IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1404/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

16 December 2021

Before:
The Honourable Mr Justice Marcus Smith
John Cubbin
Eamonn Doran
(Sitting as a Tribunal in England and Wales)

BETWEEN:

DAVID COURTNEY BOYLE & EDWARD JOHN VERMEER

Applicant

v

GOVIA THAMESLINK RAILWAY LIMITED & OTHERS

Respondent

A P P E A R AN C E S

Charles Hollander QC and David Went (on behalf of David Courtney Boyle & Edward John Vermeer)
Anneliese Blackwood and Cliodhna Kelleher (on behalf of Govia Thameslink Railway Limited & Others)
Anneli Howard QC and Brendan McGurk (on behalf of the Secretary of State for Transport)

Digital Transcription by Epiq Europe Ltd
Lower Ground 20 Furnival Street London EC4A 1JS
Tel No: 020 7404 1400 Fax No: 020 7404 1424
Email: ukclient@epiqglobal.co.uk

Thursday, 16th December 2021

(10.30 am)

MR JUSTICE MARCUS SMITH: Mr Hollander, good morning. Before you begin a couple of housekeeping matters from our end. This is not a remote hearing, but it is being live streamed and so I must give the usual warning that I do in these cases, which is that those watching on the live stream are very welcome, but there should be no photography or recording or onward transmission of the stream.

Secondly, and a little bit more helpfully, thank you all for your written submissions, which we have read. We have read those with some attention. We also have various draft orders which I am sure we will be going through, which we have looked at. We have looked at the contents of the CMC bundle in a little greater haste. We have paid good attention to the skeletons, but the case management bundle we have skimmed through and that's where we are at.

Mr Hollander, I don't want to take you out of your order, but we have identified the question of the stay of the proceedings pending an appeal as perhaps issue number 1 and the Secretary of State's intervention as perhaps issue number 2. We perhaps ought to get those sorted out sooner rather than later, because they really affect the shape of the proceedings going forward. But what I will do, Mr Hollander, is let you have the second word and you can introduce matters and then we can decide how we will deal with the issues as we go.

SUBMISSIONS RE STAY

MR HOLLANDER: Thank you, sir. That was exactly what I was going to suggest. As you have quite rightly identified, the stay is perhaps the most significant issue today. The terms of the Secretary of State's intervention, there's a fairly narrow issue about that but that won't take all that long. (inaudible) the second one. There are some issues about

directions but they are dates issues and slight terms. There is nothing very much more than that. So I am very happy, it seems to me sensible and subject to you, in the light of what you have said to sit down and let my learned friend Ms Blackwood open the stay application, if that's convenient.

MR JUSTICE MARCUS SMITH: I think that's very sensible. Thank you, Mr Hollander. We will do exactly that. We will go issue by issue.

So, Ms Blackwood, over to you on the question of a stay. Let me be clear. I appreciate that the intervention of the Secretary of State is further down the line, but, Ms Howard, I have every intention of letting you follow Ms Blackwood, to the extent you had anything further to say, because I don't want to anticipate either which way the intervention question and then we will let Mr Hollander respond and you can both reply in reverse order. So just so we are all clear that you obviously have the right to address us, to the extent you have anything further to say than what Ms Blackwood has, but, Ms Blackwood, over to you.

MS BLACKWOOD: Thank you. We request a stay in these proceedings pending the determination of the Respondents' renewed applications for permission to appeal to the Court of Appeal in the case of Gutmann, and if permission is granted until determination of that appeal.

By way of very brief background, in Gutmann the class representatives had brought a claim against three rail operators, one of which is LSER, alleging in essence that they abused their dominant position by not making boundary fares sufficiently available, and therefore Travelcard holders paid too much for their onward journeys out of London. LSER is represented by the same legal team as the proposed Respondents in the present case, and that's why we are aware of the details of LSER's grounds of appeal. All three rail operators we understand are renewing applications for permission to appeal, and

those are due in tomorrow. So regrettably we don't have those grounds before us today, but we are able to explain LSER's.

I intend to address you first on why the issues raised in the proposed appeals are relevant to the present case and then turn to why a stay should be granted.

There are two grounds of appeal in particular that we say are relevant to this case. The first is what we refer to as ground one in our skeleton argument. This concerns what the PCR is required to do to establish liability and causation in collective proceedings. LSER is challenging the Tribunal's adoption of obiter comments in the minority judgment of the Supreme Court in Merricks relating to the interpretation of section 47C(2) of the Competition Act.

I think it is helpful very briefly if I could ask you to turn to the Authorities bundle, Tab 4, page 170.

MR JUSTICE MARCUS SMITH: Yes.

MS BLACKWOOD: This is part of the minority judgment, and if we could start at paragraph 93, you will see this sets out the language of section 47C(2). I don't propose to read that out. It then goes on in paragraph 94 to discuss an academic article by Professor Rachel Mulheron , and it comments that she notes that:

"There are two functions, which a provision allowing damages to be awarded on an aggregate basis may in principle fulfil."

She then goes on to say:

"The first concerns quantification of loss",

which LSER accepts, but then, in paragraph 95, at the beginning, it says:

"A provision for aggregate damages may, however, go further and serve an additional purpose. It may also permit liability to be established on a class-wide basis, without the need for individual members of the class to prove that they have suffered loss, even though this would otherwise be an essential element of their claim."

In paragraph 96, the Canadian authorities are referenced, and it is noted that the Canadian aggregate damages provision at the bottom of that paragraph could not be used to establish proof of loss where this is an essential element of proving liability. It goes on, Mr Justice Rothstein, is quoted there as saying that:

"The legislation was not intended to allow a group to prove a claim that no individual could. Rather, an important objective of the legislation is to allow individuals who have provable individual claims to band together to make it more feasible to pursue their claims."

Then, in paragraph 97, this is what was adopted by the Tribunal in Gutmann, and which LSER is challenging. They conclude that:

"Section 47C(2) is phrased in broad terms, and is properly read as dispensing with the requirement to undertake “an assessment of the amount of damages recoverable in respect of the claim of each represented person” for all purposes antecedent to an award of damages, including proof of liability as well as the quantification of loss."

It is that obiter comment that was made by the minority in Merricks that the Tribunal has adopted in paragraphs 110 to 130 of Gutmann.

LSER's position is that this interpretation of section 47C(2) is wrong, on the basis of a textual analysis, but also in light of the majority ruling in Merricks and the Canadian and US authorities.

For the avoidance of doubt, we say this matter was not argued or resolved by the decision of the Supreme Court in Lloyd v Google, because that case concerned rule 19.6 of the CPR, and Lord Leggatt, who wrote the judgment in Lloyd v Google and Merricks simply referred to the collective proceeding (inaudible) in passing. It does not resolve the matter. The Tribunal, in its ruling on permission to appeal, accepted that the comments that they relied on in Merricks are obiter.

The PCR has said that this ground of appeal is not relevant on the facts of the present case, and we don't accept that. I think it is instructive if we can consider just two issues that arise on the facts of this case, which relate to causation and loss.

The first example is that the PCR asserts that due to the alleged abuse, class members pay too much for 'Any Permitted' fares or not-Gatwick fares, as they are called, as compared to the price charged for single brand fares. I don't know if we need to turn it up, but we can see in paragraph 76 of their claim form, which is Volume 1, Tab 1, page 43, this explains how they will be quantifying the overview for people who purchase those fares. It is essentially a comparison between what they paid for Any Permitted fares or the not-Gatwick fares in comparison to single brand fares.

If I could ask you to turn up Mr Harvey's second report, which is in Volume 2 at Tab 22, page 1290.

MR JUSTICE MARCUS SMITH: Yes.

MS BLACKWOOD: You will see he accepts in relation to unregulated fares, which we understand to amount to about 50% of the fares in issue, the price of the unregulated Any Permitted fare would go down in the counterfactual, but the price of the single brand fare would go up in the counterfactual.

Now, as a consequence, this means that whether any particular passenger suffered loss will depend on the specific combination of tickets that they bought over the claim period. This is because any loss that a passenger allegedly suffered as a result of buying the Any Permitted fares or not-Gatwick fares could well be wholly or partially offset by the savings he or she made buying the single brand fares at a price in the actual world which was lower than what they would have been able to purchase them for in the counterfactual world.

So whether a particular class member suffered loss will depend on their individual ticket purchases over the claim period, and there is no uniform position across the class.

This is why we think there is a potential for there to be uninjured members of the class within the scope of the claim, and there is currently no provision in the methodology for winnowing out these class members, proposed class members, who have not suffered loss.

As a consequence, we say that the appeal on ground one, which is looking at what the PCR is required to prove, including loss, is obviously likely to be highly instructive if permission is given.

MR JUSTICE MARCUS SMITH: Is there a difference between actionable loss and quantification in this sort of case, because it was a chicken and egg problem that I encountered in BritNed where it was not possible to say, without going into quantification, whether there had actually been a pounds, shillings and pence loss and, of course, causation is decided on a balance of probabilities test rather than on a take all factors into account, put them in a pot and stir them approach. I defined actionable damage in this sort of case as simply an impairment of the market structure, where you didn't actually have to prove any kind of loss beyond that rather general point.

