Neutral citation [2025] CAT 26

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1404/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

1 May 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 Salisbury Square House on 26 and 27 March 2025

JUDGMENT

APPEARANCES

Mr Nicholas Saunders, KC, Mr David Went, and Mr David Illingworth (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.

Ms Anneli Howard, KC, and Mr Laurence Page (instructed by Linklaters LLP) appeared on behalf of the Intervener.

A. INTRODUCTION

1. This judgment covers the following issues considered at a hearing on 26-27 March 2025:

   (1) An application by the Secretary of State for Transport ("SoS") for their costs of giving disclosure.

   (2) An application by the Defendants ("Ds") and the SoS for their costs thrown away by reason of the Class Representative's ("CR") change of economic expert witness.

   (3) Whether the Tribunal should order a preliminary trial concerned with issues of regulatory breach.

   (4) An application by the Ds for the CR to produce a witness statement answering a list of questions raised in correspondence, and to attend for cross-examination.

2. The factual background and procedural history is set out in our judgment of 6 March 2025 ([2025] CAT 16]) (the "6 March 2025 Judgment"). That judgment and this one should be read together. We use the same definitions as in the 6 March 2025 Judgment. We shall refer to the SoS using the pronouns they and their as there has been more than one Secretary of State during these proceedings.

B. THE SOS'S APPLICATION FOR THE COSTS OF GIVING DISCLOSURE

Further background

3. On 16 August 2021 the SoS applied to intervene in the proceedings under Rule 16 of the Competition Appeal Tribunal Rules 2015 ("the Tribunal Rules").

4. On 16 December 2021 the Tribunal ruled ([2021] CAT 38) that if the proceedings were certified the SoS ought to be permitted to intervene.

5. On 25 July 2022 the Tribunal made a collective proceedings order ("CPO"). In its judgment ([2022] CAT 35) the Tribunal indicated that the CR may wish to join the SoS as a party, in light of the Ds' point "that they were only implementing the Department [for Transport]'s policies" and directed the SoS to file a statement of intervention.

6. On 11 October 2022 the SoS filed a statement of intervention. They explained that public law powers have been conferred on the SoS to regulate and subsidise the railways sector, with the aim of maintaining an essential public service and balancing the interests of rail passengers (who must bear the direct cost of railway fares) and taxpayers (who bear the cost of subsidising railway services).

7. The SoS's intervention arose from the stated wish to protect the interests of passengers and taxpayers from the potential implications of these proceedings for fare-setting and more generally, including the precedential impact of any judgment in these proceedings. The SoS also explained that they have a role in protecting the interests of taxpayers against the prospect, to the extent that the Ds may be found liable, of a dispute as to whether and the extent to which the SoS may be obliged to fund any damages and/or costs award made as a result.

8. We shall return to the position and role of the SoS as an intervener in these proceedings below.

9. We turn next to the expert-led disclosure process ordered in this case. We covered some of this in the 6 March 2025 Judgment. We should however give some more of the history.

10. At the case management conference ("CMC") on 14 October 2022 the Tribunal recognised that the role of the SoS in the case is "unusual" and required "careful handling". In the course of that hearing, the Tribunal indicated a wish to establish a disclosure regime by which (i) the SoS could give voluntary disclosure; and thereafter (ii) "we can allow the experts to consider what more they need and move really seamlessly into a specific disclosure regime." The Tribunal described this as a light touch regime. It said that this second stage of the disclosure process would be directed by the experts.

11. At the hearing counsel for the SoS indicated that, as an intervener, the SoS had not envisaged being subjected to disclosure requests from the CR, and that they wished to avoid a situation where the Department for Transport ("DfT") had to run large-scale searches, which could be expensive and duplicative. The Tribunal stated that the involvement of the SoS in disclosure should be minimised but that the SoS should take a co-operative stance.

12. The Tribunal did not seal an order at the conclusion of that CMC. However, a draft order in circulation between the parties on 9 December 2022 recorded that, after Govia Thameslink Railway Limited ("GTR") had provided voluntary disclosure on 17 December 2023, the SoS had liberty to provide their voluntary disclosure in advance of the February 2023 CMC and that, thereafter, the parties' experts would request any additional material they needed beyond the voluntary disclosure to substantiate their analyses for the purposes of the Stage 1 trial and, if so, specify how that material should be produced (defined as "Expert-Led Requests").

13. On 14 March 2023 the SoS provided voluntary disclosure.

14. At a CMC held on 17 March 2023 the Tribunal discussed with the parties the implications of Dr Davis's appointment as the replacement expert. In the course of that hearing counsel for the CR stated that 2,700 documents had been voluntarily disclosed.

15. At a CMC on 12 October 2023 the Tribunal reiterated its desire for any further disclosure to be expert-led, and stated that it would afford every assistance to the CR and his expert to enable this to be done, with a view to the CR (supported by expert evidence from Dr Davis) then being able to put forward his full case.

16. The Tribunal stated that it would assume that any request for documents by Dr Davis would satisfy a "necessity" test, and it hoped that the Ds and the SoS would provide the documents on this basis. The Chair described Dr Davis as being "put in the driving seat for a period of time", and stated that the Tribunal was "handing that power and responsibility to him".

17. At that CMC, the Tribunal ruled that the CR must submit his case in full by 31 July 2024. The Tribunal also directed the experts for the CR, the Ds and the SoS to meet as and when appropriate "to explore the feasibility of providing the disclosure sought by the Class Representative in [Dr Davis's] Disclosure Request." Counsel for the SoS indicated that they were laying down a marker about the SoS's costs but sought no specific order or directions.

18. The Tribunal's directions gave permission to the SoS's factual witnesses to attend the proposed disclosure meetings. In the event attendance was by persons attending in their capacity as representatives of the SoS, rather than as factual witnesses. In addition, the SoS was eventually joined by Ms Harris, an external lawyer from Eversheds with extensive expertise in rail regulation. Ms Harris' involvement was initially proposed by the SoS in order to assist Dr Davis in understanding (among other things) the applicable regulatory framework in which GTR operated and help respond to his queries efficiently. This proposal was not accepted by the CR on the basis that Ms Harris is a solicitor, but Ms Harris' attendance was subsequently directed by the Tribunal at a case management hearing held on 7 March 2024.

19. Two senior representatives of the SoS participated in 39 expert-led disclosure meetings, typically of one to two hours each.

20. Dr Davis produced a "Disclosure Request" on 17 November 2023. It comprised over 100 requests and sub-requests for documents. It was 44-pages long and had over 4,000 pages of exhibits.

21. The evidence on behalf of the SoS explains how the DfT co-operated in the expert-led disclosure exercise:

    (1) The SoS carried out searches for documents as requested by Dr Davis. Documents that were potentially responsive to his requests were then reviewed for relevance and to check for issues of legal professional privilege.

(2) This process resulted in 15 rounds of document production between 23 January 2024 and 22 July 2024.

