IN THE COMPETITION APPEAL TRIBUNAL

Case No.: 1404/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Friday 14th October 2022

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

BETWEEN:

David Courtney Boyle

Class Representative

v

Govia Thameslink Railway Limited
The Go-Ahead Group PLC;
Keolis (UK) Limited

Defendants

-and-

Secretary Of State For Transport

Intervener

A P P E A R AN C E S

Mr Charles Hollander KC, Mr David Went (On behalf of David Courtney Boyle)

Mr Paul Harris KC, Ms Anneliese Blackwood, Mr Michael Armitage, (On behalf of Govia Thameslink Railway Limited, The Go-Ahead Group PLC, Keolis (UK) Limited)

Ms Anneli Howard KC, Mr Brendan McGurk (On behalf of Secretary Of State for Transport)

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Friday, 14 October 2022

(10.00 am)

Housekeeping

THE PRESIDENT: We've been staring at each other across the screens for 10 minutes, that's because the live stream has been refusing to cooperate and although we hope that these proceedings will be live streamed, I don't think we can wait any longer, given that we have a 10 o'clock start, for it to catch up.

I will give my usual warning that hopefully these proceedings are to be live streamed. When they are, everyone is welcome to watch, but there should be no recording, photographing or transmission of these proceedings, and a breach of that injunction will have serious consequences.

Next, can I just ensure that we have good communications. I can see all of the advocates, Mr Hollander, Mr Harris, Ms Howard. You are very welcome. Could you just confirm that you can see and hear me.

MR HOLLANDER: I can hear you, sir. I can't actually see you at the moment for some reason. I am not quite sure why.

THE PRESIDENT: Is that a common problem for Mr Harris and Ms Howard?

MS HOWARD: No, all clear.

THE PRESIDENT: And sight as well?

In that case, I am very pleased to say, Mr Hollander, it is your problem, not mine.

MR HOLLANDER: I am disappointed at not being able to see you, but don't worry about it.

THE PRESIDENT: Let's hope it will rectify itself. If it proves to be a problem, Mr Hollander, do speak up. But I don't think we ought to hold up things still further.

MR HOLLANDER: Of course.

THE PRESIDENT: So welcome. Thank you very much for your written submissions

and for the case management file which we have looked at and read your written submissions with some attention. It seems to us that the order in which we ought to approach things is first to determine what it is that we are actually going to be trying first. We will hear submissions on that before anything else.

We have had a discussion and had some thoughts which I think I will articulate first before I invite submissions.

We will then, unless things are extremely clear, rise to consider what we ought to do next. Then we will come back and debate how we are to do it. Because there is no point, we think, in debating procedural steps like disclosure and witness statements without knowing what it is they are going to be directed to.

So that is our thinking. Mr Hollander, Mr Harris, Ms Howard -- Mr Harris, you have your hand raised.

MR HARRIS: Sir, thank you. That seems like a very sensible course. Can I begin with a thank you though to the members of the tribunal. I am the one who asked for a 10 o'clock start and I am grateful that you were able to indulge me. The reason is that I have unforeseen logistical difficulties this afternoon. That doesn't mean that I cannot sit but it creates awkwardness and problems. But I was rather hoping that if we do start with the shape of the trial or trials, and even with a rise to determine that issue, we ought, with any luck, to be able to finish all the agenda by lunchtime. But plainly I am in the tribunal's hands, but I am grateful for the early start.

THE PRESIDENT: Mr Harris, despite the best efforts of live stream, we are very pleased to accommodate you. Like you, I think we are anxious -- consistent with hearing everything properly -- to deal with things by a 1 o'clock English time conclusion. I hope we can achieve that. But we will see how we go.

But thank you for that.

Mr Hollander, Ms Howard, are you happy with that sort of rough agenda?

MR HOLLANDER: That seems admirable, sir.

MS HOWARD: Very sensible.

THE PRESIDENT: Thank you. We see that all of the parties are advocating some form of splitting up of the trial. To be clear, we think that that is probably sensible. The real question is how these issues are split.

Let me begin, though, by saying that it is the common sense of judges at least that preliminary issues seem like an awfully good idea when they are ordered and then they rapidly -- I hesitate to use this joke -- come off the rails come trial. I am quite keen that we stress test whatever structure of trial that we run, in order that we at least all leave feeling satisfied that there is a sensible structure in place for carving up the issues.

So it would be too simplistic to say I don't like preliminary issues, but I do regard them as potentially quite dangerous.

What I think we would require some persuading about is a split that is based simply upon dealing with abuse first and allowing dominance to follow. Speaking for myself, I find that questions of abuse are very often informed by whether there is and what the nature of any dominance might be in the market. Because in a sense abuse is very context specific in that it is a constraint on the conduct of the putatively dominant undertaking not to be able to do certain things, but those things that cannot be done are in a sense informed by why there is market power and the nature of that market power.

I know it has been done in a number of other cases where the abuse has been heard and determined first. Usually I think that is where the market is perhaps easier to understand than it is in this case, and that may be why I am a little bit jumpy about the abuse/dominance divide that informs some of the parties' suggestions.

On the other hand, what is unusual about this case and why the Secretary of State's

presence is so welcome at this hearing is that there is what I am going to call a public/private divide, which is unusual and which requires, we think, quite careful handling. Our provisional thinking is that it is well worth thinking about separating what we call the public elements from the private elements. That we have a sort of moderately clear provisional view on. What we have very little view on is the order in which those public/private elements should be heard, and indeed what constitutes a public and what constitutes a private issue for these purposes. Those are matters which I think are quite hard.

But to try to put a little bit of flesh on that very broad skeleton, we found as a sort of agenda for this, the defendant's Defence paragraph 6 very helpful, at page 80, tab 4 of my case management bundle.

What is very helpfully done there is the issues are sort of set out, the fault lines or various points that the defendants are taking are articulated with a great deal of clarity and precision. What we see is a number of issues which are, what I would call, private law and a number of issues that I would call public law.

So 6(a), non-admission of dominant position, private. 6(b)(i), not contrary to contractual provisions, again we would say private. 6(b)(ii), contravention of those provisions, again private. And 6(b)(iii), the final private issue, no exploitative or exclusionary abuse or objective justifications.

So there may be argument about labelling these as I have done, but provisionally that's how I am labelling so you know where we are coming from.

Then, (iv), (v) and (vi) would be what we would call the public law questions. Namely, there is the Secretary of State's role in affecting the way in which what is ostensibly a private supply of service becomes public. The same is true of (v) and (vi).

That, as it were, is the definitional question. We are very happy to hear from the

parties about whether that is a division that makes sense or not. But assuming that it does, the question on which we are troubled is: if it is sensible, as we think it might be, to split private from public, does one do the public bits first, following on with the private bits, or does one do the private bits first, followed on by the public?

Now my gut feel -- but I think it is very much my individual view, on which I am very open to persuasion -- is that it would be better to do the private questions first, and to work out whether there is -- viewed solely through the prism of private law spectacles -- a cause of action or not.

Now, if there isn't, if Mr Hollander's clients fail, then we never get to the public questions at all. It is only if Mr Harris' clients fail, and one would envisage probably as a kind of provisional judgment at the end saying "subject to all of the public law questions Mr Harris' clients lose for these reasons", if that is the outcome, we then proceed on to the (iv), (v) and (vi) questions, and decide whether in the light of those issues there is in fact an infringement as we would on this assumption provisionally have found.

Now that has the advantage of essentially confining the first stage as a two-way fight. We would have no problem in the Secretary of State being present as an intervener in this stage. We think it would be a good thing. But it would keep the Secretary of State's involvement in terms of adducing witness statements or anything like that at the absolute minimum, if anything at all, because the battle would be purely on the plain of the private law.

If we then needed to go into the second phase, it would be for the Secretary of State to take a much more overt role with witness statements, disclosure coming into play.

So that is perhaps I am afraid a rather long introduction into our thinking. What I would be minded to do is first of all if you need time to take five minutes with your teams to discuss this, we are very happy to accommodate. But otherwise, we would

want to hear from Mr Hollander, Mr Harris and Ms Howard -- I think in that order -- as to whether you want to press your different carvings-up, or whether you think this, or a variant of this, is something that we can do business with.

So, Mr Hollander, I will hand over to you. But if you need time, do please say so.

Submissions by MR HOLLANDER

MR HOLLANDER: I am happy to carry on, sir. Can I tell you what -- that's obviously a very helpful introduction and as you have gathered from the skeletons, there is not actually all that much between the parties and we've considered what GTR have suggested, and our concern with that was about the interrelation between dominance -- my learned friend in his skeleton says quite rightly there are a number of cases where the court has determined abuse on the assumption of dominance, and that is in many cases an entirely legitimate way of doing things.

The reason we thought that perhaps would not work in the present case -- which I think is aligned to your provisional view -- is that it seemed to us that there was an overlap between that and abuse in this case.

But I think our concern about the proposal that you made is that we think that there is quite an overlap between the public and the private elements as you put it. I really wonder whether a split of that nature is feasible for much the same reasons as you identified in terms of dominance. Because it seems to us that what is being said to be -- the argument being put forward by the defendants, and to an extent adopted by the Department of Transport, is essentially that you have to look at the idea of abuse in the particular regulatory context. If that is right, or if that is their position anyway, it seems to us quite difficult to divide up the public and the private in the way you have suggested. I wonder whether one is going to get into the same difficulty that you identified as between abuse and dominance.

We also looked at the Defence really from exactly the same perspective that you did. You are absolutely right that paragraph 6 is the starting point. They don't admit dominance at 6(a), but part of that is because of the regulatory structure. We can see in a moment -- I will show you the other paragraphs apart from paragraph 6.

But what I understand GTR are saying is "look, you can't treat this as being a normal market because of the regulatory structure" and that seems to us to provide something of an overlap between the public and the private, which I think is perhaps why my learned friend, Mr Harris, although taking a different view to us in the skeleton on dominance, I think also has in mind that subject to that, that these issues would be tried at the first stage.

So as you say, (b)(i) is contractual under paragraph 6. (b)(ii) is perhaps also contractual, in terms of whether it is an abuse. Then there is an objective justification.

