be responding in a granular fashion to whatever it was they said.

1 I bet they are going to come back then and then say: oh, can we give some further evidence,  
2 because that's what always happens or if they don't, then it will be less advantageous,  
3 one imagines, for them.

4 So we think three lots of witness statements and, of course, that's why -- they think two, that's  
5 why we haven't been able to agree dates.

6 The dates we had in mind -- it all depends on when you have the PTR and how late the  
7 Tribunal would be prepared to have the PTR. If it were, say, at the beginning of May,  
8 say 8 May or thereabouts and one works backwards, disclosure in January, our  
9 opening gambit is to suggest they serve their witness statements on 22 February, we  
10 respond on 28 March, that's Maundy Thursday and then their response can be, say,  
11 19 April and then there's two weeks or more, two or three weeks until the PTR.

12 If the PTR could be put back a bit, there might be more time at the beginning of that timeline.

13 One just has to be a bit careful of Easter, to make sure it doesn't clash. So that's where  
14 we are on that.

15 I mean the first trial starts on 17 June. If it were felt a PTR weren't required until the very  
16 beginning of June, say --

17 **THE PRESIDENT:** No, that's too late.

18 **MR MOSER:** There we are. So that's our opening gambit on the basis the PTR is 8 May.  
19 22 February, 28 March, 19 April.

20 **THE PRESIDENT:** But as you say, the question is really three grounds or two.

21 **MR MOSER:** Yes.

22 **THE PRESIDENT:** Because the dates will then slot in accordingly, I think.

23 **MR MOSER:** Yes.

24 **THE PRESIDENT:** But can you also clarify this. You will appreciate that your person will be  
25 responding to what is said by the defendants but will he also be, as it were, offering  
26 evidence not just based on them but based on his knowledge of what happens  
27 elsewhere in other train operating regions and how tickets are sold there or how ticket

1 machines are configured. In other words, saying: well I know from my experience and  
2 my study of the way tickets are being sold that it's possible it's being done here and  
3 here and here and not simply, as it were, critiquing the position within the defendants.  
4 You understand the point?

5 **MR MOSER:** I do. There are going to be three sources of evidence for him. One is going to  
6 be disclosure from the other side, the other is considering their witness statements and  
7 the third will be such industry knowledge as he holds himself, insofar as it's relevant.

8 **THE PRESIDENT:** Yes.

9 **MR MOSER:** I cannot promise or particularise today the percentage or nature of the third.

10 **THE PRESIDENT:** No, of course not. But it's just that that is -- so the first and the third are  
11 matters that could be provided without having to be responding. They could come in  
12 in a first round.

13 **MR MOSER:** Indeed, although they might have to be augmented once we've seen the other  
14 side's evidence.

15 **THE PRESIDENT:** Yes. But what would then happen is that -- yes, you'd then get -- I see  
16 that. Right. Thank you. Is it Mr Harris or Mr Ward?

17  
18 **Submissions by MR HARRIS**

19 **MR HARRIS:** There are two interlocking sets of submissions because they're both about the  
20 timetable and I'll go first to address you on the date for disclosure and how that bears  
21 relevantly upon the date for witness statements. Then Mr Ward will address you on  
22 the two or three stages.

23 But just to preface that, we are firmly opposed to three stages and if it is to be sequential, if  
24 anything it should be the claimants going first. They are, after all, the claimants. We've  
25 just ascertained from Mr Moser that there is freestanding evidence from this person  
26 who is said to have all kinds of skilled, independent knowledge about the markets and,  
27 therefore, when he had submitted earlier into the blue, this man will be opining or giving

1 evidence, that's just wrong. But I will leave that mostly to Mr Ward. The relevant bit  
2 on timetable I wish to address is the disclosure. We somehow left it, before that small  
3 adjournment, it would be somewhere in January and the 12th was mentioned and the  
4 19th was mentioned but I would like, based upon experience, to push back against  
5 both dates.