(3) The SoS also produced three "explainers", to set out for Dr Davis how the relevant regimes worked. In particular:

(a) In the first explainer, dated 29 January 2024, the SoS responded to Dr Davis's questions about how the DfT measures profitability, margin and return, and how it determines subsidies in relation to GTR or other rail franchises.

(b) In the second explainer, dated 13 February 2024, the SoS responded to questions about the DfT's decision-making process regarding service levels and/or fares generally, and in respect of GTR specifically, along with documents.

(c) In the third explainer, dated 24 April 2024, the SoS explained the extent to which franchise agreements and National Rail Contracts are amended over time, and the varying degrees of formality of such changes.

(4) The SoS issued two 'stock-take' letters, summarising the status of the requests which had been directed to the SoS up to that date and recording the progress made against each one:

(a) In the first stock-take letter, dated 15 March 2024, the SoS recorded that, by that date, Dr Davis had made 26 requests of the SoS, of which 21 were now closed. In response to those requests, the SoS had disclosed over 19,900 documents. These were summarised in a 20-page schedule. The largest request (by volume of documents it generated) was 10.c., which asked for documents relating to the competition for the Franchise, and DfT's assessment of the bids. The SoS recorded that 18,920 documents from the "Award Database" had been provided, alongside various other documents. They also recorded the following:

> "The Intervener notes that, prior to the disclosure of the documents from the "AWARD" database, it explained to Dr Davis the considerable volume of documents in this set, following which Dr Davis confirmed he would like them to be disclosed."

(b) In the second stock-take letter, dated 8 May 2024, the SoS recorded that, by that date, 32 requests had been made, of which 30 were now closed. That work had resulted in a further 172 documents being disclosed in four tranches.

22. As part of the expert-led requests process, the Tribunal convened short CMCs at which the Chair heard directly from the experts. These were informal hearings. During one, on 7 March 2024, Dr Davis stated he had received 265 documents from the DfT, and a set of 20,000 documents related to the award of the franchise. He said that he was expecting those documents to be useful and helpful for the exercise he was engaged in. In the course of that hearing, the Chair indicated concern that some of the CR's requests up to that date suffered from a lack of focus and were akin to "a sort of shotgun blunder-bus approach... which isn't helping you [i.e. the Ds and the SoS] help them." He said that he expected requests to be necessary and expressed concerns that the requests were not sufficiently specific. The Chair ultimately indicated that Dr Davis was in control of the process and that he expected that the requests would be complied with.

23. Similar points were made at further mini-CMCs on 18 March and 21 March 2024. At the latter hearing the Chair again emphasised that the governing issue was whether Dr Davis needed the documents.

24. In addition to the expert led requests, there were requests by the solicitors for the CR, Maitland Walker LLP ("MW").

25. Overall, the expert-led requests and the MW requests caused the SoS to conduct searches which resulted in disclosure of 19,984 documents. Dr Davis's report dated 31 July 2024, in which he was required to set out his entire case, cites 19

documents provided by the SoS following this expert-led regime and six more which formed part of the SoS's voluntary disclosure.

Summary of submissions for the parties

26. Counsel for the SoS (Mr Page addressing this aspect) submitted as follows.

27. First, the expert-led disclosure process resulted in very substantial costs being incurred to produce documents which were not necessary for the CR to set out his case.

28. As to this:

(1) The Tribunal clearly intended that disclosure should be carried out in a way that would save costs. It directed that there should not be a traditional or lawyer-led process whereby documents are disclosed by reference to the pleadings before the experts consider the material. Rather, the Tribunal said that it was placing Dr Davis at the forefront of the process so that he could directly inform and request from the Ds the information and materials he needed. This was connected with the order of 24 November 2023 directing the CR to submit his case in full by 31 July 2024.

(2) Dr Davis made a large volume of unfocused document requests. Significant costs were incurred in the resultant searches, privilege review exercises and provision of documents. It appeared that Dr Davis did not fully understand how the railway network is regulated and managed. The SoS representatives addressed these through narrative explanations provided in the course of the 39 meetings convened by Dr Davis, and drafting the three new "explainers".

(3) Despite the SoS telling Dr Davis that some of his requests would generate a large quantity of documents which would then need to be reviewed before being disclosed, the wide-ranging requests were maintained and a substantial number of documents were disclosed.

(4) Almost none of it was used in Dr Davis's report. Only 19 out of 19,984 documents obtained through the expert-led requests are cited in his report of 31 July 2024. The shortfall has arisen because most of the requests were not necessary and should not have been made.

(5) The result is that the SoS has incurred expenditure and disclosed documents on a far greater scale than they would have done but for Dr Davis's unnecessary requests. The CR should therefore bear the costs of this unnecessary work.

29. Second, as the SoS is participating in the claim as an intervener, they should have played a secondary role in the disclosure process. They are not a full party to the proceedings. As such, for the purposes of non-voluntary disclosure, Rule 63 of the Tribunal Rules applies either directly or by implication. This contains the test to be applied before a third-party is ordered to provide disclosure. The language reflects CPR 31.17. There is a two-limbed threshold test: (i) are the documents likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and (ii) is the disclosure "necessary in order to dispose fairly of the claim or to save costs". If both limbs are satisfied, the Tribunal then has a discretionary power to determine whether it should order disclosure against the third-party. The general rule under CPR 31.17 is that the third party's costs of giving disclosure will be paid by the applicant for the disclosure provided that the third party does not behave unreasonably in opposing the disclosure.

30. Alternatively, the SoS should be seen as being in position akin to a non-cause-of-action party against which a *Norwich Pharmacal* order has been made. The usual order in such cases is that the applicant has to pay the reasonable costs of the party required to provide the documents or information.

31. Third, the SoS properly engaged with the process in good faith and carried out searches as requested by Dr Davis. This engagement was in line with the Tribunal's expectation that it would support Dr Davis in his efforts, and would assume that documents requested met the 'necessity' threshold. To that end the SoS gave extensive disclosure, provided the explainers, and voluntarily adopted

a Scott Schedule approach in their stock-take letters to identify the progress being made against each of the requests.

32. Counsel for the CR submitted in summary as follows.

33. First, the expert-led disclosure process was instituted by the Tribunal. It has turned out to be challenging, and has probably led to an increase in costs. The Tribunal directed that expert-led disclosure should apply to all the issues in the case including factual ones. Strictly speaking, the SoS was not ordered to give disclosure but agreed to co-operate in the expert-led process.

34. Second, the facts about which documents exist or are in the control of Ds and the SoS were known to them and not the CR or his experts. The Ds and the SoS did not always respond to requests by saying that something else was available which might assist. This led to Dr Davis having to write to the Tribunal on 29 February 2024, saying that he had encountered problems in obtaining the disclosure he needed as quickly as desired. He explained that this was the first time he had been involved in expert-led disclosure and that he and his counterpart for the Ds (Mr Johnson of Oxera) were having to find their way.