That's all you need to do in order to make a claim have legs. It may be at the end of the day, when the quantification process is run, you end up with nothing, because the impairments go both ways and net off, but your point is that there is a fundamental deficiency in the cause of action, because you can't show actionable loss in the individual case.

MS BLACKWOOD: Yes. So there are members of the class who, if they would bring a claim individually, as it were, wouldn't get it off the starting blocks, because --

MR JUSTICE MARCUS SMITH: That's a premise that I am pushing back on a little bit.

MS BLACKWOOD: Well, I think that --

MR JUSTICE MARCUS SMITH: The thing is we are at the stage where one is simply framing the cause of action rather than working out what the final outcome is. We are

at the level of arguability, not final quantification. So doesn't all Mr Hollander have to show at this stage is "We have got an individual cause of action, even if you are right on the law regarding individual loss in a class"?

MS BLACKWOOD: Well, I think we would say that in order to establish such a cause of action, each individual Claimant needs to establish that they did suffer loss, because that's a constituent element of the tort. There are different elements to it. Obviously, the PCR doesn't need to show necessarily at the time of certification that it has winnowed out the class members, but it does need to show that it has got a methodology for doing so by the time of judgment. That's the question in a way that's being tested with this ground of appeal, whether they need to winnow out those uninjured class members before judgment, otherwise you are going to have an award of damages that has been inflated because you have not had a proper offsetting. You are including members within the class who have not actually suffered loss, because they bought more single brand tickets than they bought Any Permitted fares or not-Gatwick fares.

MR JUSTICE MARCUS SMITH: Yes.

MS BLACKWOOD: I think it is understandable that the PCR might not need to resolve or have winnowed out every class member in the definition now, but he has to have, we would submit, a methodology for doing so before judgment, and it is that very point that is in issue in ground one.

MR JUSTICE MARCUS SMITH: Yes.

MS BLACKWOOD: The second example I am just going to take you to is that the PCR claims damages in relation to passengers who tapped in and out with a pay as you go or similar contact payment card at platforms 13 and 14 at Victoria Station. There is a causation issue in relation to these class members, because I am instructed that they didn't actually have to tap in and out of those specific barriers, and that usually what the Respondents would do is to give an announcement on the train. If a Southern train

turns up at platforms 13 and 14, "Don't tap out at these barriers. Tap out at a different one".

So there is a factual issue in relation to individual Claimants, whether or not that message was provided to them, and we would say that if it was, they did not suffer loss as a result of any wrongdoing on the part of the Respondent, because they made their choice nonetheless to go through and tap out of areas 13 and 14 for their own reasons.

This raised a question again of whether it is necessary to winnow out individuals who have not suffered loss as a result of the proposed Respondents' conduct prior to judgment.

These are just two issues of causation of uninjured class members that arise. Therefore we say if permission is granted on ground one it is going to be highly instructive on the present case.

We also say that ground two of LSER's application for permission to appeal is going to be instructive. One of the legal issues raised by that ground is whether the Tribunal can find that a proposed methodology satisfies the process test. Where the methodology before it is incomplete and the PCR has simply asserted that the methodology will be completed in due course, I could take your Lordship to the extract of process, but if you are well familiar with it, I will not take your time.

In the Gutmann proceedings, the PCR, amongst other things, failed to set out any methodology for removing point to point fares from the scope of the claim, and it simply asserted that that could be done in due course.

LSER's position before the Tribunal is that if the methodology before it is incomplete, it can't scrutinise that properly and can't be satisfied that it is credible and plausible.

We do say that's a question of law. It is a question of principle whether an incomplete methodology is good enough to satisfy the process test. I am not saying provisional. I think a provisional one is different, where you can expect that on further disclosure

they might improve their methodology, but where simply aspects of the heads of claim are not dwelt in the methodology at all.

That's relevant in the present case, because the PCR has no proposed methodology for two out of the four heads of loss that they are claiming.

If I could ask you, sir, and members of the Tribunal, to turn to Volume 2 of the bundle, which is Tab 21, page 1077. This is the first witness statement of Mr Harvey, who is the PCR's expert in these proceedings. You will see at paragraph 1.10 he repeats the class definition, which is helpful, because it shows (a), (b), (c), (d), the four separate types of loss that are being claimed, Any Permitted fares, not-Gatwick fares, tapping in and out of platforms 13 and 14 and the penalty and excess fares claim.

If you come on to paragraph 1.11, you will see that all Mr Harvey has been instructed to do is explain his methodology in relation to heads of loss (a) and (b). He doesn't go any further in relation to the remaining two categories of class members. There is no methodology at all in front of the Tribunal.

Therefore, we submit that again, in relation to ground two, any appellate guidance on whether or not the partial methodology can in principle satisfy the process test is going to be instructive.

We say that the stay should be granted in these proceedings because it is a developing regime and the appeals raise issues which are fundamental to how the regime operates, and further appellate guidance is likely to be very helpful to make sure that this claim proceeds on the correct footing, and also consistently with the numerous other claims that are going forward before the Tribunal.

The Tribunal, in its refusal for permission to appeal in Gutmann, did accept that ground one, if permission is granted, will be of wide significance and did encourage the Court of Appeal to expedite the appeal, if permission was granted, because it recognised the impact that it was likely to have across the cases that are waiting behind.

It was notable that in Gutmann itself the Tribunal did stay those proceedings, waiting for the appellate rulings in Merricks. Although the underlying facts were very different, it was recognised that it is a developing regime and this appellate guidance at this stage is particularly helpful.

We think permission for appeal is likely to be granted. We obviously say that we think that the grounds of appeal have real prospect of success, but also it is clearly helpful for the Court of Appeal to give guidance on these matters, in light of the developing nature of law and number of cases waiting behind.

It is notable in that regard that permission was granted in Le Patourel v BT.

As already discussed, the guidance provided by the Court of Appeal if permission is given is highly likely to have a direct impact on how the proposed Respondents seek to resist the PCR's application and how they wish to plead their case.

If a stay is not granted, we are concerned that there is going to be a risk of wasted costs for the proposed Respondents and the PCR in having to plead a response and reply based on a position which may be altered following an appellate decision.

In this regard it should be noted that the proposed Respondents, like many rail franchisees at the moment, are currently operating under emergency recovery measures agreements with the DFT, where it receives significant taxpayer support as a result of the impact of the Covid pandemic. Therefore it is particularly important for the proposed Respondents to manage their expenditure carefully. They have a particular interest, therefore, that the costs of these proceedings are proportionate and not wasted.

The PCR have said a stay should not be granted because Rule 4 of the Tribunal Rules requires cases to be dealt with expeditiously, but it also obviously requires cases to be dealt with in a manner that are proportionate and saves expense. We say where the grounds of appeal are obviously going to have an impact on the matters in this case, and where we anticipate permission will be granted and there are cost sensitivities for the parties, that

the appropriate approach at this stage would be to stay the proceedings, pending the renewed permission for appeal application being considered by the Court of Appeal.

MR JUSTICE MARCUS SMITH: Suppose the action goes ahead but the PCR's framing of the case is fatally undercut by a decision of the Court of Appeal, such that it either needs to be abandoned or significantly revised? You are not saying that you are at risk of costs in that eventuality, when you get the costs of having to replead if you needed to or, if the action had to be abandoned altogether because it is not sustainable, you'd get your costs then, or do you say you wouldn't?

MS BLACKWOOD: I think, first of all, if they abandoned, possibly, but more likely, if they have to amend, we will not necessarily. It is unclear if we will get our costs back.

MR JUSTICE MARCUS SMITH: You'd get the costs of the amendment, wouldn't you, or not?

MS BLACKWOOD: Well, I don't want to say -- we might not, because the PCR pleads its case on its understanding of the law, which turns out to be wrong, in the light of the appellate decision. All parties then have to amend. My learned friend has helpfully pointed out that we don't get them if it is withdrawn. Apparently that was the position in Qualcomm. So there are costs risks here. Also I think critically resource risks for us. It is not just the expenditure of lawyers' costs in preparing the responses. This is a very fact intensive proceeding, and a lot of time is going to have to be put in dealing with those factual matters on the clients' side. That is costly for them at a time when there are a lot of other pressures.

Those instructing me have just said that in the Gutmann proceedings it created difficulty because they did have to amend, in light of Merricks, and then the cost position was quite unclear and not all the costs of amending were actually recovered in those proceedings either.

So, members of the Tribunal, those are my submissions, unless I can assist you further.

MR JUSTICE MARCUS SMITH: Thank you very much, Ms Blackwood. Ms Howard.

MS HOWARD: Thank you, my Lord. Our submissions are set out in paragraphs 12 to 16 of our skeleton. I don't have that much to add, other than to reiterate that we support the application for the stay. We concur with the arguments put forward by my friend in submission.

I just have two points. One is on timing. Obviously, we adopted a slightly nuanced approach, where we said we should have a phased stay, pending the initial determination of the permission to appeal. That seems sensible.

Secondly, we would like our intervention question to be determined regardless of the stay, because we do think it is important that the Secretary of State is permitted to intervene even if the proceedings are stayed so that we are involved from the outset.

Lastly, I would support very much the position of avoiding wasted costs and potential further appeals down the line, particularly when under the ERMAs, as we tried to explain to you, ultimately the Secretary of State and the taxpayer is at risk for the cost and risk revenues under the current arrangements for the remainder of the franchise term. So that's an important consideration in the public interest.

