



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

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

**BETWEEN**

**JUSTIN GUTMANN**

Applicant / Proposed Class Representative

-and-

**(1) FIRST MTR SOUTH WESTERN TRAINS LIMITED**  
**(2) STAGECOACH SOUTH WESTERN TRAINS LIMITED**

Respondents/Proposed Defendants

**AND BETWEEN**

**JUSTIN GUTMANN**

Applicant / Proposed Class Representative

-and-

**LONDON & SOUTH EASTERN RAILWAY LIMITED**

Respondent/Proposed Defendant

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**ORDER**

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**UPON** the Applicant's applications dated 26 February 2019 for a collective proceedings order (the "**CPO Applications**") pursuant to section 47B of the Competition Act 1998 and Rule 75 of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) (the "**Tribunal Rules**")

**AND UPON** a confidentiality ring having been established by Order of the Tribunal of 2 April 2019, and the Applicant having disclosed to members of that confidentiality ring and provided to the Tribunal the Litigation Funding Agreement, the Adverse Costs Deed of Indemnity and

the After-the-Event Insurance Policy (“**the Funding Documents**”) in unredacted form, save for information over which privilege, strategic sensitivity or commercial sensitivity is asserted, but highlighting any information for which confidential treatment is requested

**AND UPON** reading the materials submitted by all the parties including a request by the Applicant for confidential treatment of the highlighted passages of the Litigation Funding Agreement, the Adverse Costs Deed of Indemnity and the After-the-Event Insurance Policy

**AND UPON** hearing counsel for all parties at a case management conference on 9 April 2019

## **IT IS ORDERED THAT**

### **Forum**

1. Pursuant to Rules 18, 52 and 74 of the Tribunal Rules, the CPO Applications be treated as proceedings in England and Wales.

### **Evidence and case management**

2. The CPO Applications be heard together, with evidence in one to stand as evidence in the other so far as relevant.
3. All documents filed and served to date and in future on or by the Respondents to each CPO Application, including in accordance with this order (such documents to be redacted and/or marked-up, if appropriate, in respect of information over which confidential treatment/privilege is claimed), be served by the serving party on the Respondents to the other CPO Application.
4. A party may choose to disclose documents, in respect of which a claim of confidentiality is agreed or has been or will be made to the Tribunal by that party pursuant to Rule 101 of the Tribunal Rules, into the confidentiality ring in the form appended to these directions (“**the Confidentiality Ring**”), with liberty to apply in due course should amendments to that arrangement be necessary.

### **Confidentiality (Funding Documents)**

5. The Applicant's request in accordance with Rule 101 of the Tribunal Rules for the confidential treatment of Mr. Gutmann's private address in the Funding Documents be granted and this information ("**the Confidential Information**") be treated as confidential by any party to whom it has been or shall be disclosed, such that in particular—
  - a. the Confidential Information should not be disclosed to any party to whom they have not yet been disclosed or to any non-party without further order of the Tribunal;
  - b. all reasonable steps should be taken to preserve the confidentiality of the material;
  - c. access to it should be limited to those natural persons who need such access for the purposes of the present proceedings; and
  - d. no party shall refer to any Confidential Information at any hearing held in public without the Tribunal's permission.
6. The Order of the Tribunal dated 2 April 2019, establishing a confidentiality ring for the Funding Documents, shall cease to have effect on the approval of these directions.
7. The Applicant to prepare, file and serve non-confidential versions of the Funding Documents by 4pm on 16 April 2019.

### **Disclosure**

8. The South Western Respondents and the Southeastern Respondent each to disclose by 4pm on 16 April 2019 information on how many Boundary Fares, broken down by year, have been sold since 1 October 2015 in relation to services operated by that Respondent as part of either the South Western or the South Eastern franchise.
9. Within three days of the date of this Order, the Respondents shall write to Transport For London ("**TfL**") informing them that the Travelcard Agreement or Agreements covering the period since 1 October 2015 or (in the case of the South Western Respondents) the part of that period during which the relevant Respondent operated the South Western franchise, will be disclosed into the Confidentiality Ring in these proceedings, and

subsequently so disclose said agreements unless TfL makes an application within two weeks of receipt of such notice to oppose any such disclosure.

10. The Applicant disclose by 4pm on 16 April 2019:
  - a. the instructions given to Decidedly by the Proposed Class Representative, Charles Lyndon, Hausfeld and/or any other relevant instructors (e.g. AlixPartners); and
  - b. the survey design and methodology underlying the findings of the Decidedly Report, including instructions given by Decidedly to individual participants in the Decidedly research, any scripts given to those participants for use in ticket office and telephone purchases, and any quality control carried out.

