Neutral citation [2025] CAT 16

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1404/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

6 March 2025

Before:

THE HONOURABLE MR JUSTICE MILES
(Chair)
EAMONN DORAN
PROFESSOR ANTHONY NEUBERGER

Sitting as a Tribunal in England and Wales

BETWEEN:

DAVID COURTNEY BOYLE

Class Representative

– and –

(1) GOVIA THAMESLINK RAILWAY LIMITED
(2) THE GO AHEAD GROUP LIMITED
(3) KEOLIS (UK) LIMITED

Defendants

– and –

SECRETARY OF STATE FOR TRANSPORT

Intervener

Heard at the Rolls Building on 6-7 February 2025

RULING (AMENDMENT)

APPEARANCES

Mr Charles Hollander, KC and Mr David Went (instructed by Maitland Walker LLP) appeared on behalf of the Class Representative.

Mr Paul Harris, KC, Ms Anneliese Blackwood and Ms Cliodhna Kelleher (instructed by Freshfields LLP) appeared on behalf of the Defendants.

Mr Laurence Page (instructed by Linklaters LLP) appeared on behalf of the Intervener.

Mr George Hilton (instructed by Fenchurch Law) appeared on behalf of Mr Harvey.

A. INTRODUCTION

1. This is the fifth case management conference ("CMC") in these collective proceedings and the fourth to take place after certification.

2. This ruling concerns the application of the Class Representative ("the CR") to amend the claim form. The Defendants ("the Ds") object to the amendments.

3. The proposed amendments have been grouped under three heads – "the flexibility claim", the "effects amendments" and an amendment to the class definition to capture all persons who made relevant purchases from 1 October 2015 to the date the amendment takes effect.

4. We shall not set out the full factual background as it is well known to the parties and has been addressed in earlier Rulings of the Tribunal ("CAT") in these proceedings. In very short summary, the CR alleges that the manner in which the Ds set and enforced fares for journeys on the London-Brighton mainline amounted to an abuse of dominance which caused actionable loss to the passengers within the proposed class. The collective proceedings were certified for the reasons set out in a judgment dated 25 July 2022 ([2022] CAT 35). Some of the terms used in that judgment are adopted here, including Dual Brand tickets, Single Brand tickets and Any Brand tickets ("DBTs", "SBTs" and "ABTs").

5. The flexibility claim is a claim for damages relating to class members who purchased Brand Restricted Fares and who suffered increased waiting and journey times as a result of being unable to travel on the next available train. The "effects amendments" are described further below.

6. We refer to various witness statements and expert reports below by the surname of their maker and their number (e.g. Davis 4). For ease we shall refer to the Ds without differentiation though it is only D1 which actually operated the trains.

B. PROCEDURAL HISTORY

7. On 10 June 2021 the CR and Mr Vermeer applied for a collective proceedings order. The then Joint Proposed Class Representatives ("the PCRs") filed witness evidence and two expert reports from an economist, Mr James Harvey (Harvey 1 and 2), concerning price differentials and calculating class-wide damages ("the CPO Application").

8. In brief summary, the PCRs alleged that the Proposed Defendants ("the PDs") had acted contrary to Chapter II of the Competition Act 1998 by abusing their dominant position as train operators in respect of London-Brighton train services by setting different prices for differently branded train services. The PDs had sold SBTs, DBTs and ABTs. SBTs could be used only on trains with the specific brand; DBTs could be used on trains of two specified brands; ABTs could be used on any trains. The PCRs alleged that this was contrary to the relevant regulatory regime and that it was an abuse of the Ds' dominant position.

9. The damages claimed were calculated by reference to the prices actually charged for DBTs or ABTs compared to the single price that would have been charged (counterfactually) in the alleged competitive world for all journeys. In short it was said that losses had been suffered by buyers of DBTs and ABTs for journeys, as they had paid more than they would have done in the competitive counterfactual.

10. On 16 August 2021 the Secretary of State for Transport ("the SoS") filed an application for permission to intervene in the proceedings.

11. On 16 December 2021 there was a CMC at which the CAT made a ruling: (i) granting the SoS permission to intervene; and (ii) dismissing an application by the PDs that the proceedings be stayed pending the outcome of any appeals arising from the certification judgments in two other CAT cases: *Justin Gutmann v First MTR South Western Trains and Others*, Cases 1304 and 1305/7/7/19.

12. On 4 February 2022 the PDs responded to the CPO Application.

13. On 25 March 2022 the PCRs filed a Reply to the PDs' Response and Harvey 3.

14. On 1 June 2022 the PDs filed a Rejoinder.

15. On 24 June 2022 the PCRs responded with Harvey 4. The PCRs applied to expand the claim to include a "loss of flexibility claim". In short the PCRs wished to allege that buyers of SBTs and DBTs had been prevented from travelling on branded train services excluded from their tickets and had therefore taken longer to travel. The PCRs said that this was a measurable loss.

16. On 13-15 July 2022 the certification hearing took place.

17. In a ruling of 25 July 2022 the CAT certified the claims as eligible for inclusion in collective proceedings and authorised the CR (but not Mr Vermeer) to act as class representative: [2022] CAT 35.