MR JUSTICE MARCUS SMITH: Thank you. Thank you, Ms Howard. We will obviously come to the question of intervention separately. I say that to assist Mr Hollander. You don't need to address that but we will obviously come to it.

MR HOLLANDER: The use of the Tribunal's case management power to stay, when the stay relates to a decision in a different case, is obviously an exceptional power, because delay is potentially a denial of justice and infringes upon the obligation on the Tribunal to deal with cases expeditiously. We can see that in Merricks. Merricks was obviously important to have a stay. It was the first big case in this new jurisdiction. What happened was the gap between the first instance and the Supreme Court judgment was three and a half years. One can see why it would be an unusual case to stay.

In Gutmann, we will look at the reasons for refusing leave to appeal in a moment, but this was a case where this Tribunal declined to give leave to appeal and concluded that there was no arguable point of law involved at all.

Now, whether or not the Court of Appeal takes the same view, that in itself, in a case where a stay is being sought on the basis of it speaks volumes. At this relatively early stage in this new jurisprudence, it would be possible to say that every case has a potential impact on the next.

So if we look at the position in Gutmann, compared to now, we know the application for leave to appeal was made to this Tribunal and refused. We are told by my learned friend that an application will be made for leave to appeal, though it has not been made. What are the grounds? We can't be told that, because they have not been served yet. Will they be the same or different? There were four grounds set out as justifying a stay in Freshfields' letter of 3rd December. You need not turn it up. In my learned friend's skeleton they were down to three, and her submissions today are down to two, oral submissions.

So it is a shifting position as to exactly what it is. Whether that's because they have abandoned certain things in Gutmann, whether because they have decided they are not strong points, who knows.

What's then going to happen? Let's assume that this Tribunal today orders a stay. It will be until the application for leave to appeal, assuming it is made tomorrow, is heard. Then, if it turns out that it is refused, the stay has been a complete waste of time.

Let's assume, therefore, that leave is given, expressing a different view therefore to this Tribunal. Then there will be an appeal at some stage, and no doubt it will be said after the appeal that the stay should wait until an application for leave to go to the Supreme Court.

You can see the potential for very significant delay.

It is relevant to have in mind in that regard that defendants tend to want stays for strategic reasons because in the same way as claimants want to have trials and hearings, defendants are usually in favour of delay, and therefore there is scope for opportunism.

I am going to suggest to the Tribunal that on a scale of opportunism this one is pretty high up. You can see that, because when we look to see what the issues are, we sent a letter before action.

Can I ask you to turn in the bundle to page 238. We sent letters before action on 30th October 2020 in relation to this. You don't need to read it. It starts at 238. The response is at 265. So 30th October. Three months passes by and on 29th January, page 265, Freshfields come back and say they have considered in paragraph 2 the letter, and they essentially say that the case is hopeless, which no doubt they will say in due course again.

They talk about Covid in paragraph 3.

Then, in paragraph 4, very generously they say:

"In the interests of preventing unnecessary litigation and wasting court time, and with a view to providing an explanation to your clients of the key reasons for the weakness of the claim they are conducting further enquiries into the main matters raised. But given it discloses no claim with any hope of succeeding, we don't consider they have any obligation to provide your clients with any documentation, still less the expensive pre-action disclosure sought in your letter."

Not entirely consistent with protocols and the like, but never mind.

Then the next response is on 29th April on page 268, where they say, after a chaser from those instructing me, on 29th April, page 268, they say:

"As noted they continue to operate under resource constraints as a result of the dramatically changed operating circumstances for passenger rail operating companies since the pandemic. They have been undertaking further enquiries in relation to the issues raised

by your correspondence. It has not yet been able sufficiently to conclude those enquiries."

So that is now six months:

"To be able to provide a written response, but they expect to be in a position to respond substantively by the end of June this year. For the avoidance of doubt the fact that GTR is a responsible business, undertaking enquiries in response to your letters of six months ago, should not be taken as an acceptance that your letter discloses any viable claim."

30th June, which was the date on this letter, came and went. Therefore, having waited from 30th October until 30th June the next year, the application was issued on 5th July. So we never had from the Respondent any form of setting out any of the issues.

Now, my learned friend gave certain reasons as to why she said there was an overlap on the facts. It was interesting to hear that, because that was the first time that we had ever heard anything relating to what the Respondents see as the issues in the case, because if you look at her skeleton, you will see no trace of any of that. So not only do GTR not respond at all in any of the eight/nine months after the letter before action in any sense, nor does her skeleton disclose any basis for saying what the issues are going to be in the case.

She sets out in paragraph 6 three reasons why -- we seem to be down to two today -- as to what issues are in common, she says, but does not explain why.

Paragraph 7 says that they are of fundamental importance.

Paragraph 8 says the guidance is likely to have a direct impact, but still there is nothing there which tells us what they see as the issues are. They don't say that an appeal decision in Gutmann will be decisive or anything like that. The highest they can put it is that:

"If such a stay is not granted", last sentence of paragraph 8, "there is a substantial risk that the Respondents and the PCRs will incur significant wasted costs pleading the response and reply respectively, which will ultimately need to be extensively amended."

So that's the highest they put it.

In her submissions this morning, my learned friend said to you that it would be instructive. That was the word she used I think more than once.

So we know nothing from there. On her feet this morning, it was the first time in this entire case we had heard anything from the Respondents as to what they regarded as factual issues. What she sought to suggest was that there was a potential issue in terms of members of the class -- ground one, members of the class who had she said suffered no loss.

We said in our skeleton -- again, no engagement in respect of this at any stage. First time it was said. It seemed to us that there was a significant distinction between Gutmann, in any event, insofar as this point matters, because in Gutmann there were plainly, as far as appears from the judgment, categories of people who suffered no loss, whereas in the present case the classes have been formulated so that that is unlikely to be the position. But if she was going to say that and she was going to make that point, then it would have been helpful if somebody had made this point at some stage before this morning, which is why I say that this application is deeply opportunistic.

If you then look at what happened on the application for leave to appeal in Gutmann, that also is helpful. If we can turn to that, please. So that is Tab 8 in the authorities bundle. Can we just look at the points, please? Starting at page 381 in the bundle, now the first point is common issues of people who have suffered no loss. We made the point in our skeleton and I still make it that so far as we can see on the class -- I take on board the point the President made in argument to my learned friend, but quite separately from that we think we have formulated the class in a way that doesn't include people who have not suffered any loss. So there's a factual issue as to whether actually anything on this in Gutmann is going to make the slightest different, because it goes to a different point.

Then we look at what this Tribunal said in Gutmann on permission to appeal. Paragraph 23, please. The Tribunal says:

"In essence, the train companies contend that the Tribunal was in error in determining that matters were “common” issues when they have beendecided in various and differing ways as between individual class members and some class members who had suffered no loss."

That's the point.

Then you have the point that is in paragraph 25:

"We recognise this is an important matter of considerable significance for the collective proceedings regime, but we consider it has been resolved by the appellate courts."

Interestingly, in my learned friend's skeleton, she cited the first part of that but not the second part of that. Of course the second part of that sentence is quite important.

Then this Tribunal in paragraph 25 goes on to point out that:

"In Merricks, the Court of Appeal, reversing the Tribunal, held that pass-through was a common issue, although there were clearly a wide variety of the extent to which individual class members will have experienced pass-through to them by merchants, and depending on where and/or in which sector of commerce they made purchases, some class members will have experienced minimal pass-through. Although not challenged on further appeal, the Supreme Court clearly approved the Court of Appeal’s determination of common issues.” Then, further addressed by Lord Sales and Leggatt, referring to an article by Professor Mulheron and comparisons

So the Tribunal refers to that:

"Although it is submitted the views of Lord Sales and Leggatt should not be followed, that has been repeated and concurred in by Lloyd v Google."

Setting out the passage there.

What on this point is being said by the CAT is that the point of importance has been decided both in Merricks and in Google, and therefore that's the basis on which they refused leave to appeal. That's the first point.

The second point which is raised is in relation to methodology. This was the second point that she raised. She said that there was an important issue about methodology, although, of course, it might have been helpful if that point had been set up at some stage before her oral submissions this morning. Let's leave that, as to why she said that might be the position, let's leave that aside for the moment.

If you look at the same judgment, page 385, paragraph 36, this is the point.

"It is contended that the Tribunal erred in concluding that the Applicant has put forward a credible and plausible methodology, for which there was available evidence, to estimate aggregate damages, i.e. in application of the test in Pro-Sys. It was and remains common ground that the Tribunal should apply the Microsoft test, which is set out in the judgment at [100] ".

So it follows that in Gutmann the test was common ground between the parties and, therefore, that test is not going to be an issue. It seems to be the application was based on the factual application of that methodology as being an error of law. With great respect, even if leave to appeal is given, it is hard to see how that is going to make the remotest difference in this case in any event.

I don't know whether the third point is still being maintained as raised in the skeleton, because it was not developed orally, but just in case it is, this is I think the point.

MS BLACKWOOD: If it assists, we are not relying on ground four as a basis for the stay today.

