



Neutral citation [2024] CAT 34

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

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

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

16 May 2024

Before:

THE HONOURABLE MR JUSTICE ROTH  
(Chair)  
PROFESSOR SIMON HOLMES  
PROFESSOR ROBIN MASON

Sitting as a Tribunal in England and Wales

**BETWEEN**

**JUSTIN GUTMANN**

Class Representative

-and-

**FIRST MTR SOUTH WESTERN TRAINS LIMITED**

Defendant

**SECRETARY OF STATE FOR TRANSPORT**

Intervener

**AND BETWEEN**

**JUSTIN GUTMANN**

Class Representative

-and-

**(1) LONDON & SOUTH EASTERN RAILWAY LIMITED**  
**(2) GOVIA LIMITED**  
**(3) THE GO-AHEAD GROUP LIMITED**  
**(4) KEOLIS (UK) LIMITED**

Defendants

**SECRETARY OF STATE FOR TRANSPORT**

Intervener

**AND BETWEEN**

**JUSTIN GUTMANN**

Class Representative

-and-

- (1) GOVIA THAMESLINK RAILWAY LIMITED**
- (2) GOVIA LIMITED**
- (3) THE GO-AHEAD GROUP PLC**
- (4) KEOLIS (UK) LIMITED**

Defendants

**SECRETARY OF STATE FOR TRANSPORT**

Intervener

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**RULING: ADMISSIBILITY**

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## **A. INTRODUCTION**

1. The Secretary of State for Transport (“the SoS”) applied to intervene in these proceedings. That application was opposed by the Class Representative (“CR”). Following a hearing on 22 March 2023, the Tribunal granted the SoS permission to intervene in writing on only limited grounds but otherwise refused his application. The Tribunal gave a reasoned judgment discussing the application and setting out the reasons for refusal of most of the bases on which intervention was sought: [2023] CAT 23 (“the Judgment”). The related order of the Tribunal dated 5 April 2023 provided, at para 1:

“The Application for Permission to Intervene is granted to the extent that the Secretary of State is permitted to file neutral written submissions regarding the statutory and regulatory framework in which fare setting was and is carried out, and the arrangements made thereunder. The Secretary of State’s Application for Permission to Intervene is otherwise refused.”

2. There was no appeal against that decision.
3. On 24 April 2023, the SoS filed a lengthy Statement of Intervention (“SoI”), comprising 98 paragraphs.
4. Following correspondence between the parties, the CR applied for an order excluding parts of the SoI. That application, identifying the parts of the SoI to which objection is taken, is set out in the letter from the CR’s solicitors dated 25 April 2024 (“the Application”). By letter dated 3 May 2024, the solicitors to the SoS set out a detailed response (“the Response”) objecting to the Application.
5. The Defendants to the proceedings have adopted a neutral position. Both the CR and the SoS agreed that the Application can be determined on the papers without a hearing.

## **B. THE CORRECT APPROACH**

6. The Response contends that the Application constitutes an application to strike out under rules 11 and 74 of the Competition Appeal Tribunal Rules 2015 (“the

CAT Rules”). That is mistaken. The SoS is not a party and the SoI is not like a claim or defence, or indeed an appeal.<sup>1</sup> The SoS is an intervener and, as the Judgment makes clear, pursuant to rule 16 of the CAT Rules he can intervene only with permission of the Tribunal and on such terms as the Tribunal specifies.

7. Here, as stated above, the SoS was granted permission to intervene only on a limited basis. If and insofar as the SoI exceeds the extent to which intervention was allowed, it is simply inadmissible. The objections made in the Application have to be determined on that basis. There is no question of some independent ground being required, or of “striking out” an admissible pleading or statement.
8. Accordingly, the analogy which the Response seeks to draw with the treatment of strike-out applications is misconceived. The case of *National Westminster Banks Plc v Raboobank Nederland* [2006] EWHC 2925 (Comm), on which reliance is placed, concerned an application to strike out part of a counterclaim, made several weeks into a long trial. It is far removed from the present application and wholly distinguishable.