6 The experience is this. You may or may not know my client, GTR, is also in another train  
7 collective proceedings. That's fronted by a gentleman called Mr Boyle, who is the  
8 Class Representative and in that case there was a disclosure exercise ordered by  
9 Mr Justice Smith and his colleagues which was due to take place, essentially, over the  
10 Christmas period, with a 17 January date. This is the January of this year, right, so  
11 some, whatever, eight months, nine months ago.

12 That couldn't be done and we had to have an extension until the end of January and the reason  
13 that it couldn't be done was a reason that applies in this case. And then there's another  
14 additional reason that's specific to this case or at least to my clients. The reason it  
15 couldn't be done in that case is because the experience was the train companies, with  
16 respect to them, essentially shut down over Christmas and we just couldn't get, with  
17 the best will in the world, and facing the order that was given for 17 January, the  
18 disclosure done. And the disclosure in that case was far more limited than has just  
19 been agreed and/or ordered in this case. I want to be realistic. From the perspective  
20 of my clients for certain, neither the 12th nor the 19th is realistic and that's why we had,  
21 we thought responsibly, put forward I think, 16 February, certainly well into February.  
22 So if that's going to be brought forward and we didn't resolve that issue, then with  
23 respect, certainly for my clients, it can't be done by the 12th or 19th and we shouldn't  
24 order something that we know can't be done and we strongly urge it to be at least into  
25 February, if not all the way to the 16th.

26 On that latter point, we, for our own part, don't see any reason why it shouldn't be 16 February  
27 because there's no need for these witness statements to be done before the end of

1 March, there's no need for sequential which Mr Ward will pick up and Mr Moser himself  
2 has said 28 March for some witness statements.

3 **THE PRESIDENT:** If you say end of March, then you would say reply by --

4 **MR HARRIS:** Sometime in the latter part of April, yes. Mr Moser suggested 19th. We think  
5 it could be a little bit later than that because the trial is not until mid-June.

6 **THE PRESIDENT:** But you want it for the PTR.

7 **MR HARRIS:** Absolutely. So that's what I say about the reason that I already know and have  
8 experience of for the very same client. GTR is the client in *Boyle* and is one of the  
9 clients in this case. But there's another reason why, at least in the case of my clients,  
10 this is not doable by the 12th or the 19th and would have to be (audio distortion). As  
11 you will recall, LSER stopped being the franchise holder and it went to SE Trains and  
12 that's now essentially government run, you know that. But the way in which the  
13 disclosure process is operated is by means of the handover agreement that was  
14 negotiated when this litigation was on foot or at least contemplated. We are  
15 responsible, broadly, for obtaining the documents from SE Trains Limited, the  
16 government run company, and that's because we've negotiated, essentially, and we  
17 have an in-control provision for the purposes of disclosure of these proceedings.

18 But as you will have seen earlier today, the letter from Addleshaw, they are actively involved.

19 They act for SE Trains, not my client any longer and everything has to go through  
20 Addleshaw. And Addleshaw, for instance -- in the case of disclosure, my instructions  
21 are Addleshaw say: you can't ask anything of the business yourself, even though these  
22 used to be your employees and your business. Fair enough, we're not objecting to this  
23 but this is the mechanism, you have to have scales and it all has to go in writing through  
24 us and then it takes up --

25 **THE PRESIDENT:** No, I understand.

26 **MR HARRIS:** So for those two reasons, we can't make the 12th or the 19th, it would have to  
27 be February and then there's my old chestnut which is at least in my case, I have two

1 sets of clients as well. So for a combination of all of those reasons, I would say that  
2 for all defendants, it needs to be considerably later than 19 January and certainly in  
3 my case and there's no need to have any witness statements of any kind in February,  
4 they can all be in March.

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

6 Mr Ward.

7 **MR HARRIS:** Thank you.

8  
9 **Submissions by MR WARD**

10 **MR WARD:** Thank you, sir.

11 It's an unusual proposition that in a case where the claimant bears the burden of proof on all  
12 relevant issues in trial one, that the defendant should produce its witness statements  
13 of fact first and in our respectful submission, a two-stage process is appropriate rather  
14 than three.

15 As you said, sir, a few moments ago, at least matters arising out of the disclosure and that  
16 witness's own industry knowledge, can be addressed. The whole point of the reply  
17 stage will be for the witness to be able to comment on the factual witness statements  
18 produced by the defendants.