MR HOLLANDER: Thank you very much, that's helpful, although it just shows how -- whether that's not being relied upon because they are aware it is not going to be

relied upon in Gutmann on grounds of appeal or otherwise, again we have no idea. It simply shows how this is entirely speculative. So I won't deal with that.

In relation to this case there has simply been no engagement. It is really not open to the Respondents now to come before you, with respect, and say these issues are going to arise, when they have deliberately declined to explain at any stage what issues are going to be in issue and what points they are going to take. They can't have their cake and eat it, in respect of that.

In any event, the impact on any Court of Appeal decision, if it gets to the Court of Appeal at all, in the light of those circumstances, the highest my learned friend puts it is instructive or there may need to be amendment. This is not a case, on any view, where there is going to be a fundamental shift in the law relevant to this case, in respect of Gutmann.

I would respectfully suggest that in the light of the circumstances and the lack of engagement -- this is a case where Respondents are seeking a stay entirely opportunistically. I don't say that lightly. I say it in the light of complete failure to engage. They are seeking to delay and to put off the date of determination. I would suggest to the Tribunal there really is no basis whatsoever for it in this present case.

Unless there is anything further I can assist you with.

MR JUSTICE MARCUS SMITH: No. Just so that we can work out the parameters here, I think what you are saying is there is no good enough reason -- obviously one in a changing area of law would like to know as much about the law as possible before one goes ahead, but it belongs within the "would be nice" category of things rather than "you must stay the proceedings which otherwise would go on".

If one were to have the Court of Appeal consider the Gutmann question, and let us suppose that the law was so framed that you would be in real difficulties proceeding with your claim as framed, and either had to run the risk of being struck out or have to do root and branch amendments to make it fit for purpose, do you say that the costs regime that

applies in these proceedings is sufficient to do broad justice, I put it no more specifically than that, because we are dealing with unknown contingencies, but we shouldn't pay undue regard to the potentiality for significant future change in the law, first of all, because you say that's vanishingly unlikely and, secondly, because we can cope with it in terms of appropriate costs orders going forward? I raise that and invite your response.

MR HOLLANDER: I think it is dangerous to express any firm views as to what will happen, because it all depends on the circumstances and it can work both ways. It may be that an appeal decision, not necessarily in Gutmann, but in another case, because, as you know, sir, this is a new jurisdiction. Every case potentially is raising new points. It becomes a vicious circle. You go around forever. You find one case and you say "Let's stay it for another".

Sorry, in direct answer to your question, I think it is difficult to predict exactly, but the Tribunal will have to determine costs in the light of the circumstances and what is appropriate, having regard to why matters have changed and the way they have done. You have cost powers and you will obviously have to look at why amendment is necessary or withdrawal. I don't think anyone has actually suggested -- it is not my learned friend's case that this is going to be more than, as she put it, instructive, but obviously the Tribunal has cost powers which it will have to consider in the light of why what has happened has happened.

MR JUSTICE MARCUS SMITH: Yes. Thank you very much, Mr Hollander. We will go in reverse order. Ms Howard, I don't know if you have anything to say, but now is the time if you do.

MS HOWARD: No, my Lord. All I would just reiterate, we have seen several parallel proceedings where there have been sort of interchanged multiple proceedings at

different levels going on. We have had Power Cables, the same thing and then Merricks as well. So just pointing out the risks of future appeals and cost.

For our part, I am not convinced that the cost regime is adequate. There is often a large shortfall. Obviously the Intervenors will have to bear their own costs but Respondents do not recover even 60% of their costs in these situations.

As I have said, there is the ERMA provisions, which do transfer that risk to the taxpayer at the end of the day, potentially.

MR JUSTICE MARCUS SMITH: Thank you, Ms Howard. Ms Blackwood.

MS BLACKWOOD: Sir, I was just going to add that obviously we don't view this as opportunistic at all. We are trying to deal with the situation as it emerges. The decision in Gutmann obviously came down in October and permission to appeal refused recently. We are aware that these appeal proceedings are going forward. From our perspective, it is sensible that a stay is put in place. We definitely object to the characterisation of this as an opportunistic application.

My learned friend complains that some of the details of our case were not put in the skeleton argument. I would simply add that obviously we have not set out our full case and our response yet, because this matter has arisen before the pleadings have been completed, and it wasn't until we saw their skeleton argument that we appreciated quite how they envisaged the facts of their case, that there was no causation issue at all and no risk of uninjured classes. That's why we have raised those points now.

There was complaint that we have been non-responsive to them. I would only say we were intending to respond to their pre-action letter, those are my instructions, but the issue of this claim pre-empted that response ultimately getting to them. Again, we do object to the characterisation of us as being intentionally non-responsive. Thank you very much.

MR JUSTICE MARCUS SMITH: We are going to rise for five minutes to discuss the matter and we will give a ruling at the end of that period. So we will rise and be back at about 11.30. Thank you.

(Short break)

RULING RE STAY(extracted)

SUBMISSIONS RE INTERVENTION OF SECRETARY OF STATE

MR HOLLANDER: Thank you very much. Sir, I think the next issue on the agenda is intervention. I probably should sit down and let Ms Howard speak. As I understand, I think there are only two issues. One is witness evidence, whether the Secretary of State should be allowed to put in witness evidence where our position is it is for them to make the case.

Secondly, as I understand it, it is being suggested that an order now should be made for intervention throughout, whereas I think we suggest we are not opposing, as you know, an order for intervention, but it should be limited to the application of the CPO and it should then be for the court, once they have decided that, to decide the future conduct. I think those are the only two issues. I perhaps should sit down.

MR JUSTICE MARCUS SMITH: That's very helpful, Mr Hollander.

Perhaps, Ms Howard, before you address us, we can indicate provisionally where we are coming from, so you can meet our points as we see them. Let me say this at the outset. We advance them with a high degree of hesitation, because I think the one thing that is common ground is that we know rather less about these proceedings than the parties do, and I am including in "parties" the Proposed Intervenor.

What I think you could assist us on is this. We for our part can see considerable merit in the Secretary of State joining these proceedings if when once they have been certified. We

think that's probably a question that's best addressed when we and the parties have a better understanding of what's going on, ie once certification has been dealt with. In a sense, we are offering you half a loaf there. We think that the Secretary of State should come in, because there is an interest, independent of the Proposed Defendants, as to how the industry operates and the implications for the Secretary of State.

However, we are less persuaded as to the merits of the Secretary of State incurring costs up to the question of certification. It seems to us that there is not the advantage in the Secretary of State bringing, as it were, a different viewpoint to the party in the questions on certification. Given that the point of intervention is to enable the Tribunal to be assisted in having a different viewpoint, what I think would assist us today is just how you will be assisting the Respondents in testing whether certification is appropriate and the terms on which certification should be granted, because frankly our provisional view is that Ms Blackwood can look well after herself there, and we don't really see what the Secretary of State can add.

That's where we are at. Do take your own course in terms of how you address those points. There is quite a lot wrapped up in that.

MS HOWARD: Thank you, my Lord. I am very grateful for that provisional indication. I have set out our grounds for intervention in our skeleton and also in our application, which is at Tab 23 of the bundle. I was planning really just to address my learned friend's initial objections and reservations about the intervention and then explain why we have a sufficient interest not just for the CPO application but the rest of the trial and how we hope to assist.

My first point was it appeared that the PCR objects to the basic intervention that we should just be a mere objector in the ordinary course of the CPO application process under rule 76. We see that to be misconceived because we see there is a bright line difference between the intervention procedure in rule 16, rule 30 and rule 74, on the one hand, and the

position of a mere objector under rule 76, because an objector may have an interest in how the CPO application is conducted, whether it is an opt in/opt out, whether the class rep is a suitable representative, et cetera, but the requirements for an intervenor are a higher threshold of having a sufficient interest in the outcome of the proceedings.

So that, by taking an analogy with other areas of practice, means that either their interests are directly or indirectly engaged in some way by the outcome of the proceedings.

We submit that the Secretary of State clearly does have a sufficient interest within the meaning of those rules. I have set those basic grounds out in paragraph 20 of my skeleton. Just to recap those three main grounds for you, and then I will show how we plan to assist the Tribunal.

Firstly, the Secretary of State and the department under it have the responsibility for administering the railways. They act as the franchising authority and they are the counterparty to the franchise agreements that they have entered into, obviously in this case with GTR but also with other franchisees or TOCs, as I call them, for other railway lines. Because of that position of being the counterparty, obviously the Secretary of State is acting in the public interest, because these agreements, as my friend has already referred you to, are effectively subsidies. They are public service contracts which are supported by subsidies paid on behalf of the taxpayer. Therefore, the Secretary of State has a slightly different interest to the Respondent. Obviously, the Respondent will have its own narrower commercial interests, but the Secretary of State has a wider public interest, and is standing here before you to represent the interests of the taxpayers and the travelling public, who otherwise would not be represented in these proceedings.

Firstly, the Secretary of State, we submit, is well placed to assist the Tribunal as an amicus, not just in explaining these particular agreements, the franchise agreement, the EMA and the ERMA with GTR, but also how they fit within the wider regulatory framework, and also agreements potentially with other train operating companies, so that you can see,

from a neutral perspective, how the regulatory framework is intended to work, how the fare setting provisions arise, and how the fares in this case have been set, against the context of the regulatory background.