You have identified that as private, and in one sense it is, but again I would have thought there is an overlap there with the public issues as to objective justification argument; and then effectively at (iv), (v) and (vi), they say that the regulatory framework and/or the involvement of the Secretary of State means that the Chapter II prohibition doesn't apply at all here.

Now, I really wonder whether there is a clean divide between that. If we just look at one or two of the other paragraphs. If you look at page 94, for example, at the bottom right-hand side, page 16 of the Defence. If you look at the -- and this is part of the pleading starting (iii). The structure and level of the fares offered and so on were required and directed by the Secretary of State:

"Inter-availability provisions of the TSA were not intended and shouldn't be taken to apply to GTR's position in the abstract but should be interpreted in the context of the regulatory environment in which they operated in which the structure and the level of

GTR's fares were required by the franchise agreement."

As I understand it, that particular plea -- when there are others to a similar effect -- is marrying the public and the private together.

If we look at one or two more, page 104 -- (b) at the top of 104 -- which is abuse of dominance, and (b):

"It is denied that GTR held or holds a dominance position. Regardless of that, it is subject to significant competitive constraints in relation to its ability to set fares. Those constraints include competition for the market through other TOCs and other modes of transport, the regulatory regime to which it is subject and the role of the Secretary of State in relation to the price and availability of different fares. As a consequence it doesn't have the ability to act independently of its customers and competitors that is the hallmark of a dominant position."

That is marrying up -- very briefly at 30(c), it perhaps does not matter so much in light of your preliminary indication, but one of the points made by my learned friend is that if we did it his way, excluding dominance, there would be a need for at best very limited expert evidence. I don't think that's actually right. It may not ultimately matter very much to the scheme of things, but 30(c) is all about choice and competition and it seems to us that there would be a need. I don't think he disputes it in principle. He says "not much of a need" for economic evidence in relation to that. Again that's a pro choice argument.

Then if you go to page 105, if you look at (g), the prohibition -- that the prohibition doesn't apply. That's what you would, I think, regard as the public point.

Then (h) on page 106:

"Further or alternatively the national legislation created a legal and/or regulatory framework which deprived GTR of its commercial autonomy and/or required it to act in a certain manner in relation to ticket prices and that they are not attributable their

own commercial conduct and the Chapter II prohibition doesn't apply."

That also seemed to us to marry the public and the private elements.

So I think our position is that the reason we had put forward exclude causation, exclude quantum, is that there isn't a clean split otherwise. I would respectfully suggest, you said quite rightly that there are often problems with preliminary issues in that they don't turn out to be the clean position that one had sometimes hoped for when they seemed an awfully good idea at the time.

I think our concern would be that that public/private split would have the effect that there is a danger that they run together. I really wonder whether there is a clean split. I fear that if one tries to slice it in that particular way, that we may get into a bit of a mess where the two overlap.

So that is our concern about that. Can I just briefly deal with one or two other matters?

THE PRESIDENT: Yes.

MR HOLLANDER: My learned friend Mr Harris suggests that there should be a set-off. The set-off point. You will remember well the set-off point from the hearing in July. We can come back to that if necessary. I would suggest that there are a couple of problems with it.

It may be, in due course, that it is sensible to have that dealt with before quantum, on the assumption that we are getting into quantum. I think it is an open question at the moment. The problem with it, in 1, is it really is a quantum question and not, I would suggest, for now. Secondly I think it may need some facts. Thirdly it is premised on Mr Harvey saying that in the counterfactual the non-regulated fares, the price may rise. That is all a bit tentative, with respect. One needs to go a bit further and find out whether actually when one has done the analysis towards a trial, that that actually is the position, because otherwise that is also being done on a false

premise.

So far as GTR is concerned, they are trying to slice it, I think, in a slightly different way. They talk about contractual construction. I think there is a danger that their proposals are seeking to salami slice it in a way that actually is not efficient at all, whereby one has too little decided. I appreciate to some extent they are suggesting that one deals with what you have referred to as the public element first, although I don't think they grapple, with great respect, with the overlap.

There is also the slight problem, although perhaps we need not deal with it now. They have suggested that the test for preliminary issues -- what they have set out there just simply is not the law. We can look at it if we need to. They refer to a paragraph in the Court of Appeal where Mr Justice David Steel, who I think was obviously frustrated about the fact that the preliminary issues that were being put forward just didn't work -- sorry, I am told I said GTR, I meant Secretary of State. I hope that is obvious. I am so sorry.

I think there is a case they refer to in the Court of Appeal, Mr Justice David Steel sitting as the third member obviously frustrated about the fact that the preliminary issue that was proposed had not worked out at all, which is really echoing your point, sir, says "a preliminary issue should only be ordered in very limited circumstances" and one can quite understand in the particular case why he was frustrated, but the restrictions he set out have never been the law. Neither of the other members of the court agreed. We can look at it if necessary but with great respect it is just wrong as a statement of law.

To be fair to my learned friend Mr Harris, the principles in relation to preliminary issues are perfectly correctly set out in his skeleton, and we agree with the principles.

THE PRESIDENT: I doubt that we are going to need to go to the law on this.

MR HOLLANDER: I didn't think we would, either.

So those are the points I wanted to make in relation to the preliminary issue, sir.

THE PRESIDENT: That's very helpful, Mr Hollander. So really what you are proposing is the traditional liability/quantum split.

MR HOLLANDER: With causation as part of quantum.

THE PRESIDENT: Yes, causation always floats like an unhappy orphan child between liability and quantum. So we will allocate the orphan to the quantum stage. That is quite a traditional split.

MR HOLLANDER: Yes.

THE PRESIDENT: Though even that has potentially unhappy outcomes. One need only think about the Quadric litigation which did not end happily in that regard. Obviously the advantage of making that sort of split is that if you lose, you don't incur the costs of the assessment of quantum. The reason I am pressing you is my sense -- and it may be entirely wrong -- was that the quantum exercise in this case is very much a question of bottoming out the relevant data sets and ensuring that your expert and the other party's experts are, first of all, happy that they have the data they need to do the number-crunching, and then to work out what figure the number-crunching produces. No doubt affected by the conclusions that are made in relation to liability. I am sure there is that sort of nexus.

My point is, though: ought we to be thinking about running no split between liability and quantum on your view of the case -- and obviously we will come to Mr Harris and Ms Howard in a moment -- but on your view of the case we actually prepare on the basis that everything would be tried, and then have a trial which would be, as you suggest, liability only but with the potential for a quantum trial as soon as we hand down the judgment on liability, so that there is no need to worry about getting the data out of the parties who have it and ensuring the experts know what is going on,

so that one gets to an end-to-end resolution that is really as rapid as it possibly can be.

In other words, I am not really envisaging what one all too often gets, which is two trials, one liability, one quantum, with, you know, pleadings and things like that, proceeding the quantum trial and adding to time; but a hiatus almost rather than a separate trial, where one uses the liability judgment to essentially give the experts the precise marching orders as to -- putting it very simplistically -- what buttons they press on their spreadsheets to get an outcome. I will float that with you just because I want to understand what you say against that before I hear from the other parties.

MR HOLLANDER: Well, in one sense it won't surprise you to hear that the sooner we can get a judgment which is enforceable, if we are entitled to that, the better. Therefore in one sense one would be enthusiastic.

However, I respectfully doubt whether the quantification is quite as simple as that.

THE PRESIDENT: Yes.

MR HOLLANDER: There is the question of counterfactual prices. That's quite a substantial exercise. There will be quite a lot. We debated survey evidence at great length in July and we heard my learned friend Mr Harris' rather strong views about survey evidence. But let's not -- we may end up with that or may not.

But I would think that quantum would involve some quite material economist costs. One only has to think -- the data there is going to be -- there's going to be quite a lot of money spent on data as well. One only has to think about the Trucks case where the amount of money that is being spent on agreeing data and working out the data is just unbelievable.

It may be that the exercise here is nothing compared to that. But I would think that the costs on quantum are not at all insignificant. I would have thought that, as I said, notwithstanding the enthusiasm for getting the final judgment as soon as possible,

which is obvious, I would have thought there are really quite significant disadvantages in doing that at the same time.

THE PRESIDENT: That's helpful. What I am hearing -- let me paraphrase -- is although you would actually like, if wishes were horses, a trial which embraces everything, you can see that the risk of costs unnecessarily be incurred on a substantial level to be the reason why one ought to go down the traditional liability/quantum split.

MR HOLLANDER: I would not underestimate the costs that are likely to be incurred.

THE PRESIDENT: Exactly.

MR HOLLANDER: You know, my learned friend Mr Harris, he has a big team and a sophisticated team, and I suspect there are going to be some quite significant issues on data and on counterfactual pricing, never mind survey evidence, all of which will need to be grappled with for the quantum.

THE PRESIDENT: Okay.

MR HOLLANDER: I have not really addressed causation either. I have not quite got my head around exactly how causation is going to be determined in this case, but that may be an issue too.

THE PRESIDENT: We are grateful.

Just to put you on the spot, Mr Hollander, so we have a sense of where we are going, let's assume for the moment we are with you on the liability/quantum split.

MR HOLLANDER: Yes.

THE PRESIDENT: And with you that causation is allocated into quantum, but I am really suggesting that as a thought experiment at the moment, how long, in your judgment, will a liability trial take --

MR HOLLANDER: I am so sorry, go on.

THE PRESIDENT: I am sorry. And when you want it in terms of what is the earliest

feasible date at which in your judgment that is doable. I say that just so we can get a feel of what we are talking about tectonically.

MR HOLLANDER: We think a couple of weeks. I think my learned friend Mr Harris feels slightly longer than that. We think the earliest will be October 2023. It is possible that that is optimistic. I see from his draft proposals in terms of timetabling that he is seeking to push back on some of the dates we have proposed.

So it is possible that we are talking about, say, January 2024, but we would have hoped it would be possible in autumn 2023.

THE PRESIDENT: Mr Hollander, thank you very much.

Mr Harris, over to you. I will let you say exactly what you want about how we should split these things up.

Submissions by MR HARRIS

MR HARRIS: Thank you.

Let me be clear completely what the defendants would like by way of directions. What we would like is a split trial such that there is causation and quantum at a stage 2. We are completely clear about that. It sounds like Mr Hollander's client is of the same mind.