18. In its ruling the CAT refused to certify a case for the loss of flexibility claim addressed in Harvey 4. It said at [34], under the heading "A new claim":

> "Harvey 4 also raises the spectre of a new claim, accruing to the benefit of those class members purchasing (over-priced) Multi-Brand Tickets but also purchasing (under-priced) Single-Brand Tickets. In such a case, Harvey 4 contends for damages assessed by reference to the "loss of flexibility" arising out of the Single-Brand Ticket purchase, this loss existing because the ticket purchased in the counter-factual world would have been more "flexible". Given that we accept that the Respondents have not had sufficient time to consider Harvey 4 and make any response, we are not going to give permission to take this claim forward at this stage. Should the Applicants (or rather Mr Boyle) wish to apply to amend then (of course) we will hear and consider such an application. It may be that the point was only raised in response to the "set-off point" which (for the reasons given above) we consider does not, at least at present, arise. In these circumstances, it may be that this new claim will not be pressed further by the Applicants."

19. On 5 October 2022 a Collective Proceedings Order "(CPO") was made.

20. On 11 October 2022 the SoS filed its statement of intervention.

21. On 14 October 2022 there was a CMC. The CAT made a ruling on the structure of the trial ([2022] CAT 46). The CAT directed that there be a split trial with questions of quantum hived off to stage 2, and all other questions dealt with at

stage 1. The CAT stated that it would seek to list the stage 1 trial for hearing after the summer vacation in 2023, with a time estimate of 4 weeks.

22. On 28 November 2022 there was a reasoned order of the Chair (the then President of the CAT) ordering the Ds to: (i) pay the CR's costs of, and occasioned by, and incidental to the opposition to the CPO Application, such costs to be subject to detailed assessment forthwith if not agreed; and (ii) the Ds to make a payment on account of £250,000.

23. On 28 November 2022 Mr Harvey notified the solicitors retained by the CR (Maitland Walker LLP) that he was going to take a sabbatical and had decided to withdraw from the case.

24. On 1 December 2022 the solicitors for the CR informed the CAT and the Ds that Mr Harvey had withdrawn from the case and that a replacement had not yet been identified.

25. On 9 December 2022 the parties filed a draft order containing directions for the stage 1 trial.

26. On 23 December 2022 the parties filed a composite list of issues for the stage 1 trial.

27. On 13 January 2023 the parties filed a revised version of the draft order filed on 9 December 2022. The parties agreed that the Ds' voluntary disclosure would be provided in two tranches, on 17 and 31 January 2023. The Ds gave that disclosure on those dates.

28. On 25 January 2023 the CR informed the CAT and the Ds that he had instructed a new expert, Dr Davis.

29. On 2 February 2023 the CR filed Davis 1.

30. On 17 March 2023 there was a further CMC. The CAT criticised the CR and stated that he should have pro-actively made the CAT and the parties aware of the issues that the change of expert created.

31. On 24 March 2023 the CAT made a ruling ([2023] CAT 19) ("the March 2023 Ruling"): (i) vacating the trial listed for the last quarter of 2023; (ii) staying the proceedings; (ii) requiring the CR to file, by no later than 19 May 2023, a revised and amended collective proceedings claim form which had to include a report from Dr Davis setting out – in line with *MOL (Europe Africa) Ltd v. Mark McLaren Class Representative Ltd* [2022] EWCA Civ 1701 and *Gormsen v. Meta Platforms Inc* [2023] CAT 10 – a blueprint to trial. The CR was also required to file a fresh litigation budget. The CAT ordered that the costs of the revised claim form were to be paid by the CR in any event. The stay applied to the Ds and the SoS until the revised claim form was served on them.

32. On 19 May 2023 the CR filed (i) a re-re-amended claim form, (ii) Davis 2, and (iii) an updated litigation budget.

33. On 7 June 2023 the CAT made a directions order which, inter alia, listed a CMC for 12 October 2023. The CAT also directed the Ds to make any applications arising from the documents filed on 19 May 2023 by 28 July 2023.

34. On 28 July 2023 the Ds made a number of applications relating to Dr Davis's methodology. In particular, the Ds objected to the "service level" amendments.

35. On 8 September 2023 the CR filed his response to the Ds' applications.

36. On 6 October 2023 the Ds filed their reply to the CR's response concerning the Ds' applications.

37. On 12 October 2023 a CMC took place to consider the Ds' applications. The CAT stated that it would require expert-led disclosure. On 19 October 2023 the CAT gave a ruling ([2023] CAT 63) about the way the proceedings were to proceed. The CAT decided that there would be expert-led (rather than

traditional) disclosure and that the CAT would give the CR every assistance. The CAT stated:

> "9. …
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> …
>
> (9) …We consider that Dr Davis should…articulate in full the [CR's] case, and that he should do so by no later than 31 July 2024. We regard this as a generous date, and ideally the job can be done well before then…
>
> (i) …The [CR], through Dr Davis, must first produce a body of evidence which, assuming no pushback or evidence in response from the [Ds] subsequently, is sufficient to persuade a probing and appropriately sceptical Tribunal of the merits of the claim, including as to quantum, so that the Tribunal could make a final order in a given, ascertainable, quantum. Of course, we appreciate that these proceedings will be defended, and the [CR's] path will not be so straightforward. We are seeking to articulate, however, what the [CR] must produce by 31 July 2024, in anticipation of a response from the [Ds].
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> …
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> (iv) The Second Ruling directed a split trial. Whilst that split may still be appropriate for trial, we want to be clear that the material that must be produced by the [CR] should cover all issues, not just those relating to Trial 1.
>
> …
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> 10. This paves the way for a case management conference on the far side of the 2024 long vacation at which the [Ds] will articulate the directions they need for trial, and the Intervener will state their own position. A trial at some point in 2025 should then be possible. We make clear that we expect the [Ds] and the Intervener to review the [CR's] work over the long vacation and to have considered - and ideally begun work on - their responses."