19 It's just worth, if I may, putting down -- I hate to say -- a marker here that, of course, the  
20 defendant witness statements are likely to deal with matters of practical commercial  
21 experience and they may in some senses be expressing a view based on that  
22 experience. So judgments about what might be possible with a ticket machine. So we  
23 rather suspect they will fall in the category of factual evidence from a skilled witness  
24 but we are not seeking a direction to call some independent person to go toe to toe  
25 with the Class Representative's witness in that respect.

26 What we would suggest is that the initial exchange takes place in mid-March and then the  
27 reply stage takes place towards the end of April.

1 The next constraint is the PTR and I think it's common ground here that the dates given on  
2 the timetable are too early. Of course, the PTR needs to be in time to make useful  
3 orders but also at a time when thinking and preparation for trial is really well  
4 crystallised.

5 The trial date we had is 17 June. So I appreciate this is an area where the Tribunal is bound  
6 to have a strong view based on experience but the second half of May seems, with  
7 respect, entirely viable for that purpose.

8 **THE PRESIDENT:** Yes, thank you. Before we respond, just a moment. **(Pause)**

9 Yes, Mr Moser, the disadvantage from your perspective of your proposal is that your witness  
10 only has one go and we do think it might be more satisfactory in our view, if -- given  
11 that part of his evidence will be based, as you rightly said, on disclosure and on his  
12 experience more widely, he can deal with that. It's accepted, of course, that the  
13 defendants will want to reply to that but equally, he will then be able to have a second  
14 go, replying to the factual witness that has been put in and that way he gets, as it were,  
15 two rounds rather than just one and that, actually, that might work well for your side  
16 and not just for the defendants, doing it on a really mutual basis.

17 **MR MOSER:** I will just take instructions for a moment. **(Pause)**

18 Sir, I am not going to, especially at this hour, risk looking a gift horse in the mouth and so we  
19 will go with the two dates. It may well be that our first round of witness statement is,  
20 therefore, going to be a little more economical than it might otherwise be but that's not  
21 a bad thing perhaps.

22 **THE PRESIDENT:** Yes, and you'll see what you get on disclosure.

23 **MR MOSER:** Exactly.

24 **THE PRESIDENT:** Very well. So we'll do that. There will be two mutual rounds.

25 **MR MOSER:** May I say something about --

26 **THE PRESIDENT:** So that takes us then, going on dates, on disclosure.



1 **MR MOSER:** Disclosure. We listened to what Mr Harris had to say and the lessons learned  
2 or perhaps not learned from *Boyle*. They will this time be forewarned about what  
3 happened in *Boyle* and perhaps be able to avoid it. In *Boyle*, as far as we can see,  
4 the pleadings didn't close until 1 December 2022, as we understand the order on the  
5 CAT's website. So we are in a very different position here, as they have a great deal  
6 more time to prepare disclosure before Christmas in this case. They can start now, if  
7 they haven't started already. It's October. They have three months until Christmas. If  
8 they don't come back to us until February, the whole process is going to be impossibly  
9 squeezed. We've heard from Mr Harris how extensive the disclosure is apparently  
10 going to be. Someone has to read all that stuff and then say something about it  
11 sensibly. We'll be seeing it for the first time, when they disclose it to us.

12 So we hear all of that but really they must do better, I am afraid and it's said: oh well, we have  
13 two sets of clients. I have not said this today yet but we always have to respond to  
14 four things coming from the other side, don't forget.

15 **THE PRESIDENT:** Yes. Just a moment. **(Pause)**

16  
17 **Ruling**

18 **THE PRESIDENT:** What we have in mind for disclosure, and we do want to be realistic but,  
19 equally, we think it is important matters progress because if there is going to be any  
20 request for further disclosure, that has to be accommodated, that all defendants except  
21 for LSER should be by 2 February and LSER, we will give you, Mr Harris, not quite as  
22 long as you want but 14 February and we recognise your extra difficulties but we do  
23 not think it should apply to anybody else.