We are completely clear that therefore there should be a stage one in which other issues are dealt with and we are completely clear that we do not think that dominance should be part of that stage one for reasons that I will elucidate in a moment. I just want at the moment to sketch out what we are totally clear about.

What we cannot be definitive about today is precisely how one would frame or list the issues that we say should go in stage one, aside from saying that we definitely think dominance shouldn't be one of them. The reason for that is because we have only recently put in our Defence; the statement of intervention is even more recent;

we have not had a chance to liaise properly with even the Department for Transport let alone with Mr Hollander's clients. There are not any list of issues that are in circulation and we think, with respect, that the better course would be for the parties to have the opportunity to liaise as to the list of issues -- the precise list of issues -- that should go into a stage one, with the caveat that I am completely clear that we don't want dominance.

So, for instance, right now, when we are taken to that summary paragraph 6 of our Defence in which we mention objective justification --

THE PRESIDENT: Yes.

MR HARRIS: -- as a for instance, I would like to be able to liaise and reflect more thoroughly, including with the other parties, before saying that that one should or shouldn't be in the first stage trial. And partly I take Mr Hollander's own point there. He points to a different section of the pleading in which there is a suggestion that that one might conceivably involve some expert evidence.

I would want to take that into account, because one of the attractions of what I am going to go on to say definitely should be in the first-stage trial is because there is certainly going to be a list of important issues that are potentially dispositive of this case that do not require expert evidence. And we see that as a significant attraction of a first-stage trial.

I put it like that for this reason: dominance, in sharp contrast to whatever else does go in first stage, is undoubtedly heavily expert evidence driven. And that has a number of effects. Obviously, significantly more expense, significant more time -- as I will go on to elaborate in a minute -- we say therefore it would have to take place later by way of trial. It would be later in the calendar, because it would be materially longer and involve materially more preparation, leaving aside the expense.

So let me give you, however -- whilst I can't be definitive about the entire list today of

issues that we say should be in the first stage, I can be definitive about two major sets of issues that we say on any view should be in the first-stage trial. They are what can be broadly called the ticketing practices issues. I think to a large degree that corresponds to what you called the private issues in 6(b)(i), (ii) and (iii) in my pleading.

To characterise them in another way, the abuse that is pleaded against us at the moment is: you, GTR, are in breach of -- and then various, if you like, railway contracts, to use a non term of art.

We say, well, actually, we are not in breach of any of them. Therefore, if we are right, and you, the claimant, is wrong, there is no case against us. So we say they should definitely be in. And partly no expert evidence is needed about any of that and they are broadly questions of law and they are within a discrete enough category that they, you know, might take, say, a week to do that.

What else do we say should definitely go in? We say that what you have characterised as broadly the public law issues, so 6(b)(iv), (v) and (vi) should also go in. And we say that for three reasons really. There is no expert evidence required for them. So, again, they are fairly discrete. We are thinking approximately a week of trial, bearing in mind, as Ms Howard will doubtless elaborate upon in due course, she and her client needs to be involved. There is some witness statement of fact and there are some complicated submissions. You can already see that from the pleadings.

THE PRESIDENT: Well, indeed, I don't think we need at this stage much persuasion that where (iv), (v) and (vi) are in issue, there the Secretary of State ought to be. Whether that is stage 1, 2 or whatever stage. It seems to us that the Secretary of State has an interest to be aggressively intervening, if I can use that. And I don't think Mr Hollander was suggesting anything to the contrary, and nor, to be clear, are

we. So, yes, that is very helpful, thank you.

MR HARRIS: Good. So that was the first reason why we say that what you characterised as the public law issues or, if you like, the paragraph 6(iv), (v) and (vi) points should go in, lack of expert evidence and therefore manageable and discrete.

But, sir, we agreed with Mr Hollander -- and I suspect Ms Howard agrees as well -- that we don't see there is an easy dividing line between, if you like, the private issues and the public law issues. We agree with Mr Hollander that the entire understanding and shaping and interpretation of the ticketing practices issues under the TSA and the NRCOT and the bid fares policy, are critically determined by the public law interests and the public law roles that are played by the DFT. We therefore think that you simply cannot sensibly split off the DFT's role and understanding and submissions about how those contractual issues should be understood and determined and shaped and characterised from the ticketing issues. You can't divorce the two.

So that's the second reason why we say that those should be included. And the third reason is because, again, certain ways of putting those, if you like, public law issues by themselves are dispositive. So, for instance, if there is an exemption in Schedule 4 of the Act because of this being a service of general economic interest, to pluck one of the examples from the pleadings, well, that's the end of the case, because this is a competition law case and if we are exempt, end of story.

Then there are closely allied but different of course -- and drawn out in the pleadings -- to pick a phrase from Ms Howard's pleading, is this, if you like, modified competition law because of things like the DFT's direction towards train operating companies, of whom my client is one. And if we have been directed, and we are therefore complying with a legal requirement or legal obligation, then, again, as regards my client that's a complete defence.

So what we say -- so those are the three reasons. Number one, you avoid expert evidence and it is discrete. Number two, because it shapes one's understanding -- the tribunal's understanding -- of what the ticketing practices contractual issues are. And number three because some or all of them are potentially entirely dispositive of the claim against the defendants and therefore we would never reach stage 2.

So to summarise, we do say two stages. We do say causation and quantum, like Mr Hollander and Ms Howard, should be a separate stage. We do say for sure the first stage should not include dominance and we do say for sure the first stage should include ticketing practices and the public law elements, but what I would like to be able to liaise with the other parties and present to the tribunal, either as agreed or for determination perhaps on the papers, is what other issues around the edge -- for instance objective justification but there may be others -- should be included or not included together with perhaps what we say are the implications for the timetabling if they are or are not included or the implications for the evidence if they are or they are not included.

So I hope that is at least clear as to what we say about the split and why.

Then there are, as regards going back to dominance -- so where Mr Hollander and I do cross swords -- what we say on that is that there is no reason why in this case one could not proceed on the same basis as had been done in other cases, we say, which is to assume dominance for the purposes of deciding the other potentially dispositive legal questions. In some of those cases, that is all questions of abuse. One asks oneself the question at the first trial: on the assumption that party X is dominant, then has there been an abuse?

We say that that could be done here, notwithstanding what Mr Hollander has said. We don't see any reason why one couldn't have a trial to the effect of, well, let's assume that GTR is dominant just for the moment, but nevertheless there is an

exemption under Schedule 4, or nevertheless there is a full defence because they are directed to do what they did by the Secretary of State. Or let's assume they are dominant but nevertheless there can be no abuse because Mr Hollander's case on breach of the ticketing agreements has failed. So there are three examples that you could readily do, in my respectful submission, without engaging on the question of dominance.

The reason we are so keen to avoid dominance at that stage is the same reasons that Mr Hollander gave for not including contemporaneous or simultaneous preparation for the quantum and causation trial. It is that it is involved. I mean, it involves a lot of expensive and time-consuming expert evidence on dominance which won't be needed if any of those other, if you like, abuse questions are dispositive in favour of the defendants. Then he fleshed that out a little bit.

Where does all this expense come from? So the critical additional expense is that one has to determine all of the markets, the economic product markets, and in theory the relevant geographic market as well, but relevant product markets that apply throughout the whole claim to all of the claimants who are members of the class.

For instance, on route A that happens to go from station X to station Y, what are the other constraints from an economic analysis of a relevant market that bear upon that route, potentially at that time of year or even conceivably at that time of day?

So one might have a route in which from X to Y there are three perfectly feasible and substitutable bus routes. One might have a route from Y to Z in which actually cycling and walking is absolutely a substitute. Some stations are extremely close and some stations can easily be got to, one from the other, using other modes of transport. There are other modes of public transport, there are taxis, et cetera, et cetera. Some places have trams. One doesn't know. But the point is that that is what that analysis entails and it involves experts and it involves a lot more expert

work and expense, and it is complicated, as I said, by the fact that one might well have to do that for different seasons or different times of day.

Let me give you an example. If you ask yourself the question: am I realistically going to be able to substitute a different means of transport at rush hour between Clapham Common and Waterloo, maybe not. But if it is 7 pm, maybe yes, because frankly the journey time is going to be the same by bus or something like that. That's my point. All of that is avoided if one approaches the other potentially dispositive questions on the assumption of dominance.

So that's why we are so opposed to it. And it has a practical effect as well, which is that if you are not persuaded, and if there is to be a split trial and dominance is to be in the first part, then we say, in light of what I have just submitted about the nature and the involved nature and expensive nature of that expert evidence on dominance, it is likely to take materially longer. We think maybe a week longer. We certainly think that would be a sensible rule of thumb pending receipt of the Reply. So we think broadly speaking that absent dominance and subject to a finalisation of precisely what is in and what is out, that's a two week trial. And we agree with Mr Hollander, we think October 2023 is a little bit early but we do think it ought to be capable of being resolved by the end of Michaelmas term 2023. Whereas, if one were to include dominance, we think -- bearing in mind the need for all this expert evidence and the to-ing and fro-ing and the meeting of experts and the reply reports and what have you -- that realistically not only does a 2-week trial become more like a 3-week trial but it would have to be done after Christmas. We are talking into the spring term is our submission.

Very briefly on the remaining points, we don't feel so strongly about set-off. The reason we suggested that set-off would go into a first-round trial is just that we think it does have to be determined if we are wrong on all the other points about there

being no abuse and the competition law does apply and we have been in breach of the ticketing practice agreement. We do think it has to be determined before a causation and quantum trial. That's because it critically bears upon how one goes about approaching quantum conceptually. There has to be a report that deals with it. So you can't have it at the same trial.

What we thought would be perhaps not a welcome approach on the part of the tribunal would be to have three stages to a trial. It is as simple as that. We thought three stages was less attractive to the tribunal than two stages, and since set-off has to be done before causation and quantum, we have suggested it should go in to stage one.

Of course that one is also a pure question of law and doesn't require expert evidence --

THE PRESIDENT: That's my --

MR HARRIS: We also think it is capable of being done in a day.

THE PRESIDENT: If there is not going to be any time burnt on this issue apart from legal analysis --

MR HARRIS: Yes.

THE PRESIDENT: -- then one ought to put it into the non-quantum stage.

MR HARRIS: Yes.

