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5 **IN THE COMPETITION**

Case No: 1304/7/7/19 & 1305/7/7/19

6 **APPEAL TRIBUNAL**

7  
8 Salisbury Square House  
9 8 Salisbury Square  
10 London EC4Y 8AP  
11 (Remote Hearing)

Tuesday 26 January 2021

12  
13 Before:

14 The Honourable Mr Justice Roth  
15 Simon Holmes  
16 Professor Robin Mason  
17 (Sitting as a Tribunal in England and Wales)

18  
19 **BETWEEN:**

20 Justin Gutmann

**Applicant**

21  
22 v

23 First MTR South Western Trains Limited and Another

**Respondents**

24  
25  
26 AND

27 Justin Gutmann

**Applicant**

28  
29 v

30  
31 London & South Eastern Railway Limited

**Respondent**

32  
33  
34 **APPEARANCES**

35 Philip Moser QC, Stefan Kuppen and Alexandra Littlewood (On behalf of Justin Gutmann)

36 Tim Ward QC and James Bourke (On behalf of First MTR)

37 Sarah Abram (On behalf of Stagecoach)

38 Paul Harris QC, Anneliese Blackwood and Michael Armitage (On behalf of LSER)

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Tuesday 26 January 2021

(10.38 am)

**THE PRESIDENT:** Good morning, everyone. Although this is being heard remotely, it is of course as much a Tribunal hearing as if we were all present in the courtroom in Salisbury Square House. It is being live streamed. For those who are watching on the live stream, or indeed within the Teams platform, I should formally remind you that it is a contempt of court to make any recording, whether audio or visual, of the proceedings. An authorised transcript will be made and produced in the usual way.

Thank you all for your skeletons for today and we very much appreciate the cooperation that's taken place between the parties seeking to agree directions, which has clearly been constructive.

Before turning to the directions, we want you, Mr Moser, just to clarify two points on the claim forms. I think the point arises on both, so they are identical points. If one takes the South West Trains claim form in bundle 1, if you have that available?

**MR MOSER:** Yes.

**THE PRESIDENT:** And goes on page 2, to tab 3 - to paragraph 3, I'm sorry - which is the summary there.

Paragraph 3 is, in a sense, then picked up in paragraph 73 in much the same language. It's:

"By not making boundary fares sufficiently available for sale and/or by failing to ensure customers are aware of the existence of boundary fares and/or to buy an appropriate fare in order to avoid being charged twice for part of their journey."

Just one very small point first of all. If one looks at paragraph 42 under the subheading of "abuse", the language is almost the same but I just noticed that

1           whereas in paragraphs 3 and 73 you have "and/or" in all instances, so,  
2           "Failing to ensure customers are aware of the existence of boundary fares  
3           and/or to buy an appropriate fare in order to avoid being charged twice".

4           Under the heading of "abuse" it's:

5           "Customers are aware of the existence of boundary fares and buy an appropriate  
6           fare."

7           Should that, reflecting paragraph 3, be "and/or"?

8           **MR MOSER:** Sir, I am grateful for that spot, yes, it's "and/or".

9           It's probably for once not cutting and pasting.

10          **THE PRESIDENT:** Yes, but we read that as "and/or", I thought so.

11          Then, more significantly -- it's under paragraph 42, and I think it's exactly the same  
12          point in the other pleading, the parallel pleading.

13          The other more significant point is when you say failing to ensure that customers,  
14          various things, you have, in the response, said you are using "ensure" as  
15          I understand it, to mean making sure to the best of their ability. Is that right?

16          **MR MOSER:** That is right. We are not mounting a strict liability case, sir, we are  
17          saying that they ought to have used their best endeavours, essentially.

18          **THE PRESIDENT:** I think we want to be exactly clear what you say. Making sure to  
19          the best of their ability. In other words, using their best endeavours. Or  
20          making, I suppose, "making best endeavours". That is the allegation you are  
21          making; is that right?

22          **MR MOSER:** That is right, sir, I was going to mention that for the same reason that  
23          plainly the Tribunal has in mind that part of the argument from the other side  
24          on the strike out proposals is to do with strict liability, but that's how we have  
25          put it in our reply to their response. That is right.