**Exclusion of certain persons from the proposed class**

11. The following categories of persons (as constituted from time to time) shall be excluded from the proposed class:
  - a. members and staff of the Tribunal assigned to these Proceedings;
  - b. officers, directors or employees of:
    - i. the Respondents,
    - ii. any entities which have a (direct or indirect) interest in any of the Respondents that gives rise to significant control, and
    - iii. any entities in which any of the Respondents have such an interest;
  - c. the Applicant's and Respondents' legal representatives as well as any experts or other professional advisers instructed in these proceedings, including the professional staff assisting them.

## **Publicity**

12. The Applicant publicise the CPO Application by 16 April 2019 according to the proposal set out in paragraphs 5.1-5.9 of the Epiq/Hilsoft Plan that is exhibited to the First Witness Statement of Mr Justin Gutmann at [JG1/Tab 11], amended to reflect the directions of the Tribunal to:
  - a. make known the categories of persons that are excluded from the definition of the proposed class, in accordance with paragraph 11 of this Order;
  - b. make known that (on request) copies of the non-confidential version of the Funding Documents prepared in accordance with paragraph 7 of this Order be provided.
13. The Applicant publicise by 16 April 2019, in accordance with paragraphs 12, 17 and 18 of this Order, the right under Rule 76(10)(c) of persons with an interest to object to the CPO Application or the authorisation of the Proposed Class Representative.
14. The Applicant publicise by 16 April 2019, in accordance with paragraphs 12 and 17 of this Order, the right under Rule 79(5) of members of the proposed class to make an application to the Tribunal for permission to make oral submissions at the hearing of the CPO Application.

## **Responses and replies**

15. The Respondents file and serve their response to the Applications, including any evidence, by 4pm on 28 June 2019.
16. The Applicant file and serve any reply to the Respondents' response by 4pm on 11 September 2019.

## **Objections to the CPO Application and applications for permission to make observations**

17. Any person with an interest (including any member of the proposed class) may object to the CPO Application or the authorisation of the Proposed Class Representative by writing to the Tribunal stating their reasons for objecting by 4pm on 5 July 2019. Any member of the proposed class may also seek permission to make oral observations at the CPO

Application hearing, by making an application for such permission, with reasons, as part of his/her written objections.

18. Any third party with a legitimate interest (who is not a member of the proposed class) who seeks permission to make written and/or oral observations at the CPO Application hearing is to make such application, supported by reasons, to the Tribunal by 4pm on 5 July 2019.

### **Pre-hearing review**

19. A pre-hearing review be listed for 23 September 2019 at 2pm.

### **Skeleton arguments and bundles**

20. The parties to file and serve skeleton arguments by 4pm on 22 October 2019. The Appellant's skeleton argument shall be limited to no more than 40 pages. Each Respondent's skeleton argument shall be limited to no more than 25 pages. Skeleton Arguments to be printed on A4 paper in not less than 12-point font and 1.5 line spacing with no less than 1-inch margin on all sides of the page.
21. The Applicant to file five copies of an agreed hearing and authorities bundle (liaising in advance with the Tribunal Registry) by 4pm on 22 October 2019.

### **Hearing**

22. The hearing of the CPO Applications be listed for 5 to 7 November 2019, with 8 November 2019 in reserve.

### **General**

23. Costs be reserved.
24. There be liberty to apply.

**The Hon Mr Justice Roth**

President of the Competition Appeal Tribunal

Made: 9 April 2019

Drawn: 18 April 2019



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**ORDER (CONFIDENTIALITY RING)**

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**UPON** reading the correspondence from the legal representatives of all the parties to these proposed proceedings relating to the establishment of a confidentiality ring by consent

**AND HAVING REGARD TO** the Tribunal's powers under the Competition Appeal Tribunal Rules 2015 (the “**Tribunal Rules**”)

**AND UPON** the Parties having agreed to the terms of this Order

**IT IS ORDERED THAT:**

1. For the purposes of this Order:

1.1. “**Confidential Information**” means any material contained in the Relevant Documents in respect of which a claim of confidentiality is agreed or has been or will be made to the Tribunal by a party pursuant to Rule 99 and/or Rule 101 of the Tribunal Rules.

1.2. “**Confidentiality Ring**” means all the Relevant Advisers.

1.3. “**Relevant Advisers**” are those persons:

1.3.1. whose admission to the Confidentiality Ring has received the consent of the parties pursuant to paragraph 5(1) below or has been authorised by the Tribunal pursuant to paragraph 5(2) below; and

1.3.2. who have given a signed undertaking to the Tribunal in the terms of the Schedule to this Order, of which a copy has been provided to the Tribunal.

1.4. “**Relevant Documents**” means all pleadings and other documents served by any of the parties.