38. On 23 November 2023 the CAT made an order directing, inter alia, that: (i) by no later than 31 July 2024, the CR should submit his case in full; (ii) the parties' experts were directed to meet to explore the feasibility of providing the disclosure sought by the CR; and (iii) Ds' application for the costs thrown away by them because of the CR's change of expert be adjourned to the next CMC, to be fixed in 2024.

39. Between November 2023 and July 2024 an expert-led disclosure process took place, and the Chair held a number of informal case management meetings with the parties to discuss disclosure issues.

40. On 31 July 2024 the CR filed his "positive case" and accompanying material, namely, Davis 4, an expert report of Mr Harman (a forensic accountant) and an expert report of Mr Michael Lee (an industry expert).

41. Between August 2024 and October 2024 there was further correspondence between the parties regarding the CR's positive case. The Ds requested that the CAT should direct that it is too late for the CR to include a claim for damages for a loss of flexibility.

42. On 6 November 2024 the CAT informed the parties that Mr Justice Miles would replace Sir Marcus Smith as Chair in these proceedings and that the CAT could fix a hearing in early December 2024 or early February 2025. On 8 November 2024 the parties opted for a CMC date in the February 2025 window.

43. On 10 January 2025 the CR filed Maitland-Walker 8 and a draft Re-Re-Amended Claim Form ("the RRACF"), and applied for permission to amend.

44. On 15 January 2025 the CR filed a table of proposed "corrections and clarifications" to Davis 4.

45. As already noted, the CMC took place on 6 and 7 February 2025.

C. LEGAL PRINCIPLES

46. There was no significant dispute here. We direct ourselves as follows.

47. First, when deciding whether to allow an amendment to a Claim Form in collective proceedings the CAT applies the "Pro-Sys" or "Microsoft" test (taken from the Canadian decision of *Pro-Sys v Microsoft Corp* [2013] SCC 67). In short, the amended claim must be arguable and triable (in the sense that there is an effective and workable methodology for trial).

48. Second, the CAT may properly be guided by the principles developed in civil litigation concerning the discretion to allow amendments.

49. One of the issues raised by the parties concerns the timing of the application to amend. In *ABP Technology Limited v Voyetra Turtle Beach* [2022] EWCA Civ 594 ("*ABP*"), the Court of Appeal stated (emphasis ours):

> "23. When considering whether to exercise the discretion to permit an amendment provided by Part 17.3 of the Civil Procedure Rules, there are several factors to bear in mind. One of these factors is lateness. Coulson J (as he then was) summarised the relevant authorities on 'lateness' in *CIP Properties v Galliford Fry* [2015] EWHC 1345 (TCC) at paragraph 19 (Coulson J) (citations omitted):
>
> (a) The lateness by which an amendment is produced is a relative concept. *An amendment is late if it could have been advanced earlier*, or involves the duplication of cost and effort, or if it requires the resisting party to revisit any of the significant steps in the litigation (such as disclosure or the provision of witness statements and expert's reports) which have been completed by the time of the amendment. […]
>
> (c) The history of the amendment, together with an explanation for its lateness, is a matter for the amending party and is an important factor in the necessary balancing exercise. *In essence, there must be a good reason for the delay*. […]
>
> (f) Prejudice to the amending party if the amendments are not allowed will, obviously, include its inability to advance its amended case, but that is just one factor to be considered. *Moreover, if that prejudice has come about by the amending party's own conduct, then it is a much less important element of the balancing exercise* […]. […]
>
> 24. The simple point about lateness is that it calls for an explanation justifying the lateness. That is because an amendment which might otherwise be allowed, could well be refused if its lateness has caused unjustifiable prejudice to the other party. Therefore an explanation is needed in order for the court to work out whether or not it is a case in which, despite the prejudice caused by the lateness, nevertheless the balance comes down in favour of allowing the amendment.
>
> 25. Examples of the kinds of prejudice a late amendment might cause were given by Coulson J in *CIP Properties* at paragraph 19(e) [citations omitted]:
>
> > "at one end of the spectrum, the simple fact of being 'mucked around', to the disruption of and additional pressure on their lawyers in the run-up to trial, and the duplication of cost and effort at the other. If allowing the amendments would necessitate the adjournment of the trial, that may be an overwhelming reason to refuse the amendments.""

D. THE PROPOSED AMENDMENTS AND THE POSITIONS OF THE PARTIES

50. As noted, the loss of flexibility application was supported by Maitland-Walker 8 dated 10 January 2025. Paras 28 to 34 referred to Davis 4. Para 34 stated:

> "From paragraphs 28 to 33 above, it is evident that Davis 4 does provide a concrete indication of how losses associated with a loss of flexibility (both for Single-Brand and Dual-Brand Tickets) are methodologically ascertained and he has made the calculation of those losses in Davis 4. Accordingly, it is clear that the amendments in respect of the Loss of Flexibility Claim have a real prospect of success."