26          **THE PRESIDENT:** Yes. I don't think, speaking for myself, as long as that is clear

1 and understood and it's pleaded in your reply, it's necessary for you formally  
2 to amend the claim forms to make that point, because it's been there since  
3 something like some time in 2019, I think, the Reply.

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

5 **THE PRESIDENT:** But that is your allegation and that's the allegation that we will  
6 consider.

7 **MR MOSER:** Indeed. I am grateful. We were also keen to avoid a long semantic  
8 argument about the dictionary meaning of the word "ensure", that's not what  
9 this is meant to be about.

10 **THE PRESIDENT:** Yes, and we clearly all want to avoid the hearing being bogged  
11 down in semantics.

12 Good. Then you have helpfully agreed a timetable for the amended responses. The  
13 amended responses have, I think, now been received, unless they are drafts?  
14 We received pleadings yesterday afternoon from all three proposed  
15 defendants. One of them is referred to as a draft, that is to say Stagecoach,.  
16 First MTR and LSER are not labelled "draft", can I just check as regards  
17 those.

18 For LSER first of all, that is Mr Harris, is it a draft or is that the amended response?

19 **MR HARRIS:** Those are the amendments we propose to make. I suppose  
20 technically it's draft in the sense that we, I believe, do require your permission  
21 for those amendments, so in that sense it's draft.

22 **THE PRESIDENT:** Right.

23 Is there any objection to LSER's proposed amendments, Mr Moser?

24 **MR MOSER:** There is no objection.

25 **THE PRESIDENT:** We give permission for that.

26 Then turning to First MTR --

1 **MR WARD:** The position is exactly as Mr Harris, they are only draft in the sense that  
2 we require the Tribunal's permission.

3 **THE PRESIDENT:** Again, Mr Moser, any objection?

4 **MR MOSER:** No.

5 **THE PRESIDENT:** So permission granted.  
6 Stagecoach, Ms Abram?

7 **MS ABRAM:** Yes, sir.

8 **THE PRESIDENT:** Is your position the same?

9 **MS ABRAM:** It is exactly the same, the document is marked "draft" for the reasons  
10 Mr Harris and Mr Ward have given.

11 **THE PRESIDENT:** Mr Moser, any objection?

12 **MR MOSER:** No.

13 **THE PRESIDENT:** So we give permission to amend all three responses.  
14 Turning then to the draft directions, looking at the South Western action first. It says  
15 amended responses and any other documents by 4 pm on 2 February.  
16 In fact you are in a position to do it today, are you not?

17 **MS ABRAM: (Nods)**

18 **THE PRESIDENT:** In each case. Perhaps shall we say tomorrow? So 4 pm on  
19 27 January on that basis.  
20 Amended reply, Mr Moser, do you still want 16 February?

21 **MR MOSER:** I am sure those virtually sitting behind me would not mind  
22 16 February. We haven't objected and that's only right because the proposed  
23 defendants must be allowed to make whatever arguments they want to make.  
24 I will observe, with no edge to this observation, that some of the amendments  
25 are more in line of further arguments. That's fine, it's useful to see them at  
26 this stage, but they might require a little more than simply a technical legal

1 argument about strike outs and the appropriate test.

2 So if it could be 16 February that would be welcome.

3 **THE PRESIDENT:** 16 February, I think, is a Tuesday. I was wondering whether we  
4 could push you to 12 February, which is the previous Friday.

5 **MR MOSER:** I am sure that's absolutely fine, yes.

6 **THE PRESIDENT:** Yes. Well let's say 12 February.

7 Then in the other action. Can the dates be the same?

8 **MR MOSER:** It's all the same.

9 **THE PRESIDENT:** Yes, same dates in the other action.

10 I don't think there's been a formal order, has there, that the two applications be heard  
11 together? Has there been such a direction at any time?

12 **MR MOSER:** I don't know, sir, maybe somebody else knows.

13 **MR HARRIS:** Sir, I think that there may have been. If somebody could perhaps  
14 check one of the original orders, I think I did see --

15 **THE PRESIDENT:** That's helpful, Mr Harris. We'll check. If not, obviously we will  
16 make that direction but what we do need -- yes, Ms Abram?

17 **MS ABRAM:** There has in fact been such an order. Sir, it was made at the first  
18 CMC. It's paragraph 2 of your CMC order, sir.