THE PRESIDENT: Because it may inform the quantum stage. I suspect you are right about that. But frankly it doesn't matter. If you are wrong, it is better to have stuff that can be tried together without incurring additional avoidable costs together.

MR HARRIS: Yes.

THE PRESIDENT: Because one ought to try to decide as much as one can with a view to only hiving off those issues that generate the avoidable costs. So I suspect set-off we can deal with. I am certainly not going to go to the ideological stake on

the fact that set-off is probably more appropriately labelled quantum and for that reason alone would go into a quantum stage. I am only going to put it into a quantum stage if avoidable costs like expert costs would be incurred in resolving it.

MR HARRIS: Precisely so. So I shall leave that one. We also think it is a short period. We think the whole thing lock stock and barrel would be one day. If a further carrot were needed -- if that is not an unkind way of putting it -- of course if you were to hear a first-stage trial and decide that the case can't proceed because of some of the other issues, you wouldn't have to give a decision on the set-off. You would have heard the argument but it is not as though it would delay a judgment or take up anybody's further time. So that's all I have to say.

Last point then is: you mooted with Mr Hollander should we potentially carry on preparing quantum and causation at the same time? For the same reasons that he gave we don't think that is a good idea. I also add two more minor -- but nevertheless for the record -- points on top of Mr Hollander's reasons with which we agree is that (a) there is no, I think, particular urgency in this case such that if he wins on the first-stage trial, and it has to go to a stage 2 and one has to begin the process, yes, that may then result in a hearing that is six months later than it would otherwise have been. But that can be compensated for in interest, Mr Hollander's clients' claim interest, and this is a class action where there is no particular involvement -- nobody knows who the class members are anyway, they're not involved, so in that sense there is not a particularly acute need for an earlier resolution.

Secondly, my experience has been, although one doesn't know how this will pan out in CPO collective actions, is that there is more likely to be a settlement post a defendant losing a first-stage trial, than when there is no first-stage trial. So I simply lay that out. That has been my experience.

So I can't be any more definitive than that. Unless I can assist further, those are the submissions that GTR makes as regards splitting and what should go in each part of the split.

THE PRESIDENT: Thank you very much, Mr Harris.

Just to unpack that, or restate it with a couple of questions: your vision -- and it is understandably a little bit fuzzy around the edges, and that is not a criticism -- is a three-stage trial, where stage 3 is causation plus quantum minus set-off; stage 2 is blurry around the edges but unequivocally includes dominance; and is stage 1 is blurry around the edges but unequivocally includes the points you identified very helpfully in your Defence paragraph 6 as unequivocally going in.

It is the hiving-off of dominance that I just want to press you a little bit about. You are postulating quite simply an assumed dominance without any further embroidery or articulation about the markets that are being assumed, or the nature of the dominance that exists, we would simply have a one-liner "assume a dominant position and deal with abuse amongst other things at an anterior stage", that's your vision. Do I have that right?

MR HARRIS: That's right. We do say that in the arguments at what I am calling stage 1, so the very first stage, it can sensibly include all the points about what is the regulatory regime to which my clients are subject, what does it mean? How does it impact upon the alleged abuses? And does it mean, to take the two clear examples, that there is either an exemption altogether or there is a complete defence because my client has been directed to behaviour in the manner in which it has behaved, so it is under a legal obligation.

We don't see there is any inhibition in running all of those arguments completely and fully whilst nevertheless for the purposes of those arguments assuming that there is dominance on a series of relevant product and relevant geographic markets. So the

bits of dominance that are left over are all of these expensive expert evidence bits. Precisely, you have the point, sir.

THE PRESIDENT: Right. But would you have a list of markets in respect of which dominance would be assumed or would that in itself be part of the assumption? In other words, are we pushing the market definition exercise -- that is a necessary part of any dominance question -- into stage 2?

MR HARRIS: Yes.

THE PRESIDENT: Yes.

MR HARRIS: We would definitely be pushing that into stage 2. That's what we anticipate being an expensive time-consuming option --

THE PRESIDENT: Again, don't get me wrong. I quite understand that these questions are expert-driven. I accept that.

What I am first of all trying to work out is exactly what we would be going in with at stage 1. I think what you are saying is it would be: tribunal, don't worry about market definition, we are not articulating those; obviously, therefore, don't worry about dominance because you have to define the market in order to work out market power and so dominance. Don't worry about any of that. You can deal with abuse and the other issues without dominance being articulated, and there is no bleed-across between these issues. They are capable of being hermetically sealed.

MR HARRIS: Precisely. So let me summarise as well. Definitely we would be postponing market definition and definitely we would be postponing therefore whether we are, or in what times or what way, if you like, we are economically dominant upon those markets. And we do see that one can fully articulate and decide upon these so-called public law questions without having to have decided what the market definitions are and whether there is dominance on those relevantly-defined markets. We do see that. Absolutely.

THE PRESIDENT: You see, the reason I am pressing you on this is because I am concerned that when we come to the two-week trial that on your articulation of the issues would constitute stage 1, I am concerned that the tribunal might be interested in questions in order to resolve, let's say, abuse, that take it into the sort of market we are talking about and the sort of market power that you have.

Now, I raise it because we are obviously at a very early stage here, and for my part I can't do anything more than articulate a sense of concern that we are shutting out at a very early stage of the trial process the ability of the tribunal to ask questions in certain areas. And I mean, that's what you are saying. You are saying we don't need to worry about the markets in play, about the market power in those markets and so the question of dominance, they are, as I said earlier, hermetically sealed and just, not no-go areas, but areas where the tribunal would not want to go when trying stage 1.

MR HARRIS: Yes. Perhaps I can help in this way, sir. If one has regard in particular to Ms Howard and Mr McGurk's helpful statement of intervention, which has deliberately been pleaded in quite a full manner.

THE PRESIDENT: It is very helpful.

MR HARRIS: Very deliberately and very helpfully. The arguments that are more fully elucidated there but mirror the ones in our pleading about services of general economic interest and direction by the Secretary of State when it comes to the setting of fares and things like the need to maximise revenues consistent with other public policy objectives, they are all, if you like, of a regulatory nature. If you recall her pleading, it begins with the Railways Act and the Railways Directive and then it runs through other ways in which they are manifested in the UK through the Ticket Settlement Agreement, through the Rail Delivery Group and the National Rail Conditions of Travel.

Just having put it like that, not one of them -- not one of those arguments -- depends upon there being any particular market definition or any particular area in which any particular TOC -- whether my client TOC or frankly any other -- is dominant on any particular relevant economic and geographic market. Not one of them hinges upon that analysis.

They are all capable of being run in exactly the same way whether or not the TOC in question is dominant in the competition law or economic sense. For that reason, that's the sense in which they are hermetically sealed. To put that same point another way, if those points are good points, they win irrespective of whether or not we are dominant, and irrespective of how we might be dominant in any particular manner, in any particular market or at any particular time. That's the sense in which they are hermetically sealed and that's the sense in which you can avoid, in my respectful submission, the extra time -- considerable extra time and expense associated with all of that economic evidence about market definition and dominance.

I mean, indeed, so keen, sir, are we to avoid that extra time and expense because we do see it -- we see it clearly like that -- that subject to obtaining instructions which I can check is I think we would rather see a first-stage trial absent dominance, and then if there are only to be two stages to have dominance in stage 2 with causation and quantum. That's how clearly we see the divide between not having to have dominance in the first stage --

THE PRESIDENT: I understand what you are saying, Mr Harris. It is the usual problem with preliminary issues and carving up trials. You only know if it is a mistake after the trial has been done.

MR HARRIS: Yes. I see that.

THE PRESIDENT: That's why I am pressing you. Because I would like, if at all

possible, to avoid what with hindsight will be a mistake.

MR HARRIS: I understand that.

THE PRESIDENT: That's why I am concerned.

But, I mean, to take the statement of intervention, tab 5 of the bundle, paragraph 8 --

MR HARRIS: I am sorry, do you have the page number, because I am to an electronic bundle?

THE PRESIDENT: Yes, of course, page 115.

MR HARRIS: Thank you very much.

THE PRESIDENT: I am just looking at the paragraph which is really just summarising allegations of what constitutes an abuse of dominance.

If you look at A, there is a reference there to issuing fares, restricting travel on the London-Brighton mainline to only Southern branded trains, you see what it says there, and charging higher prices.

What you would be assuming for the purposes of 8(a) would be that there was a dominant position in respect of, well, what? I mean, you just say it doesn't matter. All we need to work out is, irrespective of whether the mainline there referred to does or does not constitute a dominant position, the charging of higher prices is abusive.

MR HARRIS: Yes. I think that's right. Let me again try to help in this way: the regulatory regime itself does not distinguish between how a party is regulated, bearing in mind whether that party is dominant or not dominant. They are regulated in the same way, right?

So if we and Ms Howard's clients are correct as to how that regulatory regime is to be interpreted and applied, then to put not too fine a head on it, my clients are off the hook, irrespective of whether they are dominant on anything at any time.

THE PRESIDENT: Yes.

MR HARRIS: That's why it is separate.

THE PRESIDENT: I am grateful, Mr Harris. That is very helpful.

Ms Howard? Essentially the same question to you.

Submissions by MS HOWARD

MS HOWARD: I concur with what Mr Harris has said. Far from not being aware or taking account of the divide between public and private, the Secretary of State is acutely aware of that division and that is the very reason why we sought to intervene a year ago, precisely because we felt that the issues of both contractual construction and the allegations of abuse as framed could not be seen in a purely private dimension but had to have the public law overlay. We made that very clear in our original requests for intervention.

How we see it -- we agree with the comments that your Lordship said, that what you are trying to do is decide where to make the first incision here as if you were surgeons, can you segregate any of these issues in a way that they are not going to bleed at a later date, and are there issues that are discrete and encapsulated that can be dealt with properly upfront which will then hopefully avoid the cost and the resource both of the tribunal and the parties? If there are issues that are dispositive and can resolve the issue at an early stage, then we don't need to proceed to stage 2 or stage 3, as my learned friend says.

The Secretary of State's position is that both as a matter of factual history and chronology and as a matter of law, these issues relating to the contractual matrix and the allegations of abuse inherently overlap, and the public and the private law dimensions cannot be segregated.