35. Third, there were a number of specific problems in the delivery of data and documents. Dr Davis and his team only discovered, through their own research, that the Ds were using the DataHub system to collect and collate a large amount of relevant data. This was a system which the Ds' experts were apparently unaware of before Dr Davis's team brought it to their attention. There were also some delays in providing Dr Davis with the necessary access to a class of data known as the MOIRA data, which was controlled by a third party. The Ds also proposed that Dr Davis should access certain industry databases directly rather than via the Ds. This proved largely unfeasible due to licensing constraints.

36. Fourth, in the light of the problems arising in the expert-led disclosure process, the Tribunal Chair convened a number of 8.00 am informal hearings with the experts to discuss and seek to progress disclosure in March 2024. No order for costs was made at any of these hearings. At the hearings the Chair made

inquiries of the experts. The experts had to spend considerable time preparing for each of these meetings. This significantly increased costs.

37. Fifth, the contention that Dr Davis's requests were too wide ranging should be rejected. All of his requests were within the scope of his original Disclosure Request. It was not realistically possible for Dr Davis to be more specific in his initial requests; only the Ds and the SoS knew what data or documents might exist to answer a particular query. Dr Davis remains unclear about what more he could have done to ensure the disclosure process ran more smoothly, having attempted to engage with the Ds' experts and the SoS in a collaborative fashion.

38. Sixth, the SoS is wrong to criticise Dr Davis for citing only 19 of the documents they provided in disclosure in Davis 4. Dr Davis's evidence shows that 94.5% of documents disclosed by the SoS related to the Award Database, covering franchise bids during the tender process in 2013-14. These documents were disclosed in March 2024 in response to Dr Davis's request for documents that would allow him to consider the Ds' argument (raised in the Defence) that even if there was little competition after the franchise was awarded, there had been competition for the franchise. Having considered the documents, he concluded in Davis 4 that a detailed analysis of submissions by tender participants contained in the Award Database would not be required, not least because fare structures were not set during the competitive phase of the tender process.

39. Apart from the Award Database, Davis 4 cited documents provided by the SoS in response to three of the seven requests originally addressed to them, and six of the eleven requests originally addressed to both the Ds and the SoS or to the Ds only.

40. Seventh, the starting point or default position is that, as an intervener, the SoS is not liable for the other parties' costs nor is able to recover their own: see para 8.10 of the Tribunal's Guide to Proceedings 2015 (the "Guide"). There is no reason for the Tribunal to depart from that usual rule. The SoS is wrong to argue that their position in the expert-led disclosure process was more akin to that of a non-party from whom disclosure is ordered. The SoS is not to be seen as a non-party. The SoS plays a central role in the rail franchising scheme, wields

very wide-ranging public law powers in the sector, and potentially has a direct financial interest in the outcome of the proceedings. A non-party would not have been attending the weekly disclosure meetings led by the Chair in March 2024. The SoS specifically requested a legal representative be present at those meetings on their behalf and as such played a direct role in the disclosure process.

Analysis and conclusions

41. We start with the position and role of the SoS in these proceedings.

42. We do not consider that the SoS can properly be characterised as a mere third party provider of documents. Though an intervener and not a defendant in their own name, the SoS has a real and direct interest in the outcome of the proceedings. First, the SoS advances a position concerning the regulation of rail services which, as they put it, could have "precedential effect". The outcome could affect not only the services franchised to the Ds, but other franchises too. Second, the SoS accepts that they would potentially be liable for any award of damages or compensation ordered to be paid by the Ds.

43. Nor is the SoS's position like that of a *Norwich Pharmacal* respondent who has become mixed up in a wrong alleged to have been committed by a defendant.

44. For these reasons we do not think there can be any presumption or predisposition in favour of the SoS's costs of the disclosure process being paid by the CR by analogy with *Norwich Pharmacal* or orders under CPR 31.17.

45. The SoS agreed to co-operate in the expert-led disclosure process. This is easy to understand as it was likely to be in their interests to co-operate in the Tribunal's suggested processes. But we note that the Tribunal when directing expert-led disclosure did not order or indicate that the SoS would be treated as a third party.

46. We do not think that there is a proper evidential basis for concluding that the SoS should have their costs because of the conduct of Dr Davis. As to this, the

Tribunal considered that this was a case for expert-led disclosure. Dr Davis had not previously been involved in such a process and, as he accepts, he found it challenging. That was one of the reasons why the Chair considered it necessary to have a series of 8.00 am meetings at which he interrogated the experts. We accept the submission of the CR that the parties incurred substantial costs in preparing for and attending those hearings and the many meetings held by the parties' representatives to discuss the disclosure requests.

47. With the benefit of hindsight, it appears to us that, however well-intentioned, the expert-led process ordered in this case may well have led to an increase in the costs of the disclosure process. However we have been unable to conclude on the evidence before us that the CR was to blame for that. We do not think that much weight can be placed on the remark made by the Chair during one of the mini-CMCs about the use of a blunderbuss. The comment was made during an informal discussion and not advanced as representing a considered ruling or settled view. The Chair was looking for a practical way of completing the process of disclosure and was not making specific rulings about the admissibility or otherwise of particular requests. We note that the Chair was not asked to and did not make any decisions at that or any of the other hearings about the costs of the process.

48. The fact that only a handful of the SoS's documents were eventually referred to in Davis 4 does not lead to the conclusion that Dr Davis's requests were unreasonable in themselves. By far the greatest part of the SoS's disclosure by number was the Award Database. Dr Davis sought disclosure of the Award Database because the Ds had pleaded a defence of "competition for the market". In the event, having reviewed the documents, Dr Davis concluded that they had little relevance. We asked at the hearing whether the SoS or the Ds had explained during the disclosure process that the documents would probably have little relevance. The SoS did not show us any correspondence or other communication where this point was raised. Nor did the stocktake letters say that the requests were too broad (though one of them indicated that the Award Database would be extensive). We are unable to conclude that the request for these documents was unreasonable when made.

49. We are satisfied that the test set down by the Tribunal was one of necessity. The Tribunal deliberately gave considerable practical power to Dr Davis, but also emphasised a number of times that this was coupled with the need to act proportionately and only request necessary documents and information. We consider that the Tribunal required Dr Davis to focus on the information or data that was necessary for him to produce his report, and then empowered him to request and obtain this in a form that was most helpful to him (principally from GTR). However, we are not satisfied on the material before us that Dr Davis's requests for documents went beyond those he considered necessary for the production of his expert evidence. The Tribunal placed a responsibility on him only to seek documents he considered necessary and his evidence was that he sought faithfully to comply with that requirement. The SoS's argument that Dr Davis did not comply with the test essentially turned on the reference to the blunderbuss approach and the disparity between the number of documents disclosed and those referred to in Davis 4. We have addressed these points above.

50. For these reasons we are not satisfied on the material before us that we should make the order sought by the SoS.

51. On the other hand we do not conclude at this stage that the SoS should not be able to claim these costs eventually. The SoS's position in the proceedings is an unusual one, falling somewhere between that of a full party and that of a mere intervener. At the hearing before us counsel for the SoS laid down a marker that the SoS may seek their costs of the proceedings at their conclusion. The SoS may be able on a detailed assessment to make good their contention (through further evidence or a more detailed examination of the available material than happened before us) that Dr Davis's disclosure requests were unnecessary and/or unreasonable. We consider that the question whether the CR should pay the SoS's costs of the disclosure exercise should be reserved until the outcome at the trial of the proceedings.