19 **THE PRESIDENT:** Thank you, it's so long ago now that I had forgotten. What  
20 I think we do need to direct, however, is the hearing of the proposed  
21 defendants' applications for summary judgment or strike out. It seems to us  
22 that they clearly should be heard together with the CPO applications. Is  
23 anyone resisting that?

24 **MR MOSER:** No, sir. Again, all that matters today is whether the arguments may be  
25 brought. We have no technical objection to them being brought. They are  
26 species of the same sorts of arguments now being run in the guise of a strike

1 out after Merricks, we understand that.

2 **THE PRESIDENT:** Yes, so we will make that direction that the proposed  
3 defendants' applications for summary disposal be heard together with the  
4 CPO applications.

5 We do think, having looked at those, that we are likely to need the full four days.

6 You may recall we have three days and one in reserve, but it seems to us that  
7 it probably will be four days.

8 Next, there is the objection to the litigation funding on the basis that it could be  
9 a damages-based agreement. As we understand what has been said, that is  
10 going to depend on the Court of Appeal's decision in the DAF case, which  
11 I think, coincidentally, has just started hearing in the Court of Appeal and that  
12 the position is that the proposed defendants, not unreasonably, want to  
13 reserve their position such that if the Court of Appeal should hold that this is  
14 an impermissible agreement, they can then run that argument here.

15 But if the Court of Appeal does not reverse the Tribunal, then they are not going to  
16 advance that argument themselves in this litigation.

17 That's my understanding of the position as put forward in the skeletons and that  
18 what's asked is that, therefore, an objection on the basis that the funding  
19 amounts to a damages-based agreement is reserved to a subsequent  
20 determination to be made following the submissions on the papers, following  
21 submissions in writing, in the light of the Court of Appeal judgment in the DAF  
22 appeal.

23 I think, Mr Harris, your skeleton articulates the position most clearly. Have  
24 I summarised that correctly?

25 **MR HARRIS:** Yes, sir.

26 **THE PRESIDENT:** So we will incorporate that in the order from today.

1 **MR HARRIS:** Just before we move on, the only other even potential possibility of  
2 anything to do with costs, on my instructions relate to the size of the cost  
3 provision made by the other side and the question of whether or not  
4 an undertaking that has been given should be turned into the form of an order.

5 **THE PRESIDENT:** Well, the undertaking can be incorporated in the order as an  
6 undertaking so it's an undertaking to the Tribunal as opposed to inter partes.  
7 I think that's what's been asked for. That's the first point.

8 Is there any objection to that, Mr Moser?

9 **MR MOSER:** There is no objection as such. I would be keen to clarify, before we  
10 come to the drafting stage, exactly what we are doing, whether we are doing it  
11 today or at the CPO hearing.

12 Before we do that, with permission, may I go back a step to the point about the DBA,  
13 the damages-based agreement, that's being heard in the Court of Appeal  
14 today.

15 The suggestion from my learned friend Mr Harris, as we understand it, is that the  
16 argument ought not to be heard at the CPO hearing. We agree with that.  
17 One supposes, if the Court of Appeal gives judgment before the CPO hearing,  
18 then you will take note of it and presumably the point will be withdrawn.

19 In every other event, what we suggest is we say it should just be parked for now.  
20 We don't think that this argument, in another case, ought to hold up the  
21 certification in this case indefinitely. I just wanted to put down a marker about  
22 that because I expect there might be some difficulty over the drafting  
23 otherwise between the parties.

24 The current state of the law is that as found by this Tribunal. If that doesn't change,  
25 there's no need for action. If it does change, the proposed defendants can  
26 always come back to the Tribunal with the point, which is reserved, and the

1 Tribunal can make a ruling, either on paper, before or after the CPO hearing,  
2 depending on the timing, or, if it happens after the CPO has been certified  
3 later this year, then under rule 85(1) if necessary.

4 But what we do suggest is that it not be a sort of tail-wagging the dog of the CPO,  
5 that it be left hanging there. There might be a further appeal from the Court of  
6 Appeal, who knows.

7 We suggest -- we completely agree with Mr Harris about all aspects of his proposed  
8 order, but for clarity what we say is that it should simply be parked for now  
9 with liberty to apply or howsoever.

