**IN THE COMPETITION APPEAL TRIBUNAL**

Case No.: 1404/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

26th – 27th March 2025

Before:
The Honourable Mr Justice Miles
Eamonn Doran
Anthony Neuberger
(Sitting as a Tribunal in England and Wales)

BETWEEN:

**Class Representative**

# David Courtney Boyle

v

**Defendants**

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

**Intervener**

# Secretary of State for Transport

## A P P E A R AN C E S

**Nicholas Saunders KC, David Went & David Illingworth** (Instructed by Maitland Walker) On behalf of David Courtney Boyle
**Paul Harris KC, Anneliese Blackwood & Clíodhna Kelleher** (Instructed by Freshfields Bruckhaus Deringer LLP) On behalf of Govia Thameslink Railway Limited, The Go-Ahead Group Limited, Keolis (UK) Limited)
**Anneli Howard KC & Laurence Page** (Instructed by Linklaters LLP) On behalf of the Secretary of State for Transport

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**Wednesday, 26 March 2025**

**(10.32 am)**

**Housekeeping**

MR SAUNDERS: Gentlemen, good morning. I think you're familiar with the representation, although Mr Hollander has changed into me for the purposes of this hearing. He sends his apologies, he was unavailable. I don't know if you want to give the usual warnings?

MR JUSTICE MILES: Yes, I'll just do that. Some of you are joining us live stream on our website, so I must start, therefore, with the customary warning: an official recording is being made, and an authorised transcript will be produced. It's strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings, and breach of that provision is punishable as a contempt of court. Yes.

MR SAUNDERS: Sir, it may assist if I start with the points on the agenda.

MR JUSTICE MILES: Yes.

MR SAUNDERS: We can run through. So I think where we are: we have a part-heard application by the intervener for their costs, so I need to respond to those submissions, and you will hear the reply on that. There are the defendants' applications for costs relating to the change of economic experts, Davis 3 and Davis 4, that's the second matter.

Third, there are consequentials from your ruling on the amendment application. You may have seen my client would like to seek permission to appeal. There are also costs and terms of the order in relation to that.

The next heading I had was "next steps", which is whether we have a preliminary issue trial or some other shorter, more circumscribed trial. There are some budget issues which, my learned friend Mr Harris wants to raise.

Then finally, there's the defendant's application for evidence from the class

representative and for cross-examination, which was the application that was made just last week.

Hopefully -- I don't know if the tribunal has seen it -- but we filed a, I'm afraid, slightly late skeleton yesterday dealing with the defendant's new application. We thought it was important that you had the points, and so my learned friend can see them.

MR JUSTICE MILES: Yes, we've seen that.

MR SAUNDERS: There's also the application for permission to appeal as well, both of which I think have made it into the bundles, but, whether they've --

MR JUSTICE MILES: We haven't had much of an opportunity to consider that.

MR SAUNDERS: Yes, no, I can entirely appreciate that, sir. So we're obviously in your hands as to the order in which you want to take matters, but that sequence seems, at least on this side of the court, to be a reasonable one. But, obviously --

MR JUSTICE MILES: Yes. I think that, since we've not yet had much of an opportunity to consider your arguments about permission to appeal, we'll deal with the matters, I think, in the order that you've just set them out.

MR SAUNDERS: Yes.

MR JUSTICE MILES: Then we can have an opportunity, during the lunch break, to look at the grounds of appeal and deal with consequentials at some point after that.

MR SAUNDERS: Yes.

MR JUSTICE MILES: I should say that we do wish to get through this agenda within two days, and we will expect the parties to tailor their submissions accordingly.

It's perhaps worth saying that we have some concerns about the amount of time that's being given to, as it were, the current state or the past state of play, and we're keen to see the matter progressing. So we're very interested in the next steps.

MR SAUNDERS: Yes. Certainly on this side of the court, that is obviously the client's representatives' concern as well, as you might imagine. I mean, certainly coming cold

to this case in the last week or so, it is very striking that we are where we are in this litigation, with no evidence from the defendants or expert reports or anything. So getting on with, and setting down some shape of trial, is certainly something which, in my submission, would be the obvious thing to do.

MR JUSTICE MILES: Right, but equally we don't want to -- of course, there are various applications before the court, but we don't want to spend undue time pouring over the details of a kind of archaeological process. We're keen to see this case progress. Anyway, I think that's understood on all sides.

So what we'll deal with first is the completion of the application made by the Secretary of State in relation to the costs of essentially the disclosure process.

MR SAUNDERS: Yes. On that, I think, Mr Page -- I'm not sure whether he's formally sat down, as it were, but -- or -- yes.

MR PAGE: Yes, I have sat down and I'll happily sit down again.

MR SAUNDERS: So --

MR JUSTICE MILES: Sorry, Mr Page, rather than sitting down, actually, can I just ask you a question before we hear from the class representative? On looking at your submissions, it seemed to us that there may be a specific point in relation to the -- I think it's called the Award database, people call it slightly different things, and the position in relation to that. Can you just assist us briefly as to the chronology in relation to that? What I have in mind is that it became obvious at some point -- this is your submission; I don't say we've ruled on this -- that, in fact, the contents of the database or those documents would not be of any real assistance, because questions of pricing to consumers were not part of the competition, if you like, in relation to the award. Have I understood that correctly?

MR PAGE: Correct. Quite simply, fair settlement was not done in the competitive stage of the tender.

MR JUSTICE MILES: Yes, and so at what stage do you submit that point should have been apparent to Dr Davis?

MR PAGE: Either from the outset, or at any point where he had properly asked and explained why he wanted these documents and whether there was any wider purpose than fare setting that he wanted to look at them. The answer I take on this point is from my learned friend's Mr Hollander's skeleton argument from the previous hearing, where they conceded -- it's paragraph 66(a) of their skeleton argument -- that the only purpose of looking at the Award database was for the purpose of fare setting. Once they had discovered that that wasn't the case, it then wasn't used, but we weren't told that it was irrelevant until it simply didn't appear in July.

What happened in the course of the 39 meetings that we had with Dr Davis is that he was told about the content of the Award database, and the range of documents inside it, and those comments, we assume, were the reasons why he then said to the former president on 7 March that he anticipated that the documents would be useful and helpful -- his words.

MR JUSTICE MILES: Right. I'm not sure that's quite addressed the point I was asking. Your point is: you look at the position now, and you can see from Mr Hollander's skeleton that it's accepted that the only purpose that Dr Davis wanted these documents was in relation to fare setting. You then say, as I understand it, these documents don't tell you anything about fare setting, because that wasn't part of the award process. But my question, I suppose, is: well, when should the penny have dropped for Dr Davis? Did someone say to him, in one of these explainers, or in another place, or at a meeting or something --

MR PAGE: Yes (overspeaking).

MR JUSTICE MILES: -- that they wouldn't provide him with any information that would be relevant to fare setting?

MR PAGE: The answer is yes. We don't have minutes to show the tribunal of the 39 meetings, but I'm very happy to try and take instructions as to the precise date when he was told for the first time that he was not going to find fare setting information. It's probably in one of the stocktake letters, but I would just need to go and check briefly.

(Pause)

So the point is also made to me that he was also provided, at an initial stage, access to the invitation to tender, and that would have explained the scope of the tender process in the --

MR JUSTICE MILES: When was that?

MR PAGE: Again, I have to turn my head for a moment.

It's a public document, so he would have had that from the outset.

MR JUSTICE MILES: I mean, it's not entirely easy to assess this submission without having some concrete material showing us that your lot told their lot that this body of documents, which is a substantial body of documents, wouldn't have anything in it. I don't think you've shown us anything so far which demonstrates that.

MR PAGE: So what I have shown you is the test which the former president set out, which was necessity.

MR JUSTICE MILES: Yes.

MR PAGE: And him explaining repeatedly to Dr Davis and counsel for the class representative that it was for them to determine what they needed, and for them to provide explanations about exactly the sort of data they needed, and there would then be an iterative process. The obligation on my client, and also Govia, was to "open its cupboards", in the phrase of the former president. So it wasn't for us, ultimately, to police that process, but we were saying and telegraphing in advance the sorts of information that would be provided. And --

MR JUSTICE MILES: We haven't yet heard their arguments, but it might well be said,

well, until you've read something, you don't know whether it's relevant or not. So the reason I've asked you about this specific group of documents, which seems to be the big thing that you complained about, really -- or one of the big things you complain about -- is whether it was made clear in some way to Dr Davis that because of the nature of the awards process, it was a pointless exercise to ask for these documents. So that's really -- and I understood you had made some submission along those lines, but we haven't seen material which demonstrates it.

MR PAGE: So, two answers to that. The first is the invitation to tender, which is a public document, and he should know that from the outset. We don't have a duty to tell him about things which are already in the public domain, and we can reasonably expect him to know that.

Secondly, we weren't told that he only wanted it for this narrow purpose; it was for Dr Davis to do with those documents as he saw fit.

Thirdly, we did tell him that they didn't contain this level of information, and I shall find for you the precise date, so far as I'm able to give it in evidence to the tribunal today, the date when he was told that in terms of one of the stocktake letters.

MR JUSTICE MILES: Right. Okay. Thank you.

Costs application by MR PAGE

Submissions by MR SAUNDERS

MR SAUNDERS: Gentlemen, we say this is a very unusual and rather confused application. It seeks just under £900,000 of costs against the class representative, for issues largely and almost exclusively in relation to disclosure. But the starting point in relation to it has to be to look at the basis on which it says there's jurisdiction for the tribunal to award these costs in the first place.

In that regard, from what I can tell, Mr Page put his application on two grounds: firstly, he says the Secretary of State is a third party, in the Norwich Pharmacal sense of the

word, when it comes to disclosure.

The second point he makes is the argument that Mr Boyle, the class representative, acted unreasonably in the disclosure process and should therefore be on the hook for these costs.

We say it's logical to look at the arguments in that order, because if the third party Pharmacal-type argument falls away, what we don't have in these submissions is any general rule identified, by my learned friend, that the Secretary of State is entitled to her costs. The starting point, when you're looking at this is actually entirely the opposite; as an intervener, the Secretary of State is not liable for the other party's costs. The flip side of that is she is not able to recover her own. If she wanted to recover, she should have applied to be joined as a full party, and of course, that is on occasion, what's necessary for interveners to do -- the government is very familiar with how this cost protection works, but also the downside of the cost protection.

So the first point, if I may, I'll just deal with the Pharmacal arguments. Could we turn up the transcript from February, and just remind you very briefly of the way in which the point was put. So we need the March core bundle, tab 3, page 270 in the bundle. If you're working electronically, I can give you the PDF page numbers, if that's easier. So March core, tab 3, page 270, or page 274 in the PDF.

MR JUSTICE MILES: Are you going to take us to the rule about interveners?

MR SAUNDERS: So, well, the best reference for that is the tribunal guide, paragraph 8.10, as far as the tribunal is concerned. But I mean, the standard CPR rules I'll have to find for, sir.

MR JUSTICE MILES: No, I was thinking about here for the moment. So 8.10 ...

MR SAUNDERS: That reflects the usual position, which is that an intervener is generally not on the hook for costs, but then intervenes at their costs risk, as it were.

MR JUSTICE MILES: Yes.

MR SAUNDERS: So I don't know if you have the transcript from the last hearing, if I could just. Yeah. If that's convenient. So page 270 in the March bundle, page 95 internal numbering in the transcript.

So, my learned friend said:

"On the question of disclosure, because we're not part of the general cost shifting principle, I'm asking for our cost on two bases: one is that we are a third party in the Norwich Pharmacal sense of the word. The focus on necessity from the present is all driven towards that concept."

And then he makes the point about "19 out of 19,000 documents", which actually, I'll come on to that in a moment, but that's very heavily related to that particular database.

The chair, sir, you, asked him a number of questions just over the page whether it's a submission about "unreasonable", but he then goes on to say:

"It's getting close to an automatic entitlement."

You'll see just on that page, sir, there's a bit of back and forth trying to understand exactly the basis on which the application is put.

Now, the difficulty for my learned friend on that basis is that the Secretary of State is not a nonparty in the Norwich Pharmacal sense, and cannot say at the same time they're entitled to their costs because of what they say is extensive and wide-ranging disclosure; you can't have it both ways.

If I may, I'll just hand up an authority on the scope of the Pharmacal jurisdiction. (Pause)

I've sent this to my learned friend already, sir, so he has this. (Handed)

MR JUSTICE MILES: Thank you.

MR SAUNDERS: So this is a decision of Mr Justice Flaux, as he then was. It was a case in which -- well, the background is that it was a case in which disclosure was sought against various entities, but actually, I can just take the point narrowly, because

Mr Justice Flaux reviews the authorities. If you just look at paragraph 61 on page 921 in the report.

MR JUSTICE MILES: Sorry, paragraph?

MR SAUNDERS: 61. So there was a submission there that the Norwich Pharmacal jurisdiction was ever expanding. In paragraph 61, Mr Justice Flaux considered that. The point he finds is that it remains the jurisdiction of a narrow scope, and cites Lord Mance's decision in Singularis. You'll see in paragraph 139, which, although it's a privy council decision, he approves for this purpose:

"It's notable even in the context of wrongdoing, the courts have been at pains to emphasise the narrow scope of the jurisdiction as an exceptional one. It was originally confined to the identification of the identity of the wrongdoer." [as read]

So you get to find out who is mixed up in whatever wrongdoing is taking place. It can go on, as paragraph 140 identifies, to identify missing pieces of jigsaw, but it isn't a basis for wide ranging discovery or gathering of evidence, and is strictly confined to necessary information.

Now, so it is not a vehicle for this kind of exercise; it's entirely a different jurisdiction. A Norwich Pharmacal defendant is not part of the litigation and is compelled, for the purpose of, often, a part A claim that's made against them for that purpose, at the behest of one of the parties, to produce information or underlying documents. To the extent that they are mixed up in something which is not their fault and compelled to do it, it's fairly easy to see why that nonparty should get its costs, because it protects them from the consequences of whatever dispute it is that they have innocently been dragged into.

That is not this case. The Secretary of State was never ordered to provide documents in the strict sense, and I can give you three references on that quickly. At the 14 October 2022 CMC, it was envisaged that the defendant and the Secretary of State

would provide disclosure on an informal or voluntary basis, without being formally ordered to do so. The draft order at that time reflected that, and that it provides -- this was a draft, as I say -- that the Secretary of State has liberty to provide any relevant documents beyond the defendant's voluntary disclosure, and that there were then to be expert-led requests to be overseen by the tribunal.

For your note, that's the CMC bundle, tab 34, page 1435, PDF 1447.

MR JUSTICE MILES: Which bundle is that?

MR SAUNDERS: That's the March core --

MR JUSTICE MILES: The same bundle?

MR SAUNDERS: Yes. Sorry, it will be the February core bundle. February core. 1435, PDF page 1447. The relevant paragraph is at page 1437 in the bundle, PDF page 1449.

MR JUSTICE MILES: Would you just give the electronic?

MR SAUNDERS: The PDF pages? Yes.

MR JUSTICE MILES: It's going to be easier.

MR SAUNDERS: I'm sorry, so it's page 1449 in the electronic bundle, paragraph 9 at the bottom of the page.

So, I must emphasise that was a draft order, but we say it reflects the consensus at that stage in time. Obviously, matters overtook. The tribunal took a course of expert-led requests.

So, the second reference is the directions order made on 23 November 2023 which ordered the parties experts and the factual witnesses to meet and referred to their general obligation to liaise cooperatively. That also did not order disclosure. That is in the same bundle, PDF page 1669, tab 39.

MR JUSTICE MILES: Just give me that reference again?

MR SAUNDERS: I'm sorry, PDF page 1669.

MR JUSTICE MILES: Right.

MR SAUNDERS: That's where it starts, and it's 1658. I'm sorry, it's page 1670 in the PDF, paragraph 2. That was about liaising cooperatively.

Then, later on in a --

MR JUSTICE MILES: What's the general obligation to liaise cooperatively?

MR SAUNDERS: Well, I think the --

MR JUSTICE MILES: I mean, there is obviously between the parties -- that's not an entirely frivolous question: clearly, as between the parties, there is a such an obligation just as part of, as it were, the equivalent of the overriding objective.

MR SAUNDERS: Yes.

MR JUSTICE MILES: But does that apply to an intervener? What's the status of an intervener?

MR SAUNDERS: Well, formally they're not being ordered to, they're voluntarily cooperating. I suppose the general obligation seems, by virtue of paragraph 2 of that order, to extend to everybody before the tribunal, which is probably correct as a matter of principle. Obviously, the Tribunal does have the equivalent of the overriding objective as well.

I mean, to give one concrete example, one would hope that if the expert asked for something, a particular class of documentation that proved that it wasn't the material for some particular purpose, then that would be explained to him, and the answer might be not just, "Sorry, that's no good", or "There is no such document", but it extends to, "There's this alternative source of information that you might find useful to conduct your analysis and it's recorded in this type of database or this type of document". So, it is not, as it were, a sort of forensic ping-pong type of process, but hopefully --

MR JUSTICE MILES: What is the obligation of an intervener in proceedings of this

kind?

MR SAUNDERS: Well, sir, the answer is very little, formally, because there is no -- I mean, certainly before the court, before the Tribunal; they have their professional obligations and so on, but they are not a formal party subject to court orders.

I certainly don't want to -- I mean, the Secretary of State did take a cooperative approach to doing this, and I'll take you to one other reference where that approach is commended by the President for, I think he refers to it being the "glass half full" approach. So, obviously he knew something of a cheery disposition in the tribunal at that particular point in time.

But when one is looking at this question of jurisdiction, what is absolutely clear is this is not a question of formal compulsion, nor is this contrary to my learned friend's submission, a Norwich Pharmacal type case.

MR JUSTICE MILES: It's a bit unclear. I mean, this does seem to be telling them to do something. Well, otherwise, what's the point of the order?

MR SAUNDERS: Yes, it's telling them to liaise cooperatively and effectively.