### **C. THE APPLICATION**

9. The Application is put under four<sup>2</sup> distinct heads, relating to different paragraphs and parts of the SoI, in section 5 of the letter of 25 April 2024. We shall address them in turn.

#### 5.1: Paras 1(b), 11, 13-15 and 58(b)

10. These paragraphs concern the so-called “SGEI framework”, i.e. the regulatory framework whereby rail services are to be regarded as services of general economic interest for the purpose of competition law. That is addressed in the Judgment at [22]-[32].

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<sup>1</sup> Rule 11 of the CAT Rules concerns the strike out of an appeal. Rule 41 concerns the strike out of a claim.

<sup>2</sup> In fact, the letter sets out five heads but para 5.3 repeats para 5.2.

11. SoI para 1(b) is for the most part a simple statement that rail passenger services are SGEIs (which is not in dispute) and a summary of the legal consequences, which is unobjectionable. For the rest, it states that the SoS may have to issue directions to the Defendants following the Tribunal's judgment in these proceedings and a submission that the Tribunal "may need" to take account of the possibility of directions from the SoS when assessing the counterfactual scenario. It is of course a matter for the Tribunal to determine what it should take into account. The fact that the SoS might issue directions to the Defendants flows from the regulatory structure which the SoI describes and is obvious. Although these comments are on the borderline of the permitted intervention, we think that, adopting a generous view, they just come within it and are accordingly admissible.
12. Paras 11 and 13 state that the prohibitions under the Competition Act 1998 may be modified for SGEIs. That is uncontentious and an expression of the statutory position.
13. Paras 14-15 (and the first sentence of para 13) summarise and explain the approach of the Railway Regulation. That is within the permitted scope of intervention.
14. Para 53(a) simply quotes from the ORR's published guidance. That is within the permitted scope of intervention as falling within a description of arrangements made under the regulatory regime.

5.2/5.3: Paras 1(d), 7, 51 and 58(b)

15. These paragraphs state that the SoS and the ORR have not intervened or taken enforcement action concerning boundary fares. In our view that comes within the permitted scope of describing how the regulatory framework has operated. What, if any, relevance this has to the case before the Tribunal is a matter for argument at trial.
16. 5.4: Paras 1(e) and 18-20

17. Paras 18 and 20 explain how the SoS operates the regulatory regime. That is within the scope of the permitted intervention.
18. However, para 19 is different. It amounts to a submission of how the Defendants might react to an adverse judgment from the Tribunal, including cutting costs, reducing services or increasing prices. That is just the kind of submission and opinion evidence considered in the Judgment at [29] and [32]. The Judgment made clear that such statements would not be admitted. Para 1(e) relates directly to that line of argument. It is far from a description of the arrangements made under the statutory and regulatory framework, notwithstanding the attempt to cast this in the context of the regulatory regime. We have no doubt that paras 1(e) and 19 fall outside the permitted scope of intervention.

#### 5.5: Part V of the SoI

19. Part V is headed: “Potential Impact on Advance Fares and Revenue from the Travelcard Agreement”. That in itself is distinct from the permitted scope of intervention. Moreover, this part of the SoI is certainly not framed in neutral terms: indeed, it consists partly of submissions. It puts forward the SoS’ view as to how the introduction of Advance boundary fares would hinder the Defendants’ ability to plan and whether such fares would benefit passengers. And it sets out the SoS’ understanding of how the Travelcard Agreement operates. Part V is clearly outside the permitted scope of intervention.

#### **D. CONCLUSION**

20. Accordingly, the Application is allowed to the extent that paras 1(e), 19 and 90-97 (i.e. Part V) of the SoI are excluded as inadmissible. In other respects, the Application is refused.
21. This ruling is unanimous.

The Hon. Mr Justice Roth  
Chair

Prof. Simon Holmes

Prof. Robin Mason

Charles Dhanowa O.B.E., K.C. (*Hon*)  
Registrar

Date: 16 May 2024