10 **THE PRESIDENT:** Yes, I think everyone is agreed it shouldn't hold up the hearing  
11 on 9 March. Further, the proposed defendants are not seeking to run the  
12 point in any event on the basis that what the Court of Appeal say might be  
13 tailored if they dismiss the point to the situation in that case. But they just  
14 want to be able, depending on what the Court of Appeal judgment may say, to  
15 advance the point in this case.

16 I think when you say parked, I think perhaps the formal word would be reserved and  
17 that they have liberty to object on that ground depending upon the judgment in  
18 the case in the Court of Appeal. I think they have also accepted that that  
19 objection would then be heard on written submissions, and we don't need  
20 a further oral hearing. I think that can be in the order as well.

21 I think we are all on the same page.

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

23 **THE PRESIDENT:** We will prepare a draft order on that and we can send it to you in  
24 draft, if you think it's inappropriately worded you can write in and say, "I think it  
25 should say this and not that".

26 **MR MOSER:** I helpfully see Mr Harris nodding.

1 **THE PRESIDENT:** Yes, I don't see that being a problem, and I think -- now, as  
2 regards the undertaking as to whether that should be in this order or in the  
3 CPO order, let me just find the terms of the undertaking.

4 **MR MOSER:** Bundle 8, page 108 is where I found it. It may be in other places also.

5 **THE PRESIDENT:** Thank you.

6 **MR MOSER:** Sorry, the first reference I have tried and I have missed. It's bundle 9,  
7 page 108. My apologies. Bundle 8 is the correspondence about it.

8 **THE PRESIDENT:** Bundle 9, it's under tab 53, is it?

9 **MR MOSER:** I am afraid I don't have tabs.

10 **MS ABRAM:** It is tab 53.

11 **THE PRESIDENT:** Yes, tab 53, costs undertaking. It's an undertaking from the  
12 third-party funder to the class representative, but ...

13 **MR MOSER:** It's an undertaking actually to the Tribunal. If we look at paragraph 2,  
14 "... unconditionally undertakes to the Tribunal".

15 **THE PRESIDENT:** Yes, I see.  
16 I am just looking at what is ... is it, Mr Ward, in your skeleton, that this is addressed  
17 or ... I think so.

18 **MR WARD:** Sir, yes.

19 **THE PRESIDENT:** What I am just puzzling about is this. If I look at your skeleton  
20 argument for this hearing, you say, "On 1 November 2019 the applicant  
21 provided an undertaking ..."

22 **MR WARD:** That is just a typo, sir, obviously it should say the funder.

23 **THE PRESIDENT:** Well, but then the wording is also different, "Any sums which the  
24 ..." I see, yes -- which the applicant is ordered to ... yes.

25 **MR WARD:** You looked at the right undertaking, even if we have not described it  
26 very elegantly in the skeleton.

1 **THE PRESIDENT:** Yes, that is the undertaking?

2 **MR WARD:** Yes.

3 **THE PRESIDENT:** Right. I am a bit reluctant to incorporate that in an order when  
4 Woodsford are not represented here.  
5 I think it is something that can be dealt with. You have it -- it's at the CPO hearing, if  
6 a CPO order is made, or even if it's dismissed, and one can seek instructions.

7 **MR MOSER:** Sir, if it helps Mr Ward at all, everyone agrees, we agree, that it's  
8 binding and we won't object to it being dealt with in some way, as you, sir,  
9 suggest, in any order at the CPO hearing.

10 In the unlikely event that there should be no certification later this year, it would be  
11 unnecessary to refer to it anyway. So perhaps that's the liberating thought.  
12 We have no drafting suggestion for today, it's a very carefully drafted  
13 document, perhaps this can be revisited at the end?

14 **MR WARD:** Sir, we are entirely happy with that.

15 **THE PRESIDENT:** I think that's a sensible suggestion.  
16 Is anyone wishing to resist it?  
17 No, Ms Abram is helpfully shaking her head, Mr Harris is shaking his head. We will  
18 deal with it that way then. Good.

19 The next point that we have seen on the skeletons is the date for the substantive  
20 skeleton arguments, and we have managed to advance the date for the  
21 amended pleading slightly. We would like the skeletons, please, by 4 pm on  
22 26 February.