C. COSTS THROWN AWAY BY THE CHANGE OF EXPERT

52. The Ds and the SoS seek an order for the costs thrown away by reason of the change of the CR's economics expert. The Ds put their costs thrown away at £553,201. The SoS's claimed costs are far more modest.

Further background

53. We have set out the history in the 6 March 2025 Judgment.

54. To recapitulate the main points: when the CR's claim was filed in June 2021, it was supported by two reports of Mr Harvey. Harvey 1 addressed evidence of price differentials between Single-Brand and Multi-Brand fares. Harvey 2 set out his methodology for calculating class-wide damages on the basis of an estimated price of fares in the CR's counterfactual. By the time of the certification hearing, two further expert reports had been adduced by the CR, Harvey 3 (containing his methodology for assessing market definition and dominance, and clarifying his methodology for the assessment of aggregate damages) and Harvey 4 (which largely concerned what has now become the loss of flexibility claim).

55. After the certification of the claim Mr Harvey withdrew from acting as the CR's expert. On 1 December 2022 the CR notified the Tribunal and the Ds that Mr Harvey had withdrawn from the proceedings and that the CR was seeking an alternative expert.

56. Dr Davis provided his Davis 1 on 2 February 2023, largely adopting Mr Harvey's methodology. It was however caveated and stated to be only his provisional opinion.

57. By its judgment following the CMC on 17 March 2023 ([2023] CAT 19) (the "March 2023 judgment"), the Tribunal ordered the CR to produce a report by Dr Davis setting out a complete "blueprint to trial" by 19 May 2023.

58. On 19 May 2023 the CR served Davis 2. Dr Davis explained in it that he had had not reviewed all the disclosure.

59. In July 2023 the Ds made a number of applications in response to the methodology articulated in Davis 2, to be heard at a CMC listed for 12 October 2023. The CR then filed Davis 3 on 8 September 2023 in response to the applications made by the Ds. There was no leave of the Tribunal to serve it.

60. On 23 November 2023 the Tribunal ordered the CR fully to articulate his case by 31 July 2024, which led to the filing of Davis 4.

Submissions of the parties

61. The Ds say that the CR's change of expert led in the first place to the vacation of the trial listed for Michaelmas 2023. They say it has also led to substantially increased costs. This is reflected in the CR's own costs budgets.

62. The Ds contend that as a result of the change of expert the Ds have incurred costs which should not have arisen in the normal course of this litigation, or which are duplicative and for which they should not be liable. In particular, the Ds have incurred costs: (a) reviewing Harvey 1 to 4, which no longer form part of the proceedings; (b) in liaising with the CR in relation to the loss of his expert and the case management issues arising as a result of this and the subsequent substitution of a new expert, and in addressing those issues ahead of and at the CMC in March 2023; and (c) reviewing and responding to Davis 1, which was ultimately insufficient for the collective proceedings to proceed without it being amended.

63. Counsel for the Ds submitted in summary as follows.

64. First, the costs incurred by the Ds have effectively been thrown away as a result of the CR's change of expert. The CR should bear his own costs, and be liable for the Ds' costs, caused or occasioned by the replacement of Mr Harvey.

65. Second, the CR's contention that he should not pay the Ds' costs of reviewing Harvey 1 to 4 because those reports were necessary for obtaining certification and the Ds have not sought the revocation of the CPO is not correct:

(1) these proceedings are no longer based upon Mr Harvey's proposed methodology. They are based on Dr Davis's reports. The costs of reviewing the multiple reports have been wasted; and

(2) though Dr Davis initially adopted parts of Mr Harvey's reasoning, Davis 1 was caveated. In the event he served Davis 2, which was over 250 pages, and the 82-page Davis 3. This has itself been overtaken by Davis 4. Dr Davis did not simply adopt the earlier reports of Mr Harvey. The work of reviewing them has been wasted.

66. Third, as to the CR's suggestion that the Ds' experts derived a benefit from reading Mr Harvey's reports in that they learned about the issues in the case, Mr Harvey's reports have no continuing relevance in the claim. If anything, the unnecessary duplication has only added to the confusion and increased costs.

67. Fourth, it does not matter whether it was the CR's fault that Mr Harvey withdrew. It was not the fault of the Ds and they should not be required to bear the costs of his withdrawal.

68. Fifth, the CR's suggestion that certain costs relating to Mr Harvey's expert reports have been the subject of costs orders already and those costs orders should not be re-opened is misguided. The pre-CPO costs order was made by the Tribunal when it anticipated that Mr Harvey's methodology would remain the relevant one for the purposes of these proceedings.

69. Sixth, the Ds also seek their costs incurred in reviewing Davis 3. It was filed without the permission of the Tribunal, shortly before the October 2023 CMC. The Tribunal wrote to the parties in advance of the October 2023 CMC to "… make clear to the parties…" that it would "… take into account that Davis 3 has been served without permission…" and that the Tribunal was "…concerned that Davis 3 has been submitted late in the day, and without particular explanation

as to why Davis 3 is necessary…". In the event the CR's case remained unclear even after the filing of Davis 3 and the Tribunal therefore directed the CR to present his complete case by 31 July 2024, which led to the preparation and submission of Davis 4. Davis 3 was never formally admitted and now has no purpose in the proceedings, having been superseded by Davis 4. The Ds invite the Tribunal to order that the CR pay the Ds' costs of reviewing Davis 3, and that the CR's costs of producing Davis 3 be borne by the CR in any event.

70. Seventh, the Ds seek their costs of reviewing the table of corrections and errata of Davis 4 served by Dr Davis ("the table"). The contents of the table are not in fact mere corrections or errata. They are substantive points. The Ds contended that the inclusion of substantive points in the table was a way of getting around the 31 July deadline.

71. Eighth, though the hourly rates claimed in the costs schedule are above the guideline hourly rates, this is a highly complex and substantial case and the rates being charged are reasonable.

72. As an alternative to a summary assessment the Ds seek an order for detailed assessment and an interim payment on account.

73. The SoS essentially adopted the position of the Ds and advanced no separate arguments.

74. Counsel for the CR submitted in summary as follows.

75. First, apart from pleadings, neither the Ds nor the SoS has served any documents in this case. On the contrary, the flow of expert reports has all been one way. If the Ds succeed, they will in principle be entitled to their costs of the action. If they lose, issues may arise after judgment or at the stage of assessment as to expert costs. The case advanced has not changed save in relatively minor respects. Where amendments to the case have been made the usual rule on costs applies and this will compensate the Ds.

76. Second, the costs of the certification process were dealt with by the Tribunal in November 2022. The CR was awarded most of his costs. If the Ds had served reports in reliance on Harvey's expert reports, it would be understandable that they should complain that costs had been wasted as a result of the change of experts. But they did not. The question is whether there is an identifiable body of costs which have been reasonably incurred by duplication of work as a result of the change of expert.