Just to give you an example, I mean, paragraph 8 that you were just referring to in our statement of intervention --

THE PRESIDENT: Yes.

MS HOWARD: -- picks up the allegations that have been made in the claim form.
THE PRESIDENT: I am using them as a (overspeaking) --
MS HOWARD: Yes.
THE PRESIDENT: -- not as statement of your position.
MS HOWARD: We have made the point that it is not quite clear exactly whether the alleged breaches are confined to breach of contract, or are some wider breach of the undefined regulatory regime, but in any event the alleged breaches of the TSA and the NRCOT cannot be divorced from the wider regulatory framework both in the bid fare policy and the franchise agreement. It is our case that no matter what was said in the TSA, those provisions were actually varied in any event as a matter of fact by the direct instructions and directions that the Secretary of State gave to GTR.
So by trying to separate them and deal with the kind of neat, dried issue of contractual construction is not going, with respect, to take the tribunal much further, because there is this overlay of additional factual materials that we have referred to in our statement of intervention at 78 to 85, where we have set out -- and I apologise, I know we are sort of pleading evidence there, but we really wanted to give you the full picture. Perhaps if you go to 78 to 85 just very briefly, you will see that although the GTR had made their set -- set out their bid fares policy, that was superseded and when they came on an annual -- each of the fare setting rounds -- to put forward their proposals, the Secretary of State actually went further and corrected them and said "no, this is not what we want you to do because of the wider public interest" and gave them, in effect, countermands. And we have set out the letters in some detail at paragraphs 80 and 82, where the Secretary of State has said "no, we don't want you to increase fares because that will impose too onerous a burden on passengers, and that's not sustainable". So regardless of what was said in the TSA or the national conditions of travel, we say that has been varied as a matter of fact but we

also say as a matter of law that that alters the competition law assessment.

This brings in those two exclusions that we have referred to. Firstly the legal requirement exclusion and the SGEI exclusion. And that brings in the concept of modified competition. So our primary case is as a result of those exclusions, competition law does not apply at all to GTR. That is because private competition law normally applies to the autonomous conduct of a private undertaking. That was in the old term EU language Articles 101/102. But once you get into an area of Secretary of State direction or a service of general economic interest, you move away from private competition law into the realm of public competition law and what was formerly Article 106 of the treaty which is reflected in paragraphs 4 and 5 of Schedule 3. So you cannot really divorce the two because the primary question here is: was GTR acting autonomously, or was it acting under direction? If it was following under the direction of the Secretary of State, then it cannot be attributed with liability and under the case law of the Court of Justice, and under the case law of the tribunal in VIP v Floe, it has a complete defence.

So we say when we pull this back and look at the concept of abuse, these issues of public law are going to fold in at every stage of the framework. So let's take the framework: is there a restriction of competition in the first place? The public law is intimately involved with the assessment of the construction of the relevant contractual framework in conjunction with the Railways Regulation, the SGEI framework and these instructions.

Next step: was there a necessity defence or ancillary restraints? Were the measures that were adopted pro-competitive and necessary to achieve wider benefits?

Then the public law concept comes in again because you are not just looking at economic efficiencies, you are looking at public interest considerations, particularly the interest of taxpayers and passengers and the Department and Secretary of

State's efforts to balance the two.

Next step: was there an objective justification? Again you are looking at the action that was actually taken against the counterfactual and whether the benefits, not just economic efficiencies but public interest benefits, outweighed the negative effects of the conduct that was pursued. So we say that at every step of the analysis of abuse there will be some involvement of the public law issues there, and you cannot simply divorce the two.

We have tried to set this out as comprehensively as we can in the statement of intervention. We apologise it is a long document, but that is what we were trying to do, to show that there is a blended issue here. So we think that the defendants' suggestion of the parties having an opportunity to liaise and agree a precise list of issues is a good one. We have been familiar with this for, you know, several years, obviously, as the Secretary of State. But the parties have only had less than a week really to see our statement of intervention and the detail that we have gone to and so probably haven't been able to formulate their views yet but we do think that having a list of issues of what should be included in stage 1 would be a sensible way forward because then we can measure what's needed for disclosure, what's needed in terms of number of witnesses and the extent of expert evidence. That will enable the parties to devise a way to pursue this on a proportionate and cost-effective manner also with regard to timing as well.

On the issue of market definition and dominance, I also agree with my learned friend Mr Harris, because that can be segregated.

THE PRESIDENT: Just pausing there. Less on the point of segregation, let's suppose we take Mr Harris' parsing of the stages of trial, so we have stage 3, causation plus quantum; stage 2, dominance plus set-off plus some other things that can be decided at the fringes; stage 1, the private/public issues that we have been

discussing.

Your clients clearly will be party, and, as it were, aggressively intervening in stage 1. I am assuming -- but I would like you to confirm this -- that there would be no real presence of the Secretary of State at stage 3. Is that right?

MS HOWARD: I would probably just need to take instructions and come back over the break.

THE PRESIDENT: Yes.

MS HOWARD: The only thing that I can see, obviously our role -- we have different interests and we have set out our four main interests for you in our skeleton.

THE PRESIDENT: Yes.

MS HOWARD: So part of it is obviously because we were factually associated with some of the factual events. We also have an interest under the risk provisions in the franchise agreement -- a financial interest -- in these proceedings. But also we may be able to assist the tribunal. I mean, part of this issue will be counterfactuals of what should have been done instead of the conduct that was pursued. It is hopeful the stage 1 hearing will be able to provide some clarity on that. At the moment in our statement of intervention we have said there are three possibilities.

There is either all fares levelled up or all fares levelled down or the third one is something in between. We may have to assist the tribunal or the parties in determining what would have been the appropriate realistic counterfactual both not just in terms of assessing abuse but also for quantum.

THE PRESIDENT: Yes. But let us be clear, I can see significant importance in the Secretary of State ploughing a potentially different furrow on the public/private law issues, because I think Mr Harris will be saying -- he may be saying the same thing, but it seems to me that they are two different standpoints and you are, to an extent, to be deemed in constructive opposition to one another on the way the (indistinct)

works.

You may well be saying the same thing but I think it would be dangerous for us to close out the Secretary of State from the stage 1 issues.

The stage 3 issues, it seems to me that the interests and points of the defendants and the intervener are pretty absolutely aligned. We would not of course want to stop the Secretary of State from providing material to the parties, but I have to say, if there is to be a more active role at stage 3 on the part of the Secretary of State, we would need some persuading.

Now, of course take instructions, but I just wanted to put that marker down. It is helpful to work out where the issues arise.

So that's stage 3 and stage 1. What about stage 2? Let's assume it is essentially dominance and have our debate on the basis of dominance. Would you be in for that, or would you be out for that? If you would be in, why?

MS HOWARD: I am sorry, I am just getting some --

THE PRESIDENT: Of course, if you need time, Ms Howard --

MS HOWARD: If may be if we have a short break -- I just don't want to answer off the hoof at the moment because there may be policy implications, precedent implications for the Department. Also because of the different interests -- financial interests -- amicus interests, I can't say. We also may have relevant materials that might help and I just say this because obviously in other sectors I act for regulators like aviation, and doing this sort of market definition of surface access to airports there is a lot of material that the public bodies hold on intermodal modes of transport and the extent to which they are substitutable.

There is also a lot of survey evidence, for example, that these regulators hold that may be relevant. So there may be relevant materials that we provide. It is certainly not going to be as intense as the involvement in stage 1. I can say that. But there

may be some residual involvement. But I would need to take instructions.

THE PRESIDENT: Of course. That's understood.

I think it would assist us to understand what you would envisage your role at that stage being. Because for my part I draw a fairly bright line between the provision of information that will assist the parties in framing, let us say, market definition questions or questions of substitutability -- I can see why there would be material there -- which requires no more than the provision of the material without your client's presence versus that plus an interest which goes to the framing of the markets and the determination of the question of dominance.

I think it would be important that we understand whether at that more intense level your client is in or out, because it does, I think, have a bearing on how we see the trial shape generally.

MS HOWARD: Yes.

THE PRESIDENT: So --

MS HOWARD: I think my client's nervousness comes -- as we have previously explained there are these risk allocation and revenue risks that the department has assumed under the terms of the ERMAs and the ERAs --

THE PRESIDENT: Yes.

MS HOWARD: -- the franchise agreements, where ultimately if there is an infringement which is outside the good operator standard then the Department may be liable not just for the costs of the proceedings but also any damages award. So it has very intense financial interest in these proceedings.

THE PRESIDENT: Ms Howard, I entirely see that. But it seems to me that you are in the position -- if I can take a private law analogy of an insurer who is indemnifying a party, and the courts in those cases will look at the party and party position and the insurer does not come into a debate about whether there is liability that triggers

liability insurance. They pay the money, dead right, and they have an extremely acute financial interest in the outcome, and will be saying a great deal no doubt about how the defence is being run. But they are not in court.

So I take your point. You are very interested. But that's something on which, if you are going to be pushing back on wanting to be in court in the quantum phase, then we will want a little bit more flesh on the bones.

But I am also interested because the answer is rather less clear to my mind on where you stand on the question of market definition, market power, and dominance.

So what we will do is we will rise. I just want to check. I do want to hear from Mr Hollander, effectively in reply, because I think he is employing the solitary furrow about dominance not being separate.

Mr Hollander, should we hear from you now and then we will rise and hear from Ms Howard when she's been able to take instructions about this, or do you want to rise now, we will hear from Ms Howard and then you can wrap up, and then we will rise again to consider what the outcome should be?

MR HOLLANDER: I am happy to carry on now. Whatever is more convenient.

THE PRESIDENT: In that case, we will hear from you now, thank you.

Further submissions by MR HOLLANDER

MR HOLLANDER: Yes. The good news is I can now see the entire panel. I am not sure what happened, it seems to have been an operator error.

I was going to address you just fairly briefly on the point you just put to my learned friend Ms Howard, the three stages, namely that you have abuse in stage 1 with the private and public; second, dominance and possibly set-off at the same time, and thirdly causation and quantum.