MR JUSTICE MILES: Well, and to meet and to explore.

MR SAUNDERS: Yes, exactly.

MR JUSTICE MILES: It's actually, without prejudice to that general obligation, telling them to do something.

MR SAUNDERS: Well, to explore the feasibility of providing the disclosure. (Pause)

So, then the third reference is Ms Howard, who was then for the Secretary of State, characterised the former president as having given guidelines, not formal orders in relation to disclosure. That's at the 7 March 2024 CMC, so again, the same bundle, PDF page 1708. No need to turn that up, it's only a small point.

Now, it's important to understand the Secretary of State's role in this case. As Mr Page

made clear in his submissions the last time the tribunal sat, there is both a narrow and a broad interest. I quote, he said:

"We have an interest in these proceedings -- hence we are intervening -- but our interest is both broad and narrow in the sense that it's broad for the wider implications of [the] proceedings... and narrow in terms of the potential economic interest in the outcome of the proceedings."

Now, when the Secretary of State came in, there was no objection to the Secretary of State being added as an intervener. They attended and made submissions in the October CMC; they consented to a role in that disclosure process along the lines that we have seen. The Secretary of State then put in a very strikingly robust statement of intervention. That is in the February bundle at page 1992, PDF page 1957. And at page 2004 in the PDF --

MR JUSTICE MILES: What's the date of this?

MR SAUNDERS: I'm sorry, so the date of that is ... it was after the October 2022 CMC, but let me find it.

MR JUSTICE MILES: Is there a date at the end?

MR SAUNDERS: Yes, I'm sorry, sir, I'm just trying to scroll through. (Pause) It was 50-odd pages. 11 October 2022. Just for your note there, that's on page 2006 of the PDF.

The interest is explained at page 2004 of the PDF, bundle reference 1992. So paragraph 111:

"The Secretary of State's interests in these proceedings is four-fold. [Firstly] to act as an amicus... [secondly] to provide relevant evidence regarding the reasons for the decisions taken, initially to harmonise fares and, subsequently, to adjust the regulation of fares as a result of external considerations bearing on the value for money that the services were delivering; [thirdly] to protect the interests of passengers and taxpayers

from the implications of any ruling regarding [rate] fare-setting that might have precedent value going forwards; and [fourth] to protect the interests of taxpayers, in respect of risk, to the extent that GTR might be found liable, of a dispute as to whether and the extent to which the Secretary of State should ultimately pay for any damages or costs award resulting from these proceedings."

Now that is a long, long way from an interest as a mere amicus. They are here to fight. I think Mr Page was right to contemplate in his submissions that the Secretary of State might become a combatant rather than an amicus when the matter goes to trial. He was quite right to say that because the Secretary of State is directly invested in the outcome.

So, to approach this matter as if she were a non-party to these proceedings is somewhat unreal, not least because part of the reason why the Secretary of State has an interest in being at the table is to provide the disclosure to sort the case out, from her perspective no doubt, and to save any potential liabilities that may pass down the tree.

Now, my learned friend in his skeleton argument, but not orally, relied on authority JJB Sports as a precedent for awarding the intervener its costs. He didn't address that orally and I'm not sure if the point is really pursued, but our short submission on that is that that is a very, very different case. JJB Sports was a case about an intervener who was a whistleblower in an OFT investigation into a cartel involving JJB Sports and others which was then appealed to this tribunal.

When one looks at that judgment, what is striking is that the status of that intervener is very different from the Secretary of State in these proceedings, not least because there is an emphasis on the principle that a whistleblower shouldn't be out of pocket as far as its expenses are concerned. That appears to have guided the exercise of the Competition Appeal Tribunal's discretion in granting intervener status to enable

recovery of costs and making an order for partial cost recovery.

So, there was a very different thing going on. It is actually in my submission, rather closer to the classic Pharmacal type case where somebody, through no fault of their own, has just ended up in the wrong place at the wrong time, is then compelled to provide a series of documents, and the court rightly takes the view that they should be protected from whatever the consequence of that is in costs.

The next point is that there is a peculiar circularity in this, which is that if the Secretary of State were awarded these costs and the class representative then succeeded in the action, then these costs would in substance be claimed back from the Secretary of State as the paymaster of the defendant, potentially. So, there is a sort of peculiar interconnection in the way that these --

MR JUSTICE MILES: Sorry, say that again?

MR SAUNDERS: If the Secretary of State were to be awarded costs at this stage, and then the case goes to trial and the class representative, my client, is successful, the costs are arguably costs in the case, unless they're ring-fenced and protected in some way.

MR JUSTICE MILES: I don't quite get that because --

MR SAUNDERS: Well, it depends on --

MR JUSTICE MILES: -- I think part of any order would be --

MR SAUNDERS: Would be to --

MR JUSTICE MILES: -- to say, their costs should first of all be paid by your client, and your client will not have a right --

MR SAUNDERS: To recover --

MR JUSTICE MILES: -- to recover those costs, your costs against them, I think.

MR SAUNDERS: Yes, so I think that must be the ring-fencing that's required, but in order to -- I mean, in a way, that ring-fencing makes the point all the more acute

because this is an odd stage in this litigation to make such an order. I mean, the logical fallacy is in a way artificial because actually the order doesn't have to be framed like that.

MR JUSTICE MILES: I mean, that seems to be a slightly (audio distortion) about timing and all that.

MR SAUNDERS: Yes, sir.

MR JUSTICE MILES: That seems to be a different kind of argument from the ones you were making about the status of the intervener in the proceedings.

MR SAUNDERS: It's more a point that if you make an interim award at this stage, which is a very unusual thing to do anyway in this sort of litigation, to a party who is not sitting on the fence as an amicus but as a, as Mr Bates puts it, combatant, future combatant, then the conclusion is that, as it were, you hive out those costs out of the action if you protect them, which is an odd thing to do. The combatant has to face the battle or not, he doesn't get an extra shield. One could make up various analogies, which are probably very helpful.

MR JUSTICE MILES: I'm just thinking, in the normal case, supposing there's just a simple case of a hearing that takes place, that party A loses, there's an order to pay party B's costs of that hearing.

MR SAUNDERS: Yes.

MR JUSTICE MILES: But party A then wins the whole case. Party A then can't say, in the normal course of things, "I now want my costs of that hearing because it's treated as part of the decision".

MR SAUNDERS: Yes, it's as it were the tribunal's or the court's decision --

MR JUSTICE MILES: Already.

MR SAUNDERS: -- as regards that order.

MR JUSTICE MILES: That bit, yes. So, it seems to me that their position is akin to

that.

MR SAUNDERS: Yes, it probably is. Although, as I think you detect, the submission is probably better put on my part by saying it's probably really a manifestation of the oddity of the timing of this relative to the litigation as a whole.

MR JUSTICE MILES: Yes.

MR SAUNDERS: But ... Yes, I mean, in the example, sir, you made, absent an appeal, you'd be stuck.

MR JUSTICE MILES: Yes.

MR SAUNDERS: So, we say the Secretary of State has willingly become part of this regime and relied upon the provision of evidence as one of the reasons why it said it wanted to intervene in the first place. So, as a matter of principle, we say it's wrong for them to then pop up in this application and then say, "Well, we want to come in and intervene, but by the way, we'd also expect our costs to be paid by the class representative to the tune of £800,000-odd". If they had suggested that they were going to have in any event entitlement to costs, or that they were entitled to chip away at costs, then arguably things might have happened quite differently when they were intervening in the first place.

Now, sir, if I may, those are the points of jurisdiction and principle, can I come on to the various bits of the various allegations in relation to the actual disclosure process itself.

Before descending into the detail, there are two preliminary points, both of which we say that the Secretary of State fails to properly engage with. The first of those is that it's quite wrong to equate the role of Dr Davis with the role of Mr Boyle, the class representative. Davis was or is an independent expert who owes his duties primarily to the tribunal, not to the class representative. He doesn't act in any sense in that regard on instructions of the class representative. He's not been told, "pursue this,

pursue that". The tribunal placed responsibility for expert-led disclosure in the hands of that person who owed his duties independently to the court.

Now, obviously, there is a limit, one could see a submission that said, well, under no circumstances could there be a principled basis for saying that expert-led disclosure should be costs that should be at the door of the class representative, or the claimant, or the party who had instructed that expert. That would seem a very extreme submission, because obviously there are costs in the case and everybody's recovering that wants to be able to deal with those in due course.

But here, the premise of this application is that in some way, that conduct, in the circumstances where the tribunal said that it wanted to have expert-led disclosure, is in some way attributable to the class representative for the purpose of making a cost order.

So, in order to do that, what the tribunal needs is to know exactly what action was said to be unreasonable and exactly what costs were said to be unreasonably incurred as a result of that. In particular, what specific incidents are relied upon and what was said to be the consequence of that?

There's no real suggestion from the Secretary of State as to how that can be properly done. If the Secretary of State wanted to make a proper application in relation to that, she would have to make an application which spells out the sort of thing which, sir, you were asking this morning explaining, well, there was a point. This was the point where this was said to the expert conducting the expert-led disclosure process. From that moment onwards, that expert was acting unreasonably. It is appropriate for that to be parked at the door of the person that instructed that expert, and an order made. That is, in my submission, an absolute prerequisite for doing this in a robust way. We're a thousand miles from that.

Now, the expert-led disclosure process can be problematic more generally. It has

been the source of some adverse comment by other chairs of the tribunal, in particular in the Trucks litigation, I think we go to the reference in the skeleton argument. When the class representative sought to make an application to the tribunal for disclosure from the defendant and the Secretary of State in respect of documents that weren't connected to that expert process, the defendant and Secretary of State resisted that because the process that was being sought was not expert-led. The President's response at the time was then to say that he envisaged that all of the disclosure in the case should be done through that expert-led process, even purely factual issues. That meant those requests had nothing to do with the work of the experts, and they had to be made through an expert.

There were then a series of 8 am hearings with the experts to discuss and seek to progress disclosure in March last year. The President at the time cross-examined the experts in sometimes rather robust terms to understand and to stress-test the points. We make no criticism of that, but one of the consequences of doing it is that the experts, knowing that they were on the spot, as it were, were going to spend significant time preparing for each of those meetings, especially where their professional reputations were at stake and they owed their duties to the court. So, any criticisms the Secretary of State seeks to make of Dr Davis have to be viewed with those points in mind.

Now, Mr Page relies on four points to establish unreasonable conduct. First of those is the disparity of the documents disclosed versus those used in reports; the second is the award database, the point which, sir, you raised this morning; thirdly, that the Secretary of State acted co-operatively throughout; and fourthly, that none of Dr Davis's explanations of what went wrong has any merit. I'll just take those four points briefly and then I can sit down.

The disparity point. Of course, as a starting point, Dr Davis did not know what

documents the Secretary of State or the defendant had. Inevitably, that lack of clarity and transparency will have led to some things being requested that weren't ultimately used. That is potentially where this cooperation and assistance is required. Dr Davis made clear at the outset in his request that he could not be more precise without knowing more about the datasets that existed, and that he made his requests on the basis of limited information. As more information was provided, it would be easier to further fine-tune his requests.

He was also given incorrect information by the defendants and the Secretary of State about what information they did have. There was some confusion about code books and various other things needed to analyse data and so on.

He says that he cited only those documents in his reports necessary to illustrate the point being made. That is entirely unsurprising and very much in the tribunal's interest because one of the whole points of this process is to act as something of a filter, so that the tribunal isn't then burdened by having to go through reams of material.

Taking the award database out of the account, the total number of responsive documents is only 1,167 by the Department for Transport, 206 responsive to requests originally addressed, 961 to requests originally addressed to the defendant. So 206 specific documents addressed to the DfT.

Now, the database. Dr Davis explains that he was somewhat surprised to receive the entire database. It was disclosed by the Secretary of State in response to a request for documents to allow Dr Davis to consider the defendant's argument that even if there was little competition after the award of the franchise, there had been competition for the franchise. That database amounted to 94.5 per cent of documents by number.

But, sir, a moment ago there was an exchange, sir, between you and my learned friend about that. If I can just -- so the point that was being made in the skeleton

argument -- sorry, my computer has gone to sleep, maybe. The point that was being made in the skeleton argument in paragraph 66(a) was that:

"These documents were relevant to the question of 'competition for the market', and were disclosed in March 2024 in response to Dr Davis's request for documents that would allow him to consider [the defendant's] argument that even if there was little competition after the franchise ... there had been competition for the franchise."

That's why. So it was not to do with fare setting, it was to do with, in large part, the question of dominance. And that is the basis on which that was requested. And for your note, Mr Davis's witness statement explaining the background to this makes that point clear as well. And the bundle reference for that is PDF page 911 in the February bundle.

So the bulk of this is that database and --

MR JUSTICE MILES: Sorry, that reference was to --

MR SAUNDERS: I'm sorry. So, that is Mr Davis's witness statement. There are his reports and there's also a witness statement by him explaining what he did. So that's the March, sorry, the February bundle, page 991, hopefully. Sorry, 911, I apologise. For those following along, it's page 899, the printed number, paragraph (c). (Pause)

So that's the award database. Simply to say, well, there are only four citations or whatever, this doesn't feature in the later report isn't, in my submission, a good point. This was something which was surprisingly provided in full. It amounted to the vast majority of vast bulk of the disclosure but actually the other -- it was part of assembling a picture with the other disclosure and went to broader issues than might have otherwise be presumed.

MR JUSTICE MILES: I just want to understand this because it may be important that the argument made against you is , as I understood it, that the reason why there was no reference to it was because it didn't actually throw any light on the fare setting

process.

MR SAUNDERS: Yes.

MR JUSTICE MILES: The Secretary of State says, well, not only was that the case, but Dr Davis knew or ought to have known that was the case. That seems to be the -- and ought to have known that in advance.

MR SAUNDERS: Well, yes.

MR JUSTICE MILES: That seems to be the argument.

MR SAUNDERS: Well, that seems to be the way it's now developed on the basis of an exchange, which I'm afraid, sir, I haven't seen. So --

MR JUSTICE MILES: Well, that seems to be the argument.

MR SAUNDERS: Yes, I mean, that's -- but --

MR JUSTICE MILES: But your point is what? That it wasn't actually being sought primarily as evidence of, well, fare setting.

MR SAUNDERS: First thing, Dr Davis was rather surprised to get the whole flipping thing. Secondly, that it wasn't being sought primarily in relation to fare settings, it also went to issues of dominance which are not admitted. I'll have to come back on to the dominance allegations in this case in due course because actually there seems to be a slightly more nuanced of an argument there, perhaps in my learned friend, Mr Harris's submissions and one sees on the pleadings. But we can come back to that if it's necessary. But it goes to issues of dominance as well. And --

MR JUSTICE MILES: How does that work?

MR SAUNDERS: Well, sir, that is the point where I may need some assistance from my learned friends as to how this is all interconnected. But if (pause) if the franchise -- if there had been competition for a franchise, notwithstanding that there was little competition for the award of the franchise, then the level of the extent to which there is competition at the tender process may assist in determining the extent

to which there is dominance in the market for supply.

Imagine that you have a tender which is made and only one person responds, you're pretty stuck because they may say, right, the price is £1 million or whatever that thing is and actually the true price might be £250,000. If you've got five people tendering, it's rather different. So the extent to which somebody can exercise power at that stage may feed across into their conduct more generally and may also feed across downstream into prices which apply, as it were, down the track.

And all of this is, I would anticipate, rather more interrelated particularly where one of the issues in this case is exactly the extent to which there are competitive levels of service and price and so on, and whether this brand strategy limiting to certain brands and not allowing substitutability across brands and so on, is all part of a way of hiking up prices and restricting consumer ability to travel most cost-effectively.

So you may find, sir, all of this can be interrelated and that is how it potentially feeds across. But in my submission either way it's very difficult for the tribunal here, now, and as you can probably ascertain for me to make submissions on, the exact contents of all of this, having not gone through it and seen the type of materials that are in it.

The point it now seems to be a slightly narrower one, which is that he was tipped off and should have said, "Oh, fine, I don't need to see that", but we just don't have that material. But that is a much narrower basis on which this application is now made.

MR JUSTICE MILES: I mean, I think you said earlier on that, that the question of the competition for the franchise, which presumably is what ultimately this goes to, is something that the defendants have raised --

MR SAUNDERS: Yes.

MR JUSTICE MILES: -- by way of defence. Is it possible just to see that so we can understand that?

MR SAUNDERS: Yes, let me see if I can find you the reference. (Pause)

PDF page 832 in the February supplemental bundle.

MR JUSTICE MILES: Right, that's a --

MR SAUNDERS: That's a different bundle, I'm afraid.

MR JUSTICE MILES: Did you say 832?

MR SAUNDERS: Yes. So it's PDF page 832, bundle reference page 828, subparagraph (b) on the top of the page.

MR JUSTICE MILES: Is it that reference to "Competition for the market"?

MR SAUNDERS: Yes. It's the competition for the market. Competition from other operators and other modes of transport regulatory regime and the Secretary of State setting various things which constrain the defendants.

As I say, the difficulty with the kind of submission that's just been made is that it's extremely difficult to both respond to and adjudicate. But one would have thought if it were the key point and that, as I say, the problem with this application more generally is that it has not identified where these, as it were, inflexion points are in the process and what was said to have followed from them. We now have a suggestion that there was one in relation to this database but the documents are not before the tribunal and I, on my part, haven't even seen them.

It's a very unsatisfactory basis on which to suggest that there should be several hundred thousand pounds of liability.

Sir, I'm not sure I can take it much further on the award database.

The Secretary of State's conduct: Mr Davis, in his witness statement, identifies various delays that had been carried out. Leaving aside the awards database, the majority of the disclosure didn't occur until March 2024 and he expressed concern in his witness statement about the extent and speed of disclosure. That's his witness statement, paragraph 23, the March core bundle, page 903.

MR JUSTICE MILES: I'd like to look at documents if you're going to refer to them.

MR SAUNDERS: Yes, of course, sir. We need the February core bundle, page 903 in the bundle, which -- let me just find you the PDF page. PDF page 915, February core, PDF page 915 and then paragraph 23.