23 Then, bundles.

24 **MR MOSER:** The bundles are agreed the next day?

25 **THE PRESIDENT:** Sorry? It's a Friday, authorities bundles on 1 March. Would that  
26 be acceptable? 4 pm on 1 March.

1 **MR MOSER:** Yes.

2 **THE PRESIDENT:** The conduct of the hearing, we have cross applications here.

3 The application for the granting of a CPO, the proposed defendants'  
4 applications to strike out and for summary judgment. A question of who goes  
5 first. Mr Harris suggested that, although the burden of proof on the different  
6 applications is of course different, that it's sensible that the proposed class  
7 representative, the applicant, should go first, as that's the real substance of  
8 the application.

9 Are you content with that, Mr Moser?

10 **MR MOSER:** Yes. I mean, if I may say so, that is a very sensible suggestion and in  
11 reality the arguments are all going to be bound up with each other and I am  
12 sure that if formally some sort of last word is needed, someone can be given it  
13 at the end of the hearing but we are perfectly content with that.

14 **THE PRESIDENT:** Right. So you will then open and, as we understand it, the  
15 proposed defendants are content with that.

16 We want to include in the order from today a direction and a requirement that all  
17 three proposed defendants should liaise to avoid duplicative oral submissions.

18 No doubt you will do that anyway, but we would like formally to order that.

19 Then there's the issue of Mr Holt. As we understand it, the defendants have not  
20 themselves asked for him to attend for cross-examination. But if the Tribunal  
21 wants to put any questions to Mr Holt, then they reserve their right to ask  
22 some supplemental questions. That's what we have understood from the  
23 submissions -- again, all three counsel for the defendants are helpfully  
24 nodding.

25 We are, to be quite open about it, not entirely sure at this stage whether we may  
26 have questions for Mr Holt or not. While we have read at first blush his two

1 reports, we have not spent the sort of time no doubt you all have in going  
2 through them and we have not studied them in the way that we will before the  
3 substantive hearing.

4 We would like to keep that option open and we will let you know before the hearing  
5 whether we have any questions, and we will try and do it several days before,  
6 for Mr Holt.

7 We would like him, please, to be available. If we do have questions, it will not be  
8 a lengthy session, and indeed it's clear from the Supreme Court's judgment,  
9 and indeed our own approach, I have to say, in Merricks, that it's not a full  
10 questioning on the reports.

11 We think most likely that if we did want to ask him questions we would want to do so  
12 on the third day, so that's on the Thursday. If he could, please, keep that free.

13 **MR MOSER:** He will.

14 **THE PRESIDENT:** I think, save for one point, that concludes the issues that we saw  
15 arising from the skeleton arguments and our looking through the papers.

16 The one issue I want to mention is that it seems almost inevitable that it will be  
17 a remote hearing, probably fully remote. There are some confidential details  
18 in the papers. These hearings are live streamed, no doubt you will all be  
19 careful if there are confidential materials, either you can just direct us to them  
20 as a paper copy, and I think we will have papers -- I don't know what system  
21 will be used for referring to documents but one has to be particularly careful if  
22 it's being live streamed, and even with remote attendees on an online platform  
23 when putting up confidential documents, so just give that some thought.

24 It may be that it's unnecessary to refer to confidential documents, but if you do, we  
25 can if necessary withdraw to a confidential Teams room where they can be  
26 looked at. It's technically quite possible, it's been done. It's a little

1 complicated so just give some thought as to whether you think that's going to  
2 be necessary and if you can let the Tribunal registry know if you expect to  
3 refer to any confidential documents so that we can consider what  
4 arrangements might have to be put in place.

5 We have, as I understand it, the bundles for the hearing. If there's anything  
6 additional, it can be sent in, but we are not expecting another set of bundles.

7 The only additions will be authorities, as we understand it.

8 Is there anything that any of you wish to raise with us that we have not covered?

9 I will go through, starting with Mr Moser.

10 **MR MOSER:** Sir, the only other thing that occurs to us, and it may or may not  
11 require any sort of order, probably not, just so that it's mentioned, is that there  
12 has been a further witness statement served by Ms Abram's clients, the  
13 second statement of Mr Joyce, we are not objecting to it but there it is, it's  
14 worth noting.