51. By the loss of flexibility amendments, the CR seeks further to expand his claim to include a head of loss said to relate to the alleged loss to class members, who purchased SBTs or DBTs, of the additional flexibility associated with ABTs, thereby allegedly increasing their waiting and journey times as a result.

52. The relevant passages are in RRACF paras 2.11, 68 and 76. The amendment to para 2.11 alleges that "Class members have also suffered loss and damage through worse service levels arising from the brand differential pricing as described, for example, at paragraph 2.5 above". Para 68 has been amended to state "As a consequence of the infringement, the prices charged to Class Members for fares on the London-Brighton mainline were at all material times higher than they would otherwise have been and the service levels were lower than they would otherwise have been.". The amendment to para 76 alleges that Davis 2 contains a common methodology for determining the extent of the loss in the factual.

53. As regards the loss of flexibility claims, the CR submitted in outline as follows:

(1) The CR filed his case in full on 31 July 2024 in accordance with the order of 23 November 2023.

(2) The amendments in the RRACF alleging the flexibility claim are arguable and intelligible and are supported by Davis 4.

(3) The Ds have not yet been required to put in any expert evidence. They have therefore not suffered any prejudice.

(4) It would be prejudicial to the CR not to be able to proceed with a properly arguable claim for damages.

(5) The CAT will have to address issues of loss of flexibility in assessing the Ds' pleaded contention that in assessing damages for the existing claims, there should be an offsetting adjustment for amounts saved by passengers who bought SBTs or DBTs.

54. The Ds submitted in outline as follows:

(1) The proceedings have moved very slowly. Nearly four years have passed since the filing of the claim, and nearly three years have passed since its certification but little progress has been made. A previous trial has already been vacated. The costs of the proceedings have spiralled.

(2) These loss of flexibility amendments are an attempt to widen the scope of the proceedings more than six months after the 31 July 2024 deadline.

(3) The CR was required to produce a final report from Dr Davis by that date setting out the whole case on which the CR wanted to rely, including as to quantum. The Ds (who had already made strike out applications) would then be able to decide whether to seek to kill off the claim and the CAT would be able to decide whether the fully articulated claims were arguable.

(4) In breach of the directions of the CAT, the CR has failed to set out his full case in Davis 4. Indeed even now the evidence served by the CR (Maitland-Walker 8 at para 35) accepts that the case advanced in Davis 4 is incomplete, and has not been properly articulated:

(i) Dr Davis has calculated a loss of £84m for purchasers of SBTs under the CR's proposed "Loss of Flexibility" head of loss.

However, this figure is overstated because, as the CR acknowledges, the class in these proceedings comprises only purchasers of DBTs and ABTs. As such, a purchaser of an SBT would also need to have purchased a DBT or ABT to fall within the class. But Dr Davis has not determined what proportion of the alleged £84m loss relates to individuals who are class members. To make such a determination, he would need, at a minimum, to conduct another survey of rail passengers.

(ii) Dr Davis has not calculated the loss allegedly associated with DBTs at all. This omission is said to be on the basis that Dr. Davis did not have "sufficient time" to conduct this analysis: Maitland-Walker 8, para 15.

(iii) Dr Davis has produced a witness statement in relation to the expert-led disclosure process but his statement is silent on his failure to conduct these analyses before 31 July 2024 (or since).

(iv) Dr Davis's own analysis of the dates on which he received disclosure from the Defendants demonstrates that he received the vast bulk of the disclosure sought by him well in advance of the 31 July 2024 deadline.

(v) Furthermore: (i) there is no application by the CR, even now, to adduce further expert evidence or survey evidence in relation to these issues; (ii) there is no draft before the CAT of the evidence that would be required in order to produce loss figures for purchasers of DBTs; (iii) there is no explanation from Dr. Davis as to how he intends to produce a revised figure for purchasers of SBTs, following a further proposed survey; and (iv) there is no draft of the proposed survey before the Tribunal for it to interrogate.

(5) A core aspect of dealing with cases "justly and at proportionate cost" within the meaning of rule 4 of the Competition Appeal Tribunal Rules

2015 ("the CAT Rules") includes the enforcement of "…compliance with…any order or direction of the CAT." (r.4(2)(f) of the CAT Rules). As the Court of Appeal noted in *Mitchell v News Group Limited* [2014] 1 WLR 795 the key purpose of the introduction of such rules was to bring to an end a pervasive culture of non-compliance with Court orders: see [60]. The days have long gone when the only touchstone was prejudice to a respondent. But in any event there is prejudice here from the continuing delay in the progress of the proceedings.

(6) The proposed amendments would, if allowed, materially expand the scope of the trial, cause delays, and increase the costs of the proceedings.

(7) No explanation has been given for the delay in advancing this part of the case promptly. This still applies as the full case has still not been advanced (see above).