24 It will mean that, Mr Moser, you will get a lot to work on before you get LSER and that should  
25 be reasonable. It gives you your Christmas break but we are only at the beginning of  
26 October, not even, so that is a lot of time.

1 **MR HARRIS:** Sir, can I just clarify. When you say LSER, you mean my clients, because  
2 there's LSER and GTR?

3 **THE PRESIDENT:** No, we don't. We mean the one that has to go through Addleshaw  
4 Goddard because you don't have direct access.

5 **MR HARRIS:** I see, so it's 2 February for all my other clients, bar --

6 **THE PRESIDENT:** Yes.

7 **MR HARRIS:** I see. Thank you, sir.

8 **THE PRESIDENT:** So on that basis, we can then look at the -- that's disclosure. Then one is  
9 looking at witness statements as a result of that. If we say that the initial exchange will  
10 be, on that basis, sometime towards the end of March, will that work?

11 **MR MOSER:** Yes.

12 **THE PRESIDENT:** And then some time towards -- we've got to watch Easter.

13 **MR MOSER:** We can stick to maybe Maundy Thursday.

14 **THE PRESIDENT:** Which was?

15 **MR MOSER:** 28 March.

16 **THE PRESIDENT:** For the first round?

17 **MR MOSER:** Yes.

18 **THE PRESIDENT:** Well when then, does the -- I think it should be possibly a bit earlier,  
19 slightly earlier than that. No, I think it should be 22 March.

20 **MR MOSER:** So be it.

21 **THE PRESIDENT:** And then reply should be ... when is Easter?

22 **MR MOSER:** Easter, 29 March and 1 April.

23 **THE PRESIDENT:** Yes. 19 April for reply witness evidence?

24 **MR MOSER:** Yes.

25 **THE PRESIDENT:** Then I think we want, I think, a PTR, if possible, in the week commencing  
26 6 May.

27 **MR MOSER:** Perhaps the 8th.

1 **THE PRESIDENT:** We can't fix that without the third member of the Tribunal and having to  
2 check his diary and you may need to check your diaries because that's a court fixture,  
3 so we will aim for the week commencing 6 May. It can, if necessary, slip to the  
4 following week but it's highly desirable it should be in the week of 6 May. The 6 May  
5 itself, I think is a bank holiday but we will communicate with the parties about that.  
6 Is there anything else on timetable at this point?

7 **MR MOSER:** There's the question, I say this with some trepidation, of timetable for disclosure  
8 in the second trial.

9 **THE PRESIDENT:** Yes. Well, I think there should be -- as I said, I don't think we need to  
10 direct that -- there should be disclosure of the results of the survey from you when it's  
11 done.

12 **MR MOSER:** Yes.

13 **THE PRESIDENT:** We are coming on to the survey, of course, because of the point about  
14 the shadowing and --

15 **MR MOSER:** We suggested that by mid-March of 2024.

16 **THE PRESIDENT:** Yes, well -- and you need to also disclose, again following the Whitford  
17 guidelines, not just the results but the methodology --

18 **MR MOSER:** Yes.

19 **THE PRESIDENT:** -- by which the results are arrived at and any instructions to interviewers  
20 or briefing and so on. If you look at those guidelines.  
21 But beyond that, the question is to have disclosure of other material, I think there's quite a lot  
22 to be getting on with.

23 **MR MOSER:** Yes.

24 **THE PRESIDENT:** And I appreciate you will say that at the previous CMC we said disclosure  
25 ought to keep going but I am not sure, on reflection --

26 **MR MOSER:** That's why we put it in.

27 **THE PRESIDENT:** -- that's necessarily the most sensible thing to do at this point.

1 **MR MOSER:** Yes. I will only say that depending on when judgment comes in the first trial --

2 **THE PRESIDENT:** Yes, well it won't come before October.

3 **MR MOSER:** No.

4 **THE PRESIDENT:** That's clear.

5 **MR MOSER:** By then it will be too late.

6 **THE PRESIDENT:** When is the second trial? Have we fixed it?

7 **MR MOSER:** The second trial is fixed for 23 June 2025.