He sets out there the chronology of what he received. (Pause)

Now, next point is, in no point in the stocktake letters did the Secretary of State complain that the requests were too broad and Dr Davis himself provides explanations of what went wrong in this same witness statement. We can look at that if we can just go back to paragraph 8. It's page 904 in the PDF, page 892 in the bundle. 904.

MR JUSTICE MILES: Yes.

MR SAUNDERS: Dr Davis and his team are doing the best they could having never been involved in this sort of expert-led disclosure process before, even though he's a very experienced economic expert. He did understand that the test was a necessity rather than relevance. You can pick that up from his original disclosure request, which is in the same bundle, page 164, which I'll get you the reference for. (Pause) It's PDF page 174. And on that page you need just to look at the instructions, paragraphs 3 to 4. And then as he explains, and as I mentioned a moment ago, the various mini 8am hearings introduced further delays, that's his witness statement paragraph (inaudible).

Now, Mr Page only dealt with the various requests from my instructing solicitors in passing but there's a different point on those requests. The purpose of those requests was to seek disclosure as to whether there had been a breach of the regulatory regime and that was a non-economic question outside the scope of Dr Davis's disclosure process, which is relevant to the list of issues.

Mr Page says, well, the objection is the documents weren't used, but in fact, there were only three documents disclosed so it wasn't an entirely open -- a delicious but not a particularly filling meal.

In summary, we say that when you look at the conduct and how this went, what we

have, actually stepping back from it all, is a process which the tribunal encouraged the parties to adopt. We had an expert who was doing his very best under the circumstances with his team to progress it. He was subject to a very robust interrogation by the tribunal in order to, as it were, kick the tyres on the approach that had been adopted. Material was provided. And all of that was done through the approach that the tribunal adopted.

Now, after the event, one may say, well, maybe that wasn't the best way to have done things, but that isn't, in my submission, a basis on which to hold the class representative liable for costs where there isn't and cannot really be a suggestion that Dr Davis wasn't trying jolly hard to progress things as he saw his role and his duty to the tribunal. So there's not only no principle basis but actually the various criticisms are also misplaced and the application should be refused.

Unless there's anything else, I'll sit down.

MR JUSTICE MILES: Is there a transcriber who requires a break or is --

MR HARRIS: Yes.

MR JUSTICE MILES: How long do you think you'll be?

Reply submissions by MR PAGE

MR PAGE: I'm conscious that I was the after-dinner mint at the previous hearing and I'm now the hors d'oeuvres today, so I don't want to overstay my welcome, particularly given your comments, sir. I have seven very short points to make.

MR JUSTICE MILES: Why don't you make those now and then we'll take a break.

MR PAGE: I'll limit myself and I'll stop, come what may, by 12 noon.

The first is the argument concerning voluntary disclosure. Mr Saunders, I'm afraid, confuses the references to "voluntary disclosure" with what we are talking about. We make no application for our costs in respect of the voluntary disclosure. That was a process whereby we, as the word suggests, voluntarily gave documents entirely

consistent with our position as intervener in this claim.

Our complaint concerns, and this is my second point, the non-voluntary disclosure. Now, on the non-voluntary disclosure it is said against me, "Where are the orders requiring us to do something?" I'm afraid the answer to that is that that is not how this tribunal used to work under the former President. He was very clear that when he said things from the bench, he expected parties to comply with it and it would be a brave litigant who would appear before the tribunal and say, "We just do not propose to do what you are asking us to do or you're telling us to do, unless you write it down on a properly formatted order." The processes were much more organic and intentionally so, particularly for this type of expert-led request.

The very basic chronology -- I won't remotely take you through it in full again -- was that we had the October 2022 CMC, where there was discussion of expert-led requests, and on that occasion, it was primarily directed at GTR. Ms Howard spoke to the tribunal to express some concern that we might get drawn into it. And the President totally agreed that we should not be drawn into it. If you want to look at those references, sir, it's pages 58 and 59 of the CMC bundle.

Matters, then --

MR JUSTICE MILES: Which bundle, sorry? There's more than one CMC bundle.

MR PAGE: Yes, I believe that's what I call volume 1. So right at the --

MR JUSTICE MILES: Are you talking about the February -- we've got something called the February CMC bundle and then we've got a bundle for this CMC.

MR PAGE: So that will --

MR JUSTICE MILES: Plus a supplementary CMC bundle. But I think for the record, it's important for everyone to say which bundle they're referring to.

MR PAGE: The October 2022 CMC transcript is in the core hearing bundle for the March CMC, so for this hearing.

MR JUSTICE MILES: Yes.

MR PAGE: Pages 58 and 59, we said we didn't want to get sucked in and the President agreed. October 2023, by this point, at around this date, Dr Davis issued his expert-led requests. There were 23 against GTR and eight requests plus sub-requests against the Secretary of State. It was in that context that the CMC then took place in October 2023 where there was discussion about the adequacy of those requests and what should happen with them. And again, in that CMC, this is the main CMC bundle, the 2,493-page PDF.

You'll find at PDF page 1568, a statement there from the former president saying that the defendants were obliged to provide documents requested of them. And although the President there was referring to "defendants", it's clear from the context that he had in mind both GTR and the DfT.

Then at page 1604, Ms Howard, again, said to the tribunal that we had now been sucked in beyond our will to the disclosure process and some commentary was made about that but there was no suggestion by the tribunal that we had any basis to complain. We were just expected to comply with the requests made of us.

The third point is the fault argument. It is said against me that we haven't made good our argument that Dr Davis was at fault. That, I'm afraid, is wrong. The test to determine whether or not he was at fault is a test of necessity and we can see that Dr Davis failed that test by looking at a number of things.

First, the disparity in output of 19 out of 19,984 documents. Second, the concession in the skeleton argument at paragraph 66(a) from my learned friends, where they say that, having considered the documents, Dr Davis concluded 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 ..."

Third, insofar as the tribunal's question to me earlier was whether or not Dr Davis realised how limited those documents were, our answer to that comes from Dr Davis's own evidence. And the best I can do for you is give you the reference to page 911 of the bundle, which Mr Saunders took you to earlier. It's clear from that, that Dr Davis understood that these documents were going to be targeted at something else. He was looking at the competitive stage of the tender for evidence of the competitive dynamics between the bidders; competition for the tender. He was not looking for fare setting and the inference to why he was not looking for that is because from the invitation to treat and the tender documents, it was clear that he would not find that in those tender materials.

The fifth point taken by my learned friend is the exculpatory argument. He says Dr Davis didn't know what we had. This point was debated at length in the 7 March 2024 CMC where the former President posed back the very straightforward question to Dr Davis, when he himself made this complaint, is, "Well, have you asked them what they've got? And have you had that type of dialogue?" And the answer was that he hadn't done that.

It's said now that it is surprising, the word is repeated today, that the full Award database was provided and indeed, it is said that it's surprising that the "whole flipping thing" was provided.

That surprise was a happy surprise to Dr Davis at the time. He was asked, in terms, whether those documents would be useful and he answered -- this is in your main CMC bundle, PDF page 1668, line 21, he answers, "undoubtedly". "It's relevant, undoubtedly."

MR JUSTICE MILES: (Inaudible) All the work had been done, hadn't it? Because it was then handed over almost immediately after that, like the next day, I think.

MR PAGE: Yes.

MR JUSTICE MILES: So you've done it all. I mean, it wasn't like a question along the lines of, "Well, you can have -- how much of it do you want?" It was going to be provided in full by then, wasn't it?

MR PAGE: But that was in accordance with his wishes. So he was not expressing disquiet that he was going to be given a very large volume of documents; he appeared to be delighted by the suggestion he was going to get these documents, and he appeared to think that they were necessary, and they would meet the test. This all comes about in the context of a hearing where the word "necessity" is bowled at him repeatedly. So he says, "Undoubtedly, they will be relevant". And secondly, he says at page 1673 of the PDF, line 15, he would find them "useful and helpful".

So I come back then to the question of the fault-based argument: it clearly was not satisfied; these documents were not necessary.

Point six then, if I may. There's some blame on my client -- it's said that we somehow delayed in providing documents. I don't follow the logic of that, I'm afraid, because it is not said by Dr Davis, "Well, if only you had given these documents sooner, my request would have been different, or I would have realised more quickly that things were not relevant, and I would have told you to stop doing this". There's no suggestion of that at all; it's not said that anything we did had any impact on costs or the process.

Seven, the Norwich Pharmacal point. This is as a buttress to my argument. I say that the Secretary of State wins this application if we can show that Dr Davis was at fault in that he failed the test set for him by the former President, that he requested documents which were not necessary, and he did so by an order of some tens of thousands.

If the tribunal is not with me on that point, or wants some further support as to why the circumstances merit a costs order being made against Mr Boyle, the Norwich Pharmacal analogy is appropriate here, because that applies where a third party is

drawn, unwillingly, into litigation and is compelled to provide documents, that compulsion is limited to necessary documents.

So the jurisdiction is relevant if one is going to delve into the weeds about understanding the word "necessary". But it appears that we haven't needed to do that in the course of argument, so I think it's perfectly understood between the parties as to what the word "necessary" really means in this context.

MR JUSTICE MILES: Well, is it really clear? I mean, you say that as though it's some sort of very clear term. I'm not sure it is. One person may think, "I need this", another person may not. As I see it, part of the difficulty here is that it's arisen from the expert-led disclosure process. Now, that is a way of doing things; there are various ways you can do it. One can have a different process where it's ultimately under the control of the tribunal, and you get parties coming along and saying, "I want this". The other side says, "No, you can't have it" -- which is perhaps what the former President called the "traditional approach" -- and the court then adjudicates on it.

But even where it's where you have a test of necessity or a test of relevance or whatever it is, there's often a great deal of room for debate about that. That's why, in a traditional process, the tribunal listens to arguments on both sides and then reaches a ruling.

It may be that at the end of the day, the test is sufficiently clear, but the interpretation of it is one on which different people can reasonably take different views, it seems to me. I don't think, logically, one can say that because the expert has not ultimately referred to documents, having had a chance to read them, that they fall outside the test of necessity for the purpose of asking for those documents.

MR PAGE: What does follow, is from Dr Davis's own evidence and Mr Boyle's skeleton argument for the previous hearing, where it is said that the documents were ultimately irrelevant. So if --

MR JUSTICE MILES: Ultimately irrelevant, but the word "ultimately" is important there. He decided they're ultimately irrelevant after he had read them, presumably.

MR PAGE: But they should only be requested if they are of a heightened state of relevance so as to be necessary.

MR JUSTICE MILES: Yes, well, he says that he thought they were. How are we how to rule on that?

MR PAGE: Well --

MR JUSTICE MILES: Unless you can say that's actually irrational in some way, that it's a position that no reasonable person could have contemplated.

MR PAGE: No, I don't think --

MR JUSTICE MILES: Sorry. Otherwise, it seems to me that what you're doing is saying, where there's a process of this kind expert disclosure and it turns out, after the requesting party has seen the documents, that actually he's not going to deploy them -- unless you can say, well, that in some way then leads to a conclusion that it's unreasonable even to have asked. It's hard to see what exactly you're saying, because ...

It seems to be close to an argument that what he did was irrational in the sense that no one could reasonably have asked for them.

MR PAGE: I'm certainly not arguing for a public law test.

MR JUSTICE MILES: No, but it needn't be a public law test. But this concept of rationality arises in quite a lot of other areas where the question is whether it's something that no one -- no reasonable person in that position -- could have asked for.

MR PAGE: The process was conceived quite differently by the President; it was very much not write down a long list in the form that lawyers trained in this area would typically do, framed by the list of issues, but rather that there was an expectation of

dialogue between Dr Davis to Govia and the Secretary of State, saying, "This is the type of information I need to plug into my model. How can I best get that? What data do you have that you can provide to me?"

So it's not a document request at all in that sense; it was intended to be a data request, with documents then being slotted into that process. The former President was at pains to explain that repeatedly, to Dr Davis, because he continued to adopt an approach that was, in the former president's words, "the worst of both worlds", because you had a non-lawyer attempting a lawyer's exercise, and he was saying, "No, that shouldn't be happening here. The proper process is explain the sorts of data you want, and then it's for the defendant to comply with that".

There was undoubtedly a heightened responsibility on Dr Davis to limit his ultimate requests for provision of that material to that which was necessary in the narrow sense of the word.

MR JUSTICE MILES: Well, why is it a narrow sense? It's what he thinks he needs, isn't it?

MR PAGE: Because the tribunal was clear that if Dr Davis said he wanted something, the tribunal would ensure that he gets it.

MR JUSTICE MILES: Yes, and he was told, "You must only ask for what you need". Well, he thinks he needs it. How are we to -- this is a difficulty about trying to adjudicate on this. Are we to say that he didn't think he needed it? I don't think he was saying these were bad faith requests.

MR PAGE: No, I'm not asking to go (overspeaking).

MR JUSTICE MILES: Right, so he genuinely thought he needed this stuff; so it's a genuine belief. Then he says, "Well, I needed it in order to satisfy myself at these various points. I've been told to set out our full case, and there was a deadline for that, and I thought I needed it".

How are we to assess this retrospectively, by reference to the use he then makes of it? Because he didn't know what the stuff was until he saw it in detail.

MR PAGE: That is why there were 39 meetings between the parties.

MR JUSTICE MILES: Yes, but the tribunal did not at any of those meetings, as far as I'm aware, say, "Right, you are acting unreasonably. You must now pay the costs of this exercise", or anything of that sort.

MR PAGE: So what we get in the 7 March 24 CMC, towards the end, is both a statement by the former President that he was not in the blame allocation stage at that point. What he did want to do is just solve the problem and get it going, and have the entire machinery of this case focused on giving Dr Davis whatever he thought he needed in order for him to produce his report.

But he was very clear that Dr Davis had a heavy burden on him in having the rights which were being granted to him by the tribunal, but there was a responsibility to limit those requests. We can see objectively that his requests misfired to a very large extent, because of the delta between the number of documents requested, number of documents supplied, the number of documents used.

Dr Davis is not saying, in his evidence to the tribunal, that, "These materials were very useful indeed in iterating my analysis, but ultimately they are a background status, and it would unduly lengthen my report to cite them fully". Instead, he's saying, "They weren't relevant".

So it must be that if they weren't relevant, that they weren't necessary.

MR JUSTICE MILES: Right. Okay, thank you very much. So is there anything more? Sorry, I think you were on your seventh point, weren't you?

MR PAGE: Yes, and four minutes over time.

MR JUSTICE MILES: Right. No problem. Right, we will take a break of a little over five minutes for the transcriber. Thank you.

(12.04 pm)

(A short break)

(12.19 pm)

MR JUSTICE MILES: Yes.

Costs applications by MR HARRIS

MR HARRIS: Members of the tribunal, I of course need to make some costs application on behalf of the defendants. We spent some three hours or so dealing with a single application by the Department for Transport. I have five or six applications, but I'm going to make them very, very much quicker than the one we heard before. Can I just enumerate them for you so you know what they are. There is the first two that I'm going to take together: they are my application for costs in respect of the failed amendment applications regarding loss of flexibility, and the failed application --

MR JUSTICE MILES: I was going to come back to that one.

MR HARRIS: I will need to take -- yes?

MR JUSTICE MILES: I want to come back to that one because I'd like to deal with consequentials from our judgment, from the ruling we gave, altogether. So, when we deal with permission to appeal as well, we'll deal with that and any consequential orders for pleadings and all of that stuff.

MR HARRIS: I'm very happy with that. So that's two, that's the effects amendment application that failed, loss of flexibility application that failed. We'll deal with them later. That's two of the six.

MR JUSTICE MILES: Yes.

MR HARRIS: There is then an application which was prefaced in the skeletons in some detail last time by my clients for costs thrown away by the change of the expert, the change from Mr Harvey to Dr Davis. There is an application by my clients for the

costs of a specific Davis report, namely Davis 3. Again, that was in all the skeletons last time. Then there is an application for some costs associated with Dr Davis's so-called table of corrections or errata list from the previous occasion. Then, I suppose technically again to be deferred till slightly later, there's a very minor cost application for costs of and occasioned by the class definition amendments that did succeed. That's only £4,000, so hardly -- anyway.

So, with your permission then, unless you see it differently, I'm going to take them in the order of the costs thrown away by the change of the expert, the Davis 3 report application and the cost of the table of corrections errata.

As I say, the schedule that relates to the costs of the change of the expert is to be found in the first bundle for last time, the February bundle, at tab 18. The hard copy page is 788.

MR JUSTICE MILES: Is there a soft copy page as well?

MR SAUNDERS: 798.

MR HARRIS: I'm told it's 800. We of course, are slightly confused because it's in breach of the practice direction for the claimant to have produced bundles with different page numbers for hard copy and soft copy.

MR JUSTICE MILES: That's not helpful.

MR HARRIS: Not helpful. But in any event, it's tab 18, it's headed schedules.

MR JUSTICE MILES: I don't have tabs is the problem.

MR HARRIS: Do you have a page 800?

MR JUSTICE MILES: 798 in my bundle, if that's of assistance.

MR HARRIS: 798, I'm told.

MR JUSTICE MILES: Yes.

MR HARRIS: You will see that what this does is it splits out this application, which is how I'm going to briefly develop it, into three separate parts. There's a part 1 called

Harvey costs, I'll explain them in a minute, and you can see that on the summary page at the first page of this document, it says "Part 1 Harvey costs" and it gives a total of 301,000.

MR JUSTICE MILES: Yes.

MR HARRIS: And then there's a part 2, the changeover costs. Again, I'll briefly explain that, although it's dealt with in the skeleton. That's 153,000, and then there's a part 3, which is the Davis 1 costs, which again I'll briefly explain, that's 98,000. Then, when you add them together, that's 553,000. So, it's a substantial costs application with these three parts.