77. Third, at the October 2023 CMC the Tribunal declined to make an order for the change-over costs "in the context of an on-going process" and uncertainty as to the extent to which Mr Harvey's work would be usable in the future. The process remains ongoing and there is no reason for the Tribunal now to take a different approach.

78. Fourth, it is unclear whether any costs have been duplicated and if so which. It is particularly difficult to see or assess this in the continuing absence of any report from the Ds. It is not possible or practicable at this stage to assess what if any costs have been wasted through duplication. In order to make an interim order the Tribunal would need to identify what costs are likely to be payable upon detailed assessment. The Tribunal does not have the material to undertake this exercise now.

79. Fifth, there is no good reason for the Tribunal to deal with these issues at the present stage of proceedings. The change of expert occurred over two years ago. Despite the series of hearings and CMCs which have taken place after the change of expert, no costs order has been made to date in respect thereof. It would be better to deal with the matter after judgment.

80. Sixth, at a more detailed level:

    (1) Davis 1 was necessary because the Ds asked the CR to confirm that the new expert adopted each of Harvey 1 to 3 in their entirety. Davis 1 was produced in response to those requests. It is a relatively short report. There was no significant recasting of the position as suggested by the Ds.

(2) Davis 3 was produced in response to objections to Davis 2 raised by the Ds in their July 2023 applications. These were wide-ranging. They were raised in support of an application to refuse permission to the CR to rely on the parts of Davis 2 objected to. The Ds' applications included one for a stay pending the provision of a proper "blueprint" to trial – effectively, the Ds were seeking a further certification hearing. In response to that wholesale challenge to the proceedings, Davis 3 was reasonably served to address this. In the event the Ds did not persist in their applications. No order was made for the costs of the hearing.

(3) Davis 3 has not been superseded. It flushed out some important points, including about the right source material for assessing demand elasticities relevant to the assessment of market definition and market power. Davis 4 was served because the Tribunal required a comprehensive statement of the CR's case.

(4) The table contains errata and corrections to Davis 4. There is no basis for a separate order for costs in respect of it.

81. Seventh, if the Tribunal were minded to grant the Ds their costs or an interim payment, the Ds' costs schedules fail to provide the necessary detail. In particular there is no breakdown of Oxera's fees, making it impossible to assess whether they are reasonable or proportionate. No figures have been given for the hours worked by counsel. There were also detailed points on the hourly rates contained in the schedules.

Analysis and conclusions

82. We are satisfied that the change in the CR's economics expert has resulted in wasted costs for the Ds and the SoS. The Ds have had to review multiple expert reports. The reports of Mr Harvey have been superseded for all practical purposes by those of Dr Davis. Moreover, the way in which the change of expert took place led to Dr Davis having to produce more reports than would otherwise have been the case. Davis 1 was essentially temporary and was superseded by

Davis 2. The Ds' lawyers and their experts had to review and consider all of these reports.

83. We are satisfied that in principle it is right that the CR should pay the costs thrown away by the Ds and the SoS by reason of the change of expert.

84. However we do not consider that the material available to the Tribunal enables us to carry out a summary assessment at this stage. There are several reasons for this.

85. First, it is not at all easy on the current information to assess whether the time spent on particular reports or stages of the case has been wasted. In cases like this there is a continuous process of education and it is reasonable to suppose that some of the work carried out on the earlier reports will have allowed the lawyers and experts to understand later ones more quickly than would have been the case had they made a standing start. We think that the Tribunal would be far better placed after a trial to determine the extent to which the later reports rendered the contents of the earlier ones redundant or useless. The information currently before us about the suggested duplicated work is limited and does not allow us to reach a securely reasoned view about the extent of any duplication or the amount of the costs arising from it. We do not think that we can safely reach a view, for instance, that the work undertaken on specific reports has been wasted (see the first point above).

86. Second, we also do not think that the costs schedules are sufficiently informative or detailed to allow us to conduct a summary assessment, given the amounts being claimed. There is no detail at all about the costs of Oxera, which are substantial. The schedules contain overall figures for counsel but no breakdown of the work undertaken. There is also limited information about the work undertaken by the solicitors.

87. For these reasons the costs thrown away will have to be the subject of a detailed assessment.

88. We are prepared to order an interim payment on account of these costs. The question is whether there is an irreducible minimum amount which the Tribunal is confident will be payable for these costs on a detailed assessment. We are sufficiently confident on the basis of the evidence before us that the Ds' costs thrown away will be at least £100,000 and we will make an interim payment of this amount.

89. The SoS also seeks an order regarding any of the CR's costs caused by the change of expert. The CR has changed expert part way through these proceedings, after Mr Harvey filed four reports. It notified the Tribunal of this position on 1 December 2022. The SoS's costs said to have been incurred are modest. We do not think it is proportionate to make any separate order in respect of them.

D. DIRECTIONS FOR A PRELIMINARY TRIAL

90. As explained in the 6 March 2025 Judgment, there has already been an order for split trials of liability and quantum.

91. At the CMC held on 6 and 7 February 2025 we raised with the parties the possibility of a refinement to this. We suggested that the parties should consider having a first trial about the issues (putting it broadly) whether the differential pricing approach of the Ds was in breach of the relevant regulatory regime or was otherwise protected by reason of the regulatory position. The reason for this proposal was that the CR had accepted (and confirmed at the February 2025 CMC) that showing a breach of the regulatory regime was a necessary precondition of his claim succeeding. The regulatory issues were therefore potentially determinative. We observed that the determination of the regulatory breach issues would not require the Tribunal to hear any of the economic expert evidence. It appeared to us that the hearing should be capable of being confined to a short hearing with comparatively limited evidence.

92. In what follows we shall refer to the suggested preliminary trial as "trial 1A".

93. After the February CMC, the parties and the SoS indicated that they agreed with the Tribunal's proposal for a trial 1A. They submitted that the suggested trial would not require extensive evidence and would be self-contained. They asked the Tribunal to order such a trial (subject to a point about funding addressed in the next paragraph).

94. Counsel for the Ds did however submit that it appeared that the CR did not have sufficient committed funding even to take the case as far as trial 1A. The Ds said that the Tribunal should not order a trial where there is insufficient funding. Counsel for the CR stated on instructions that there was sufficient committed funding to take the case to trial 1A. We accept that assurance (although as we explain below, the CR should provide further information about the funding in correspondence). We do not therefore think funding issues are a roadblock.

95. We are satisfied that it is appropriate to direct trial 1A, for the following reasons:

(1) Trial 1A would be far shorter than a full trial on liability. The evidence would be confined. It would not require the Tribunal to hear the economic expert evidence, which (even taking Dr Davis's evidence alone) will be extensive and complex.

(2) The costs of the parties of trial 1A will be substantially lower than a full trial on liability.

(3) The result of trial 1A will either determine the proceedings (if the Ds succeed) or be likely to facilitate a settlement of the proceedings (if the CR succeeds).