8 **THE PRESIDENT:** Effectively a year later.

9 **MR MOSER:** Yes, so I don't know whether it's sensible to deal with the --

10 **THE PRESIDENT:** Well we don't need -- yes, I see.

11 **MR MOSER:** -- that at a separate CMC or at the PTR for this one or there might again be

12 quite a lot to be getting on with.

13 **THE PRESIDENT:** I suggest we revisit it, we put it on the agenda for the PTR. I appreciate

14 people won't want to start doing disclosure in May, when they are preparing for trial

15 but we may see whether we should schedule something for September and what is

16 likely to happen about judgment and whether in any way, without making any

17 commitment, the Tribunal might be able to give an indication, even if it doesn't produce

18 full judgment, such that one knows what's going to happen going forward.

19 **MR MOSER:** But bearing in mind that disclosure and evidence for the second trial is going to

20 be heavier than for the first.

21 **THE PRESIDENT:** Because it involves --

22 **MR MOSER:** Because it involves more questions of fact around causation.

23 **THE PRESIDENT:** Yes. Although it will be very economist driven, won't it?

24 **MR MOSER:** That too.

25 **THE PRESIDENT:** Yes. Well let's leave it at that and we'll reflect on that. That leaves us

26 then with, I think, the question of, on the survey, the shadowing.

27 **MR MOSER:** Yes.

1 **THE PRESIDENT:** We did look, Mr Harris, at the document you gave us which I now can't  
2 find. Where is it? Yes. You particularly drew our attention to 2.50, paragraph 2.50:

3 "Once main stage fieldwork ... it's also good practice for the agency project executives to  
4 continue to monitor a proportion of interviews. Monitoring of interviewers in the field  
5 for face to face is time-consuming ... but plays an important role."

6 That's the particular paragraph you drew our attention within, saying: look at the whole of the  
7 section beginning on page 19. Well as we understand this, this is the guidance  
8 from -- good practice to parties in merger cases conducting surveys and it says on  
9 page 8:

10 "Working with market research agencies. The CMA commissions market research agencies  
11 to conduct most of its survey work. The choice of agency and the team within the  
12 agency is a key decision affecting the survey quality achieved."

13 Then 1.32:

14 "We would expect market research agencies working for parties and their external advisers to  
15 observe the MI's code of conduct, to have appropriate qualifications ... "

16 And that then takes one to the section on page 19 which talks about interviewer briefing and  
17 monitoring. At paragraph 2.44:

18 "Ideally, all field managers, supervisors and interviewers should be briefed directly via  
19 a member of the agency executive team."

20 As we read it, that's clearly a reference not to the CMA but to the market research agency.

21 They say this is common practice and then it refers to the briefing session at 2.45.  
22 2.46, "A separate written briefing note should be produced", and then 2.49:

23 "Good practice is for the agency project executive who conducted the briefing, as just  
24 described, to listen to/attend and observe a selection of the interviews."

25 2.50:

26 "Once main stage field work is fully underway, it's always good practice for the agency project  
27 executive to continue to monitor a proportion of interviews."

1 What that is saying, as we understand it, is that an executive from the market research agency  
2 should monitor a proportion of the interviews done by the interviewers they engage  
3 and as many of us know, a lot of the interviewers are sometimes, indeed, students  
4 engaged to do this, they are not fully trained professionals, so you want someone from  
5 the agency there. That's not about having someone shadowing them from outside, it's  
6 a senior executive within the agency turning up to check that they are doing the job  
7 properly. We would hope and trust that that is the way Yonder would conduct its survey  
8 and that it will have regard to these guidelines.