It is really that we can assist you from a neutral objective standpoint of the actual responsible authority in charge of administering these arrangements, to give you the proper context in order to assess the alleged conduct in this case. That was my first point.

My second point is obviously the interest goes beyond that of a mere observer or mere amicus. We are acting in the interests of taxpayers but also the future travelling public, because, as I have explained in our skeleton, these franchise agreements contain risk-sharing provisions. So, in order to encourage the train operating companies to invest and innovate and produce these public services, there is a risk-sharing mechanism in the agreement. Those risks have been supplemented by the pandemic arrangements in the EMA and the ERMAs. It is public knowledge that the Secretary of State has assumed the risk of any lost revenues that will be suffered by GTR in this case in operating the London-Brighton mainline.

Potentially, and we say it is an indirect interest, because there are the terms of the contract and there are variables that the Secretary of State is on risk for any shortfall in their revenue which might be represented by any future damages award, and that would be borne in two ways, one, by the taxpayer, because they would have to increase the level of subsidies payable in future, or by future rail passengers, because to recover that shortfall it means that fare rates will increase in future. So you have the interests of future passengers against historic passengers, including the Claimants that have suffered this loss. It may even mean that the current Claimants end up paying themselves effectively for some of their own damages award. So there are public interests here at stake.

The last point is under section 30 of the Railways Act, that should the GTR have to stop providing a rail service in the mid-term of these franchise arrangements, then the

Secretary of State could be required to step in and appoint an operator of last resort, as it has done for other train lines, and then ultimately would have to assume any revenue risks on that front as well.

We submit that there is a public interest here for the Secretary of State to intervene as of its own right. We are not intervening, as we said in our application, although we generally support the outcome that the Respondent is seeking, we are not aligned necessarily with the Respondent. We have our own representations to make, and we would want to assist the Tribunal both in determining the CPO application but also the merits of the full trial.

How would we assist you for the CPO certification criteria? I think it would really come down to -- obviously the merits of the case is one aspect, and we know that's not a decisive factor from the Merricks ruling, but it still remains a factor for the Tribunal to take account of in the round with other considerations. We would want to address on the merits. We would also want to address the Tribunal on whether this case is suitable and appropriate for certification. That may be commonality, if there are issues that we say are not common. It may be causation. I have not had time to explore in depth yet how that would work out, but we would want to put our own submissions in, on behalf of the Secretary of State, in case there are different points that we need to make from a slightly different perspective than that put forward by the Respondents.

We do think it is important that the Secretary of State has full rights of participation, both now, ahead of the CPO application, because it is going to be very difficult to row back afterwards, but also at the subsequent stage of proceeding to any main trial if the CPO application is given.

In terms of cost efficiency, obviously we would like the opportunity to make those submissions ahead of the CPO application, because if there is a chance of persuading the Tribunal that this is not suitable for certification, the matter ends there. If it is an efficiently

prompt process, then we can put our submissions in and hopefully that would be the end of the matter, but at least we have had full rights and procedural rights to put forward in the public interest, rather than going to the more involved stage, because, as we know, the CPO application stage is a marker, where often these cases are settled quite promptly thereafter, as experience from the US shows.

We do think it is important to have the chance to put in both written observations and factual evidence, but obviously we will keep that to a proportionate manner. We have suggested pragmatic arrangements in our skeleton to make sure that we don't duplicate with the Respondent. We have asked for an additional period of time to de-duplicate anything we propose putting in so that we don't overlap in terms of factual or supporting documentation. We would try to keep our submissions as short and helpful as possible so that we don't overburden the Tribunal and parties with additional costs or delay.

We really would like to be able to make a meaningful and helpful contribution in a way to further the proper conduct of these proceedings and defend the public interest.

I am just going to check whether we have any instructions, if I may.

To summarise, we have set out in our skeleton how there are provisions for regulators to intervene under the competition practice law direction. There are examples we have set out in our skeleton of other cases where the department has been permitted to intervene in judicial reviews, but also similar regulators have been allowed to intervene in CA 98 cases. We have not seen the recent ruling in the Google case, but the CMA has been permitted to intervene in the Epic and Alphabet case.

We submit we are in a prime, unique position to help the Tribunal, and although obviously we don't accept that we are liable for costs in the EMAs and the ERMA, at the end of the day, there is that potential sharing mechanism that we do need to defend the Secretary of State's interests as well.

MR JUSTICE MARCUS SMITH: Ms Howard, just from an analytical viewpoint, do you accept the distinction, in terms of label at least, that Mr Hollander draws in his skeleton between objecting up to the time of intervention and being an intervening party post certification? In other words, what Mr Hollander says, and I don't think he is making any point beyond the labelling, that up to certification this is a 76.10 (C) point, and after there has been certification there is a 16.6 point. Just so that I get my labelling right, is that a common ground?

MS HOWARD: I didn't understand that to be the case. It may be that I am reading the Tribunal's case management powers -- I think it is in rules 53 and 74, I think it is, in a broader perspective, that you have got a discretion to allow intervention. There is nothing in those rules that suggest you could not allow an intervention before the CPO application is heard.

MR JUSTICE MARCUS SMITH: The logical difficulty that I have with that is that until there is certification there is really nothing that's going on. We are dealing with an application by proposed class representatives to take the matter forward, but the proposed class representatives require our imprimatur to do so. To my mind, it seemed to me logical that the rules appear to be drawing a distinction between the objection to collective proceedings being ordered in the first place, and then, if they are not ordered, the matter just vanishes. If they are ordered, then intervention takes place. I am really talking a question of -- I am not sure what substantive difference it makes but I would quite like to get the labels right if we can do so.

MS HOWARD: We did posit our initial application on both fronts, because we did ask the PCR for consent, and they said "No, you can be an objector". We do see -- and this comes back to my opening submission -- there is a material difference between the role of an objector under rule 76 and the role of the intervenor because of the different quality of the interests. We are not just here as a third party at arm's length from the

proceedings. If we were an objector, an objector could be a consumer group. It could be another member of the class perhaps, who does not like the way the litigation has been conducted. They are very much remote from the proceedings, in that they are only seeing it through the public lens of what's on the website. They don't necessarily get access to the materials. They don't get access, for example, to the Respondents' submissions in evidence. They wouldn't be within the confidentiality ring.

So if the Secretary of State were held at arm's length in that way, and was not able to participate in the CPO application process, then I don't think we would be able to really meaningfully assist the Tribunal, particularly on understanding the merits of the claim against the full regulatory background.

I know that the Respondent is party to the agreements and will have its own understanding of the provisions that it has signed up to, but it will not have the wider perspective that the Secretary of State has in managing all of these franchise arrangements in the wider public interest of how this regime is supposed to work and function effectively. So we do feel there is a different dimension to the submissions that the Secretary of State would be making to help the Tribunal have a complete picture of the regulatory background.

MR JUSTICE MARCUS SMITH: I think there are two points nested in there. First of all, assuming that you are given permission under 76.10 (C) to object, I was not reading the rules as precluding a participation in confidential material if that's appropriate. Mr Hollander, I wonder if you could just help whether you are suggesting that?

MR HOLLANDER: I am not suggesting that.

MR JUSTICE MARCUS SMITH: That's helpful. We are really talking labels here.

MS HOWARD: Okay.

MR JUSTICE MARCUS SMITH: On that basis, let's cut to the more substantive point, which is -- I said it in my earlier ruling and I will say it again now, because I think it is

important that we have this in mind. I get the sense from Lord Briggs' attitude, particularly on the merits in Merricks, that one does not want to have a trial within a trial at the certification stage, and that whilst there may very well be a large amount of perspectives which matter when one comes to try the proceedings, if certified, one does not want to give too much latitude towards articulating these points prior to certification.

What I am struggling with is how, taking entirely as read that the Secretary of State has got a perspective on the merits that others don't have, why that matters for the pre-certification process, because what we are talking about is costs being wasted, time being wasted, and to what end? I think that is what I am groping for.

MS HOWARD: This really touches almost on a philosophical question of what is the role of the Tribunal, acting as the gateway for these claims, and is there any role for assessing these claims and refusing certification, because I think if the merit -- this is the 100 and 1 billion dollar question after Merricks, isn't it, because if the merits test is effectively being watered down, so that it is not really any criteria anymore, then all claims go through, and that gives no facility for the Tribunal to assess the claims and dismiss claims that it thinks really are clearly unarguable.

MR JUSTICE MARCUS SMITH: No. Lord Briggs is pretty clear that the strike-out jurisdiction exists, but I think his point is that that's it. In other words, if you remove the strike-out jurisdiction, there is no merits review whatsoever, but if you want to go for a strike-out, then, you know, by all means, be our guest. I think that's the message one is getting from Merricks. So "merits" is a very dangerous term, and I think that's why I am pressing you on this. If it is strike-out or bust, if there's a strike-out point, why can't the Proposed Defendants do it themselves? What do you add to that, given it is a very unnuanced point? If there is not going to be a strike-out, again what do you

bring to the party pre-certification? I stress that's the area where we are concerned, not so much the post-certification.

MS BLACKWOOD: We have highlighted the various -- what we consider for the DFT, that the Secretary of State may be of assistance --

MR JUSTICE MARCUS SMITH: Sure. You are talking about the pre-certification stage, are you?