I think largely you have the point which I made in opening about dominance. We

struggle to see how there is a clear divide. I mean, it is attractive to lose what my learned friend Mr Harris is saying is a week off the preliminary issues, and actually in some ways that is obviously attractive to everybody. But it is quite difficult -- largely for the reasons I've said in opening -- to see how there is a clear divide. It seems to us that there is an inevitable possibility that the regulatory issues are going to bleed, as it were, into dominance.

We struggle to see how there can be a clear divide. It is artificial, one would have thought, to assume dominance whilst at the same time examining public law issues that impact or impinge on the issues of dominance. There is an obvious relationship in this case -- as opposed to many cases where it is not going to arise -- between abuse and dominance.

For example, what about the potential which is canvassed about lack of dominance on a route-by-route basis? I think our concern is that if the tribunal goes down that route we actually end up in a bit of a mess because trying to divide up dominance and the regulatory and public issues in this case, we would suggest is not a clear-cut matter.

On expert evidence, my learned friend Mr Harris was suggesting that there would be without dominance no expert evidence, or at least very little. I am not sure, with respect, that's right. I mean, particularly on matters such as objective justification, which although he toyed with the idea of that going off from stage 1, I think has to be stage 1, because it is a fundamental part of the abuse. And, again, the objective justification is tied in with the regulatory issues. That is going to require some economic evidence.

A number of the pleaded issues I showed you in opening are going to require economic evidence. Yes, there will be economic evidence which deals with less issues than if you have dominance at the same time, but nevertheless there is going

to be economic evidence and possibly significant. It may be that on stage 1 one also needs a regulatory expert of some sort. I don't know. I think that's an open question at the moment.

It does seem to us that trying to divide the two has the potential of causing a lot of problems. I didn't really understand how my learned friend Mr Harris thought that they could have been neatly disaggregated. I mean, everything about dominance in this case is all about the background of the regulatory structure on, as we understand it, the defendants' case. In which case, how can you separate them off?

But anyway, that's a matter for you. That is our concern, although at least in theory it would be quite attractive to hive off dominance. We are concerned. It goes back to the point you made in opening, sir, as to too often these preliminary issues turn out to have been -- when you actually get down to trying them -- they have not worked out quite as well as one would have hoped.

So I think that's what I wanted to say about dominance. Unless I can assist you, I don't think there is anything further on that. But those are really our points on dominance.

THE PRESIDENT: I am very grateful.

Ms Howard, what we will do is we will rise for five minutes --

Further submissions by MS HOWARD

MS HOWARD: If it assists you, I can probably come back very quickly, then you can rise and make your deliberations, if that would help.

I don't think I have that much more to add to what I have said. I think what the Department would like to do is because things are still in a state of flux is reserve their position to being involved in stage 2 if there were a separate dominance assessment, but just to revisit that at the end of stage 1 to see what the extent of

their involvement is likely to be. We don't envisage that we are going to have an active role at stage 3, which is the quantum issues. If we do have any relevant information or points, we can probably feed that through to the defendants and work in a proportionate cost-effective manner that way.

But I think that they do want to reserve their rights, if there were a stage 2, to have some role. But that precise role to be defined after the end of stage 1 when hopefully the landscape should be a bit clearer and we will know exactly what the issues relating to dominance will involve.

THE PRESIDENT: Yes. The trouble is that is slightly begging the question that is before us. Let me be clear: it looks like we are heading for a hiving off of causation and quantum. That's common ground and I can see why it is being articulated. And I am more than happy, since that is the direction of travel -- we will obviously think about it -- we would be more than happy to have a debate about the Secretary of State's involvement in that stage after the anterior stage has been completed. But it does seem to us to be relevant to the structure of the trial, which after all is ultimately a pragmatic consideration, of whether we have the Secretary of State present at what would be a shorter stage 1, without dominance, so that we can cut you out of stage 2. You don't have to involve yourselves. That seems to us to be an advantage in Mr Harris' position.

On the other hand, if you are saying, well, we are not sure, we might want to be there, we might not; that rather indicates a linkage, not perhaps the sort of linkage that Mr Harris is advocating about or Mr Hollander was advocating about, but a linkage between saving some costs, at least by having you consistently present through stage 1 and stage 2. So my enquiry about your interest in the dominance question was not altogether academic.

I am not sure it is determinative. I suspect it isn't. But it is, I think, material whether

you want in or out at stage 2, and the extent to which you would want in.

I mean, for instance, are you reserving your position to the extent of wanting to adduce your own expert evidence at stage 2?

MS HOWARD: No. We have made very clear throughout these proceedings that we don't intend to adduce our own economic or expert evidence either at stage 1 or stage 2. In terms of industry expertise, we feel the Secretary of State will have its own factual witnesses who are by definition sort of industry experts, being part of the regulator. So we would not be going to the cost or expense of duplicating economic expert evidence.

THE PRESIDENT: Right. Would you be wanting to adduce factual evidence on market definition and dominance in the Secretary of State's name at stage 2?

MS HOWARD: There might be that possibility, if there is -- I mean, it depends how the documents -- if we have relevant information or we have -- because obviously there are precedent implications not just for this railway line but other flows.

THE PRESIDENT: By precedent implications you mean what, exactly? That what we decide in this case could have a bearing on other cases?

MS HOWARD: Yes, that's right, and also future regulation of the railways because there has been no kind of definitive rulings on the issue of dominance like this in dealing with individual flows. So there could be wider precedent policy implications for how the Department administers the railways.

THE PRESIDENT: I just want to understand. What I think you are saying is if we went ahead and defined the market in a particular way and said that this type of presence constitutes market power or dominance -- I'm talking entirely in the abstract here --

MS HOWARD: Yes.

THE PRESIDENT: -- but basically decide something at stage 2, as I am sure we

would decide something at stage 2, that might feed into how other public transport questions were dealt with in the future, such that the Secretary of State would want to be heard not because it is supportive of Mr Harris, although I am sure you'd want to support Mr Harris, but because it has a different --

MS HOWARD: A wider regulatory involvement.

THE PRESIDENT: You put it very well. There is a wider question on which the Secretary of State would want to be heard.

MS HOWARD: That's right. And it would affect the position of other train operating companies around the country.

THE PRESIDENT: That's fine.

Ms Howard, I have bounced you with this question. So if you want time to make a further -- ask for it and you will get it. Otherwise we will rise and we will consider our position.

MS HOWARD: I don't think we need to make a firm view on the extent of it. I can see you want to make a decision on how to cut the case, but I do think the Secretary of State's involvement shouldn't be determinative of where that cut is made between phase 1 and phase 2, because our involvement at phase 2 is likely to be very light in terms of written submissions. We are not going to be putting in copious amounts of economic evidence, which is the real cost burner. It is likely just to be relevant and helpful information and submissions to assist the tribunal almost as an amicus brief not as an interested party as such.

THE PRESIDENT: Thank you very much, Ms Howard.

We will try to get back to you at midday. We will try not only to work out how we are going to carve this up but also to give some fairly clear indications about dates and times. We have had some help on that.

We will run until 1 o'clock. Maybe a little bit past that, but we will run until 1 o'clock.

For our part, we would be minded to debate the broader outlines of how steps to whatever trial we order should be taken, rather than lock it all down right away, because I am sure the parties would want a little bit of time to think about issues of disclosure and expert evidence further down the line.

What I think you need to walk away from this hearing with is a clear understanding of what we are trying when, and that is, I think, the key deliverable that we want to give you.

Then we can have, as I say, a more general discussion about what our views or the parties' views are about disclosure, experts and other things, but without necessarily making orders. I hope that is an indicator of where we are going after midday.

MR HOLLANDER: Yes, that is very helpful.

Can I just mention -- it is entirely a matter for you -- but if it assists Mr Harris, I am perfectly happy to sit on beyond 1 o'clock until we finish, but that is obviously a matter for the tribunal.

THE PRESIDENT: No, indeed. I am keen if we can, without sacrificing an efficient outcome, to rise at 1 o'clock, because it does seem to me we ought to be able to knock this on the head in the course of a morning, and for Mr Harris to not be discombobulated unless it is absolutely necessary. So we will return at midday and give a ruling then on the direction of travel.

So thank you all very much. I will leave the meeting now.

(11.44 am)

(A short break)

(12.00 pm)

(Ruling given)

(12.27 pm)

Post-ruling discussion

(1.05 pm)

MR HOLLANDER: Thank you very much, sir.

First of all, just a couple of minor points on your ruling. Is the four weeks intended to include pre-reading for the tribunal?

THE PRESIDENT: Our thinking is actually not. What we have in mind is a four-week hearing. We put it forward as a confident expectation that it will be dialled back, but we feel that the uncertainties are such that we ought to have the parties have the assurance that this time is there for them to use, rather than for us to be reading. It may very well be that one of those weeks is later converted into reading.

MR HOLLANDER: Yes, I understand.

THE PRESIDENT: But that's the easy way of doing it, rather than saying we need four weeks for evidence and advocacy.

MR HOLLANDER: Understood. The other question I had on your ruling was I had understood -- I think you were minded to order that set-off point in some form -- and we would obviously have to work out exactly how it was -- would be part of stage 1. Was that your intention?

THE PRESIDENT: That is exactly so.

MR HOLLANDER: Yes.

THE PRESIDENT: That was essentially because we think Mr Harris is right that it is a quantum issue, but one that is evidentially relevant.

MR HOLLANDER: That is fine.

Can I just ask you, in terms of canvassing directions, as you indicated -- I am sure we can go and sort them out -- but could you give us some help: first of all,

can I mention we have asked for, this is a slightly different point, an extension of time for the opt-out.

I don't know whether you have seen -- and I don't know whether there is any issue about this, we wrote a letter overnight --

MR HARRIS: There is no issue, Mr Hollander. No issue, we are neutral on this point.

MR HOLLANDER: Thank you very much.

If you are happy with it -- the reason is simply because the order was made on 5 October and we needed to have the precise terms and the date of the order, and we couldn't get started. So unless you wanted to read the letter which has gone in overnight, perhaps we can ask for that extension.

THE PRESIDENT: We looked at the material and it seems to us that Mr Harris' neutral position is well taken and that the tribunal's position is similarly that this should be permitted. Because it can't in any way, shape or form, prejudice the work to trial. So that is the answer that I would give you. You don't need to trouble us any further on that.

MR HOLLANDER: Thank you.