55. The "effects amendments" proposed by the CR are in paras 37.4 and 64.6. The amendment to para 37.4 says that the common issues for certification comprise "4. The anti-competitive effects arising from the abuse of dominance, including whether and to what extent the abuse of dominance had an impact on the prices of fares purchased by Class Members and service levels (in particular whether brand restrictions have given rise to longer waiting and journey times)." Para 64.6 under the heading "particulars of abuses" alleges "For the avoidance of doubt, as pleaded in paragraphs 2.5. and 55 of this Claim Form and paragraph 18.a.iv of the Reply, imposition of the brand restrictions and differential pricing creates inefficiencies and is anti-competitive." The CR also referred to the amendments in para 68 referring to damages for loss of flexibility.

56. As regards the "effects" amendments, the CR submitted in outline as follows:

(1) The relevant paragraphs of the RRACF do not raise a new case. The allegations are concerned with service levels on the Ds' train services.

(2) The CR's primary case has consistently been that brand restrictions and differential pricing in breach of the regulatory regime is *ipso facto* an

abuse of dominance or, in the alternative, is abusive because it gives rise to anti-competitive effects.

(3) In the CR's Reply at para 18.a.iv, responding to the Ds denying in the Defence that a breach of the regulatory regime was *ipso facto* an abuse of dominance, the CR's case was that the Ds were not entitled to contend there was a justification for the breach of the regulatory regime in part because the differential pricing caused inefficiencies including delays.

(4) The draft list of issues for Trial 1 included Issue 12 (asking whether the alleged breaches of the regulatory regime were *ipso facto* an abuse of dominance) and Issue 13: "Are the alleged breaches capable of giving rise to any anticompetitive effects?" Indeed, it was the Ds who redrafted Issue 13 in these terms.

(5) Hence the CR had an existing pleaded effects case. The amendments simply confirm that this case is being advanced.

57. The Ds submitted in outline as follows.

(1) The effects amendments would be new elements of the CR's positive case. Any reference to them in the Reply cannot make them part of the positive case. The Reply in any case came after certification and there has been no consideration whether they would satisfy the *Microsoft* test.

(2) The references in paras 2.5 and 55 of the existing pleading to the Gibb report do not identify with any sufficient particularity any alleged abuses of the alleged dominant position of the Ds. They appear as part of the factual background. Moreover, the existing allegations of abuse in para 64 all allege that the differential pricing structure itself was an abuse. They do not refer to the consequences or effects of that structure.

(3) It is too late to seek to make these allegations now. Resolution of the new allegations would broaden the case and require extensive economic evidence.

(4) The list of issues for Trial 1 does not assist as the question is the scope of the CR's positive case.

(5) Para 68 should be addressed as part of the loss of flexibility claim amendments.

58. As regards the class definition amendments, the CR submitted in outline as follows:

(1) As a consequence of the decision in *Alex Neill Class Representative Ltd v Sony* [2023] CAT 73, all potential class members must have extant claims at the time when an application for a CPO is made. It is permissible to amend the time period covered by a class definition to the date of any amendment to the claim form post-dating the CPO: *Gormsen v Meta* [2024] CAT 11.

(2) The CR proposes to amend the class definition to capture all persons who made relevant purchases from 1 October 2015 to the date on which the amendment takes effect. This will ensure that persons who only made relevant purchases after the collective proceedings were issued on 10 June 2021 fall within the class.

(3) The CR contends that the amended definition should take effect at the date of the amendment.

59. The Ds submitted in outline as follows:

(1) The Ds do not object in principle to this amendment but argue the end date in the class definition should be 31 July 2024 as that was the date on which the CR was required to state his case in full; and the amendment should be final.

(2) The CAT has a discretion and the 31 July 2024 deadline should apply to reflect the CR's failure to prosecute the proceedings expeditiously and in accordance with the CAT's earlier directions.

60. We have summarised the principal submissions of the parties in outline in this section. In the following analysis we address these and some further arguments that were made at the hearing.

61. The SoS took a neutral position in respect of all the amendments.

E. ASSESSMENT

62. We start with the loss of flexibility claim. We have carefully considered the parties' submissions and have reached the following conclusions.

63. First, we do not accept that the CR filed his case "in full" on 31 July 2024. It was materially incomplete in several respects:

(1) The calculation was restricted to losses said to have been suffered on SBTs. There was no calculation at all in respect of the DBTs.

(2) Even for the SBTs there was no calculation of the proportion of Class members who also purchased SBTs.

(3) No details of the methodological route map proposed for calculating the proportion in (2) above were given. Dr Davis simply said that another survey would be used. There was no explanation of the contents of such survey.

(4) Dr Davis did not explain how the figure of £84m for the losses suffered by the buyers of SBTs would take account of any price differences there would have been for such tickets in the (non-infringing) counterfactual world.

(5) As a result there was still no figure for the overall claim (even in ballpark terms).

64. We note a suggestion made by counsel for the CR during oral submissions that Davis 4 was concerned only with the unamended case and did not address the damages claim for loss of flexibility. He argued that, since they did not yet have

permission to amend, it could not have been included in Davis 4. We are unable to accept this suggestion:

(1) As paras 28 to 33 of Maitland-Walker 8 explain, Davis 4 expressly covers damages for loss of flexibility. Indeed para 34 (cited above) states this in terms.