9 So I don't think 2.50 really supports the idea that someone from the other side should be there  
10 shadowing them.

11 **MR HARRIS:** Sir, there is a number of points here, if I may take them in turn. If you were to  
12 remind yourself of what we said in our letter, as to which I have been ambushed, that  
13 was Mr Moser's submission earlier on, we wrote a letter on Friday which is at tab 83,  
14 page 731, to which we received no response at all, that says LSER and GTR  
15 defendants reserve their right to instruct their own survey expert to shadow Yonder  
16 and Critical Research, while they conduct surveys as part of the survey proposal. So  
17 the first point is this. I am not seeking a direction. Mr Moser is seeking a direction  
18 which completely is unforeshadowed. He has not produced any evidence at all. In the  
19 3 minutes between Mr Moser saying: oh my word, absolutely emphatically not, to this,  
20 for the first time, me having not heard that before, Mr Armitage was able, helpfully, to  
21 identify that there was some, in what I shall respectfully submit in a moment, some  
22 helpful and relevant guidance as to the points of principle that arise. So that's the first  
23 point.

24 The second point is that as we say in paragraph 8, this was totally misrepresented by Mr Moser  
25 earlier on, when he first addressed this topic, that it was somehow going to be  
26 a shadow in the form of a GTR and LSER person in a uniform from the train company.

1 That's not at all what is being proposed. It says in terms, "instruct their own survey  
2 experts."

3 **THE PRESIDENT:** No, we understand that.

4 **MR HARRIS:** First of all, I wanted to clear away those misconceptions. It's Mr Moser who is  
5 seeking a direction and what he's seeking is a direction, as I apprehend, because  
6 there's no draft direction, that my clients are prevented on their own property from  
7 doing something to approach their own customers on their own property. That's what  
8 he's essentially saying but there's no direction and that's a startling proposition.

9 Then on top of that, the theme behind this document, the theme behind it, is that it's important  
10 for there to be monitoring. They call it monitoring, I call it shadowing. I only call it  
11 shadowing because it would be somebody not from Yonder or Critical Research but  
12 they would do the same thing as whether it be somebody from what's called in this  
13 document the agency project executive. The reason it's important is to make sure that  
14 there is a robust survey and there's going to be a live issue at the trial about the  
15 robustness of this survey. All I am saying to you, sir, is that we would like to reserve  
16 the right, for which I seek no direction, on our property, with our own customers, to be  
17 able to say, to be able to be present to see who is being asked questions because we  
18 might want to ask some questions ourselves.

19 You've already made clear today we are entitled to ask questions, so that puts the whole thing  
20 in context. Now as to the particular document and what you've said about that, I accept  
21 what you say about the structure of this document that was found within three minutes  
22 of the point first arising but as you will have seen from paragraph 1.4, it's not limited to  
23 mergers.

24 **THE PRESIDENT:** No, no, this whole problem arises because although this CMC was fixed  
25 a long time ago and it's not atypical, everybody starts writing letters within a few days  
26 of the CMC, so all of these things pop up at short notice. If people could just apply  
27 their minds a little earlier and write letters on both sides a little earlier on, we wouldn't

1 get a situation of letters coming in on Friday, concerning parties' survey consultants on  
2 both sides who are not here, who haven't had a chance to be properly engaged and  
3 everything done in a great rush.

4 **MR HARRIS:** I accept that, sir, but there's another discrete reason --

5 **THE PRESIDENT:** But I do think that if a survey is going to be done effectively -- I appreciate  
6 it's on your own property and we've made clear you can do your independent  
7 survey -- it's very odd for other people, as well as those from the agency that does the  
8 survey, standing around with those being interviewed.

9 If your survey expert wants to engage with Yonder and say: well can we send someone for  
10 one day here and there to attend to see how it is being done, they can engage with  
11 Yonder and see if that's acceptable. But --

12 **MR HARRIS:** That's what was envisaged. I don't think this suggestion -- and at the moment  
13 it's just a reservation of rights to be advised -- I don't think the suggestion is there be  
14 somebody who accompanies every Yonder survey taker on every occasion, on every  
15 station on every day because the idea is to check about the robustness of the survey.  
16 So if you are not going -- first of all, I am not seeking a direction but what you definitely  
17 shouldn't do, in my respectful submission, is direct there cannot be any form of  
18 shadowing which is what I apprehend Mr Moser is somehow seeking. But can I just  
19 address two other things, sir. You say that it's -- I think I paraphrase it, it was words to  
20 the effect of: this is not normal but those are not my instructions. My instructions are  
21 that this does happen and that there are shadows from other companies, precisely  
22 because people are, we say, entitled to come along at the trial, when the fruits of the  
23 survey are addressed and say: I'd like to criticise this, including because of all the  
24 things that are in that section of this guidance. It needs to be done properly. If you  
25 recall, at the beginning of that section, what it says is that "Strict adherence to the  
26 questionnaire script is a key principle." It goes on to say "This can be difficult to  
27 achieve in practice."