Now, in terms of directions after that, one of the things you might have wanted to consider: we had drafted on the basis that -- I know that my learned friend Mr Harris, their current position, and he's made it clear that it is subject to our Reply and so forth, is that they don't anticipate seeking any disclosure from the class representative.

We had drafted it, the proposal, in terms of a Rule 60 order, whereby they produce a disclosure report as to what they have and we then discuss with them what we want, as it were, to see from that. And in the light of that, with the view to another case management conference in perhaps February if there are any disputes.

We also suggested that -- I think my learned friend Mr Harris suggested that the parties produce a list of issues once the pleadings are closed and I am sure that is sensible, probably essential. We also suggested that there be a date by which everyone indicates what expert evidence they are anticipating calling. I am sure it will be economic evidence. It may be that there needs to be a slightly better definition of exactly what it relates to.

It is possible we'll want to call some regulatory evidence. I think we have an open mind at the moment about that, which is why we framed it in that way, and that therefore there could be a CMC in February, maybe March, to deal with those issues to the extent there is a dispute.

That was the framework we had proposed, and obviously dates for factual and expert evidence.

My learned friend Mr Harris, I think, has put in a slightly different proposal. I suspect, given what you have said about the trial dates and the content, the parties can work that out between themselves, and in the case of any dispute, refer the matter to you on paper.

If you were to give us some guidance as to what you would find of assistance in terms of the structure -- and my learned friend Mr Harris may want to say something at this stage about the extent to which he agrees or disagrees with what I have proposed.

THE PRESIDENT: That is very helpful, Mr Hollander. What I will do is I will throw in my two penies' worth and then Mr Harris can respond as he sees fit.

But before I do that, am I right in assuming that actually your client's case is going to be essentially expert led? To what extent will there be live talking factual witnesses?

MR HOLLANDER: We wondered that as well. I suspect if we have any factual evidence it will be minimal, if you like. I don't know the answer but it is not going to

be significant.

THE PRESIDENT: I am grateful.

What I would like, I think, to see is an early -- not necessarily binding -- articulation from the class representative side of the experts they intend to call and the identity, if any, of any factual witnesses that they intend to call. So there is a 'cards on the table' about the witnesses at trial, so that the defendants and intervener can take a view as to which areas of expert evidence they have a problem with, that they don't understand why you are calling it, and to take a view themselves as to what experts they want to call and whether they have additional disciplines that they feel ought to be before the court.

I see that as a consensual process that I would like to see raised sooner rather than later. It does seem to me that this is something where the class representative ought to go first and the Secretary of State and the defendants be responsive to that. But I would like the baselines of how you are going to make good your case in very broad brush terms articulated sooner rather than later.

That leads on to the question of disclosure. Now, I am second to none in my admiration for the Anglo Saxon disclosure process, but I am also second to none in my horror at the costs which this generates. I am extremely keen to ensure, in the interests of all concerned, that the question of what is and what is not disclosed is as full as it can be with minimal cost.

So I effectively want to have my cake and eat it.

I am sure a list of issues is useful. That probably ought to be part of the directions so that that is compiled so as to be agreed, but I am -- at least in competition cases -- very much not a fan of using the list of issues to drive what form of disclosure occurs. The fact is that in competition cases it is actually very hard to frame what documents are responsive to a particular issue by reference to a specific issue and a disclosure

model. It may be possible, but it is not something that I am that keen on ordering.

What I am wondering is whether, once the broad outlines of the evidence you would want to put in play has been articulated, whether the Secretary of State could, using the knowledge of the case so far and looking at that material, think about what it is that they would want to disclose in order for there to be a cards on the table understanding of the issues. After all, they know better than you what they have. And then when that has been unpacked and sorted out, we can allow the experts to consider what more they need and move really seamlessly into a specific disclosure regime to the extent that there is a disagreement between the parties about what further material needs to be produced.

So I have in mind a rather light touch regime. Maybe, Mr Hollander, you could press back on that first and then, Mr Harris, I will hear from you and then from Ms Howard.

MR HOLLANDER: Yes. First of all about identifying factual and expert witnesses. We are due to file our Reply on 1 December. That's the next stage. The list of issues in a sense can be done once the parties have seen our Reply, I suspect. That can be done at that stage.

I have no difficulty in principle with us going first in terms of identifying what we have in mind. We need a little bit of time. I suspect the only issue -- I have not really thought about the factual evidence but as I will indicate I don't imagine any factual evidence we produce will be substantial -- I suspect the parameters of the expert evidence are relatively well defined but we will set it out.

The only one that may be more debatable is there is a possibility, as I have indicated, that we call a regulatory expert. I am not saying we will, I am not saying we won't, but we need to think about that and I think we may need a bit of time in respect of that. But subject to that, that's why I think we had suggested -- and I am not saying we are wedded to this at all -- that there was a statement of intention

about experts by the beginning of February.

But in principle, I have no difficulty. The regime in terms of disclosure, I agree with what you say, sir, that we don't need a conventional disclosure in any sense in this sort of matter, at least subject to anything the experts tell us and that can be dealt with in due course.

I suspect one of the difficulties about -- what we don't know is what particularly GTR have, which is, I think, why we had suggested some sort of rule 60 approach. Again I am not wedded to that. But it is not simply a case where they can produce documents they rely on, as it were, because we don't know what there is. I think we need some form of process, which is why a rule 60 statement or something similar may be helpful where they tell us what they have. I think that was the basis on which we had suggested that.

But in principle, otherwise, I don't really have anything much to say about what you have just articulated, sir.

THE PRESIDENT: Thank you, Mr Hollander.

Can I just press you on this: I have said it will be as late in the term as is practically possible. We are really looking at the moving parts of the case being done and dusted by the end of July.

MR HOLLANDER: Yes.

THE PRESIDENT: Now, it maybe that one can slip into August and September, but let's think about the end of July as the point in time where experts' reports are in, disclosure is done, everybody know what is going on, and all they are doing is crafting brilliant and hopefully very short opening submissions for the tribunal to consider.

Now, with that sort of time-frame in mind, can I put your client's feet to the fire and say 1 December for Reply -- is it possible to accelerate that by a couple of weeks

and, as it were, get a sense of what is going to be disclosed and what is going to be deployed by way of expert evidence articulated -- well, before 1 December so that we can work out where the fault lines and potential disputes exist?

So the first question: is 1 December necessary or could we order something like 14 November for a Reply? Just to move things on faster rather than slower?

MR HOLLANDER: I would, I think, resist that simply because I think there is quite a lot of material on the public law side and on the way it is put in the Defence and also the intervention which we need to think through and work out.

I wonder whether one can make up the time, if you like -- it may be if we have 1 December, that we should put forward the proposed statement of issues on 1 December as well for the other parties, and make up time that way. I think we could produce some form of indication as to our intentions on factual and expert witnesses, I suppose, I think, this side of Christmas. That I think would make up time in a way without causing us difficulty on the Reply.

I fear we do need a bit of time. They are quite full documents.

THE PRESIDENT: I understand. I am not in any way wanting to unduly telescope things.

Can I leave it at this and then I will hear from Mr Harris and then Ms Howard: that on 1 December, we get the Reply; we get an articulation by the class representative of the issues; and we get an indication of factual and expert witnesses in play.

Now, the latter two will be indicative, not final. But it seems to me helpful that we get the ball rolling and then we would hope to have -- again informally not ordered -- an articulation in the course of December from the defendants and the intervener as to what material they are going to produce. And even better, the initial production of some stuff that is unequivocally going to be deployed. Again, on an informal not ordered basis, rather than a formally ordered basis, when all we do is rather

fruitlessly argue about what the order requires rather than what the case requires. On the understanding that the parties will be able to come back, quite possibly out of court hours but come back at least before me in fairly short order to iron out any difficulties that emerge. Is that unreasonable to suggest or is that something that the class representative can work towards?

MR HOLLANDER: We have the Reply on 1 December. I have fought hard, as it were, to hang on to that, because I think we do need that time. We are going to have to speak to an expert. I have no difficulty in doing a first draft list of issues at the same time. I understand and I can see exactly why you, sir, are suggesting that we put forward our proposals in indicative terms on factual and expert witnesses. I fear it will take a little bit of time to work through that. I am just wondering whether it might be better to say that that should be done, you know, this side of Christmas, and with a view to responses to that coming on the other side of Christmas. Because I think otherwise it may be very indicative, as it were.

THE PRESIDENT: All right, thank you for that, Mr Hollander. I have heard what you say. I will come back on the indications of experts when I have heard from Mr Harris.

MR HOLLANDER: Of course.

MR HARRIS: Thank you, sir. I will keep this brief. We agree with the tribunal's suggestion, that Mr Hollander has largely agreed with, that they should do their Reply and put in an indicative outline indication of what their witnesses are going to be, expert and factual, with an indicative outline indication of how they see them proving their case and therefore what the parameters are for the sorts of materials that we should be replying, and then we will, at a time that I will come on to, respond responsibly on a cards on the table basis with a clear indication of the materials that we have so as to move the case forward.

That, I think, means that on that basis there is no need for a formal rule 60 electronic disclosure questionnaire or materials of that kind.

As to experts, that process will flush out precisely what experts are needed. The provisional thinking we have at our end is that there are going to need to be expert economists and expert surveyors -- shall I use that? That's probably not the right -- expert survey people. I have heard what Mr Hollander has said about possible industry experts. So that will flush that out and I think that's a responsible way forward.

As to timings, if Mr Hollander can't for the reasons he's given -- and the tribunal is not minded to push him into bringing forward the Reply and therefore try to make progress in that way, then we would agree with him that he should do as much as he can, together with a Reply, on 1 December and the tribunal will give its view as to what else he can realistically be asked to do before Christmas.

Of course, if he doesn't do it before Christmas, we can't respond before Christmas and in that sense the progress of the case is slowed a little bit. But we have no firm view as to whether he should be ordered to do definitive further things before Christmas. If he does, we will try to respond, given time before Christmas. If he doesn't then we will respond in a reasonable timetable in January.

What I do say, however, is this on timetable. We agree that four weeks is sensible and that we should do it as late as is feasible. I wrote down from your ruling in the Michaelmas term 2023. In that sense we doubt that all the moving parts could be done by the end of July, or should be done.