2. Each of the parties shall (as and when disclosure is required) hereafter disclose to the other parties Relevant Documents containing Confidential Information on the condition that such un-redacted versions and any Confidential Information contained therein shall be disclosed only to the Relevant Advisers, who shall treat such documents in accordance with the terms of the undertaking each of them has given.

3. Any such Relevant Document that a party considers to contain Confidential Information shall be marked so as to indicate the parts in relation to which confidential treatment is claimed, in the manner referred to in paragraph 7.46 of the Tribunal Guide to Proceedings 2015.
4. Membership of the Confidentiality Ring becomes effective upon the receipt by the Tribunal of the Relevant Adviser's signed undertaking.
5. If any party wishes to add any person as a Relevant Adviser for the purpose of this Order, they may either:
  - 5.1. obtain the written consent of each of the other parties to the admission of that individual to the Confidentiality Ring and inform the Tribunal in writing accordingly (copying the representatives of the other parties); or
  - 5.2. apply to the Tribunal for an order authorising the admission of that individual to the Confidentiality Ring.
6. If any party wishes one of its Relevant Advisers to be removed from the Confidentiality Ring, they shall inform the Tribunal in writing (copying the representatives of the other parties).
7. When a Relevant Adviser is admitted to or removed from the Confidentiality Ring the relevant party will provide to the Tribunal an up-to-date list of the membership of the Confidentiality Ring.
8. With the exception of solicitors' or counsels' notes, and to the extent permitted by law or any applicable professional conduct regulations, copies of all or any (as appropriate) Confidential Information disclosed pursuant to this Order (in both hard and soft copy) must be destroyed insofar as is technologically possible or made inaccessible at the conclusion of these proceedings, or when a Relevant Adviser ceases to be involved in these proceedings. Each party shall notify the other parties that the Confidential Information has been destroyed:
  - 8.1. at the conclusion of these proceedings;

- 8.2. when a Relevant Adviser ceases to be involved in these proceedings; and/or
- 8.3. if it is ordered that all or any (as appropriate) of the Confidential Information is no longer relevant to and/or disclosable in these proceedings.
9. For the avoidance of doubt, in the event of any anticipated or actual breach of this Order, any party may seek to enforce the terms of this Order.
10. The parties shall make available without charge to any person on request an up-to-date list of the members of the Confidentiality Ring.
11. Costs be reserved.
12. There be liberty to apply.

## SCHEDULE

### UNDERTAKING

I, *[name]*, of *[firm, company or establishment]* being *[legal or other qualification]* and regulated so far as my professional conduct is concerned by *[regulatory body, if any]* undertake to the Tribunal as follows:

1. I have read a copy of the Tribunal's Order of *[date]* 2019 (the "**Tribunal's Order**") and understand the implications of the Tribunal's Order and the giving of this undertaking.
2. Save in respect of provision to the Tribunal, I will not disclose the Confidential Information (as defined in the Tribunal's Order) to any person who is not a Relevant Adviser (as defined in the Tribunal's Order) without the express written consent of the person which originally disclosed the Confidential Information ("**the Disclosing Person**") or the permission of the Tribunal.
3. I will use the Confidential Information only for the purpose of these proceedings and for the purpose of no other current or future proceedings, dispute, complaint, or other use whatsoever without the express consent of the Disclosing Person.
4. I have read, and understand the implications of, Rule 102 of the Tribunal Rules, and will use the Confidential Information only in accordance with that Rule.
5. The Relevant Documents (as defined in the Tribunal's Order) containing the Confidential Information will remain in my custody or the custody of another Relevant Adviser at all times and be held in a manner appropriate to the circumstances so as to prevent unauthorised access or disclosure.
6. The production of further copies by me of the Relevant Documents containing the Confidential Information shall be limited to those required for the use of the Relevant Advisers for the purposes of these proceedings and shall be held in accordance with paragraph 5 of this undertaking.
7. With the exception of solicitors' or counsels' notes, and to the extent permitted by law or any applicable professional conduct regulations, any and all copies of the documents containing the Confidential Information will be securely disposed of insofar as is technologically possible or rendered inaccessible from any computer systems, disk or device so that the Confidential Information is not readily available to any person at the conclusion of these proceedings.
8. None of the requirements in this undertaking shall prevent disclosure of any Confidential Information to any administrative, IT, or support staff for the purposes of fulfilling my instructions in the context of these proceedings.

9. The present proceedings for these purposes shall include any further appeals from the Tribunal to a higher court and/or any references to the European Courts, save in so far as that higher court orders otherwise.
10. Save that none of the requirements listed at paragraphs 2 to 7 above shall prevent Relevant Advisers from disclosing Confidential Information to persons who have already legitimately seen it.

Name: .....

Signed: .....

Date: .....