MS BLACKWOOD: At the pre-certification stage. Sir, as you have alluded to, we have obviously not put in our responses yet, but we may be considering a strike-out on the merits of the abuse claim in the proceedings, and the Secretary of State is obviously a counterparty to many of the fare arrangements that have been put in place. It understands the regime. It does have a different perspective to add on that.

Sir, you were also commenting that merits of the claim were not necessarily relevant at the CPO stage if the strike-out was not made. We say it is relevant to the consideration of opt in/opt out and that determination. Also, we noted the comments that were made about that it would feed into the cost benefits analysis, about the impact it is going to have if a damages award is made on the wider public and, in essence, really what the benefits of bringing this claim forward would be. That feeds into your assessment of suitability of certifying this action.

From our perspective, as a Respondent, we do think that it would be helpful for the Secretary of State to be involved at the CPO stage, where those sorts of issues are likely to be raised.

MR JUSTICE MARCUS SMITH: Thank you.

MS HOWARD: Thank you. I mean, we agree with that. When I was talking about suitability, because of these different public interests of taxpayers and passengers, we think that does lead into the cost benefits analysis and suitability assessment. If you look at the procedure in a long frame, you know, if there is a point that we can make on arguability

to say "Actually, this claim is unarguable because of this or that feature", it may be that the Respondent does not make that point on their commercial understanding of the contract, but we have a wider policy argument. That may actually save costs in the long-term, because you can stop the proceedings then at the application stage rather than go forwards.

I don't want to raise alarms for you that we are going to come wading in and suddenly drown you in a deluge of documents. We do plan to put in our submissions in a proportionate manner. Whether we are labelled as an intervenor or as an objector, what we would like is a meaningful opportunity to assist the Tribunal. We are concerned at being limited to sort of ten pages, when there is quite a complex regulatory framework that we need to explain to you. It may be that the Respondent does that. We can obviously liaise and make sure we don't duplicate. But we do think it would assist you, as has happened in other cases, to have the regulator involved to explain the background to you and give that different perspective, so you can reach your judgment in the round.

MR JUSTICE MARCUS SMITH: It has. I did permit the CMA to intervene in Epic v Google, but there was no certification stage there. The reason on which permission was given -- I see no reason why I can't disclose the thinking -- was that although this was private litigation, there were going to be certain analytic approaches to market definition in the case of digital platforms which made it appropriate to facilitate the CMA's participation. On interventions, one does not want to go too far in nailing down precisely what assistance a third party may give. One needs to be alive to the different viewpoint, and here the CMA clearly did have a different viewpoint that we felt ought to be heard. To be clear, that is something which we do see post-certification.

What I am struggling with is that you seem to be attaching much more weight to substantive matters in the pre-certification stage than I think actually are relevant. That's why I am concerned that we don't have a situation where the fact that you are interested, in the

sense that you would like the result to be one way rather than another, for whatever reason, that to my mind shouldn't be enough to say "Well, we are going to give you latitude to object".

It does, I think, have to be a question of how far you are properly going to be assisting the Tribunal in providing a different viewpoint. It is on that point, pre-certification, that I am struggling.

I am concerned that we are going to get an overloading of this process in a manner that is not close to criticism. It is simply the signals that the Tribunal would be sending by saying: "You have a different view on the overall outcome of these proceedings. You have got lots of things to say on suitability", when actually these are matters for the substantive dispute resolution rather than the certification stage. It is the signal that we give, for no clearly articulated reason, permitting you to object that I am troubled by.

MS HOWARD: Obviously, we are very mindful of the test that has been laid down by the Supreme Court and obviously wewould keep within those parameters. It is not our intention to deluge you with lots of information on the merits. We are purely trying to assist. It is hard for me to articulate exactly how we are going to help yet, mainly because, although we asked for the CPO application in August, we didn't get a copy of it until the very end of October. So we have not had a chance to consider yet exactly how we will address it. We didn't want to expend resource and money on that in advance of getting permission from the Tribunal. I apologise if I am answering in an abstract, but we simply haven't had time yet to analyse how we would do it. We would obviously want to coordinate to avoid duplication.

I think your concerns could be relieved by us putting in a very proportionate, limited -- whether it is an intervention or statement of objection, and then we see, as and when permission is given for the CPO, whether we intervene on a fuller basis thereafter. That may be the way forward.

We do think it is critical that if we are going to try to help the Tribunal, as a minimum we have access within the ring to some of the documents that are filed so we get a copy of the Respondents' submissions and their evidence, and that we are able to make a submission that (a) does not duplicate but also assists the panel as much as we can.

MR JUSTICE MARCUS SMITH: Yes, I see. Thank you.

MS HOWARD: Thank you.

MR JUSTICE MARCUS SMITH: Ms Blackwood, do you have anything to add?

MS BLACKWOOD: No, sir.

MR JUSTICE MARCUS SMITH: Mr Hollander?

MR HOLLANDER: I think the Tribunal has most of the points. Can I first of all just deal with the relevant rule briefly? I think we have set out rules 16 and 76 in our skeleton at paragraphs 20 and 21. That's probably the most convenient place to find it.

76 is much more specific and in a sense deals with the present issue much more appropriately, I would suggest. The only passage I was going to show you was the Tribunal, Mr Justice Roth, in the Trucks case.

If you look at page 83 in the authorities bundle at tab 3, this is what Mr Justice Roth says, line 9 on page 83, if the Tribunal has it:

"We have considered the short submissions we have heard regarding the question of intervention in these applications for approval of collective proceedings. We didn't hear extensive argument and we do not think it is not necessary or appropriate to decide whether rule 16 properly applies in a situation where the proceedings cannot continue unless and until a collective proceedings order is made. We are satisfied in this case it would be more appropriate for those with an interest wishing to object to the grant of a collective proceedings order on either of these applications to be heard as parties with an interest, wishing to object under 76(10) (C) with regard ..."

Then the facts:

"With regard to the submissions we have heard there should be no restriction on the scope of observations… so long as there is no duplication andthey are distinct from the submissions and argument addressed by the Respondents to the respective applications."

It is obviously not decisive, but I would suggest that 76.10 (C) looks like the winner here, or more appropriate.

So far as what the position is, it is obviously for the Secretary of State to explain to the Tribunal if there is desire to put in submissions. I didn't hear any suggestion that they would want to put in oral evidence -- witness evidence, sorry, not oral evidence. It was not suggested by my learned friend, Ms Howard.

The question then is as to whether they should be allowed to do that rather than the matter being considered if and when an order being made, and obviously that's a matter ultimately for the Tribunal.

One then says: what is it that they want to say or what is it that they seek to add to this that they can add?

On that, to be fair to my learned friend, she accepted, because they said they only had this six or seven weeks ago, that they had not actually perhaps really got to grips with some of the detail.

We referred at paragraph 25 to reasons why that didn't seem to be obvious, that the Secretary of State would have anything separate to say. We identified three reasons why we thought this was unlikely. Firstly, paragraph 25 of our skeleton:

"No other train operating company sets prices or imposes travel restrictions by brand like GTR."

So there are no wider implications, as suggested:

"The Secretary of State acknowledges that the extent to which his financial interests might be affected depends on a number of variables and on the terms of the franchise agreement.

It is not clear why the Secretary of State would have information on the franchise agreementrelevant to the application that GTR doesn't."

My learned friend's response to that I think was not really to respond to those with any detail or particularity. The suggestion appeared to be that they might understand the franchise contract better and more accurately than the Respondents, which seemed a rather odd reason. She said: "We might have a different or better interpretation". I would suggest that is probably unlikely at this stage, as opposed to the post-certification stage, assuming that happens, to assist the Tribunal, but ultimately it is a matter for the Tribunal to decide whether it would be assisted and to what extent.

MR JUSTICE MARCUS SMITH: Thank you very much, Mr Hollander. Ms Howard, you have I think the last word. Ms Blackwood, I will check whether you have anything to say. I don't think you do.

MS HOWARD: I certainly wouldn't want to denigrate the Respondents' understanding of the contracts they signed up to. My point was a short one. This is just one contract in a wider regulatory background, including other franchises, and the Secretary of State's risk allocation is similar across these other franchise agreements. So it is just explaining the wider regulatory framework to the Tribunal and assisting you if you have any questions that you want to ask at whatever stage. Thank you.

MR JUSTICE MARCUS SMITH: Thank you very much, Ms Howard. We will rise for five minutes.

MS BLACKWOOD: Sorry.

MR JUSTICE MARCUS SMITH: I am so sorry.

MS BLACKWOOD: I just had a very brief comment which is to say that we appreciate that the regulatory regime is extremely complicated. We do anticipate that the Secretary of State will have helpful insight, particularly because certain of the agreements that are

in place stem back to '94, '95 and really require some historical knowledge. We would anticipate they will be helpful in that regard.

MR JUSTICE MARCUS SMITH: Thank you very much, Ms Blackwood. We will rise for a further five minutes to consider the outcome and resume then. So thank you very much.