1 You can imagine that I may well, on behalf of my client, want to make submissions -- I will  
2 come on to cross-examination because that's a separate point but address the  
3 Tribunal about that flaw being present in this survey. Now how am I going to do that,  
4 at least effectively, if I have never been allowed to have any form of monitoring or  
5 shadowing? That leads me on to the cross-examination point. You yourself said  
6 earlier and we respectfully endorse, the anticipation is somebody from Yonder will  
7 appear at trial and be cross-examined. I would like to cross-examine that person by  
8 reference to something that a shadow/monitor has done, who has been instructed by  
9 my team. Not only by reference to what they say happened, when the CMA document  
10 itself says it often doesn't happen. It might be the best will in the world that the  
11 guidance says A, B and C but then perhaps because they're students, perhaps  
12 because they're inexperienced or hung over, whatever the case may be, it doesn't  
13 happen.

14 **THE PRESIDENT:** I said to you earlier and I can only repeat, the courts have been admitting  
15 survey evidence for decades. There have been a lot of arguments about what should  
16 be the requirements, what should be the obligations. I don't think, as far as I am aware,  
17 this has featured and it certainly is not in the Whitford guidelines approved more  
18 recently by the Court of Appeal in *Interflora* that that's a requirement and yet in all these  
19 cases you do find exactly what happens is the defendant saying: oh, they attack the  
20 survey, it's not robust and so on which is why these requirements have been  
21 developed.

22 So I think this would be, so far as I am aware, but if your research show otherwise, something  
23 different. We hear what you say. It will be relayed to Yonder. It seems to me the first  
24 thing should be that your survey expert, and we don't know who they are either, should  
25 engage with Yonder and address -- because it's only going to be them, it's not going  
26 to be the train company or your solicitors, obviously -- what it is they actually want to  
27 do. Yonder can consider whether this is going to interfere, in their view, with the way

1 they conduct the survey. They know that their rigour is going to come under scrutiny  
2 at trial, so they may think this might help, they may think this is contrary to our protocol,  
3 I don't know, and see where you get to, rather than both sides having to deal with this  
4 on the basis of a letter from Friday and a response today. If you find that can be  
5 resolved in a sensible way, all well and good. If you don't, then I suggest you both put  
6 in written submissions to the Tribunal.

7 I don't think you need anyone there from the pilot because the pilot is just to try and refine the  
8 questions.

9  
10 **Submissions by MR HARRIS**

11 **MR HARRIS:** Sir, I agree with that last point. May I make two very short points to close this  
12 off. The first one is a discrete one. We would like and I think it stands four-square with  
13 the reasoning that you have elucidated during today, disclosure of any verification or  
14 monitoring that is conducted by Yonder or whoever, when it's done.

15 **THE PRESIDENT:** Yes.

16 **MR HARRIS:** That seems to be consistent -- but the second and last point is just, again, the  
17 answer to your suggestion to me, sir, that this hasn't been done in another case, is that  
18 this is a different, new and unprecedented area, these Class Representative's  
19 proceedings, because unlike when you put to me before, say the IP case, where there  
20 is a survey about "is this novel?" in a trademark case, those people are almost certainly  
21 not going to be claimants in the case.

22 **THE PRESIDENT:** Yes. I appreciate there's a difference but I don't think it really affects the  
23 quality of the survey evidence. I don't think --

24 **MR HARRIS:** But I agree, sir, the way forward is no direction given and we proceed in the  
25 manner you've indicated which is liaison between and if we have a dispute after that,  
26 we'll come back to you.

1 **THE PRESIDENT:** They both will be professionals in this field, they may well know each other  
2 and may well be able to come to a sensible arrangement.