The three parts are all very simple. Part 1, the Harvey costs. All references to Harvey's first three reports, one to three, have all been deleted from the claim form. I don't need to turn it up because they've been deleted, but if you want the reference to that, it's volume 1 of the February bundle at tab 11. I'm afraid somebody will have to give me an electronic. The hard copy number is 685, does anyone have the ...?

MR JUSTICE MILES: Well, you say they're not in there, so if they're not in there, they're not in there.

MR HARRIS: Yes. My point is simply that if you wanted to see that they were in there and they've all been crossed out, that's where --

MR JUSTICE MILES: Well, I'll take it from you.

MR HARRIS: Yes. Harvey 4 was never in there because it was never admitted. So, my starting point is that there are costs associated with Harvey, Harvey's reports 1 through to 4, and they are no longer relied upon and any references that there formerly were have all been deleted, but we obviously had to read them all and digest them. So, that's no use: it's no use to us, it's no use to you. It's all water under the bridge. Indeed, in the modality to trial judgment that's at February bundle 2, tab 38 the learned then-chairman said that "the work of Mr Harvey has already faded into the

background". That's paragraph 4 on page 1642. Dr Davis had said the same thing, in fact, the very same phrase, in his witness statement at paragraph 43. That's cited in our skeleton for last time at paragraph 45.

So, so far, what we've got is we had to spend all the time and money and effort reading them, as incidentally did the tribunal, of course, but you can't make a cost application. They're all completely useless, they've all been deleted. No reliance upon them, but we had to read them.

So, as a bare minimum, we've expended duplicated cost and effort to some considerable degree. Those costs are set out, as I say, in part 1 of the cost schedule. That would not normally happen in litigation, we wouldn't be forced to read otiose expert reports. It's plainly not our fault. Plainly, somebody else should be paying for those wasted costs. We make the application against, obviously, the class representative, Mr Boyle. He's our opponent.

Of course, if the class representative wants himself to then say, "Oh, well, actually, then Mr Harvey's fault", that's a matter for him. We know that he does blame Mr Harvey, but that's not our responsibility. What we say is we want those costs because they've been totally wasted and they were quite substantial. So that's part 1.

Part 2 changeover costs is pretty straightforward. It's very simple that the mere fact of Mr Harvey withdrawing and being replaced by Dr Davis generated time for consideration at our end amongst the legal and expert team with our lay clients and then in correspondence and in consultations, and indeed has already arisen at previous CMCs for which there has not yet been any cost order. It's self-evident that we had some additional costs resulting simply from the fact that there was a changeover. The same point I make again, that's plainly not our responsibility, they're wasted, and they should be the responsibility of the CR unless he seeks to pass the buck, which is a matter for him.

In a moment, I'm going to show you a document that makes this very point for me that there are inevitably substantial changeover costs coming from the mouth of the class representative's own lawyers. I'll show you that in just a moment. So, in other words, my part 2 of the cost schedule, as a matter of conceptual wasted costs, is agreed to by the other side.

Then the last point, which is part 3 of the costs order about Dr Davis's first report, that's on the final page of that schedule. Again, that's very simple: it was duplicated. This was the very first report that was produced by the class representative.

The excuse for not paying these costs seems to be that, well, a first report from Dr Davis was needed, and that we, the defendants, asked for it. But we don't really understand this point. It was obviously needed for the class representative; it wasn't needed for us. It was needed for the class representative because his case had been certified on the back of Mr Harvey's various reports, but then Mr Harvey disappeared, and the CAT needed to be satisfied that the CR had an expert who would support what had already been certified.

But what's more important is that Dr Davis's first report was clearly unsatisfactory and it was then very quickly superseded by Dr Davis's second report. Telling in this regard is you will search in vain in the amended or perhaps re-re-amended claim form for any reference to Davis 1. There isn't one, and that's of course, because it was a useless report and it was completely superseded by Davis 2.

The Davis 1 report is the one that you'll recall from our skeleton argument -- this is dealt with in our skeleton for last time at paragraph 40(i) -- the one that was extremely heavily caveated about which part or parts of Mr Harvey's various reports were being adopted by Dr Davis when he first came on board.

You'll recall, because it's set out in that skeleton, that Dr Davis at that time for Davis 1 said that he hadn't read into the underlying materials, so that explains why it had to be

superseded and it was useless and why we've wasted costs.

Just to summarise, it was needed by them, not by us; it was completely superseded because it was so useless, it was so heavily caveated and he hadn't read the underlying materials.

This was the one where you may recall -- again, this is set out in our February skeleton, so for the last hearing at 40(ii) -- that when it was put forward, Mr Hollander, KC, then for the CR, said, "Oh, well, there's a more or less seamless transition from Mr Harvey, the former expert, to Dr Davis, using Dr Davis 1".

But the learned chair on that occasion -- this is in the judgment from that hearing at paragraph 9.1 -- said that that "rosy view" was mistaken. It wasn't a seamless transition. Of course, you now have the benefit of hindsight; you can see perfectly well that there wasn't a seamless transition to just take Mr Harvey's reports and turn them into a report with Dr Davis's name on the front.

So, from my perspective, the point is clear. What we had was a Dr Davis first report that we spent time and effort on, wasted costs, they are set out in part 3 and they've been wasted.

So, that's the essence of my first application, but I just said I'd show you a particular document and this is important on the changeover costs. This is in the February supplementary bundle. It's tab 5, pages 30 to 33 --

MR JUSTICE MILES: I'm so sorry, just before we leave the schedule of costs and what you're actually asking for here. Just assume for present purposes that we're with you on the principle of the thing. That's just an assumption.

MR HARRIS: Yes, I understand.

MR JUSTICE MILES: These are chunky numbers. What we don't have, for example, is the kind of breakdown that one sees often in cost schedules when people are seeking a summary assessment. So, it doesn't say what work by category has been

done by the solicitors; it just gives overall hours spent on various tasks. That's one point.

The second point is, as I say, very substantial numbers. Are you asking for effectively a summary assessment here, or are you asking for an interim payment? What are you asking for?

MR HARRIS: We're asking for summary assessment, and although I deliberately haven't done it given constraints of time, you may recall from the skeleton on the last occasion and the cross references therein to the witness statement from the senior partner at Freshfields, who's overseen the creation of these and put his name to how he's satisfied that they've been appropriately put together, and he's explained in those witness statements -- I think the one that accompanied this one was Mr Sansom's fourth witness statement.

He's explained, amongst other things, that careful consideration is being given to the detailed cost bills submitted by both experts and the various people in the Freshfields team and the counsel team, and various conservative assumptions are being made about how to split, for example, time that was spent at a hearing on this and the time that was spent on a hearing on that. So I rely upon all of that, to substantiate --

MR JUSTICE MILES: I mean, I'm not trying to undermine what he's saying, but he's just saying, "I'm being careful and conservative". But he hasn't then produced the underlying bills, has he?

MR HARRIS: No, he hasn't done that. But what he's done is, as I would respectfully contend, is something that can safely be relied upon because he is, after all, a well-respected and senior partner.

MR JUSTICE MILES: But normally one would, as a judge in this situation, have quite a lot more detail which you could then scrutinise by looking at it. We haven't got that here.

MR HARRIS: What you have -- let's take for example the part 1 Harvey costs.

MR JUSTICE MILES: Yes.

MR HARRIS: What one has is the dates, a description of the narrative, a description of who did the work and their rates and the number of hours. So in my respectful contention, that is pretty detailed. I accept, of course, that you don't have annexed at the back of this, for example, counsel's invoices. But what Mr Sansom does say -- with the benefit of his team, which of course includes specialists, and he's acutely aware of his responsibilities to the tribunal -- that he has carefully, with the assistance of his team, been through this and satisfied himself on a conservative basis, that this represents exactly what is said in the narrative.

So for that month of July 2021, it consists of -- and you can read it for yourself, and that's a careful exercise. Then for the next month, August 2021, there's the narrative, there are the people who've done it at their rates for that number of hours, and that's the subtotal. It's been split out. So in other words, it's a careful exercise --

MR JUSTICE MILES: We have no information about what which persons have done these, have we? Like, who's meant by "senior associate", what category would they fall into under the guideline hourly rates? I mean, we just haven't got this information, which is the kind of information you'd normally have, certainly when deciding such a large bill.

MR HARRIS: Well, perhaps I can approach it in two ways. My understanding is that these categorisations -- partner, senior associate, associate, and then over the page, counsel and elsewhere, the experts -- are the same categorisations that one finds in the guidelines for hourly rates. So I'm not sure -- and then -- so I'm not sure that there's a point there.

MR JUSTICE MILES: Well, is there any evidence of that?

MR HARRIS: Well, we could call up -- I can obtain for you after lunch that guideline.

I think it's a Master of the Rolls document, and my understanding is that that's how it characterises --

MR JUSTICE MILES: Well, no, it doesn't do it in this way, it does it by reference to, I think, years of qualification. But I might be wrong about that.

MR HARRIS: Well, I will also check, certainly. But you have what you have. What I could say, perhaps another way to approach --

MR JUSTICE MILES: The other thing I should say, while on that point, is that these are very substantially above the --

MR HARRIS: I'll address that.

MR JUSTICE MILES: -- guideline hourly rates.

MR HARRIS: I will address that, because that recurs -- there's a letter we received this morning, I think, making a complaint about that. So I will address that.

But if there is a concern, sir, members of the tribunal, that there is, notwithstanding what I say, is a careful, multi-page, document carefully and responsibly put together with narratives and all the rest of it. If there's not enough, then an alternative approach would be for you to make an order for a payment on account -- an interim payment, if you like, by reference to this schedule, with the remainder to fall to detailed assessment.

MR JUSTICE MILES: All right.

MR HARRIS: My instructions are that that would be an acceptable alternative from our perspective.

Can I deal then with this question of hourly rates? Because it arises on all of the cost applications that I make, I apprehend. The document that I'm going to perhaps get printed off over lunchtime, that I'm referring to, is the guide to summary of assessment of costs by the master of the rolls. At paragraphs 28 and 29 -- I'll get copies of this -- it says --

MR JUSTICE MILES: This is in the White Book, I think.

MR HARRIS: I think it is; that's right.

MR JUSTICE MILES: Where is it, 44, is it? Part ...

MR HARRIS: It is in part 44. Perhaps so that everybody has it, I can get copies made over the short adjournment.

MR JUSTICE MILES: Is this the guide to the summary assessment of costs, 2001?

MR HARRIS: Yes.

MR JUSTICE MILES: Okay, page 1451, for my colleagues, at volume 1 of the White Book.

MR HARRIS: My note records, and I was reading it this morning, that paragraphs 28 and 29, state that the guideline rates in that guide are only the starting point, and expressly may be an award of amounts in excess of those where appropriate. So what I propose to do is identify for you, in my submission, several reasons why rates higher than those rates are appropriate.

But can I begin on --

MR JUSTICE MILES: I'm sorry to keep interrupting you. There is actually authority on the court of appeal authority on this question of the extent to which the tribunal or court should depart from the guideline hourly rates.

MR HARRIS: Sir, I will also have a glance at that over the short adjournment. What might be of assistance is if I identify for you that the class representative --

MR JUSTICE MILES: I'm so sorry. This is what the White Book says at it page 1424: "If an hourly rate in excess of the guideline rate is claimed, a clear and compelling justification must be provided".

That's the Samsung Electronics case. Okay.

MR HARRIS: I can identify for you what the factors are, but before I identify several factors, can I just point out to the tribunal that the class representative's own hourly

rates are also in the region of twice as high as the rates in the summary guide to assessment, which in my respectful submission reflects the factors that I'm about to enumerate for why it's appropriate for us to have claimed the rates that we have, or at any rate, the solicitors' rates and the reference to my learned friend's team's rates being almost twice as high as in the ...

I'm not suggesting you need to turn it up, but it's in the supplementary bundle for last time. There's a reasoned costs order at tab 3, page 29, paragraph 9 of the supplementary bundle for the February hearing. What that records is that there was some force to the point that we were making, when the boot was on the other foot and costs were being claimed against us, that the hourly rates for the class representative's team were almost twice as high as the guideline hourly rates.

So my starting point is that both teams on both sides of the litigation appear to have approached this case on the basis that there are factors giving rise to higher than the hourly rates. The fact is, in very brief overview, are as follows:

Number 1, these are complex proceedings, and we say, in fact, they've been rendered more complex by the class representative's behaviour, such as the changes of position and the multiple experts reports. You'll be aware now that there are now -- and we're nowhere near even a first round trial -- ten expert's reports have been produced by the class representative in this case, and they become sufficiently complicated that the tribunal on former occasions during 2024 had to engage in detailed case management meetings, and both of those features I say are unusual. So that's the first point: complicated and unusually so.

Secondly, I rely upon the fact that the value of the claim is very significant. Obviously, this is a collective set of proceedings claiming on behalf of a large group of people with large sums involved. On some occasions, the class representative suggests that they are well into the hundreds of millions of pounds of damages, and it's significant for

a different reason, not just the amount of costs, but because if the class representative is right, they will give rise to the need on the part of my clients and indeed the DfT, fundamentally, to reorganise the service of public services of public interest.

What they say is, "You're not doing your rail service provision correctly; you need to reorganise it, because you're acting unlawfully". That's again an unusual feature of the case.

Thirdly, it's not purely a private case seeking damages. Essentially the DfT, hence why they are an intervener as public interests here. Indeed, the tribunal has previously recognised that that's an "aggressive interest", and you'll have seen that in their statement of intervention; there is the more than usually complicated interplay between private law on the one hand and public law.

So those are the factors I rely upon as regards why the hourly rates are higher than the guidelines. So what I've done so far on this application relating to cost thrown away by the change of experts, I've identified the three types of costs. The next point I'm going to show you is a document in which the CR --

MR JUSTICE MILES: Sorry.

MR HARRIS: Not at all. The CR has recognised precisely the type of cost that I'm claiming for -- I'll show you that document. Then I'm going to deal with a couple of granular points that were made in the skeleton argument of my learned friend last time round, so I'll deal with them in that order.

So in the supplementary bundle for the hearing last time in February, it was tab 5, pages 30 to 31. In soft copy, it starts on page 34. So it's the supplementary bundle from the February hearing starting on page 34. That was an exhibit to a witness statement from the class rep --

MR JUSTICE MILES: Can we have the electronic number?

MR HARRIS: I told you, it's 34.

MR JUSTICE MILES: 34?

MR HARRIS: Yes.

MR JUSTICE MILES: Yes.

MR HARRIS: That is an exhibit to a witness statement that was put in by my learned friend's instructing solicitor for the last hearing. What I've got written down is that it says as follows: are you able to find a passage that says:

"In terms of fees, the current situation has already resulted --"

MR JUSTICE MILES: Yes.

MR HARRIS: So this is them saying this; they're saying it to Mr Harvey, the former expert:

"In terms of fees, the current situation has already resulted in substantial increased fees."

Well, if it resulted in substantial increased fees for them, obviously it did for us. And indeed they then identify them:

"Both management time, discussions with the client and funder, as well as addressing multiple correspondence from Freshfields [that's my instructing solicitors] and Linklaters [they're for the DfT]."

So again, just pausing there. Well, exactly. If you had these costs, self-evidently we did as well.

"And, when the new expert is appointed, s/he and the team will need to spend a substantial amount of time reading into the case."

Well, exactly. So just like we did. Goes on:

"Also, there will be inevitable inefficiencies and management time involved in two firms of economists being involved."

Well, again, yes. So it speaks for itself res ipsa loquitur. Curiously, on the skeleton argument on the last occasion that my learned friend's team put in at paragraph 30,

on the question of whether there had been wasted costs, it was said, and I quote: "None of that has occurred in the present case."

But that's inconsistent with the class representative solicitor's own letter. Not clear how that submission could have been made, and it's wrong.

Much more quickly, there were several granular points that were taken in writing in opposition to this first application. They are to be found in the class representative's skeleton for the former occasion in February at paragraphs 33, 36, 37, and then even more granular points at 39. I'm going to take them very briefly.

The one at paragraph 33. It was said there that it would be "understandable that they [that's my team] should complain that costs had been wasted as a result of the change of experts" if we had filed some actual expert reports in response to Mr Harvey.

So they conceded that if we'd actually filed some expert report, it would be understandable that we'd wasted costs, but of course, that's a nonsense; the logic of the position is that even though we didn't write the reports in response, we still had to read all of Mr Harvey's and understand them and get ready to deal with them at hearings.

So my respectful submission is that, although this application is opposed, the key principle has already been conceded. I don't need to actually write a report to have the costs associated with dealing with it.

The point at paragraph 36(ii) of my learned friend's skeleton last time around was that we should only be able to somehow revisit the costs of the CPO stage, bearing in mind that some of what I now seek are costs that arose at the CPO stage. Somehow it's said I should only be able to revisit them if I bring a decertification application.

Well, with respect, that's obviously wrong. Costs are at large for this tribunal. There's been a fundamental shift between what happened then, where Mr Harvey was pleaded and relied upon, and what faces you now, namely, all references to Mr Harvey

have been deleted and he's no longer relied upon.

In any event, in the adjournment judgment of this tribunal, on page 147, paragraph 13.4, that's volume 2 of the February bundle, tab 36. My note says page 1547, paragraph 13.4. The learned chairman said on that occasion that all "past and future costs" are up for grabs and will be "considered" on a later occasion, all options to be open. That's because he recognised that there had been this fundamental shift.

So it's a poor point to say somehow I can't even make this application unless I make a decertification application too.

MR JUSTICE MILES: Well, you're not seeking the costs of reading Harvey. You're seeking the costs which you say are thrown away by the fact that Harvey is out of the picture.

MR HARRIS: Yes. Yes. Well, I mean, that's essentially the same thing. The costs that have been thrown away are the costs of reading and digesting and getting on top of -- and then actually dealing with all of the Harvey points that have now been thrown in the bin.