(4) The issues to be determined at trial 1A will have to be decided in any event.

(5) This is not a case where the issues to be decided at trial 1A are hard to disentangle from the other issues in the case.

(6) The interests of other litigants before this Tribunal will be advanced because the result of trial 1A will either bring the case to an end or facilitate settlement.

96. In short, this case has been on foot for many years. It is in danger of becoming one of the sprawling cases described by the Court of Appeal in *MOL (Europe Africa) Ltd v Mark McLaren Class Representative Limited* [2022] EWCA Civ 1701 at [46]. We consider that requiring the parties to have a trial 1A is a proportionate way of managing the proceedings in the interests of the parties and other litigants.

97. We indicated to the parties at the hearing that they should seek to agree a list of the issues to be decided at trial 1A. These will need to be formulated with care. We expect the parties to produce an agreed list. We discussed directions with the parties at the hearing and expect them to agree a timetable. We will resolve any points of dispute on the papers.

E. THE DS' APPLICATION FOR THE CR TO PROVIDE A WITNESS STATEMENT

98. The Ds applied by letter from its solicitors, Freshfields, dated 20 March 2025 for an order that the CR should provide a witness statement responding to a series of questions in the Ds' letter of 13 March 2025, and permission to cross-examine the CR on the matters set out in that letter. The Ds anticipated that this cross-examination would take about one day.

99. The letter of 13 March 2025 had a 7-page Annex headed "Questions to be answered by the CR". This contained 32 questions, many of them with sub-paragraphs.

100. Many of the questions relate to earlier stages in the proceedings. We are also satisfied that some of them would require the disclosure of privileged communications, including for the CR to state whether he had made any decisions which had gone against the advice of his solicitors and, if so, which decisions.

101. The solicitors for the CR have already given such answers as the CR considers appropriate to the Ds' questions in correspondence. They have also pointed out that some of the questions stray into privileged grounds.

102. The Ds were not satisfied with these answers and seek an order.

The parties' submissions

103. Counsel for the Ds submitted in outline as follows:

104. First, the Tribunal has a continuing responsibility to manage collective proceedings. This is particularly so in collective actions. This is shown by rule 78 of the Tribunal Rules and para 6.36 of the Guide.

105. In *McLaren* the Court of Appeal said:

> "45. The duty on the CAT as gatekeeper in collective proceedings is proactive as well as reactive. Once the CAT has decided to make a CPO that is not the end of the gatekeeper role. A CPO "… is neither the beginning or the end of measures whereby the CAT may case manage collective proceedings" (*Merricks* (ibid) paragraph [28]). A class representative might not have to overcome a very high hurdle to obtain a CPO but the CAT should nonetheless ensure that from the certification stage the case proceeds efficiently to trial. This role might well entail the CAT imposing substantial case management burdens on the parties at an early stage.
>
> 46. In *Gutmann* the Court of Appeal, when seeking to pull the threads together from the case law, endorsed the proactive gatekeeper role of the CAT (e.g. ibid paragraphs [60] and [61]). In *Merricks*, endorsing Canadian authority, the Supreme Court emphasised the strong public interest element in collective actions (ibid paragraph [37]); see also the summary in *Le Patourel* (ibid paragraph [29]). There are clearly established strong public interest benefits in the CAT performing an active elucidatory role which include: ensuring that large scale litigation is run efficiently; ensuring that defendants are not confronted with baseless claims; and ensuring that potentially sprawling cases do not absorb an unfair amount of judicial resource."

106. Second, there are a number of areas in which the CR has mismanaged the proceedings. These included:

(1) The failure of the CR to seek to convene a CMC as soon as possible after the change in his expert at the end of 2022. The Tribunal criticised the CR for failing to grasp the nettle at that stage.

(2) The late application to amend that was made before the CPO was made – which led to the Tribunal refusing to certify that part of the case.

(3) The unnecessary number of expert reports. These are listed earlier.

(4) The CR's expert's failure to put his whole case forward by 31 July 2024, which breached the order of the Tribunal.

(5) The page numbering in the bundles for this hearing did not comply with the rules, namely Practice Direction 1/2025.

(6) The failure by the CR to apply in time for the loss of flexibility amendments, or to advance his full case in relation to these by 31 July 2024 as previously ordered by the Tribunal; coupled with a failure to explain why the application for permission to make the amendments had been made late.

(7) The CR's expert was criticised by the former Chair of the Tribunal at the mini-CMC in March 2024 for taking a blunderbuss approach to disclosure.

(8) The failure of the CR, despite numerous vague promises, to set up a consultative panel to assist him in making decisions about the case.

107. Third, there has been a huge increase in the budgeted costs. The CR's original costs budget was for £10.44m. The most recent one, served in February 2025, is for £20m. The most substantial increase has been the costs of experts which have gone up from £875,000 to more than £7.6m (and that does not include the costs of all of the experts because some have been included in other line items). This increase in the costs itself suggests that the case is not being properly managed by the CR.

108. Fourth, and in addition, under the litigation funding agreement between the CR and his funder ("the LFA") the amount prima facie recoverable by the funder is a multiple of the amount committed; hence the potential amount of damages

prima facie available for members of the class is diminished not just absolutely by the increasing costs, but by the funder's multiplied prima facie share. On the Ds' calculations the prima facie entitlement of the funder would be between £72m and £102m. Counsel for the Ds submitted the CR himself should have brought this increasing prima facie share to the attention of the Tribunal.

109. This point has to be seen in the context of some of the damages calculations advanced by Dr Davis in the table of corrections to his fourth report, which put the lower amount claimed at about £40m. Though the range goes up to £333m, taking the bottom end of the range at £40m, the potential returns for the funder would substantially exceed that.

110. Fifth, it appears that the CR is running out of committed funding to pursue the case. It appears that there is only about £1.4m left between the amount spent to date and the amounts committed by the funder under the LFA. The CR has not explained how he will fund the continuing proceedings.

111. Sixth, as to the powers of the Tribunal to require a witness statement, in *Christine Riefa Class Representative Limited v Apple Inc* [2025] CAT 5, which concerned the certification stage, the Tribunal required the proposed class representative, who had already served one witness statement, to provide another statement addressing the Tribunal's concerns and allowed her cross-examination. The Tribunal also explained at [91] that its concerns were cumulative and that any one of them alone may not have been fatal to certification. The Tribunal refused to certify the collective proceedings. The Tribunal should follow that case by analogy and order the CR here to produce a witness statement and attend for cross-examination.

112. Seventh, at the mini-CMC on 7 March 2024, the former Chair of the Tribunal said that there was a high chance that the case would be decertified, because the case would not be ready. He was right to do so. That was a fair warning to the CR, who has not taken it on board.

113. Eighth, it appeared that the CR had been less involved in the case than he is required to carry out his functions as a class representative. He did not attend

the February 2025 CMC. The latest budget suggested a lower level of participation than originally budgeted (from 500 hours to 290 hours).