3 Mr Moser, are you content to leave it like that? We don't know what Yonder will say in the  
4 way it has been developed and it seems to me you ought to have an opportunity to  
5 discuss it with them and for them to consider and I have left completely open the  
6 possibility -- they may say "No, that just would disrupt the way we conduct a survey",  
7 but whether it would or not, I just don't know.

8 **MR MOSER:** We are in an invidious position, whatever the accusations that we've not  
9 responded instantly or 3 minutes or whatever, so we get this letter after hours on Friday  
10 and it says they reserve their right to instruct their own survey expert to shadow and  
11 we may be forgiven, I hope, for being concerned about the danger of interference with  
12 our survey.

13 **THE PRESIDENT:** You are not being criticised at all. I said it's not arisen in a satisfactory  
14 way but are you content with the way it has been left? What has been made clear  
15 which is not clear from the letter, it's not suggested someone will be there with every  
16 questioner. Secondly, it's clear it's not going to be anyone from the defendants or their  
17 lawyers, it will be someone from a survey expert agency like Yonder and that is what  
18 is envisaged and to what extent they will wish to attend is something that has been left  
19 open.

20 **MR MOSER:** Well, we don't, in truth, know what's envisaged and it's a matter for Mr Harris'  
21 clients to clarify. He did say one very concerning thing -- this is my last point on this.  
22 In his final words, he said "We may wish to ask questions ourselves." That is --

23 **MR HARRIS:** Not on this --

24 **THE PRESIDENT:** I don't think he meant they will intrude in the interview.

25 **MR MOSER:** That's entirely impossible.

26 **THE PRESIDENT:** No, I think that's clearly not appropriate, this is your survey.

27 **MR MOSER:** Entirely inappropriate but that's why need to know what they really want.

1 **THE PRESIDENT:** Go away and consider it and if necessary, write in and we will rule. Both  
2 Mr Holmes and I have heard all that. Just one moment. **(Pause)**  
3 Just to make clear, the disclosure to give that survey, including the methodology, includes the  
4 briefing and the method of monitoring and the monitoring process, so there is full  
5 transparency about the way the survey is conducted and supervised.

6 **MR MOSER:** Yes.

7 **THE PRESIDENT:** And so that can be seen.

8 **MR MOSER:** Yonder are used to this.

9 **THE PRESIDENT:** What you don't have to disclose, as we make clear, is the names and  
10 addresses of the interviewees, on the understanding that they are not disclosed to your  
11 client or solicitors, they remain with the survey agency.

12 **MR MOSER:** Yes, this will be entirely standard, sir. Just for the avoidance of doubt, we don't  
13 plan to say anything proactively to Mr Harris' clients. They've reserved their rights  
14 generally and we accept that. If they want to come to us with a more detailed proposal  
15 of what it is they mean by paragraph 8, then we will of course consider it and respond  
16 timeously.

17 **THE PRESIDENT:** That's what I suggested they should do because it comes from them and  
18 then put their survey expert or agency in touch with Yonder and they should discuss it  
19 in the first instance among themselves and see if some agreement can be reached. If  
20 not, it will have to come back through the lawyers.

21 **THE PRESIDENT:** Very well. I think costs in the case.

22 **MR MOSER:** Yes.

23 **THE PRESIDENT:** Is there anything else to do today? Do we need to formally give permission  
24 to amend for joint and several liability? What's the position on that?

25 **MR MOSER:** I think so and also we need a date for when we are going to get that defence.

26 **THE PRESIDENT:** It's a re-amended defence, is it?

27 **MR MOSER:** Yes.

1 **THE PRESIDENT:** On joint and several liability. Do we have a date from someone, please?

2 **MR HARRIS:** Within a week? I mean it's a question of deleting some words.

3 **MR MOSER:** Perfect.

4 **THE PRESIDENT:** That's fine. We'll say by the end of next Wednesday.

5 **MR HARRIS:** Thank you.

6 **THE PRESIDENT:** With permission to make the amendments.

7 Anything else? Thank you all very much.

8 **(4.38 pm)**

9 **(The hearing adjourned)**

10

11

12

13

14

15

16

17

18