MR JUSTICE MILES: So you're not seeking to upset a costs order which was made in relation to the position at the time of the CPO, are you? Well, I suppose --

MR HARRIS: I don't put it like that, no. What I say is: if and insofar as it's going to be said against me -- which appears to be the case from the written skeleton -- that Mr Harvey was in play at the CPO certification stage, and there's already been a cost order about the CPO certification stage, and therefore, somehow, you shouldn't be allowed to go and make submissions about anything to do with that stage. That's conceptually wrong for the reasons that I've just given. That has been recognised formally by this tribunal as being wrong, which is why on page 1547 at para 13.4 --

MR JUSTICE MILES: He just said that it was all up for grabs, I'm not sure you could

read much into that.

MR HARRIS: Well, except that he says past and future.

MR JUSTICE MILES: Yes, but it's all up for grabs.

MR HARRIS: Well, well, exactly so. Well, that's good enough for me. It's all up for grabs. Perfectly good enough for me.

MR JUSTICE MILES: Yes, but they didn't mean that if someone had an argument for saying, "Well, you shouldn't have them", they're stopped from having the argument.

MR HARRIS: Oh, no, I don't say that. Well, what I'm saying --

MR JUSTICE MILES: Well, that's where we are now.

MR HARRIS: Well, you have my submissions on that. Then, I'm not going to go through them in detail, but if you were to go back to the written argument, I don't know if it's still relied upon, my learned friend's team for the last occasion on this application at paragraph 39(I), (II), (III) and (IV), there were various really detailed granular points, essentially saying -- this was in Mr Maitland-Walker's ninth witness statement -- querying particular amounts in the schedule. I can deal with them compendiously, and if necessary, in reply.

We have carefully been back and checked that the amounts that were claimed in, for example, one of the complaints was about the amount spent in December 2022. We've gone back and checked, and my learned instructing solicitor team is completely confident that those are correctly calculated amounts for the months. One, there was a complaint about December 2022, February 2023, March 2023. I'm not sure it would be a particularly enjoyable experience if I turn them all up. If there's a particular point that's still relied upon, I can deal with it in reply, but that is the situation.

So, that's what I have to say about that application, essentially, the costs wasted by the change of experts. I can deal in the time available before the short adjournment with the very short application that we make for costs relating to Dr Davis's third report,

if that suits the tribunal.

We say this is very straightforward. You've heard me address Davis 1 and Davis 2 already: Davis 1 was essentially wasted and was superseded. But then what happened was, after Dr Davis had taken over, it led to the next CMC that some of us will doubtless remember in October 2023, which was the first CMC post the change in expert.

At that stage, Davis 1 had already been overtaken and superseded and Davis 2 was in existence. Davis 2 was the one where the tribunal had said, well, actually words to the effect of Davis 1's not good enough, so do a proper job. What do you actually rely on? That's why a lengthy Davis 2 came into existence.

It was leading to an October 2023 CMC, and then out of the blue, without forewarning, without order, without direction, suddenly on our desks and the desk of the tribunal appeared Davis 3. Never intimated, and it was never admitted by the tribunal. It was never admitted, there was no order, it wasn't placed on the court record, and it's been no use to anybody. You will note if you went through the latest re-re-amended claim form that it's not mentioned anywhere, Davis 3, so it's not even relied upon by the class representative.

What is relied upon, of course, is the very chunky Davis 4 that we looked at some parts of last time. So, Davis 3 falls into the same effective category as Davis 1 as being completely superseded, useless and unnecessary. But this one's worse because it came out of the blue shortly before the hearing and we had to spend time and money dealing with it.

No reliance is placed on it now, so there is no list, let alone a pleaded list of which parts we're still supposed to be relying upon or you're supposed to be relying upon. So, what's happened is it's just been, we assume, duplicated by the much more lengthy Davis 4, which was the one that was ordered to be provided by 31 July 2024,

wherein the class representative was supposed to put in his "full case", but as you know from your judgment last time, he didn't quite manage to do that.

What is said about Davis 3 is that it was adduced, albeit without permission and then not admitted, to develop and expand upon Davis 2. But just pausing there, Davis 2 was supposed to be, in 2023, the case that the CR relied upon, the tribunal having said that Davis 1 was so heavily caveated that it was of no use, words to that effect.

So, we're a bit confused. Davis 3 was supposed to be a development and expansion upon Davis 2, even though Davis 2 was supposed to be the full thing. In any event, when the tribunal in October 2023 said, well, actually -- again, I'm sort of paraphrasing -- you've really got one last chance now, we're losing a bit of patience. You must put in your full case by July 2024. Plainly, therefore, any expansion or development or however it was described that took place in Davis 3 compared to Davis 2 was all then superseded by Davis 4. So in other words, Davis 3 again is a category of report that we had to spend time looking at; not only that, but we had to do it in double-quick time because it came in out of the blue before the hearing without permission.

So, our costs schedule, I'll have to give you the reference after the short adjournment. I think there's another cost schedule that deals with -- oh yes, it's in the next tab, so tab 19 at 796.1, and somebody will give me the soft copy page number.

MR JUSTICE MILES: So, this is in back in the February bundle?

MR HARRIS: February bundle. The hard copy is 796.2. It comes to a total of £97,468. It's page 808 of the soft copy for last time, I'm told.

But I recognise that the same point you put to me about the nature of the schedule.

MR JUSTICE MILES: Yes.

MR HARRIS: Page 808, I'm told.

MR JUSTICE MILES: Just a moment. (Pause)

MR HARRIS: It won't escape your attention that some considerable part of this cost schedule relates to the fees of our own experts, Oxera Consulting, because plainly, they had to engage urgently with this third report that turned out to be of no use to anybody and isn't relied upon. So, of the £97,000, you can see that a fair amount, looks like it's over 60,000, is Oxera work.

Just before I pause for the short adjournment, just for the avoidance of doubt, we ask for our costs of these two applications, so costs thrown away by the change of expert and costs of Davis 3, but we also ask that the CR should obviously should be directed to pay his costs of and occasioned by all of these things in any event.

What we don't want is any situation in which somehow later on, the CR comes back and says, "Oh well, even though you got your costs, nothing was said about our costs". It follows as a corollary of what I've been saying that if I'm right and I get my costs, then they should be made to pay their own costs of all of these things in any event.

So, after the short adjournment, then, that would leave the fairly short and discrete application I make about the table of corrections, errata, and then for later in the hearing, the costs of the loss of flexibility amendments that failed and the effects amendments that failed, and the class definition amendments.

MR JUSTICE MILES: Right. Okay, we'll come back then at 2 pm.

MR HARRIS: Thank you.

(1.00 pm)

(The short adjournment)

(2.04 pm)

MR HARRIS: Sir, can I just pick up on one of the two of the incidental matters that arose before the short adjournment? You asked me about the nature of the cost schedules that have been put in and why they were as they are. And I have two further things to say on instructions now and on reflection.

The first is they both, in my experience and that of my instructing solicitors and weboth practice day-to-day in this tribunal, is that the type of cost schedule that we've put in, in support of an application for summary judgment, is entirely usual in this tribunal. It may not be quite the same as one sees in the High Court but that's what we commonly do. And may I give you an example of how this has already happened in the other direction, with something that was less fulsome and that's to be found in something you will see later on in this hearing. It's called the "Certification cost schedule" and that is in the supplementary bundle for today. Those in hard copy it's tab 24 --

MR JUSTICE MILES: Sorry, supplementary bundle.

MR HARRIS: Yes. For reasons that defeat me, sometimes it's called the core bundle for today but in any event --

MR JUSTICE MILES: How many pages is it?

MR HARRIS: Well, my one of course is not the same as the electronic one unhelpfully but mine's got 890 pages and 36 tabs. And at page 406 --

MR JUSTICE MILES: I don't know if I've got this. Have you got it?

MR HARRIS: I'm told the soft copy is page 438. You ought to have there something called "Schedule of costs UK in the matter of Boyle". [as read]

MR JUSTICE MILES: I don't seem to have that. Well, the problem is my screen is not working. Could someone come and sort it out, please. I haven't got that bundle.

MR HARRIS: Page 438.

MR JUSTICE MILES: That's the wrong bundle.

MR HARRIS: It's also called the core hearing bundle for CMC on today's date, if that helps. It was updated again last night. Do you have a document at page 438 which is a schedule of costs.

MR JUSTICE MILES: Yes.

MR HARRIS: This is a document that was prepared when the boot was on the other

foot and the CR was seeking costs from my clients following their success at the CPO application stage. As I said, we'll be coming back to this later in the hearing so you can see that it's for the period February 2022 to July 2022. But most importantly for the purposes of the current submission, you will see what it shows and what it doesn't show. It doesn't have any narrative at all, but it does effectively show that there were two partners, some trainees and a consultant. And it shows some outline subheadings for sorts of attendances and it has the hourly rate and the number of hours.

And I draw your attention to this for the obvious reason that in the ones that you were looking at appended to Mr Sansom's witness statement, we have a more fulsome narrative compared to this. But this was acceptable to the tribunal when the CR said following their success at the CPO hearing, "We would like our costs of the CPO hearing".

You will find the reasoned costs order, I think strictly it's of the chairman alone, the then chairman, and that's to be found in the supplementary bundle for the February hearing at tab number 3 at page 22. I'm told soft copy, that's page 26. So February supplementary, page 26, is a document called "Reasoned order (costs)". If you have that document, over the page at "Reasons" number 1, you'll see that:

"The CR [sought] his costs of, occasioned by, and incidental to the Defendants' unsuccessful opposition to the CPO Application."

It might be worth you just noting that, because that's relevant to a point -- not now, but later in the hearing -- that what the CR was given was some costs of the opposition to the CPO hearing. But for today, for this point, you can see that what they put forward, they sought an order that (a), (b) and (c) and the order that they sought, the numbers, are contained in the document I showed you just a moment ago. It's called the "Certification cost schedule" at page 438 of the other bundle. You can see what it has and what it doesn't have. That was sufficient for the learned chairman, then chairman,

to make a cost order in favour of the CR.

I accept that what was sought was an interim payment and what was given was an interim payment but nevertheless, it's not said in here, "Well, hang on a minute, it's just defective because it just doesn't provide enough detail". As I said, for what it's worth, those of us who practise regularly in the courts, that's not something that we or certainly that I and my instructing solicitors have encountered, as one might do or as one might have done in the High Court.

MR JUSTICE MILES: He says at the end of that, he says it's not appropriate because it's an interim payment to conduct an intensive review of the cost schedule and the court or tribunal is more likely to be prepared to deal with documents like this for an interim payment than it is for a summary assessment.

MR HARRIS: I quite accept that, Mr Chairman. And of course, that leads me on to my second one, which is why were we seeking summary now, not interim plus detailed. And there's a good reason for that, which I forgot to mention before lunch. It's that this cost application has been adjourned twice before and indeed a large chunk of it arose back in 2023 when we first sought the costs. And so what motivated us, for what this is worth, is that we thought, well, hang on a minute, now's the point where we know what the costs are; we'll put them forward; we'll seek summary assessment. But as I said before, we are content that if you think there's not enough detail, we'll go for an interim payment, should you be with me on the points of principle, that is.

And what I'd say there is, that we would seek the same figure that -- when we first saw this cost order back in 2023, we did in fact say, can we have an interim payment with detailed assessment. But life has moved on. And what we sought then was 65 per cent by way of the interim payment. And that's what we would seek now, if that's the course that commends itself to the tribunal.

The only other update by reference to what happened before lunch is you very helpfully

took me back to the White Book, page 1457 and those guideline hourly rates. And I've, of course, made the point that they're just a starting point and I accept entirely the Court of Appeal's language, "clear and compelling" or "compelling justification". I've given you what my reasons are. You'll either accept them or you won't.

But the update is that you asked me why does my cost schedule not mirror precisely the gradings A, B, C and D in this table. I've checked with my solicitors and they assure me that the "Partner" heading is the grade A -- so what Mr Sansom's schedule calls "Partner" is a grade A, by reference to that, it fits within that bracket. The next one down "Senior associate" is B and et cetera C and D. So I can tell you that. What I'd say is it's actually conservative because two of the people, one of whom is in court today, who's on the schedule at a lower rate, has since moved up but nonetheless, her lower fee rates have been claimed. So that's an example of where there's been a conservative approach. So she was at the lower rate when the issue first arose, she's now at the higher rate, but all of her costs have been claimed at the lower rate.

The next thing I propose to do, with your permission, is address you on the very quick and simple cost application regarding the table of corrections or errata.

But just before doing so, I apprehend that the tribunal may now have had an opportunity to look at the PTA application and you had said you wanted to deal with all consequentials, including costs, but of course, now that you've at least had a chance to peruse it, you will see that it has no bearing on my cost application for loss of flexibility or for the amendment to the class definition, but I'm in your hands. I could either then go on and make those two at least and leave aside the effects amendments cost point --

MR JUSTICE MILES: We'll come on to the consequential costs after all these other costs.

MR HARRIS: In that case, very quickly then, there is a schedule in the February

supplemental bundle at tab 25. Somebody will give me a page number, which is I'm told it's page 744. February supplemental bundle, page 744. Anyone with a hard copy, I think it's tab 20.

MR JUSTICE MILES: What are we looking at?

MR HARRIS: This is the schedule for --

MR JUSTICE MILES: This is a --

MR HARRIS: -- table of corrections in the errata.

MR JUSTICE MILES: What we're looking at is a letter.

MR HARRIS: Yes, so something's gone wrong. Thank you. Ms Blackwood tells me that the schedule is behind the letter.

MR JUSTICE MILES: At which page? I can't see it at the moment. There's a witness statement of Mr Sansom.

MR HARRIS: Behind the witness statement and the soft copy number is 760, I'm told.

MR JUSTICE MILES: What are we looking at? This is --

MR HARRIS: Page 760 of the soft copy, it's the schedule to accompany this application that I'm making about the costs we claim for Dr Davis's very late table of corrections or errata lists. So you should have a document on page 760 saying: "The defendants' schedule of costs in relation to Dr Davis's table of corrections and clarifications to Davis 4".

MR JUSTICE MILES: Yes.

MR HARRIS: You can see it's a relatively modest amount but nevertheless it's not peanuts and we make an application -- this is all set out in the written documents. But just to, in very brief outline, explain why we make this. You may recall that what had happened was Dr Davis's fourth report was put in back in July 2024, but was not full and complete for the reasons you deal with in your judgment on the amendments. And then shortly before the February CMC, but unannounced, there was a long table,

I think 36 pages of so-called "errata or corrections", but they weren't limited to typos and grammar and things like that. On the contrary, they had, on the face of it, substantive extra workings and they had a lot of additional numbers. So, for example, it was said that the damages figures in Davis 4 were wrong and he wanted them to be changed. And we went through this last time so I don't propose to do it again.

But what was curious about that document was we, of course, had to spend time not for the first time in short order, in the run up to a hearing when confronted with a new document that had not been anticipated or presaged, let alone directed, we had to deal with all of that in short order, and it cost us £13,494.

But it's completely unclear what was going on with that document back then, and it's still unclear today, so no application was made in respect of it. Nobody said, can we now amend to make these changes, back then. Nobody said that today. In any event, that seems at least in large measure, to have been overtaken, given your judgment from the last hearing, because it related, inter alia, to things like loss of flexibility but that's now off the table. And what we say is that it's now been overtaken, it's completely at large. There's no application in respect of any of it.

And in any event, Dr Davis's fourth report will now have to be substantially amended again in light of the judgment from the February hearing because he addressed in that, as you will recall, because we went through it last time, he addressed things like loss of flexibility and the so-called effects case, but they're not any longer -- subject to PTA, of course -- the first one is definitely no longer part of the case and as things stand today, the second one is also not part of the case. So they're modest costs but nevertheless this is more from our perspective --

MR JUSTICE MILES: Quite sort of micro, this point, because this sort of thing happens a lot in litigation where you get some report and then someone says, oh, I made some mistakes or something, and here's a table of corrections and you just live with it, don't

you? Aren't these normally just part of the flow of litigation?

MR HARRIS: I think the key words there, I would respectfully say, is "normally". This case is not normal in these regards, including for the reasons that you gave in your judgment to deny loss of flexibility and effects amendments. This is a case in which Dr Davis and the team for the CR have been told very clearly, you must put in your full case by 31 July. And they didn't. And, as you say in that judgment, did so without explaining, never explained to you, even today, never explained to you why it is that he did not do that. And yet all the time -- you say, relatively, I can't remember exactly what your word was -- "quite micro". Yes, but it all adds up and we respectfully say enough's enough. These are further instances, we say, of mismanagement that caused further costs on behalf of our client and ultimately that's a taxpayer bill.

MR JUSTICE MILES: But do we have to look at these to see which ones are corrections and which are not, and things? I mean, supposing that there's something wrong with the numbers, you've got to put it right. It's his job.

MR HARRIS: In which case he should, last time, have made an application and said what's a pure correction and what's not but he didn't. It was completely at large, if you recall. But even worse, of course, it's not even been regularised today. So you don't have any application for this document today. But what you do know --

MR JUSTICE MILES: But do we need an application? I mean, it gets to the point where everything, every single step in the case is a matter of debate and dispute. I mean, normally when someone -- you get it all the time, you get witness statements and then you get someone saying, oh, I've slipped up here. Well, there's a wrong reference; here's a schedule of corrections. You get it with experts' reports all the time. I mean, I'm concerned that this is sort of, as I said, it's micro stuff and to have a separate hearing about costs on something like this seems to me to be getting close to overkill.

MR HARRIS: Sir, you have my point. We say this is not normal for all the reasons I've given. That's why.

MR JUSTICE MILES: But are we going to have to go through and look to see what's a correction or not?

MR HARRIS: Not in my submission; for the reasons I've given, you can take this as a matter of principle for the modest sum that's on the shelf.

MR JUSTICE MILES: Well, what is the principle?

MR HARRIS: The principle is that the CR has, without any direction, without any forewarning, put in an at large table, the status of which was completely unclear then --

MR JUSTICE MILES: Well, they call it a "table of corrections and clarifications". I mean, if it is that, if it's corrections, then I would just say, well, okay, it's got some errors in it; they need to be corrected. You may say it goes well beyond that but then we're going to have to go through, line by line, and work out which is which, which is not just -- it's first of all, it would require a hearing, it seems, or submissions, we are here now, but it also places quite a burden on the tribunal. I mean, are we supposed to go through this and say, well, I'm not sure that's really a correction?