(Short break)

RULING RE INTERVENTION BY SECRETARY OF STATE(Extracted)

SUBMISSIONS RE TIMETABLE

MR HOLLANDER: Thank you very much. Those are the two sort of major items. The rest is essentially going to be arguing about dates, which I hope will not take very long. Probably simplest, if it is convenient, to take the issues from my skeleton. We will just tick them off if we may, and I will show you where I think -- if you have my skeleton, there's a reference to forum, but I don't think that is controversial. Paragraphs 2 and 3.

MR JUSTICE MARCUS SMITH: No. We see that's common ground and we agree.

MR HOLLANDER: There was an issue -- I suspect now in the light of the Tribunal's ruling paragraph 27, so a nice jump to page 10. On confidentiality, we had agreed the terms of a confidentiality ring with the Respondents. There was an extra paragraph proposed, I think, as I understand it, and I will be corrected if I am wrong, by the Secretary of State, which seemed rather beyond what was necessary. I am accepting for this purpose that the Secretary of State will be party to the confidentiality ring. I don't know if you have that. I received it in an e-mail last night.

MR JUSTICE MARCUS SMITH: I have a confidentiality ring order before me. The question is, is it the right version?

MR HOLLANDER: Has it got the Secretary of State in red?

MR JUSTICE MARCUS SMITH: It does indeed and it has various emendations in red, blue and green.

MR HOLLANDER: I think the only one that matters is there is a new paragraph 4. That's the only one I want to address you on.

"The relevant documents are to be used by the Relevant Advisers only for the purpose of these proceedings. The subsequent use of any Relevant Document provided in the course of these proceedings for any other purpose by the receiving party is prohibited, even where the document has been read to, or by, the Tribunal, or referred to, at a hearing which has been held in public, subject to an orderof this Tribunal to the contrary."

I saw that last night. I am not quite sure of its provenance. I query why it is necessary at all, given that the collateral undertaking is going to apply anyway. But even if it is, the idea that, as a matter of course, it applies to documents read or referred to at a hearing in public seems a very odd provision and would require special justification.

Perhaps somebody else should address you on that. That was the only point we have. Otherwise it was agreed originally between us and the Respondents.

MR JUSTICE MARCUS SMITH: Before anyone pops up to justify, let me just articulate the difficulties that I see. We are quite capable of protecting confidential material that is, as it were, referenced in open court but not read out, but I do feel that it is asking for trouble to have a general protection that is not specifically asked for. That's for two reasons. First of all, what's in public ought to be in public, but also, where one is saying "This material, although it might appear to be in public, isn't" does need to be specifically articulated when someone stands up and says "Look, you need to protect this material". We get it in patents actions all the time. We are willing to make such orders. I think the blanket protection is just going to put someone in breach in circumstances where they wouldn't expect to be. I say that by way of provisional view. Ms Howard.

MS HOWARD: I am conscious I haven't really got any status to be making submissions to you, given that we are not officially intervening. This provision has been used in the Visa interchange. It has also been used in Inmarsat and also in the rail franchising litigation. As you are aware, there are often practical mechanics at trial to make sure that materials are not read out aloud or using code words. But there are always accidental slippages where somebody's confidential information is read out. It is simply just trying to protect that information can't be used either for other litigation or by competitors who may be in the room. I think it is premature at this stage to have this in now. I think we were trying to kind of have one ring that would last, but obviously we are aware of our status. If as you get closer to a hearing you feel there is additional protection, you can consider it at that stage, but we are not pursuing it now.

MR JUSTICE MARCUS SMITH: I am grateful. Ms Blackwood, do you have a comment?

MS BLACKWOOD: Just as to the Secretary of State's proposed amendment, we were content with it. Equally, if they are not pursuing it, we are happy for it to come out.

MR JUSTICE MARCUS SMITH: I think we will stop the sentence at "prohibited" at the end of the third line and delete those two sentences, without prejudice to any further form of protection that the parties seek to move in the future.

MR HOLLANDER: I don't feel very strongly whether we need the first part at all, given the collateral undertaking and whether one needs it to be especially in the confidentiality ring. It is a matter for the Tribunal.

MR JUSTICE MARCUS SMITH: I can't see the harm, whereas I could see the harm in the last two lines.

MR HOLLANDER: Exactly, sir. I understand completely.

Then we go to paragraph 30 onwards. I think the issue here, which hopefully will not take very long, is a response date. The dates go consequentially from that. The Respondents want until 11th March. We had suggested in our table in paragraph 31, 4th February,

although I see there is a typo on the bottom of page 12 which suggests 11th February. That's what we had suggested.

The main point there is that they have had this since 5th July. So they have had five and a half months already. We obviously want to get on with this. The delay in not responding to the letter before action was obviously held up a certain amount, because we gave them the benefit of the doubt and waited until nine months after the intended letter before action before starting proceedings, but I have shown you the correspondence on that.

We were rather hoping that we would get a response pretty soon, given the period of time that has passed since 5th July, but I think that's the issue for you. 4th February on one side and 11th March on the other. I think most things also follow from that.

MR JUSTICE MARCUS SMITH: Yes, I see. Ms Blackwood, perhaps you could address me on that point.

MS BLACKWOOD: Sir, yes. We do say that requiring us to put our response by 4th February gives us wholly insufficient time to put in that response. I think we have alluded to it already to some extent, but there is a great deal of complex factual matters underpinning this claim. Just to give you a sense of that, I think we have touched a bit on it, but we will need to get on top of the history of the TSGN franchise. It is a franchise that GTR operates. It was created by combining several separate franchises in 2014 which had their own independent fare structures. Our understanding at the moment is that when GTR took over the franchise it did not set fares afresh but it adopted some fares that originate from those previous franchise fare setting arrangements.

We also have to understand the background and history to the ticketing and settlement agreement. That's an agreement that was set up in 1995, about 25 years ago. There are very few people in the industry who were there when it was signed and agreed.

The relevance of that is that there are terms and expressions within that agreement that you can only really understand the significance of it if you understand how the rail industry operated at the time, because things have moved on and changed significantly. So when you are reading that agreement, you need to understand its context.

There is also complexity in relation to the TSGN franchise itself. From the outside it has been a franchise where the Secretary of State is on revenue risk and GTR is really operating the franchise. As a consequence, the franchise arrangements are significantly more complicated than normal.

I could go on. I don't want to -- but you can see it's a very complicated factual background to what looked like quite discrete claims.

The Respondents have been actively engaging in the intervening period since when they received the claim form. It's very detailed and complex matters, not helped by the Covid issues we have been having, where people have been working remotely. They have not had access to the hard copy documents and so on.

The suggestion that we put in a response by 4th February is complicated by the fact that the availability of the witnesses that we need to speak to in the intervening period is going to be limited. We have the Christmas period, when we know that witnesses will not be around to be spoken to, but also, critically, witnesses are likely to have limited availability because the GTR franchise agreement expires on 1st April. So for many of the individuals that we need to speak to, they are intensively occupied and will be intensively occupied with either negotiating extensions to the franchise or national rail contract or demobilising the franchise.

So we have an issue of accessing the necessary people to provide us with the information for the response, and also supporting witness evidence.

I think to some extent as has been foreshadowed, we also think it is important to build time into the timetable to liaise with the Secretary of State, understanding that they will have helpful points on this and they can feed into us.

We are conscious that they have not had the claim form for a particularly long period of time. I understand there was quite a delay before the PCR provided it to them.

A further understandably more subsidiary point, but I do mention it, is that there are timetabling steps in the Gutmann proceedings. The LSER in Gutmann is represented by the same legal team as is representing the proposed Respondents in this claim, and therefore there is an overlap of the dates at which responses will be going in. Therefore we would say a few extra weeks really would assist with alleviating that crunch on the legal team.

We suggest that the Respondents be allowed until 11th March in order to be able to file and serve their response.

MR HOLLANDER: Just very briefly --

MR JUSTICE MARCUS SMITH: Just to be absolutely clear about what we are expecting on 4th February or 11th March, one of the things that probably needs to be clarified with this whole regime is the relationship between the collective proceedings application and pleadings more generally. I think that Respondents need to know that we are not expecting any particular engagement, however contentious they might be, we are not expecting engagement on the merits.

MS BLACKWOOD: Sir, I think there is an issue in this case where the PCR has said that there is an abuse, because in part we did not set our fares in accordance with the regulatory regime, and there's a question as to whether or not that's even right. So if we wish to make a strike-out application, because we think their claim on abuse is ill-founded, we do need time to consider that and set that out.

MR JUSTICE MARCUS SMITH: You can have a date for the response to the CPO application of 4th February. That is without prejudice to any application to strike out that you may make, which is a matter that you can move separately.

MS BLACKWOOD: Sir, as I did mention before, I know that Merricks says that merits are not the key part of the certification process, but they are relevant to determining opt in/opt out.

MR JUSTICE MARCUS SMITH: They are. The strength of the case is something which is expressly articulated as an additional factor --

MS BLACKWOOD: Yes.

MR JUSTICE MARCUS SMITH: -- to the question of opt in versus opt out certification. It is obviously something we have to take into account. But strength is not merits. I am afraid what I heard from your submissions was a whole series of points that seemed to me to be appropriate when you serve your defence after certification. I do think it is important that the parties appreciate what it is that they are throwing in, because having not just come out, but having six months ago come out of a five day hearing on all of this stuff in O'Higgins, we were not assisted by the sheer volume of material that was presented.