114. Counsel for the CR opposed the application. In summary he submitted as follows.

115. First, the Ds' complaints were exaggerated. On analysis they did not amount to very much, and did not support the accusation that there had been serious mismanagement of the proceedings by the CR.

116. Second, the law on such matters as the involvement of consultative panels and the rights of funders to share in the proceeds of collective proceedings is in a state of development, and things have moved on somewhat since the original CPO in this case. In the present case the CR has taken steps to constitute a consultative panel (see further below).

117. Third, it is open to the Ds to bring an application for decertification if they believe that it is appropriate to do so. But the anticipatory relief being sought on this application is unjustified and is likely simply to increase costs, without any assurance that the Ds would even seek decertification. Applications of this kind may be used as tactical forensic instruments.

118. Fourth, as to the specific complaints:

(1) The comments in the March 2023 judgment have to be read as a whole. As well as saying that the CR should have sought an earlier CMC to discuss the change of experts, the Chair said that the law was developing and that he did not wish to be too critical of the CR or his solicitors. He said that the position should be clear for the future.

(2) The Chair's comments in the March 2024 disclosure hearing were to the effect that there might be decertification if the case was not ready by July 2024. The comments were informal and there were also references to "defendant inertia". Reliance on this kind of comment is redolent of unproductive satellite litigation.

(3) The CR cannot be blamed for the change of his expert, which came as a shock to him. This is what led to the adjournment of the trial. This is not an example of mismanagement.

(4) As to the number of expert reports, four were produced by Mr Harvey and the change of expert meant that they were substantially replaced. There have been good reasons for the four reports from Dr Davis. The latest of these contains a consolidation of his work and contains the CR's full positive case for trial.

(5) As to the reference to the width of some of Dr Davis's requests for disclosure, there were some criticisms of both parties. But in any case the Tribunal had specifically required an expert-led disclosure process, and explained that it was placing responsibility for it with Dr Davis. If he made mistakes, this is not a proper basis for criticising the management of the case by the CR.

119. Fifth, the apparent discrepancy between the figures in the February budget and the costs schedule on the basis of which the Tribunal ordered an interim payment in respect of some of the failed opposition to the CPO ignored the full history. A revised costs schedule was placed before the Tribunal on 12 September 2022 which reduced the costs claimed from c.£715,000 to £553,000. Moreover there are bound to be differences between budgets and costs schedules. The Ds' point about the dates covered by various parts of the costs schedules was one of detail, which could not justify the kinds of orders sought on this application.

120. Sixth, as to the Ds' reliance about overall increase in the costs, it is accepted that the budgets have increased substantially. There was an intermediate budget in October 2023 for c.£15.4m. Hence the CR has provided three budgets. The increase in budgeted costs is largely due to an increase in the costs of the CR's experts. This has partly resulted from the change of expert. The Tribunal also directed Dr Davis to put the whole of the CR's expert case in his fourth report, which was an expensive exercise. The expert-led disclosure process turned out to be very expensive and required much extra work by the experts. Whether the

Tribunal would, with hindsight, have stipulated that procedure for disclosure is now debatable. But it happened and the CR's expert had to go along with it. There is no evidence of mismanagement of the case.

121. Seventh, the CR has sufficient resources to fund the proposed trial 1A. If further information is required about such funding the CR is prepared to provide it.

122. Eighth, as to the point about the potential share of the funder to any proceeds of the litigation, the CR's principal and secondary cases for damages are between c.£183m and £333m. Though Dr Davis explains that on one scenario the claim would be £40m, that is not the principal or secondary way the claim is advanced. In any event, it is common ground that the funder's actual entitlement is under the control of the Tribunal.

123. Ninth, the CR has been working on the creation of a consultative panel for some time and has budgeted for the costs of the panel. Counsel for the CR said on instructions that his client committed to constitute a consultative panel within three weeks of the hearing.

124. Tenth, this application was brought very late (a few days before the hearing). The letter by which it was made referred to information from a "third party" (a disgruntled former paralegal of the CR's solicitors' firm). This was not a satisfactory way of making an application involving such serious allegations against the CR.

125. Eleventh, the CR was participating in the process. He attended the hearing before us remotely. The reduction in his budgeted fees reflects his decision not to claim at the rates he initially intended, not a falling off of his involvement.

Analysis and conclusions

126. We start with the power to make the orders sought. We agree with the Ds that the Tribunal has such power. This arises from its case management powers. We also agree that para 6.36 of the Guide and the case law shows that the Tribunal

will continue to manage collective proceedings actively and have regard to the CPO requirements throughout the proceedings.

127. We did not find *Riefa* of assistance on the present facts. In that case the Tribunal had serious concerns as to whether Prof. Riefa understood the litigation funding agreement and ATE insurance, and whether she had demonstrated a properly independent stance. The hearing was an application for certification and the Tribunal had to be satisfied that Prof. Riefa was a suitable class representative. It was in that context that the Tribunal ordered a witness statement and cross-examination. The facts and circumstances of the present case are different. A CPO has been made and the proceedings have continued on that basis, with procedural steps being taken.

128. The Tribunal of course has the power to decertify but it will only do so on proper grounds. The present question is whether, in its case management functions, the Tribunal should make the order, where no application to decertify the proceedings has been made and where the Tribunal has not of its own motion raised a potential decertification.

129. In approaching this question we bear in mind the importance of avoiding a proliferation of satellite litigation and of focusing on the resolution of the real disputes between the parties. We also agree with counsel for the CR that there is a danger of applications of this kind being used as a forensic tactic.

130. We start by reminding ourselves of the nature of the application. The Ds apply for the CR to answer 32 detailed questions (more than that once sub-paragraphs are counted). A large number are concerned with a trawl through of the history of the proceedings. Some would involve the disclosure of communications covered by legal professional privilege. The solicitors for the CR have already given their responses in correspondence. For the CR to produce a witness statement would put him and his lawyers to substantial expense and time. More costs would be spent if the CR was then to be cross-examined.

131. Some of the concerns relied on by the Defendants go back several years. One example (the late application to amend) even pre-dated the CPO itself. Another

is the failure of the CR proactively to convene a CMC to address the change of expert which concerns events in late 2022. We accept that the CR was criticised at the hearing, but we would not of our own motion have considered that these historical complaints were a ground for decertification (or for requiring the CR to produce a witness statement).

132. The Ds' submissions about the overstatement of the interim costs order made following the CPO appear to us to have been based on a mistaken review of the history. Counsel for the Ds initially argued that there was a discrepancy in counsel's fees in the order of £100,000. It turned out that a revised schedule had been given to the Tribunal before the relevant costs order was made and that the difference was closer to £26,000. There were other detailed complaints about the costs schedules, including as to the periods covered by them. Again these did not persuade us that there has been serious mismanagement of the case such as would have led us to consider decertification of our own motion. If the Ds consider that this issue (or the others identified) is sufficiently serious they can apply for decertification of the proceedings and we will consider the application.