MR HARRIS: Certainly not, sir. Indeed, if that were the stance that were taken by the CR, you would have expected the CR to address you now, including in the skeleton and say, "No, you're wrong, Mr Harris, because actually, this is a genuine correction. That's a genuine grammatical error. That's a genuine typo. And those are all perfectly legitimate." And if that had done, there's a very good chance that we would have said, oh, of course, if it's genuine, and what's more, if it's still sought in that bucket, then we don't seek any cost because that is a normal incidence of litigation.

But in fact, what we saw in that 36 pages, if you recall from last time, were changes to the methodology, changes to the nature of the evidence, including things like offsetting, and changes to the damages figures. They are not properly called

corrections and errata and they never were. This was a back door --

MR JUSTICE MILES: Well, that's your submission then. I think you've got to be clear about this. It's not just a question of whether these are corrections because if they're corrections then it's difficult to see how this is anything other than coming out in the wash. You've got to persuade us that there's something else. So you better do so if you're going to press this application.

MR HARRIS: As I say, what's happened is we've had to take account of something that's now been completely overtaken. It's not even said to you today by the CR that any part of that so-called "table of corrections" is any longer pursued, in which case it's pure wasted effort. So I put it as high as that.

MR JUSTICE MILES: Well, then it comes out in a different way, which is that it's part of the costs thrown away by the application to amend, isn't it? I mean, if it's genuinely all caught up with the amendments and there's nothing left but that's not, as I understand it, it's not as simple as that. So what I'm concerned about is whether we're going to have to go through this and work out -- and I don't know how we're going to work it out -- which look like corrections and which don't.

MR HARRIS: I don't invite you to do that; it's not worth it. My point is a much more high level one, and I apologise, I've obviously not made it clear.

What we say is the table, whatever one calls it, was of no utility back then and wasn't put forward as being of utility, now is being completely overtaken. So it's still of no utility yet we had to spend time engaging with it, including with the experts, at the last minute and that has been wasted costs. And what we say is that that is yet another incidence where we've been faced with wasted costs. It's modest. I don't want to spend any more time, but that's how I put it.

MR JUSTICE MILES: Right.

MR HARRIS: So those are, subject to the points that I want to make in due course

about loss of flexibility, the effects of amendments and the class definition amendments, the points that I wish to make, with the obvious point that I made before that -- for this point, we say that CR should pay his own costs of and occasioned by the table, in any event, that's the parallel that I made of the other two applications. So unless I can assist further, that's what I have to say about those costs applications.

MR JUSTICE MILES: Okay. Thank you very much. Thank you.

Yes.

Submissions by MR SAUNDERS

MR SAUNDERS: Gentlemen, if I may, I'll just pick up that final point first.

MR PAGE: I'm so sorry, it just may be convenient just for me to stand at this moment, just for me simply to say that the Secretary of State also has its cost application. All I need to do, sir, is to refer you to the main CMC bundle.

MR JUSTICE MILES: Which one is that?

MR PAGE: This is the 2500 page one from February.

MR JUSTICE MILES: Is that what we've been calling the February one?

MR PAGE: Yes.

MR JUSTICE MILES: I just think it's important for the record that we know exactly which bundle we're talking about. We're going to call that the February CMC bundle.

MR PAGE: So the February CMC bundle, PDF page 824, internal pagination 812. You will see there at page 825, part 2 is what I have been addressing you on up to now. Part 1 is the costs relating to the change from Mr Harvey to Dr Davis. (Pause)

MR JUSTICE MILES: Yes.

MR PAGE: We intend to adopt Mr Harris's submissions on that application. There's about one page of my skeleton from the February hearing, which deals with this very briefly as well.

MR SAUNDERS: So I'll pick up £15 of Ms Howard's time in due course.

If I could just return to the report with the corrections in it. I mean, on any view, it cannot be a sensible thing for tribunals in this to be going through item by item and trying to adjudicate where an expert has formed a view that he needs to make corrections to his report. No doubt in due course, my learned friend will very vociferously be cross-examining him about the timing of those corrections, what they were, whether he should have made them earlier, and so on. But to try and suggest that there's a whole slice of costs that should be paid on an interim basis in relation to those is, we submit, rather impossible.

As, sir, the chair, you identified, how on earth is anyone supposed to adjudicate this, and how can it possibly be said to be proportionate to do so? At this stage, they should just be rolled in and kept as costs in the case.

Can I just return to the factual basis on which the applications are made, and a little bit of the background to them? My learned friend said that the costs were, and I quote, "totally wasted". Then he goes on to say that these wasted costs were agreed to by my client, or at least we "conceded" the point, I think he put it, that costs were wasted. One has to be a little bit careful about what costs you're talking about, because costs in the hands of the class representative are different to the costs in the hands of the extremely adjutant defendant in this case, who was, as it were, lobbing spears at an opportune moment to do everything they could forensically to disrupt proceedings, in my submission.

You have got to step back from these proceedings. We would invite the tribunal to see that some of these skirmishes are not really advancing matters at all.

Now, the background is that at the CPO hearing, Mr Harvey's full statement wasn't allowed in because it was too late and the subsequent costs order took the class representative's lack of success on that point into account, and that was referred to as some of the very late amendments, which includes the way that the tribunal

characterised Mr Harvey's fourth report at the CPO stage back then.

The class representative informed the tribunal and the parties of Mr Harvey's withdrawal on 1 December, which came as a complete surprise to the class representative; that was three days after his withdrawal. There then followed a very, as one can imagine, frenetic period trying to take steps to find a replacement as quickly as possible. Difficult to see how it can realistically be said we should have been doing anything else.

The tribunals previously made clear that a change in expert was not the fault of the class representative, so this is not a case of experts shopping around. Sir, I'm sure you'll be familiar with a lot of case law, particularly TCC case law, about people swapping experts when it doesn't suit them. This is not that case. On those occasions, cost sanctions and various other sanctions have followed, but we're a thousand miles away from that.

Dr Davis's first report was produced on 2 February, very shortly after his appointment. At that stage, what he said was he's broadly comfortable with Mr Harvey's methodology, but as an independent expert, he includes a clear caveat that it's still early days for him. There's then the March 2023 CMC, the CAT. The tribunal stayed the proceedings and ordered a further report from Mr Davis setting out a blueprint to trial. That's when Davis 2 comes in, on 19 May, 2023. There was then a CMC listed for 30 May, which was vacated to give the defendants time to consider Davis 2.

There was then in July an extensive series of applications founded on various objections to the methodology in Davis 2. A lot of costs were spent dealing with that, and there was a hearing to be in October 2023. But at that hearing, critically, the defendant GTR accepted that none of its objections amounted to a barrier to the case proceeding. The tribunal back then considered it pointless to consider the applications which didn't have anything to do with triability.

So that's how Davis 3 came about. In response to those various points of economics that were raised in those July applications, Davis 3 is produced.

Now, and it may be worth if we can just turning up February supplemental, PDF page 565, internal page 561.

MR JUSTICE MILES: Yes.

MR SAUNDERS: You should hopefully have --

MR JUSTICE MILES: Yes.

MR SAUNDERS: -- paragraph 1 through -- paragraph 2 explains what he's doing. At that stage, Mr Davis says he's dealing with the points of economics raised in the various applications dated 28 July. Now, that report cost money to produce, but it was only necessary because of the applications made, and not persisted in, by GTR.

Pausing there, one might wonder quite what should be properly done with the cost of that application, but obviously I don't have an application to the tribunal in regard to that. But that is the background. We have a very unfortunate circumstance. I don't seek to go back over who it is that was to blame for the change and everything else that I understand the tribunal heard last time around.

The class representative scrambling around to find somebody else, expert instructed, they take an independent view, they affirm their position later on, and subsequently, as I just mentioned, they feel it's appropriate to produce some corrections. So that's the background.

Now, is there any principled reason to make an order for costs at this stage? We say no. The tribunal heard argument on the change of expert costs back in October 2023, but declined to make an order because it was in the context of an ongoing process. That process still remains ongoing, and what is very striking, again, is that in the absence of any reports from the defendants, we still don't really know the full compass and relevance of this material for the trial at large.

Now, it may well be that once Oxera produced something, it turns out that some of the things that Dr Davis has been looking into are things that Oxera might be looking into. But how on earth can we assess that at this stage? So it is an ongoing process.

The change of expert occurred two years ago. There's been a series of hearings and no order since then. We say that in the circumstances, this should be dealt with following judgment.

As, sir, you observed, it is very difficult to see on the basis of these particular schedules that have been put in how a summary assessment can be properly conducted. My learned friend said in submissions these are a type commonly used in this tribunal. But the vice of this -- and this is the vice that you don't have if a summary assessment statement is produced more generally -- is that it precludes the payee from engaging properly with the costs that are claimed.

It may well be that we want to say things like, "How come Mr Harris is being paid £15,000 an hour?" We don't know, because we don't know what Mr Harris is being paid on an hourly basis -- I'm sure, you know, it could be any figure.

Again, all of this sort of material would be the kind of material that would be properly before the court if a summary assessment was sought.

The point that my learned friend made by reference to the claimant's cost schedule was, as, sir, you observed, in the context of an application for detailed assessment and a payment on account. But there, of course, the court has to form a view in the round as to where the appropriate irreducible minimum should be, you know, applying the usual principles in cases like Excalibur Ventures and Martin v Technology and various other things.

So how do you go about doing that in this case? It's quite difficult, in my submission, to form a view on that, because what you don't have, at this stage, is any idea where the costs have been wasted through duplication. You just have to take a guess at

that. My learned friend has just explained that he wants a 65 per cent interim payment.

All we know is what these costs are not: we know that they are not costs of abandoned applications, in fact, we spent the cost on those three in response to those applications; we know that they're not costs of certification, those have already been dealt with, and we had a discount on those costs because we didn't win on everything; we know that they're not the cost of amendments, that's something which we'll have to come back to; they're not the costs of preparing reports because none have been prepared or filed; they're not the cost of giving disclosure; or the costs of engaging with the expert-led process.

So they are some other nebulous costs. Now, my friend says, well, there's a witness statement from senior partner at Freshfields in support of them. We're certainly not making any criticism of him. But what we do say is it's difficult to see how the tribunal can really form a reliable view on an assertion by a senior partner who presumably did not carry out the individual costs crunching himself, he just merely supervised it. It would be rather surprising if he was there tapping away on his calculator, running through the bills.

And the costs were calculated using an unspecified set of conservative assumptions, none of which we know anything about in determining -- how on earth does that assist the tribunal in determining what costs are reasonable and proportionate?

When it comes to the costs of Oxera, I can make that submission a fortiori because the Oxera costs are even more vague. We have a one line item, as you may recall, sir, in the bill that we looked at a moment ago where my learned friend was on his feet. Literally, that bill has two lines in it with figures attached -- I think they come to £60,000-odd, and there's some sort of rubric which says, "Oh, we've thought very carefully about what that cost is".

How is the payee to engage with that kind of material in a way that could possibly be fair? Or, to put the point slightly differently, how can the tribunal form a view, reliably, as to what to award? (Pause)

Well, as I say, we don't know how many hours counsel has spent on things, we don't have a breakdown of particular aspects of work.

So those are the big picture points. In terms of the specific reports: if I can just take you to Mr Davis's witness statement where he explains a couple of points about Mr Harvey's evidence. So if we could go to the February CMC or February core bundle and PDF page 937, bundle page 925. PDF 937.

So in that statement, paragraphs 42 and 43, he was asked "to comment on Mr Hennah's views in relation to the lack of relevance of Harvey 1 - 4".

"In the narrow, practical, sense I agree that Mr Harvey's four reports have now 'faded into the background'. However, more generally, I consider the ideas that were originally seeded in [the] four reports continue to play a role in significant respects in the case. Specifically:

And he goes on say that although he didn't feel able to simply adopt every word that Mr Harvey wrote -- and it would be rather surprising if a subsequent expert did that -- he considered it a reasonable starting point, and it turns out, actually, big chunks of it went into his other reports, and he sets out in the footnote there, 87, where those chunks are.

So bits carried across from Harvey 2 and 3. So what Dr Davis is not doing, he's not reinventing the wheel. The case is not, in my submission, substantially changed. What we see is an independent expert saying, "I've got to stand up for this myself in my own name, and so I want to express it in the terms in which I would express it". In my submission, there's nothing wrong with that as a matter of principle. But to suggest that all of these are wasted costs -- I think my friend said they were "totally wasted,

thrown away" -- is, in my submission, quite wrong.

The tribunal recognised this as well. If we can just look at the October CMC transcript. So the same bundle, page 1643 in the PDF.

MR JUSTICE MILES: Can I have the hard copy?

MR SAUNDERS: Yes, you can. It's 1631. (Pause)

So this just starts at the bottom of the previous page. You'll see Mr Justice Marcus Smith asking a couple of questions, and his observation at line 3 on page 1643 in the PDF, 1631 in the bundle:

"First of all, it's not so much one Harvey 1, 2 and 3 have been jettisoned. It is that they have been necessarily deleted because Mr Harvey is no longer the expert. My reading of Dr Davis's reports is that he used material in Harvey and there's some benefit to be derived from them remaining in play, albeit as satellites to Dr Davis's own work."

So that is sort of point one. And then he goes on to make a comment about Oxera, who are the defendant's experts:

"In doing so they have been learning about the case. There's a derived benefit from considering Harvey 1, 2 and 3 and Davis 1 in the sense that they are learning about the issues.

"Thirdly, suppose we go down the route of an expert-led process of the sort we have [discussed] the morning [...] a complete fresh start in the sense that we would have a further Davis report, [and that'll] be the case for trial."

So we say that those submissions were quite prescient, because what the tribunal recognised is that Dr Davis had used material in Harvey; those reports remain as satellites to his work. It will no doubt be said at trial, if Dr Davis says something that is in contradistinction to Mr Harvey -- and I'm sure my learned friend when he's doing his cross-examination will be saying, "Well, hang on a minute, why do you say that when the previous expert said something completely different?" So this may all come

back anyway, insofar as there are differences, but this is part of the evolution of the evidence in this case.

Now, it is an unusual case in that one does not normally have a case in which it has been necessary for somebody to swap experts. But, as I said before, this is a case where that situation was forced on the class representative, not through the choice of the class representative.

Now, Davis 1. Specific points in relation to the first Davis report: my learned friend said, "Well, it's unsatisfactory and it's superseded, a useless report". But the point is, it was in response to a position adopted by the defendants.

Now, wishing not to seize the gift horse when one presented it to themselves, the defendants asked the new expert to confirm whether he adopted each of Harvey 1 to 3 in their entirety and, if not, the specific points he did or did not adopt, and why. That was made very shortly after Dr Davis's appointment. They also asked him to confirm he'd reached his own independent view on Mr Harvey's methodology. As Davis 1 makes clear -- so we need the February supplemental bundle, PDF page 267.

MR JUSTICE MILES: Sorry, can I have the --

MR SAUNDERS: I'm sorry, yes, just give me two seconds because I think that may be a better reference.

MR JUSTICE MILES: Which bundle is this?

MR SAUNDERS: It's page 263 of the supplemental bundle, PDF page 267, paragraph 5. So, it's printed page 263, PDF page 267 in the February supplemental bundle.

So, that was what Harvey -- so Davis 1 was -- I'm not sure, sir, whether you've got that, but he was writing that report in order to confirm whether he adopted those reports. He obviously had a caveat to his position, quite properly. And as, sir, you may have seen, he essentially says that his preliminary view is that he can support

that methodology.

Now, Davis 1, that first report, is substantively a very short report. Leaving aside the CV and various other things, it's roughly ten, 12 pages of actual evidence. He summarises the Harvey reports, he sets out his expert opinion on the methodology proposed.

To suggest, as my learned friend does, that Davis 1 was superseded by Davis 2 is, well, to a certain extent, of course, correct. It's superseded in the sense that Davis 1 was written for a very specific set of circumstances. The defendant was pressuring the class representative to have his new expert confirm the position, and that's what they got. That was Davis 1.

MR JUSTICE MILES: The only reason it exists is because of the change of expert.

MR SAUNDERS: Yes, of course.

MR JUSTICE MILES: It wouldn't have happened otherwise.

MR SAUNDERS: Well, because otherwise we would have just stuck with Mr Harvey.

MR JUSTICE MILES: Yes.

MR SAUNDERS: So this is the new expert --

MR JUSTICE MILES: Leave aside the question of whether your client was to blame in any real sense. The fact is that the other side would not have had to incur the costs of looking at this at all, because they would have just had Mr Harvey.

MR SAUNDERS: Well, they would have just had this.

MR JUSTICE MILES: And they already had four reports from him by then. So, this report has been brought about entirely by the change.

MR SAUNDERS: Yes. Sir, I think where I might depart from your observation is the "entirely" part. It is absolutely correct that there had to be a change of expert. And it is, of course, absolutely correct that whoever the new expert was that came in, they are going to have to write something, presumably agreeing or disagreeing or reflecting

their own views in respect of the work that has been done previously. You can imagine they won't just sign off on another expert's job.

Where I have a slight reservation with that approach is that the existence of that first Davis report at that time was in part due to the position adopted by the defendants. They wanted double quick confirmation that the expert was on board, that he'd read everything, that he'd signed up to it all; if he didn't sign up to it all, they wanted to know what he didn't adopt and why. Do you agree with all the parts of Harvey 1 to three? You can imagine it's a fairly easy forensic position to adopt. You just say, right, it's a bit like one of those very overreaching requests for further information that sometimes you see. Just fire it off and leave the other side to worry about sorting it out. But if you want that on an interim basis, which we don't criticise them for asking for it, but we do criticise them for saying, having asked for it, that they should be entitled to costs of reading the thing that they'd asked for. I mean, this was a game of forensic ping pong.