(2) The suggestion was in any case inconsistent with the position taken by the CR elsewhere in his skeleton argument that the CR set out his case (including the flexibility case) in full by 31 July 2024. The CR positively asserted that he had set out his case in full by that date. In para 13 of his skeleton he said that Dr Davis had set out his calculation of the money value of the loss of flexibility experienced by travellers purchasing SBTs; and in para 14 that Dr Davis had produced an economic model for calculating losses associated with the loss of flexibility.

(3) Moreover, the draft amendments to the RRACF (which have been set out above) would not be sufficient on their own at this stage to satisfy the requirement that amendments must be clear and sufficiently specific. The only specific case advanced in respect of the damages arising from the lower service levels (in the sense of loss of flexibility) is given in Davis 4. There is nothing in the pleading taken on its own which provides even an outline of how the damages would be calculated.

65. We also reject the CR's suggestion that the missing pieces of the analysis would involve only a small amount of work. The CR has given no details of the methodology by which Dr Davis intends to determine the proportion of the certified class members who are alleged also to have suffered losses by reason of buying SBTs. Nor is there any explanation of how Dr Davis intends to off-set any compensating amounts to accommodate any increase in the price of such tickets in the counterfactual (non-infringing) world. We consider that the missing pieces are material and that without them the Ds and the CAT are unable to assess what further steps would be required to ready the case for trial.

66. We also accept the submission of the Ds that part of trying cases "justly and at proportionate cost" within the meaning of rule 4 of the CAT Rules includes the enforcement of "…compliance with…any order or direction of the Tribunal" (r. 4(2)(f)). We also accept that the CAT, like that of civil courts, no longer simply asks whether the respondent to an amendment application can show specific prejudice. We consider that the CR failed to comply with the requirement of the CAT to set out his case in full by 31 July 2024.

67. Second, we consider in any event that this failure is materially prejudicial to the Ds and to other users of the CAT. The manifest purpose of the directions given by the CAT on 23 November 2023 was to ensure that the whole of the case advanced by the CR was put on the table. The case had already been going on since mid-2021 and was still far from being ready for trial. The CAT was anxious that it should be put into a triable shape as soon as possible. It indicated that it would give the CR (and his expert) every assistance to enable him to advance his final case. It would then be possible for the CAT, with the assistance of the parties, to conduct a full stock-take and see what else was required to take the dispute to trial. But this required the CR (as stated in the order of 23 November 2023) to state his case in full. He has not done so, but has made an application for permission to amend material parts of the claim unarticulated or explained in the evidence.

68. In short, we are unable to accept the argument of the CR that there has been no prejudice to the Ds or other litigants from this lateness. The fact that the CR's position has not been fully articulated is prejudicial to the Ds as there will inevitably be further delays while the complete case is put forward.

69. Third, the CR's application for permission to amend has been made late in the proceedings. As the history shows it was originally referred to in the expert evidence of Mr Harvey in June 2022. The application was not made until January 2025. The *ABP* case shows that an amendment is late if it could reasonably have been made earlier in the proceedings.

70. Counsel for the CR contended that the draft amendment was in fact included in a draft provided in May 2023. It is correct that some of the proposed

amendments forming part of the flexibility complaints were included in the earlier draft. However, counsel for the CR ultimately accepted that the May 2023 proposed amendments did not include a damages claim for loss of flexibility, and that the damages claim was only introduced in the draft provided in January 2025. Moreover, the amendments advanced in May 2023 did not provide even a blueprint for the calculation of any damages under this claim. As already explained, Maitland-Walker 8, served in January 2025, incorporates by reference Davis 4 as the basis of the methodology for the calculation of the loss of flexibility damages.

71. Fourth, the proposed amendments do not merely seek to plead a new particular of loss. The entire basis of the losses is different from that sought in the existing claim. Under the existing claim the CR says that purchasers of DBTs and ABTs lost as they had paid more than they would have done in the competitive counterfactual. The loss of flexibility allegations advance a quite different case, namely, that buyers of SBTs and DBTs did not get the same flexibility as they would have done in the counterfactual. The valuation of the alleged losses, and the supporting economic evidence analysis, are entirely different and distinct. We accept the Ds' submission that allowing the amendments would substantially increase the costs, complexity and length of the proceedings.

72. Fifth, the CR has not explained why the application to amend has been made so late (more than 2.5 years after the point was first floated). As *ABP* shows such an explanation is required for late amendments. There is no justification for the failure to progress this part of the claim since it was intimated in 2022. Moreover, there is no explanation for the failure of Dr Davis to complete the various elements of the work (if only in draft) since 31 July 2024.

73. We reject the suggestion made by the counsel for the CR that the Ds are somehow responsible for Dr Davis's failure to set out a full case for flexibility damages. The CR suggested that Dr Davis only obtained some of the relevant documentation very late, a couple of weeks before the 31 July 2024 deadline. However, we are satisfied by Sansom 3 that he obtained most of the evidence he needed in advance of the deadline, namely on 22 March and 14 May 2024. There was some other information contained in a public database which Dr

Davis appears to have some difficulties accessing. But the evidence shows that the Ds and the SoS assisted him in accessing that too.

74. Moreover, the CR and Dr Davis could have sought an extension of the deadline if it had been necessary. They did not do so.