133. As to the comment of the former Chair at the hearing of 7 March 2024, it is important not to give passing remarks of this kind made in the course of hearings (particularly informal hearings) the status of considered rulings or directions. There has been a tendency to do just that in this case, and we would discourage it. In any case the Chair was linking the prospects of decertification to the chances of the CR failing to present a comprehensive case by the 31 July 2024 deadline. The CR and his team served their documents by then. We have addressed the consequences of the failure to cover the elements of the case for which they sought permission to amend in the 6 March 2025 Judgment. The CR lost the application for permission to amend and had to pay the costs. But the unamended case was substantially presented by the deadline.

134. As to the related contention that the CR did not put forward his own case in full by 31 July 2024, the Tribunal ruled in the amendments application made in February 2025 that the CR had not advanced his full case in relation to the flexibility claim amendments and that this was one of the reasons for refusing permission to amend to introduce these claims. That ruling did not affect the

core claim that members of the certified class had overpaid for Any-Brand or Dual-Brand tickets. The CR's failure to advance the case he sought to raise by way of amendment is not a basis on which we would consider decertifying the proceedings of our motion. The same applies to the failure to explain the lateness of the amendments.

135. As to the lack of a consultative panel, we agree with the CR that the principles concerning this practice are developing in the case law. It is becoming more common to require such a panel as a pre-condition of making a collective proceedings order than was the case when the CPO was made in these proceedings. We see no reason to doubt the assurance given during the hearing that a consultative panel will be constituted shortly. We agree with counsel for the Ds that having a consultative panel is often helpful as its members can be expected to assist the CR in discussing important steps in the case and to advise on the charges of solicitors and experts. We consider the assurances given by the CR that the finalisation of a panel is imminent to be a positive step in these proceedings. We would have expected the Ds to welcome it. They submitted instead that it was far too late and they continued to rely on it in support of their application.

136. As to the fact that there have been numerous expert reports, some of this is explained by the change of expert, for which the CR was not to blame (albeit there was a failure to bring the matter to the attention of the Tribunal as soon as possible). This has led to a proliferation of costs – a point we have addressed earlier. There are certainly some criticisms that may be made of the large number of reports. It is arguable that some of Dr Davis's reports could have been avoided. But this does not lead us to think that there has been serious mismanagement such as to have led us of our own motion to consider decertifying the proceedings. Again if the Ds believe that this and other issues are sufficiently serious they can apply for decertification.

137. As to reliance on the non-compliant page numbering in the hearing bundles, while irritating this is not the kind of point that could possibly have led us to consider decertification of our own motion.

138. As to the submission that funding is about to run out, counsel for the CR confirmed on instructions that the CR has the funding to take the case as far as trial 1A. If the Ds wish to explore that further in correspondence they may do so. However we see no reason to doubt the confirmation given by the CR on instructions. It also appears to us that the outcome of the preliminary trial is likely to be material to funding whatever the outcome. If the CR fails, the case will (subject to possible appeals) be at an end. On the other hand, a successful outcome for the CR would be likely to influence the decision of the existing or alternative funders about whether to invest further amounts. Of course if the CR were, at that stage, to be unable to fund further proceedings, even if successful, that would be highly material, but we do not think that prospective concerns of that kind are sufficient to justify the order now being sought by the Ds.

139. As for the overall amount of the costs and the prima facie increasing proportionate share of the funder, we have noted the concerns raised by the Ds. It is perhaps important to bear in mind that the prima facie entitlement of the funder is just that, and that the funder's actual share of any settlement or damages award will be in the discretion of the Tribunal. The principles concerning that issue are developing. We do not consider that the fact that the CR has not itself raised these issues with the Tribunal amounts to serious mismanagement such as to lead us to consider decertification of our own motion. Again it is open to the Ds to seek decertification on this ground (and the others) if they consider it is right to do so.

140. The complaint about the late application to amend made before the CPO is now historical and, indeed, was something the Tribunal took into account even before deciding whether to certify the proceedings. It is not a basis on which we would have considered decertification of our own motion.

141. We also give weight to the Ds' argument that we should consider the CR's conduct in the round and not item by item. We have done that and reached the overall conclusions that the CR's conduct does not appear us to amount to the kind of mismanagement as would have led us to consider decertification of our own motion.

142. In our judgment, if the Ds wish to apply for an order decertifying the proceedings they should do so. They have threatened to do so a number of times. They have corresponded about their concerns. We do not however consider that we should require the CR to produce a witness statement before any such application has been issued requiring him to answer the Ds' chosen questions. That would serve to increase the costs and the burden on the parties and the Tribunal. Part of the case management function of the Tribunal identified in the *McLaren* case is to avoid unnecessary time and costs being wasted on satellite litigation rather than on the proper adjudication of the proceedings.

143. Counsel for the Ds submitted that the Tribunal has a responsibility to ensure that collective proceedings are carefully case managed, as they are potentially burdensome and capable of getting out of hand. We agree. Indeed it was at the prompting of the Tribunal itself at the CMC in February 2025 that the parties started to consider what has now become trial 1A. The Tribunal has now ordered such a trial to be fixed. In proposing the preliminary trial on those issues the Tribunal was concerned to seek to find a cost-effective and efficient approach to the resolution of the real disputes between the parties. The Tribunal has expressed its concern about the length of time these proceedings have taken and the need to expedite the adjudication of the real issues.

144. In short, we have considered all of the Ds' complaints. The Tribunal has a duty of active case management. But this has to be exercised with a view to the governing principles specified in Rule 4 of the Tribunal Rules, which are the same as the overriding objective in Part 1 of the CPR. We are not persuaded that we should consider decertification of our own motion or that we should require the CR to answer questions of the Ds' choosing in a witness statement or to attend for cross-examination. We also take account of the assurance given by the CR to constitute an advisory panel which we regard as a positive step. We do not think that the additional costs and time of the CR and the Tribunal that would be incurred were we to accede to the Ds' application amount to sensible case management. We do however consider that the CR should proactively keep the other parties and the Tribunal informed about any further significant changes in the budget. We also think that the CR should provide further information, as

offered by his counsel, about the budgeting for the trial of the preliminary issues. This should be in solicitors' correspondence.

F. DISPOSITION

145. We reach the following conclusions:

(1) We shall not order the CR to pay the SoS's costs of the disclosure process, but these costs shall remain at large between the parties.

(2) We order the CR to pay the costs of the Ds and the SoS thrown away by the change of economics expert, such costs to be subject to a detailed assessment, with an interim payment in favour of the Ds of £100,000, payable within 14 days of the order giving effect to this judgment.

(3) We direct that there shall be a trial of the issue whether the Ds were in breach of the relevant regulatory regime and related issues. The issues are to be set out in a list to be agreed by the parties or settled by the Tribunal. We shall also give directions for that preliminary trial.

(4) We refuse the Ds' application that the CR provide a witness statement answering the questions raised in the Ds' solicitors' letter of 13 March 2025.

146. This Judgment is unanimous.

The Honourable Mr Justice Miles Chair	Eamonn Doran	Professor Anthony Neuberger

Charles Dhanowa, CBE, KC (Hon)
Registrar

Date: 1 May 2025