And as I say, the reality of this case, stepping back from it, is that it is very striking that there are a lot of these satellite disputes of which this is one, and actually we're not getting on with it. So, one has to see this as part of the litigation strategy it is. I don't have to put my submissions that high, but as I say, this is an unusual case, as my learned friend would say, not for the reasons he says, but for the reason that we are now several years into it. We don't have any evidence or report or anything from the defendants.

So, that's why Davis 1 exists. Now, what about Davis 2? So, in response to Davis 1, the defendant said, well, the full report has got to be provided, and that was Davis 2. But Davis 2 is not entirely duplicative of Mr Harvey's evidence and nor could it be, because Mr Harvey had written reports at a time where the Secretary of State and the GTR had not set out any pleaded cases, so it was just at the time of certification.

Mr Harvey treated dominance very peripherally because he thought it was entirely obvious.

At the stage of Davis 2, Dr Davis had the benefit of all pleaded cases from the defendant and had the benefit of limited voluntary disclosure given in late 2022. So even if we had had the first expert on board, they would have had to have updated their position because, from pre-CPO, if it's right that they should provide fuller details and an update on their position, they've got to take account of the pleadings.

So, it is true that Davis 2 obviously is a fuller report because it has to deal with issues which result from Dr Davis coming in as well as the change to Davis 1. But it has to be updated, the evidence, because all of the previous Harvey evidence was pre-CPO.

Now, Davis 3. As I alluded to a moment ago, our position is that Davis 3 was required to respond to points of economics relating to Davis 2 that were raised in GTR July 2023 applications, another series of applications trying to make points about the previous evidence.

Davis 3 itself makes that clear, and you can see that if we could just go to it. In the February supplemental bundle, it's 561 in the bundle page number and PDF page 565. Paragraph 2. He's providing a response to the 28 July applications about the proposed economic methodology that he outlined in Davis 2. So essentially, they had a go at his second report and here's the third report responding.

Now, one of the extensive applications made by the defendants at the October 2023 CMC included an application for a stay pending the provision of a proper blueprint to trial. Effectively, what they wanted was a further certification hearing.

In response to that, what was in effect a wholesale challenge to these proceedings, it was perhaps entirely unsurprising that an expert report would be needed to deal with the points that have been made against Davis 2.

What actually happened was that the defendant conceded that none of those points

about Davis 3 could amount to a barrier to the case proceeding and on that basis, the tribunal decided to manage the case to trial and to a certain extent criticised the defendants for raising points that didn't have anything to do with trial ability or driving the action forward.

So, that is --

MR JUSTICE MILES: Was there any discussion about costs as a result of all of that, or was it just done in the case?

MR SAUNDERS: I think it was all just dealt with in the case, as far as I'm aware. Let me just double check. Yes. I understand, yes. There was no matter about costs.

Sir, I think under the former chairman, there are a number of aspects of the management of these proceedings which proceeded in a rather informal way, I think as you've already heard in different submissions. But that was in other contexts. That was rather consistent with the way that it was dealt with at that stage.

So, this was what made the tribunal form the view, the chair formed the view that this wasn't about progressing the case, it was just a series of knockabout points which didn't have anything to do with trial ability and so it moved on.

Now, one of the points that GTR make is that Davis 3 has been superseded by Davis 4. But actually, if you look at Mr Davis's witness statement, so I'm looking at the February core bundle, page 938 in the PDF.

MR HARRIS: Can you read out each number every time?

MR SAUNDERS: Yes, I've just done it, Paul. Don't worry.

MR HARRIS: Oh, I didn't hear it.

MR SAUNDERS: I haven't read it out yet. Can you give me a second? I'll go to it.

MR HARRIS: I noticed on several occasions you haven't done it, so.

MR JUSTICE MILES: Let's not get into a spat, please.

MR SAUNDERS: I'm sorry.

MR JUSTICE MILES: No, you carry on.

MR SAUNDERS: PDF page 938, bundle page reference 926, paragraphs 44 to 48.

(Pause)

MR JUSTICE MILES: Right, thank you.

MR SAUNDERS: So the section "relevance of Davis 3". He goes on to explain why he has formed the view that points in Davis 3 are still live. Particularly if you look over the page at page 40, at paragraph 48, what it did, contrary to the assertion in the defendant's applications in July, is it showed that the patterns of demand forecasting handbook had been updated on multiple occasions and was being relied upon. So, that, as a means of assessing elasticity of passenger demand, is something which had been flushed out by Davis 3 and indicated that price elasticity for rail services, for demand for rail services is low: colloquially, people have got to travel, and it doesn't change too much when you charge them more, they've still got to travel.

Now, he's got the basis to say that and he considers in paragraph 45 of his statement a point which he says is a fundamental point when assessing market definition and market power.

MR JUSTICE MILES: Can I just get the chronology clear in my mind that Davis 3 is produced in response to the July 2023 applications and at that stage, this is all before the expert-led disclosure process?

MR SAUNDERS: Yes, which then starts in 2024 which Davis 4 is then produced in reference to.

MR JUSTICE MILES: So, then, the expert-led disclosure process happens and Davis 4 is then produced, which includes references to --

MR SAUNDERS: (Inaudible) loyalty and the like.

MR JUSTICE MILES: -- things which is one of the points he's making here. And Davis 4 was also supposed to be the whole of your client's case, effectively, in relation

to the expert evidence. That was what the tribunal told him to do. So, one would expect Davis 4 to, as it were, replace Davis 3 because it would all then be in one place. Is that right?

MR SAUNDERS: Well, I mean, as a matter of form, you could -- I mean, there are two different things, there's the substance and the form.

MR JUSTICE MILES: Yes.

MR SAUNDERS: So, the substance is that Davis 4 contains the corrections and adjustments that he considers necessary to his previous reports. In terms of substance, it isn't done in that way as you've already seen. I mean maybe --

MR JUSTICE MILES: Is the idea that Davis everything is --

MR SAUNDERS: Everything is part of the Davis set, as it were. Yes.

MR JUSTICE MILES: But by that stage he's seen the disclosure as well?

MR SAUNDERS: He has.

MR JUSTICE MILES: So, you'd expect it to be, as it were, a more complete bigger picture than Davis 3?

MR SAUNDERS: Yes. Just in the light of the material he's reviewed and what he's learned about the case going forward.

Sir, another way of looking at it, which my learned junior says, Davis 1, 2 and 3 are in large part the methodologies and, based on the limited disclosure, we've had, Davis 4 is putting the methodologies into practice based on the evidence he's seen. That's effectively what you get.

MR JUSTICE MILES: Yes.

MR SAUNDERS: So, there we are. Now, I entirely accept that there has been a change of experts; I couldn't possibly pretend otherwise. Certainly from my client's perspective, that has incurred costs that were not envisaged, and there are costs in dealing with that replacement. There are also costs of Dr Davis coming up to speed

and everything else.

But the extent to which that sits in my learned friends on the other side of the case is not quite the same thing, because as I said earlier on, this is an incremental development. He has adopted certain aspects of the earlier evidence where he's felt it was appropriate to do so and then he has also produced reports in response to applications from the other side, from criticisms by the other side, and he has also dealt with changes in the evidence. So, in that sense, it is very difficult to disaggregate from this whole exercise what is properly or not properly the fault of the class representative, and we say there's no basis in this case for ascribing a liability for costs at my client.

I mean, the bottom line is things do sometimes happen in cases like this. Experts have dropped off. It is unfortunate that that has happened. It's resulted in both sides expending some costs, probably not the very substantial sums that my learned friend seems to be recovering or attempting to recover on this basis, but we can't interrogate that because we don't know exactly where any of that has come from, other than the assurance that there's some sort of conservative set of assumptions used to disaggregate that money. That is, I'm afraid, just the reality of this sort of high-cost, large-scale litigation.

But to suggest that there should be interim costs orders as we tick through on different aspects of it is, I would submit, wrong as a matter of principle. These costs should all be at large in the usual way. So, those are our submissions on those aspects of the costs, unless there is anything I can assist you on.

MR JUSTICE MILES: Yes.

Reply submissions by MR HARRIS

MR HARRIS: Sir, may I reply very briefly. In my respectful submission, my learned friend hasn't got any real answer to the point of principle on the expert wasted costs

application that we put. Whichever way you cut it, the defendants have been forced to go to extra unnecessary and abnormal additional cost, and he has no answer to that.

Indeed, just then at the end he said, oh well, both sides have incurred extra costs. Well, that's my point. Obviously, I don't care about his extra costs, but my client's instructed me to ask now because of this unusual situation, which on any view is not our fault but has led to substantial extra costs, we want those costs now.

It's no answer to say, which was my learned friend's final remark, "Oh, that's just a reality". It's not just a reality. If you mismanage things and I'm going to come on to the CR's fault in just a moment -- he says he's no fault, but that's not what this tribunal has already said -- it's not "just a reality" that can be swept under the carpet. This is, as you've seen from the schedules, hundreds of thousands of pounds of additional wasted costs, which ultimately is taxpayer cost and we say the CR should be made to face up to that reality now with this funder. It might have the effect of ironing out, we would hope, some of the other aspects of mismanagement that we'll doubtless reach later in the hearing. So that's the first answer.

As to the question of fault, my learned friend said at least two, perhaps three times. There's no suggestion that he was at fault. But of course, that's not what the tribunal has said in the February core bundle, volume 2, tab 36, the hard copy page is 1545, and this is in the adjournment judgment.

MR JUSTICE MILES: So this is which bundle?

MR HARRIS: This is February core bundle, it's volume two, 1557 is the front page. Is that right? Oh, okay, it's paragraph 10, 1557, and it's the adjournment judgment of this tribunal with the --

MR JUSTICE MILES: 1557? No, that can't be right.

MR HARRIS: Yes, you should have a paragraph 12 with some subparagraphs and

the ones I want are subparagraph 3 on internal page 10 of the judgment and subparagraph 4 on internal page 11 of the judgment. Do you have those?

MR JUSTICE MILES: Yes.

MR HARRIS: So, my learned friend, as I say, said two, perhaps three times that he was not at fault, it's just one of those things, it's a reality. But that's not what the tribunal has previously found. At subparagraph 3, it said:

"We also consider that the Class Representative should, of his own motion, have informed the Tribunal that a case management conference in December 2022 was highly desirable, even necessary."

Just pausing there, that's something that he should have done, but he didn't do. That alone is a fault. It goes on:

"We consider that in collective actions, class representatives need to regard themselves as under a somewhat greater responsibility with regard to the conduct of those proceedings than a claimant in individual action [and then explains why]."

It's fair for me to read out specifically, seven lines up from the bottom, the sentence:

"We recognise, of course, that this is an area of procedure where the law is still being articulated and we do not wish to be too critical --"

MR JUSTICE MILES: Look, this is a complaint -- sorry to cut across it because I want to keep this as crisp as possible. This is saying you should have gone on and told us a bit earlier. It doesn't really go to all the points you're making about all of these costs which have been wasted. It is a complaint, but I don't see at the moment the causal potency of it.

MR HARRIS: Well, the reason I raise it is because it was being submitted to you that in this context, the CR is not at fault at all.

MR JUSTICE MILES: No, they're saying that they're not at fault for the change of expert. They might be at fault for not getting on and telling you quickly enough or

telling the tribunal.

MR HARRIS: Well, I will take you on to another passage where the further criticism is made that the failure to inform the court at an earlier stage turned a possibility of adjournment into an inevitability. In this same judgment at paragraph 10(ii) --

MR JUSTICE MILES: Yes.

MR HARRIS: -- what it says, "the tribunal then found".

MR JUSTICE MILES: Sorry, where are we now?

MR HARRIS: In the same judgment, but this time in paragraph 10(ii), there's internal page 9 of the judgment at the top of that page. For anyone in hard copy, it's page 1544.

MR SAUNDERS: I think it's 1556.

MR HARRIS: 1556.

MR JUSTICE MILES: Yes.

MR HARRIS: So, what it says at 10 is.

"We indicated the provisional view that the trial fixed for later would have to be adjourned."

Then it goes on to say in (2), beneath the stuff about counterfactual:

"That is to say, before the end of 2022. Had that happened -- and this is a matter we will be coming to -- we would have been in a position to consider the very difficult question of 'Where do we go from here?' some three months sooner."

So what he's saying, the tribunal, not just the chairman, but the tribunal of which there are two coincident members today, had the CR done what he "should" have done, then the tribunal would have known three months sooner. And then it goes on:

"Those three months are lost and the opportunities for case management that they provided are lost also. That loss moved the question of adjournment from being 'on the cards' to 'inevitable'."

So, the background to these wasted costs is that that aspect of mismanagement by the CR not doing what he should have done caused an adjournment of the trial, and inevitably that's caused additional --

MR JUSTICE MILES: Right, but those aren't the costs that you're seeking.

MR HARRIS: No.

MR JUSTICE MILES: I mean, let's try and keep everything focused. You're looking for the costs thrown away by basically duplicative work, not the trial date being lost.

MR HARRIS: I accept that, but what --

MR JUSTICE MILES: And I accept your point they should have done it sooner; that's something for which they've been criticised.

MR HARRIS: That's right. But what --

MR JUSTICE MILES: But I want to keep this as focused as possible because we're spending a lot of time on these points.

MR HARRIS: I entirely accept that, but it was incumbent upon me in reply, those instructing me expect me as part of my --

MR JUSTICE MILES: I know, but still your job is to stick to the points that really matter.

MR HARRIS: I totally agree, but that's what I say when I'm met with the submission there's no fault on the part of the CR. (Inaudible) I submit that there is a fault.

Then, my learned friend said very curiously that the July 2023 applications that we made once we had received Davis 2 were variously "not persisted in" or "abandoned". But that's just wrong, just flatly wrong. They were never "not persisted in" and they were certainly never "abandoned". What happened?

As I say, two members of the tribunal may be able to recall this very hearing. We criticised Davis 2 by means of some applications, and that would have involved various bits not being allowed to proceed. But it was perfectly open to the tribunal to say, which it did, "Well, actually, you know what, thanks for those applications, but

they don't knock the case out, even if you win completely and in light of that, we've decided to move forward in a different way: namely, do your full case by the generous deadline of next July, July 2024."

So, that's what happened. They weren't not persisted in and they weren't abandoned at all. Indeed, they were helpful to the tribunal because, having received the applications that pointed out the deficiencies in Davis 2, the tribunal at that hearing had then received, albeit on the eve of the hearing, Davis 3, purporting to address those deficiencies and at that point, the tribunal said, well, taking it all in the round, we should have the full case, including the full Davis 4. So, far from being abandoned or not persisted in, they were of substantial assistance because they led the tribunal to a different path, which was, "Let's go to trial and put your full case in".

So I don't accept what was said about that.

Then, it's said by my learned friend that, in Davis 4, what happened was Dr Davis -- it was put variously, but the gist of the point was -- adopted, significant parts of Davis 2 and Davis 3. But you yourself, sir, elucidated the true position was Davis 4 is a brand new, substantial report that came on the back of disclosure. That rather proves my point, which is that Davis 2 and Davis 3, leaving aside Davis 1 that had been well and truly superseded, was superseded. Therein lies the rub. That's what's given rise to additional wasted costs. Those are the costs that I --

MR JUSTICE MILES: I mean, superseded is a word that has, in this context, can have two very different meanings. One is that it's a new thing, a new report, Davis 4 is a new thing and basically, Davis 3 can just be regarded as something entirely different. Or it could be that quite a lot of Davis 3 has been incorporated in Davis 4. Those can have quite different consequences, because in the second case, it can be thought, well, actually getting on top of Davis 3 turns out to have been quite helpful because it makes it a lot quicker to understand Davis 4. If the position is the other, that loads of

Davis 3 has just been abandoned and Davis 4 is a new story, then Davis 3 becomes a pretty -- well, the costs of reading Davis 4 are entirely new.

This is another situation where, without drilling down into how much of Davis 4 essentially picks up on and repeats things in Davis 3, it's quite difficult for the tribunal to reach a view, it seems to us.

MR HARRIS: I understand entirely the point put to me and I would have, if I could put it, my learned friend would have a better point here, were it not for these points upon which he's completely silent; he has no answer to them. They are that Davis 3 was never admitted by the tribunal; number 1, he ignores that. Number 2, Davis 3 is not pleaded at all. He's silent on that. And number 3, Davis 3 is not relied upon in any way, shape or form.

MR JUSTICE MILES: Well, that's because we've now got Davis 4 and the pleading has come after Davis 4 and so you wouldn't expect them then to say, well, in some spectral way, "We're going to also rely on Davis 3", because the whole point of Davis 4 is that it was going to be all inclusive. So those points I don't find particularly persuasive.

MR HARRIS: Well, my learned friend can't have it, in my respectful submission, both ways. He can't say we should wear the cost of reading Davis 3, which is not relied upon and not pleaded and has been superseded. And yet we should also wear the costs of Davis 4 because his case was, before -- although he didn't show you, any bar one short passage -- that there is essentially Davis 4 has incorporated chunks of Davis 3. You can't have both. Whatever happens that has led to -- this is my basic --

MR JUSTICE MILES: No, but this is how litigation works. You read stuff, you think about it, you educate yourself, you understand it, more information comes along, you read that too. But you've educated yourself already at the earliest stage. And it's unrealistic to say that the whole of the process of reading Davis 3 has, as it were, been

forgotten, has left people's heads, that it's of no assistance to them. This is how litigation that goes on for a long time works. And it seems to me that there's a danger in you saying, well, let's just have all of the costs of Davis 3 on the basis that it's all been a waste. I'm not sure it has. And the only way of the tribunal really adjudicating that would be, again, a bit like the earlier point, drilling down to see to what extent stuff that was in Davis 3 may have carried on, in some sense or another, finding its life in Davis 4.