75. In any case, at its highest the CR's case is that Dr Davis was only able to calculate the overall loss of flexibility claim for the SBTs a couple of weeks before 31 July 2024. But there is no evidence as to why Dr Davis has not conducted the further survey he says is still needed to complete the calculation for SBTs. There is no evidence about why it could not have been conducted at the same time as an earlier survey carried out in early 2024. Nor has he explained why he has not calculated the flexibility losses for DBTs. Nor has he explained why he has not calculated any offsetting adjustments needed for any price differences in the counterfactual. Moreover, we repeat that even at the date of the hearing before us (some six months after the 31 July deadline) Dr Davis had not provided any of this information.

76. Sixth, in our judgment, it is prejudicial to a party against which damages are claimed to be told that there is a substantial claim but to fail (several years into the proceedings and after a firm deadline has been set) to provide a calculation of the amount of the claim. This also runs counter to the imperative under the CAT Rules of ensuring that cases are dealt with justly and at proportionate cost.

77. Seventh, we recognise that refusing the amendments would mean that the CR would not be able to claim this head of loss and would therefore be prejudicial to the class he represents. However, as the Court of Appeal explained in [32] of *ABP*, that kind of prejudice always arises where permission is refused. Civil trials are decided on the issues properly before the court and, once proceedings have begun, the court has control over the issues properly to be tried.

78. Eighth, we are unable to accept that the same analysis and evidence as would be required to determine the proposed loss of flexibility claims will necessarily be addressed at trial in relation to the Ds' plea of "offsetting". As to this:

(1) The point arises from the contention of the Ds that, assuming the case of abuse of a dominant position is established, in the counterfactual world SBTs would have been more expensive. The Ds say that a credit or offsetting adjustment is therefore required. The CR has pleaded in para 20.c. of the Reply that no such credit is required as a matter of law as the transactions for SBTs are separate from those complained about in the claim. That part of the pleading says "Moreover, as a matter of fact, purchasers of [SBTs] and/or [DBTs] would not have obtained the travel rights to which they were entitled and therefore the counterfactual prices of such [SBTs] and [DBTs], which would not have had the brand restrictions but enabled "Any Permitted" travel, are not a valid comparison for any offsetting benefits."

(2) A number of points arise from this. In the first place, assuming that the CR succeeds in showing that the Ds abused their dominant position by overcharging for ABTs or DBTs, it is possible that, as a matter of law, there is the possibility the Ds will be unable to claim set off between notional losses suffered on separate transactions for SBTs.

(3) In the second place, para 20.c. of the Reply does not plead a case of off-setting in the sense of a measurable "loss of flexibility". Rather, it makes the point that the counterfactual prices of SBTs and DBTs are not a valid comparison at all.

(4) Moreover, we consider that there is a distinction between the CR responding to the Ds' case on the one hand, and the CR being allowed to advance the damages claim as part of his positive case on the other. We are concerned here with the latter, not the former.

(5) This is not a dry point about the order of pleadings. The Ds' offsetting case in the Defence is concerned with issues of the quantum of any damages. If the Ds succeed on issues of liability at trial 1, issues of offsetting will not arise.

79. For these reasons, we do not allow the loss of flexibility amendments.

80. We turn to the "effects" amendments. We have carefully considered the parties' submissions and have reached the following conclusions.

81. First, for the same reasons as set out above, we consider that these amendments have been made late. There is no explanation for this.

82. Second, we do not think that the amendments are sufficiently clear in their terms to be made at this late stage in the proceedings. We do not think that the general references to "inefficiencies" in para 64.6 are sufficiently defined. The cross-references in that paragraph to paras 2.5 and 55 do not help. They refer to the Gibb report and in general terms to overcrowding and delays but do not identify with any specificity the inefficiencies sought to be advanced by the CR. We do not consider that, at this stage in the case, it would be appropriate to allow such a general plea of abuse of dominance to be introduced as part of the positive case advanced by the CR against the Ds.

83. To expand this point, we consider that the reference to "delays" in the summary of the Gibb report was (read naturally) a reference to delays in the sense of trains not leaving from and arriving at stations in accordance with the published timetable, whereas it appeared that in his submissions the CR was seeking to use the term, "delay" to cover a loss of flexibility (i.e. the inability of holders of SBTs or DBTs to travel on some services, which may potentially slow their journeys). We consider that the generalised references to delays in the Gibb report are inadequate to identify a case based on loss of flexibility.

84. Third, we do not consider that it is an answer to say that the CR has referred to the references to (inter alia) delays in the Gibb report in para 18.a.iv. of the Reply. We repeat the previous point about the natural meaning of the reference to delays. But, in addition, there is a difference (as acknowledged by counsel for the CR) between advancing these matters as part of the CR's positive case of abusive conduct and the CR's responsive case in seeking to rebut the Ds' Defence.

85. Fourth, we do not think that the List of Issues takes things further. That was formulated by reference to the pleadings as they stood, which does not include the amendments.

86. Fifth, although para 68 of the draft RRACF was referred to in the arguments about the effects amendment, we record that the CR accepted that this paragraph stood or fell as part of the loss of flexibility amendments application. We have addressed this above.