Now, we understood why it was produced, because this is an unknown jurisdiction, but I do think that, as this process crystallises, the parties need to be given pretty clear steers as to what it is that they should spend their money on.

Yes, we absolutely accept that strength is something that needs to be addressed if you are opposing opt out certification, but strength, as it seems to us, is something that can be addressed at a level of abstraction that really doesn't require detailed witness evidence. I confess that we are obviously talking about known unknowns here that we don't know what it is that you want to produce, but I do think that your clients are entitled to a pretty

clear steer as to what it is that we are expecting to see and what it is we are not expecting to see.

At the moment it seems to me that if we give you a date of 11th March, that is going to imply all kinds of factual material that at the moment we don't see the need for.

If you have got a strike-out application, then think about framing it, and we will talk about a timetable for that. If you have got a situation where you simply can't address a point like strength by 4th February, well, again we will hear you, but I think the indication that you and other Respondents need to get is that the certification process is not intended to be a trial.

What I heard from your submissions was submissions that are more apposite to the timetable for a trial than for what is a heavy but containable interlocutory application.

MS BLACKWOOD: Well, I think in a sense when I was addressing you on the stay I perhaps raised a couple of points which show you that witness evidence is relevant when you are considering the methodology that has been put forward. So we do need to put in evidence that explains tapping in and tapping out at platform 14 and what is done in that respect. We do need to put in evidence to show what the fares are likely to be like in the counterfactual, how unregulated fares, the cost of single fares are likely to go up in the counterfactual, and that affects the consistency of the position of the class members.

So there are matters. You know, we obviously have not bottomed all these issues out, so I can't tell you what they all are now, but it does matter that we understand the regime.

I take your point that you don't want volumes of information, and that this is not a sort of -- at the certification stage it is not a detailed assessment of the merits, but we need to fully understand how the various agreements work and the regimes so that we can tell you, if it is appropriate, "We think this is an exceptionally weak case when you look at these agreements" and so on. That will feed into your analysis in strike in, strike out.

I think also the point about cost benefits that was touched on earlier, it is helpful to explain the impact, that if this award is made, who is it going to benefit? Probably principally the funders, because the costs will have to be recouped by increased fares in the future, and that does factor into your assessment on suitability.

In a sense I am having to sort of pick up a few preview points, but it does matter that we understand these things. It does matter we can speak to the witnesses we need to talk to, and it is just unfortunate timing that it overlaps with them being heavily involved in a major franchise reorganisation matter. A delay of a few weeks means a huge amount to us to be able to put our response together, but I don't think it is going to unduly impact upon the PCR. It is just a matter of a few weeks' delay.

Sir, those are my submissions.

MR JUSTICE MARCUS SMITH: Thank you very much.

MR HOLLANDER: Can I just flag up one matter. I have rather lost control of who is putting which colour on the latest version of the draft order which was provided to us. It perhaps does not matter, but it certainly was envisaged by somebody in blue that if there was going to be a summary judgment -- it is paragraph 19 -- or strike-out application, that that would be served by the date put forward by the Respondents, which is going to be 11th March.

It is obviously convenient that if there is going to be such an application that it be heard at the same time as the certification application. I was assuming that any time-frame for -- my learned friend I think is keeping her powder dry, perfectly fairly in respect of that, as to whether she wants to do that or not, but that needs to be at the same time as the Respondents' evidence. That's the first point.

Secondly, my learned friend, you know, two counsel, smart solicitors, 30th October 2020, they had a very long letter before action, and by January they are able to say in correspondence that the claim was hopeless.

As you know, since 5th July, they have had the whole thing.

If they want to say that they need all this time, we need to have, with respect, a little bit of detail, either a witness statement, or if that's over the top, at least some details in the skeleton as to exactly why, after all this huge amount of time, they need this extra time. What they have done so far, what all these distinguished counsel and solicitors have been doing over the last months and months. If they really wanted all that time, we have not had anything of that. We have had the most general of comments. Anyway, the Tribunal have the point.

RULING RE TIMETABLE(Extracted)

FURTHER DISCUSSION RE TIMETABLE

MR HOLLANDER: I have very little to say. Thank you very much. That's very helpful.

The only matter I think that I wanted to canvass was we had suggested a pre-trial review and we put down 6th April as a possible date. I think at that stage we anticipated there would be some involvement at this stage from the Secretary of State. I am not sure for our part we think it is necessary if the Secretary of State is not going to be involved, but I don't feel terribly strongly about it.

As for the three days, I think the answer is it rather depends what we get from the Respondents and we don't really know much about that at the moment.

MR JUSTICE MARCUS SMITH: Well, Mr Hollander, the real question is whether one has got a realistic assessment that can be cut back rather than one that needs expanding.

MR HOLLANDER: Yes.

MR JUSTICE MARCUS SMITH: My thinking was, knowing as little or less than you about what is going to be in play, that three days seems broadly about right. For our part we would be minded to put in the diary a PTR just in case on the basis that, as your skeleton

says, it can be vacated if not needed, because it is so much easier to take things out of the diary than put things in. So that was the spirit with which we approached both the time estimate for the hearing and the date for any PTR.

MR HOLLANDER: That would certainly be convenient to us. Can I just ask this question? It is normally in a sense partly for the court to have a pre-hearing review. Would it be convenient if the parties decide we don't need it without the involvement of the court, because, if so, that probably ought to be referred to in the order? That's a minor point.

MR JUSTICE MARCUS SMITH: I understand where you are coming from, Mr Hollander. I think usually, almost always, the Tribunal will row in behind the parties. If the parties don't think a hearing is needed, then that is a pretty good indicator that the Tribunal won't insist, but I think, again given that this is very much a jurisdiction where we are still feeling our way, it probably is worth running under the nose of the Tribunal to see whether it is needed.

MR HOLLANDER: Let's leave it in the order along the lines of the draft and if the parties don't think they need it, they can write to the Tribunal.

MR JUSTICE MARCUS SMITH: They can write. I mean, we are very good communicators. So I don't think that will be a problem.

Ms Blackwood, any points on detail?

MS BLACKWOOD: No, we have no further points. Thank you, sir.

MR JUSTICE MARCUS SMITH: Ms Howard, I will hear from you, even though you are only anticipatory intervenors.

MS HOWARD: Thank you, my Lord. It is still open I assume for the Secretary of State to put in -- to fall in as any person with an interest. We could apply by 25th if we wanted to make an application with, as you said, more focused articulation.

MR JUSTICE MARCUS SMITH: That's absolutely right. I mean, Ms Howard, I think you have quite clearly got where we are coming from in terms of objection. We don't want

to close out an objection if your client is so advised to make it. It is really the focus that is important. We are saying no to a wide-ranging objection. We are absolutely saying not at all on a narrow objection which for whatever reason is more appropriately brought by the Secretary of State than by the Respondents, and those are the two tests that we will apply for an objection.

MS HOWARD: Can I just clarify our role, if any, at the subsequent hearing, because obviously we are not an intervenor. If we were to put in an objection on the papers on 25th, would there be any liberty to apply if it would assist the Tribunal to assist in oral argument at the hearing or would you consider that going too far?

MR JUSTICE MARCUS SMITH: We certainly would consider it. The procedure in this Tribunal is directed towards achieving the right outcome at a proportionate cost. So I hope you will not take it amiss if we say we would rather you were not here, but that is something which we would be minded to keep under review and you certainly should not regard yourself under any constraint to say, "We would like to be present at a hearing" for whatever reason, because I know the Secretary of State will act in a responsible way in putting forward what there is.

So we are not going to make any provision in the order, but this matter is docketed to us. You have heard what we say and we are certainly not saying "no".

MS HOWARD: I am very grateful. Thank you.

MR JUSTICE MARCUS SMITH: Mr Hollander, does that deal with all of the points that we can assist the parties on today?

MR HOLLANDER: I think it does. Thank you very much indeed.

MR JUSTICE MARCUS SMITH: We are very grateful to all three of you and your legal teams for your assistance. If you could provide in due course agreed forms of the two orders that we have been debating.

MR HOLLANDER: Of course.

MR JUSTICE MARCUS SMITH: We will make those as soon as possible.

MR HOLLANDER: Thank you very much indeed.

MR JUSTICE MARCUS SMITH: I am helpfully reminded there was one point which I had on my list which was really by way of anticipating a potential future problem. I understand that there is a potential question regarding objection to your client's application on the grounds of funding.

Now obviously any objection will be dealt with at the three-day hearing of the CPO application, but I just wanted to check with Ms Blackwood whether there is anything you need from us in order to enable you to articulate that objection in good time for 4th February, I mean, if you haven't been given disclosure of documents that you need to see or whatever?

MS BLACKWOOD: I think we are content we have the material we need and we will be responding to the PCR.

MR JUSTICE MARCUS SMITH: That's what I understood. If there should prove to be something, then again by way of indication I am sure Mr Hollander with his team will respond as quickly as he practically can, but I would not want your response to the CPO application to pull its punches for reasons because you don't have enough information.

MS BLACKWOOD: I am grateful, Sir. Thank you.

MR JUSTICE MARCUS SMITH: Very good. Thank you very much for that reminder. Thank you all once again. We will adjourn until the next hearing. Thank you very much.

(1.10 pm)

(Hearing concluded)

Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
…	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?