We can perfectly see that factual materials should all be done by then. But we hesitate about nailing our colours to the mast on all the expert stuff given that dominance -- subject to any change of heart -- but because of the change of position can all be done by end of July. We respectfully suggest that that should be done in

a sensible earlyish September -- early to middle September period. That still gives October and November. Let's say the trial is mid-way through November, four weeks takes us up to the end of term. That is still two months before and it still gives time for experts to meet.

In this regard, we have a slightly personal plea. It is not personal just to me, but on my side, every one of us at the counsel level and nearly everybody at the solicitor level is involved in the Trucks 2 trial and whilst the contours of that have not been finally determined and they are to be determined at a CMC in a week or two's time, it is inevitable that they are going to be progressing full tilt in June and July, and therefore whilst I think we could more readily handle factual materials, I think a bridge too far might be all of the experts, given what we have ventilated, which is that they are fairly complex, the expert issues.

So that is what I say. I do also add this, which is in the tribunal's judgment on the CPO, the suggestion was made that it should be an expert-led disclosure process. We are still ad idem with the tribunal on that. What are you ventilating and what I am agreeing with and Mr Hollander I think has largely agreed with is it lends itself to that expert leg. We identify the experts early, they say what they need and how they are going to prove the case. We put our cards on the table and then there is sensible and responsible to-ing and fro-ing about that at an early stage.

THE PRESIDENT: Mr Harris, thank you very much.

Before, Ms Howard, you respond, let me be clear first of all about the 31 July dates that I articulated. I entirely accept that that is, let's say, a date which certainly not all, if anything, can be done by then. What I am using it as is as a convenient sort of signal as to danger signs. It seems to me that if one is saying it cannot be done by the end of July, then that may very well be containable by submitting things in September, particularly if one has the trial in the latter half of November. But the

greater the level of discomfort about July being, as it were, a warning light date, the more I am inclined to hold people's feet to the fire, including in particular the class representative, in the very valuable time up to Christmas this year.

What I really want to achieve is to have in place a very good understanding of what the material at trial is going to be, which includes the expert evidence and a sense of what it is there is in the defendant's and the intervener's cupboards in terms of disclosure that is going to be important to operate things, precisely so that come January of next year, we can go to an expert-led disclosure where someone says "look, I need to see the following material, for whatever reason the defendant or the intervener does not want to disclose it, I need to see it for this reason, there is a dispute that needs resolving". I obviously hope that one does not get to the point of the dispute being resolved and the experts say "I need this" and it is provided, but I want that to be the route by way of which disclosure issues are resolved.

I don't really want to say we are going to say what the court says is relevant to a particular issue. It is what the experts say they need to deal with a point that really ought to be determinative in a case where the likelihood is that there is not going to be any factual evidence from the claimant.

So that's how I see it working. I don't think that is in any way inconsistent with what you have articulated as to what the defendants are minded to do.

MR HARRIS: Yes, sir.

MR HOLLANDER: It may be we are at the stage where Mr Harris and I, or our respective solicitors, need to talk and see if we can thrash it out with a view to coming back to you on paper if we really need to. Is very helpful that you have articulated -- although you are obviously a very hard task master -- it is very helpful that you have articulated the tribunal's thoughts. I would have thought, subject to my learned friend's views, we probably have enough from you that we can go and talk

about it in the light of that. Unless he has a different view?

THE PRESIDENT: No, I think you are right, Mr Hollander.

As I say, I don't really want to make any order. So the only direction, which I think has already been made, is the Reply on 1 December. I am just going to express, how can I put it, a measure of disappointment on the tribunal's part that if the draft list of issues and the draft indication of evidence is not produced at the same time, there will be disappointment because the expectations of the tribunal in terms of how we will manage the case next year will have been somewhat broadened and you can therefore expect altogether more swinging orders in the New Year in order to catch up.

So I am very happy to leave it at that stage, subject of course to anything, Ms Howard, you have to say about the same process.

Sorry, Mr Hollander.

MR HOLLANDER: No, no, I was going to say, I think we have on board that it is not tactically particularly wise to incur the tribunal's disappointment quite this early in the litigation.

THE PRESIDENT: The message has come across, I am very grateful, Mr Hollander.

Ms Howard?

MS HOWARD: Well, I would agree with the directions made about the class representative. And for us to be given an opportunity to respond to those. And certainly the Secretary of State would be prepared to set out sort of an indication of the number of factual witnesses that they intend to put forward.

I think we are fairly clear we will not be putting forward any independent economic evidence or industry evidence of our own. I just wanted to flag that obviously over this time period the Department has not had the continuity of personnel and obviously with the Practice Direction witnesses can only talk to what is in their own

knowledge, so that there may be sort of potentially two to three witnesses -- we are not sure of the exact number yet or who they will be -- but we can indicate that by 1 December.

I think where I am slightly confused is what more you wanted from the intervener. Really to explore the role of the Secretary of State as an intervener, because we had understood from the litigation plan that obviously disclosure and the rule 60 report were directed at the defendant, and the class representative didn't envisage obtaining disclosure from the Secretary of State. Obviously reserve the residual right.

But we are very keen to avoid a situation where the Department has to be running large-scale searches for documents that actually will end up mostly duplicating a lot of the documents that are already in the defendant's possession and control. For example, those letters of instructions, well GTR should have copies of those because they received them.

So, you know, there will be some isolated documents that the Department has, which obviously it will make available, whether that is as exhibits to a witness statement or as disclosure, but it is very keen to avoid being embroiled in a vast-ranging search in a haystack for individual documents which largely will be duplicative and obviously will incur great cost and a lot of time and resource.

THE PRESIDENT: Ms Howard, I agree. The last thing I want, unless there is very good reason for it, is your clients incurring significant costs on disclosure. So what I have in mind -- and again I am not making any orders, what I am doing is a sort of informal structuring of efforts up to the end of the year -- and if that doesn't work, all of the parties can expect the informal structuring to end and a somewhat more brutal formal structuring to begin, so we will see how it works.

But what would be helpful, let's assume that Mr Hollander's clients decide to avoid

the disappointment of the tribunal and produce the Reply, draft list of issues and statement of evidence on 1 December, it will be helpful to have, before the end of the year, an indication of what the intervener proposes to do in terms of witness evidence and in terms of disclosure so that Mr Hollander knows whether he's going to need more or whether, actually, the process is operating on a largely consensual basis without the need for too much heat rather than light to be shed on the process.

So you will naturally want to speak with the defendants about disclosure and take a cooperative stance so that you don't duplicate. It may be that actually certain classes of document can be more efficiently produced by the Secretary of State than by the defendants. I don't know. But if that is the case then I would hope that course would be taken. But what I don't want you doing is both of you providing the same set of documents so that we waste time.

MS HOWARD: Exactly.

THE PRESIDENT: I hope that is sufficient indication on disclosure.

I think I also want to float one further point on the Practice Direction regarding witnesses, which of course makes perfect sense in the context of ordinary bilateral civil litigation. But when one is talking about, as it were, departmental policy and how an industry is operating on a more macro rather than a micro level, I have to say I am not sure you are going to find a single person who is going to be able to speak with personal knowledge, without the documents, to these matters.

Again, I am not making a direction, but my pretty strong inclination would be for you to be released from that practice direction to produce someone who is capable of speaking to the issues in a manner that will render a cross-examination of that person profitable rather than not profitable.

Now, I would like to hear from Mr Hollander on that to see if I am not overstepping the mark in making that indication; but for my part, I think that if you were obliged to

comply chapter and verse with the practice direction, we are asking for trouble with no particular benefit in the context of this case.

MS HOWARD: If I may, it might help if I just add my commentary before Mr Hollander speaks.

But I would absolutely agree. We have obviously been thinking about this and how we would manage it. Our proposal had been to almost do the equivalent of like a judicial review, where you would have a statement with the gist evidence exhibited, or similar to what is done in procurement claims, obviously have a witness statement with exhibits that the relevant individual can be cross-examined.

It may not be strictly within the four corners of the practice direction. Inevitably you would have somebody sufficiently senior that is able to speak to these matters even if they may not necessarily have been there the whole way through, for example. But they would speak to the documents and explain them.

THE PRESIDENT: Ms Howard, it seems to me that the more you can articulate the gist before Christmas and speak to the defendants and give Mr Hollander an idea of what is coming, the better, with a view to a production commencing as soon as possible after the end of the year to be discussed.

Mr Hollander, are you wedded to the practice direction? I didn't sense any particular agitation when I articulated my proposal.

MR HOLLANDER: I think it is a question of degree, isn't it? The practice direction was put in for a number of reasons. One is because witness statements were arguing the cases too often; one is because they had become far too long, and there was a whole bunch of material -- I think it is just a question of degree. I hear what you say. I am not sure I have anything much to contribute to that stage.

THE PRESIDENT: Ms Howard, I know that the Secretary of State will behave responsibly. In a sense, it is a sign of that responsibility that you are worrying about

the practice direction.

So, again, I am not making an order but I think you can take it that we are going to be sensible about the practice direction. I am going to indicate we will disapply it. That's not because I think it is a bad thing, but I think it is something that needs to apply in a more nuanced way in this case. We may need to argue about what nuanced means later on down the line, but we are not going to have that debate today.

MS HOWARD: I am grateful, thank you.

THE PRESIDENT: I am looking for the time. I see it is 1.05.

Do the parties have enough to be getting on with up to Christmas? If there is anything else you want to raise, then please do raise it. Otherwise, with my and my colleagues' considerable gratitude, I will end the hearing.

MR HOLLANDER: There is nothing else I wanted to raise apart from the fact that your ruling appears to have caused the Chancellor to resign, but apart from that.

You had not seen that?

THE PRESIDENT: I had not seen that. But there we are.

MR HARRIS: No, thank you, sir. We are very content. And may I again express my own personal gratitude to the tribunal for starting early and finishing at lunchtime. I am very grateful.

THE PRESIDENT: I am very grateful to all three of you for the efficiency and assistance you have given in your submissions.

I will wish you a good weekend. Thank you all very much.

MR HARRIS: Thank you.

MS HOWARD: Thank you.

MR HOLLANDER: Thank you.

(1.05 pm)

(The hearing concluded)