15 It is, I think the case, that Mr Ward's clients intends to serve a further witness  
16 statement as well but we have not seen that yet, but I may have  
17 misunderstood, it may be the same one.

18 Other than that, it is of course possible that Mr Holt will, as part of the other amended  
19 reply documents, have a short coda to his second, his responsive, statement,  
20 in relation to the latest points being made about his evidence. If so, I merely  
21 mention it for the sake of completeness so that nobody says afterwards we  
22 didn't understand that when you said you may amend your reply documents it  
23 could be that. If so, it will be quite short.

24 **THE PRESIDENT:** Yes.

25 Ms Abram's client's further witness statements is really a correction of something in  
26 the previous witness statement, correction and clarification.

1 **MR MOSER:** It's something that he says he's somehow remembered, although he  
2 doesn't tell us how, about his cards but he says there's nothing in it and that's  
3 fine. I am not suggesting that it makes any difference either way. I am just  
4 observing that it's there.

5 **THE PRESIDENT:** Yes. I do not think we need make any order about it, or  
6 direction.

7 Mr Ward, are you intending to put in any further evidence?

8 **MR WARD:** Sir, yes.

9 We had intended to do so in time for today's hearing and very much regret it was not  
10 possible. It will be a short factual witness statement, among other things it will  
11 address the same point that Mr Joyce refers to, which has obvious overlap. It  
12 has not been possible to get it ready for today despite strenuous efforts, and  
13 we would ask for permission to serve it by the end of Friday.

14 We will do it as soon as we possibly can.

15 **THE PRESIDENT:** Yes, well I think we should have a deadline for sure when it must  
16 be produced. Friday is what date? 29th, is it?

17 **MR WARD:** It is indeed, sir, yes.

18 **THE PRESIDENT:** 29 January. Mr Moser, is that a problem for you if it's Friday?

19 **MR MOSER:** No, depending on what's in it, but we have no problem in principle at  
20 all.

21 **THE PRESIDENT:** Right. Any further evidence from -- you will have to remind  
22 me ...

23 **MR MOSER:** First MTR.

24 **THE PRESIDENT:** First MTR, thank you. First MTR by 4 pm on 29 January.

25 Mr Harris?

26 **MR HARRIS:** Yes, sir, may we have the same permission? The reason is that

1 having seen Ms Abram's statement and realising Mr Ward is going to address  
2 the topic we are taking urgent instructions as to whether we need to clarify the  
3 record as regards a type of, if you like, pass or card. Unfortunately, that's not  
4 been possible for today, but we will do it as soon as possible and obviously no  
5 later than the Friday deadline.

6 **THE PRESIDENT:** Yes, so similarly any further evidence by 29 January. We will  
7 put in liberty to apply in the order in the usual way, just in case Mr Moser's  
8 client then thinks he wants to put in any evidence in response, which he  
9 cannot really decide until he has seen what you say.

10 Yes, thank you.

11 Anything else, Mr Moser, on that, or anything?

12 **MR MOSER:** Nothing from me, sir.

13 **THE PRESIDENT:** Thank you.

14 Mr Ward, anything further from you?

15 **MR WARD:** No thank you, sir.

16 **THE PRESIDENT:** Ms Abram? From you?

17 **MS ABRAM:** Nothing from me, sir.

18 **THE PRESIDENT:** Mr Harris?

19 **MR HARRIS:** No thank you, sir.

20 **THE PRESIDENT:** I should just formally make sure that my colleagues have nothing  
21 that I have left out that the Tribunal wishes to raise.

22 **MR HOLMES:** No.

23 **THE PRESIDENT:** Very well, that concludes this CMC. We will draw up an order  
24 here. We will send it out as a draft, just in case there is any issue on the  
25 wording of the order; if you can come back to us in short order so it can be  
26 drawn up. We will see everyone then on 9 March.

1 Thank you all very much.

2 **MR MOSER:** Thank you, sir.

3 **MR WARD:** Thank you.

4 **MS ABRAM:** Thank you.

5 **MR HARRIS:** Thank you.

6 **MR HOLMES:** Thank you.

7 **(11.15 am)**

8 **(The CMC concluded)**

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