87. Sixth, para 37.4 of the RRACF is part of a description of the common issues raised by the claims. These include limitation (37.1), dominance in the relevant markets (37.2), whether the Ds' conduct is an abuse of dominance (37.3), the anti-competitive effects, including on prices and service levels (37.4), and interest (37.5). The amended para 37.4 refers to the "anti-competitive effect arising from the abuse of dominance". That paragraph assumes that there has been abuse. The effects are the consequences of this alleged abuse, i.e. the alleged damages caused by the alleged abuse. This is further shown by the reference to the "impact [of the abuse of dominance] on" prices and service levels "(in particular whether brand restrictions have given rise to longer waiting and journey times)". On our reading this is simply a description of the existing damages claim and the additional proposed claim for loss of flexibility. It does not plead a separate basis for alleging abuse of a dominant position. In our view this proposed amendment stands or falls with the loss of flexibility amendments addressed above.

88. For these reasons we do not allow the "effects" amendments.

89. As to the amendments to update the class, we consider that the end-date should be the date at which the amendments take effect. We do not accept the Ds' submission that the end-date should be 31 July 2024. That was the date ordered for the CR to produce his full case, in order to allow further case management directions to be given. We do not think that the CAT intended to make it the cut-off date for the definition of the class. We do not think either that we should impose any special condition that the amendment is final in the sense that no further amendments could ever be made. The Ds may well have compelling

arguments, in the event that a further application were to be made, that it would be too late, but we cannot anticipate all circumstances or events.

F. REVISED COSTS BUDGET

90. The Ds have applied for an order that the CR should submit an updated costs budget. The last one was served in May 2023. The Ds submitted that this information would assist the CAT in further case management decisions and that it might also be relevant to a possible application for decertification of the proceedings.

91. The CR did not object to providing an updated costs budget but asked for a further 28 days to do so. They did not advance any specific reasons for seeking that long. The Ds said that the time should be 14 days.

92. At the hearing we made the order sought by the Ds. Fourteen days was more than sufficient. Indeed we consider that a revised costs budget should have been served before the February 2025 hearing. Since the hearing a revised costs budget has been served.

G. POSITION OF MR HARVEY

93. There is a discrete issue relating to the position of Mr Harvey. As explained, he was the former expert instructed by the CR.

94. In the March 2023 Ruling the CAT stated that Mr Harvey had failed to make his associate, Ms Mantri, available to Dr Davis so as to explain the acquired understanding of the team; and that Dr Davis had had to approach the case from a standing-start without the benefit of assistance from Mr Harvey's team. During the hearing the Chair remarked that Mr Harvey appeared to have acted somewhat unprofessionally. These comments were reported in the professional press. These comments reflected evidence filed and submissions made to the CAT by the CR's representatives in March 2023.

95. Mr Harvey has recently served a witness statement taking issue with the CAT's account of events. He has exhibited various emails and other communications that were not available to the CAT.

96. Counsel for Mr Harvey submitted that the comments made by the CAT in the March 2023 Ruling and in the transcript of the hearing of 17 March 2023 were potentially damaging to his professional reputation and that they were made at a hearing where he had had no opportunity to explain the sequence of events. Nor was he given fair warning that he might be criticised at the hearing. The CAT did not have the full evidence and should not have criticised his conduct without allowing him the chance to present his side of the story. More evidence about the circumstances of his departure from the case is now available.

97. Counsel for Mr Harvey accepted that the CR continues to criticise Mr Harvey but submitted that we cannot and should not seek to reach a concluded view as to whether that criticism is justified. He invited us to state that the comments made by the CAT should not have been made without giving Mr Harvey a chance to explain his conduct and that he does not accept the criticisms that have been levelled at him. He relied on the inherent jurisdiction and the case of *W (A Child)* [2017] 1 WLR 2415.

98. The CR submitted that the CAT should make no further comment on the position of Mr Harvey. Counsel submitted that the CR has not made any submissions before the CAT which misrepresented the circumstances surrounding his departure as the CR's economic expert. The CR's position is that, on 20 December 2022, Mr Harvey made definitively clear that he was unwilling to allow his juniors to work with a new expert. The CR's position is that this was a clear and unequivocal statement that his and his firm's involvement was drawn to an end at this point. Counsel for the CR continued to contend that Mr Harvey had acted unprofessionally and inappropriately.

99. Our conclusions are as follows. We have been provided with more evidence than was available to the CAT in March 2023. We consider that it shows that Mr Harvey's firm was prepared to give some assistance to Dr Davis in the hand-over period, but were not prepared to carry on working for the CR under Dr

Davis's supervision. The evidence also shows that Ms Mantri did in fact give some limited assistance in providing documents (as sought by Dr Davis) and adding annotations to the coding files. It is far from clear on the evidence we have seen that Mr Harvey and his firm refused to provide temporary assistance to help educate Dr Davis and his team. We consider that the CAT did not have the full information before it in March 2023 and should not have criticised Mr Harvey in the terms it did without giving him an opportunity to explain the position. We do not reach any decision as to the CR's continuing complaints about Mr Harvey's conduct.

H. CONCLUSIONS

100. The contested parts of the CR's application to amend the RRACF are refused.

101. This Ruling is unanimous.

The Honourable Mr Justice Miles Chair	Eamonn Doran	Professor Anthony Neuberger

Charles Dhanowa, CBE, KC (Hon)
Registrar

Date: 6 March 2025