MR HARRIS: Well, my learned friend, he's known about this application for a long time. He has never come to you and said, here is a schedule of all the bits in Davis 4 that are essentially just the same as Davis 3 and therefore they've not been wasted. He hasn't done that. What you also have was a reference in the transcript of the hearing. My learned friend took you to the transcript of the hearing on 12 October 2023 which, in the hard copy page from core bundle for February, it's volume 2, hard copy page was 1630 and 1631; I'll just give you the soft copy, 1642. You may recall he took you to this and he said, "Oh, well, look, Mr Justice Marcus Smith, the then-chairman, put various points to you, Mr Harris", and he read out -- But what he didn't do was then read out the answers because these were all dealt with. I say, "Can I take them in reverse order?" He says, "Please". And then if you were to read over the bottom of that page and down to the next page, you'll see that all of those points are answered. Most pertinently, for today, what I say over the page at line 2 is:

"These were extra costs unnecessarily incurred by us by reason of Mr Harvey leaving and therefore there being a duplication of effort that marks it out from the usual case."

I accept entirely what you say, my Lord, that in big scale litigation things move and evolve and develop. But this is not that normal case. What we have done in our costs schedules is seek carefully and on a conservative basis to strip out the additional and

extra costs that have been wasted because they're duplicated. So that, I respectfully say, is the answer to what --

MR JUSTICE MILES: How can one tell? I mean, how are we able to tell that?

MR HARRIS: Well, because those are -- that's the basis upon which the costs budgets are being put forward. And my learned friend --

MR JUSTICE MILES: Can you show me that --

MR HARRIS: Well.

MR JUSTICE MILES: -- again, so I understand it because at the moment I don't understand how that's been done. How has that process been carried out of saying this is a duplicative cost rather than, for example, the cost of considering Davis 3? I mean, have you taken all of the costs of your team considering Davis 3?

MR HARRIS: No, the costs --

MR JUSTICE MILES: Well, explain to me how it's done then so that we can understand it.

MR HARRIS: Well, the costs that are being put in the schedule under the cover of the senior partners' witness statements, saying carefully and conservatively --

MR JUSTICE MILES: Show me how it's done then by reference to the evidence.

MR HARRIS: Well, I don't have that material before you today but the point is, my Lord, that this cost application has been extant for a long time and had it been the case -- these points, for example, are not taken against me in the skeleton argument for last time. My learned friend, now, if he's going to seek to jump on the bandwagon of saying, "Well, actually I can't understand how one bit is duplicative and one bit is not, look at Davis 3 compared to Davis 4", then that would have been one thing and then I could have said, oh well --

MR JUSTICE MILES: It's your application. You've got to persuade us that these are costs that you should have now. Their basic point is that there shouldn't be an order

for costs at this stage, partly because it's a very difficult process to work out -- indeed, I can't really see at the moment what methodology you've used for saying that the costs, for example, are in relation to Davis 3, have all been thrown away.

MR HARRIS: Sir, I can't take it any further in terms of the detail but what I can say and where I certainly rest my submission, is that whatever one says about this application, no matter what the points are against me, you simply cannot escape the utterly inevitable fact that we have been put to additional cost and my learned friend said the same on his side. And so if you're not happy, and I hear what you say, with the detail or you feel like you can't interrogate the methodology and quite how it's been done in the narrative, then that's not an answer to giving an interim payment on a summary basis for some of it, with the rest to go to detailed assessment and a detailed assessment, whoever the assessor is, can say, "Okay, well, I, you know, I've looked into this and I either am satisfied or I'm not satisfied that you've properly stripped out the duplication."

But what there is no answer to, simply no answer to, is that we have been put to unnecessary wasted costs and we should, in my respectful submission, be entitled at least to some order for that. And that's why we pressed this application.

Finishing off just very briefly as regards Davis 1, you effectively made the main point to my learned friend in submissions. You said to him, well, the defendants essentially, you said the defendants would not have had to look at anything from Dr Davis had it not been for the withdrawal of Mr Harvey. And exactly so. My learned friend didn't have an answer to that. It's exactly so. Whatever you say about the methodology, the amount, the cost schedule or what have you, it's utterly inevitable that we will put to wasted duplicative costs by that. And that's what should be reflected.

Then finally, unless I can assist further, my learned friend made this submission that another thing that's odd about Mr Harris's application regarding Davis 1 is that -- the

way he put it was, "Well, they were just reading what they asked for. They asked for Davis 1."

But with respect, that's no answer at all. It's my learned friend's case to continue to satisfy this tribunal that it has a proper expert with a proper methodology that can go to trial. And when Mr Harvey withdrew, it was incumbent upon my learned friend, utterly irrespective of what my client said, to present to this tribunal a proper expert report that assured this tribunal that he still had, on a continuing basis, a case that should go to trial under the continuing gatekeeper role of this tribunal. So he had to do that irrespective of whatever my side says. And what we know, of course, was that Davis 1, I mean, more or less gave the game away because what he said was, "Oh, well, it's only about ten pages of substance, with half of it being his CV." And that was the point. This tribunal, when it was faced with Davis 1 all that time ago, essentially came to the view, well, it's not good enough. It's so heavily caveated and you haven't even read the materials and you say, well, on your very provisional and preliminary view, you might adopt something of what Mr Harvey said. And this tribunal said that's not good enough. So it was completely superseded by Davis 2.

Unless I can assist further, those are the reply submissions on the cost application at this stage.

MR JUSTICE MILES: All right. That's very helpful. Thank you. Right. We'll, take a break for five minutes. Thank you very much.

(3.24 pm)

(A short break)

(3.36 pm)

MR SAUNDERS: Sir, I think one thing I've got my learned friend, Mr Page, has reminded me is that I didn't formally say we object to the Secretary of State's costs as well, for the same reasons. I do. I should just --

MR JUSTICE MILES: I've taken that as read.

MR SAUNDERS: Yes, but I should make that express. Yes.

MR JUSTICE MILES: Right. Good. Yes.

MR HARRIS: Sir, largely in your hands, there are a number of options, now. We could deal with consequentials from the last hearing. In your own mind, I don't know quite how you plan to do this, but arguably, PTA is one consequential. There's some logic to having that. Equally, there's the order. I've got a rival set, an order with some slightly disputed wording. And then there are the other cost applications. But I'm in your hands, you may have --

MR JUSTICE MILES: I mean, the normal -- certainly my experience is that the first thing to deal with is costs, then PTA and then the terms of the order. So let's deal with it in that way.

Further costs applications by MR HARRIS

MR HARRIS: I'm pleased to say that, although it's now me again but further costs orders --

MR JUSTICE MILES: Yes.

MR HARRIS: -- they ought to be really very swift.

MR JUSTICE MILES: Yes.

MR HARRIS: As you know, there are technically three of them. There are the costs of the application that my learned friend's team made to add a case of loss of flexibility, which he failed on, or his team failed on; identical submissions relate to the next one, which is his application to add by way of amendment an effects case, which failed. I'm going to take them both together, briefly, but then, strictly speaking, there is a slightly different category, a third cost one about costs of updating the class definition, which is even shorter. So those are the three things.

Very quickly, we say this is an orthodox cost application. My learned friend made two

specific applications to add loss of flexibility, add effects. We had a full hearing. We had full skeletons. We had full argument and he lost. You say that cost should follow the event. I just remind you, with great respect, of a couple of matters that you made clear in the tribunal's judgment when dismissing those applications.

MR SAUNDERS: We don't object to the incidence of costs on those.

MR HARRIS: I'm very grateful to you.

MR SAUNDERS: Cut you short on that.

MR HARRIS: I'm very grateful. Okay. Well, in that case, thank you so much. So the principle is not objected to. As I understand it, therefore, there are two points that are taken. One is that the rates are too high from Freshfields. I've dealt with that already, so I'm not going to repeat any --

MR JUSTICE MILES: Sorry, you better show us the schedule for this. So that we can --

MR HARRIS: Yes, will do. The schedule is to be found in the March supplemental bundle.

MR JUSTICE MILES: Right. Hang on.

MR HARRIS: Tab 27. At the back of that tab -- so my hard copy page, the first page is 430.

MR JUSTICE MILES: Do we have a soft copy?

MR HARRIS: Which I'm told is 462.

MR JUSTICE MILES: Right. In the future, please, please may we have bundles which comply with the rules. That's to say that there's only one set of numbers. It's very inconvenient.

MR HARRIS: Right, sir. That one should say "Defendant's schedule of costs in relation to ..." and then it's the three applications.

MR JUSTICE MILES: Sorry, I'm now behind you. I've managed to --

MR HARRIS: Soft copy, 462.

MR JUSTICE MILES: Oh, that one. Yes. Good. Right. Sorry, sorry. I'm behind you. So, 462. Thank you very much.

MR HARRIS: That's just the front page. If you turn over to 463, the summary, you'll see part one, part two and part three. I'll explain what that means in a moment. And then Freshfields, counsel and Oxera; subtotals for all of those. And then you can have the grand total; you see that at the end. So, again, I accept chunky numbers. You'll see that the way in which this is being put together is the same as the previous. So insofar as you have points with which you were not content, if I could put it like that, they are the same here, so I don't propose to cover them again.

What I can just say, though, is at part one you'll see is May 2023, June 2023, July 2023 and then a much, much smaller bit in January 2025. And that reflects the fact that lots of flexibility was on the agenda, together with effects claim amendments back in 2023. So that's why part one is considering those in May, June, July 2023 and a little bit in -- and that one comes to --

MR JUSTICE MILES: Sorry, that's the loss effect.

MR HARRIS: Strictly, if you look at the very bottom of the page.

MR JUSTICE MILES: Going a bit slow. Yes.

MR HARRIS: No, I'm explaining this because it requires explanation. If you look at the very bottom of that page, which I think is 464, do you see that it's split out for that period as between the three applications.

MR JUSTICE MILES: Yes.

MR HARRIS: So that's how that works. Then over the page, do you see that there's a part two and they are, "Defendants' applications for October 2023". So again it's a historic period or historical period in relation to the CR's cost of flexibility. So that reflects the fact that we had applications outstanding about them back in 2023. And

so you can see again preparation -- if I just take the narrative of May 2023, including "preparation for the defendants' July 2023 applications in relation ..." and you can see the rest for yourself. And then that split, May, June, July and September; over the page it carries on. It's got some counsels' fees and then October and then there's a subtotal. And then as between the two applications that were being dealt with then, because the class definition one doesn't appear in this period, you'll see them at the bottom of the page. So there's a split: 141,000 for one of them, 141,000 for the other one. So that's why it's a subtotal of 282.

And then just to finish it off, part three on the final page, that's the remainder of the figures for the applications as they were presented at the hearing a few weeks ago, so February 2025. So we've moved on now to 2025. That's why all those fees are January 2025 and a little bit in February. You can see the figures for yourself. Again, the narrative is self-explanatory, but can I just draw your attention to the bold bit before the line on the final page. What we've got there, we split out as between loss of flexibility and effects claim.

Then just so that you know, we've been very careful that the class definition amendments that -- I opposed those and I lost. So the total cost that we incurred as regards that application was £17,515, but we don't claim £17,515 because actually I lost that application. What we do claim is the amount of £4,378.78, which is identified also in note three at the very bottom and that's simply that, we say, the orthodox order for a late amendment is we, the person who's responding to it, should get the costs of an occasion by the amendment but we're not saying we want the costs of opposing the application because we didn't succeed.

So I just wanted you to be completely clear that we've recognised that and we stripped it out. It's a very small figure so I don't propose to say anything else about it.

As I understand it, given that the principle is not opposed, the CR paying the cost of

these two bigger applications, and I assume the principle of paying costs of an occasioned by the class definition amendment is not opposed in principle, the two points were the Freshfields rates -- I've dealt with that already, so I'm not going to say any of that again -- and then in the letter we received, I think either very late last night or perhaps this morning, the other essentially major point that was taken was, "Well, you put in a version of this cost schedule for these applications in advance of the February hearing", so I think it was early February we put in a schedule, "and now you've put in this one which came in last night and why are they different? And indeed this one is bigger than that one and you haven't explained why and it's all too late." That's essentially what's said in the letter.

But there's a very simple explanation for that and it is this: as we explained on the last occasion, we had to estimate the costs of the loss of flexibility application opposition and the opposition to the effects amendments application because the application hadn't been heard so we had to estimate it. We did so conservatively, as we have done with everything else.

But of course, now, we know what the costs, in fact, were. So this schedule that I've just showed to you is no longer an estimate, but is an actual, again, conservative and careful. And the principal reason why they've gone up compared to the estimate -- well, inevitably things can change between an estimate and an actual, so that's the obvious point -- but the principal reason they've gone up is, not surprisingly, when we estimated in advance of the February hearing the amount of time that would be taken at that hearing, as between the various applications that were then on the table, we understandably estimated that some considerable part of last hearing would be spent on the cost applications. So therefore, the costs of the last hearing, quite a lot of that chunk was taken off the table for the purposes of these costs schedules, because we didn't think we'd be spending all of the last hearing on matters other than

the costs applications.

So if that sounds a bit convoluted, let me put it a different way. There were two days last time around, we thought broadly a day on costs and broadly a day on other stuff. So when we were estimating, we thought only one of the days would be on loss of flexibility and effects amendments and what have you but it turned out that it was basically two days. That's not a criticism, it's just the way it happened. But because it happened like that, when you move from estimated to actual, of course, the costs numbers go up.

MR JUSTICE MILES: Yes.

MR HARRIS: So that's as simple as that.

MR JUSTICE MILES: And the numbers that you've put forward, you've split it 50/50; is that right?

MR HARRIS: Yes. We've split it -- yes.

MR JUSTICE MILES: Between the two?

MR HARRIS: Yes. Mr Samson deals with this. Perhaps I could just show you. It's same tab, and it's three pages earlier.

MR JUSTICE MILES: Yes.

MR HARRIS: By my reckoning, is soft page 458. That's within the text of Mr Sansom's fifth witness statement. Do you have on that page, paragraph 2.3?

MR JUSTICE MILES: Yes, yes.

MR HARRIS: What he said there was:

"The previous version is conservative, forward-looking, what was anticipated.

"2.4. What we've now done is update to actual." [as read]

So that's the point I just made. And then what he says in 2.5:

"In preparing the updated, my team has adopted the same approach as in the previous version, namely conservative approach, such that the amount in the cost schedule is

less than the full cost actually incurred by the defendants. In particular, my team working under my supervision has taken the following approach." [as read]

And you can see that in (a):

"There was a detailed review of solicitor, counsel, and Oxera narratives." [as read]

You can see what it says.

"And it deliberately stripped out any time that related to any other workstream." [as read]

So in other words, although you don't have all of the underlying invoices, Mr Samson is saying that, you know, here he is, one of the senior partners at Freshfields. Under his direct supervision, people in his team have gone through that in detail, and on a careful and conservative basis, stripped out from the narratives anything else and left only these. And then at be -- well, that's the point I made before, "There's been a review of the transcripts --"

MR JUSTICE MILES: Does he explain the 50/50?

MR HARRIS: That's (b), I think:

"Review of the transcripts from the February CMC, conservatively estimated the amount of time discussing the loss of flexibility and effects claim." [as read]

So that's why the split has come out as it has.

MR JUSTICE MILES: Okay. All right.

MR HARRIS: So I'll happily respond in reply if there are any other points. Those are, I understand, to be the points on the numbers.

MR JUSTICE MILES: Okay, thank you.

MR HARRIS: Thank you.

Submissions by MR SAUNDERS

MR SAUNDERS: Sorry, it may be convenient if I can just do this through the correspondence. There's a copy of the letter. (Several inaudible words)

But I'm not going to say much. (Handed)

MR JUSTICE MILES: Thank you so much.

MR SAUNDERS: Oh, no, I think you can have that as a souvenir.

So, gentlemen, you've already heard submissions in relation to a similar form schedule. One particular thing about this schedule is that it suffers from the same defect as the other schedules, which we've seen, which is Oxera in particular; there's no breakdown of their fees by type of fee earner or any narrative given for their work, beyond just a few lines of narrative, which just encompasses all of Freshfields counsel and Oxera work. So it is very difficult to know how to engage with that. And in part 2, the fees are £132,000 for Oxera. If you have the table on the PDF page 463. If my learned friend -- I'm sure he has the reference -- 431, PDF 463.

So just looking at the overall figures, there's a very healthy slice of fees there for Oxera, and we have absolutely nothing on which to engage with that. There is a comparison in this letter at paragraph 8.

"The class representative economist spent an estimated 42,000."

MR JUSTICE MILES: Sorry, where are you looking?

MR SAUNDERS: I'm sorry, paragraph 8 in the hard copy letter. It may be just convenient just for you to read that to yourself rather than listening to me read it out.

(Pause)

So it is very difficult on the face of this to really engage with what Oxera have or haven't done. That, we say, is the reason why it should go for detailed assessment rather than summary, because we're just not in a position to deal with that today.

Just winding back to the solicitor costs, paragraph 4 of the letter. There are two points in paragraph 4. The first of those is that between 2023 and 2025, my friend's instructing solicitors have become rather enormously more expensive, over 30 per cent for partners and 50 per cent for associate increases. So it is quite striking,

that increase. But also, you see the compare --

MR JUSTICE MILES: Is that recorded in the -- oh I see, so you get on to page --

MR SAUNDERS: So we're just looking at --

MR JUSTICE MILES: -- 467. I'm seeing how this is reflected in the numbers. So.

MR SAUNDERS: Yes.

MR JUSTICE MILES: Yes, I hadn't picked that up. So 467 for part 3, the rates go up quite a bit.

MR SAUNDERS: Yes. So £895 to £1,180 for partners. So you'll see there on page 467, partners are £1,180, senior associates. Even humble trainees -- I wouldn't say they were humble, it's obviously my learned friend's firm -- are £315 an hour, which is quite a sum.

So we have the point about the increase, but also the point relative to the guidelines which you'll see reproduced in the letter, you see in the table just on paragraph 4 there. So, in any view, these are considerably in excess of the guideline rates.

A moment ago, sir, you mentioned the Court of Appeal authority, Samsung v LG. I don't have a copy of that in court, but I can give you the reference to the judgment, which is [2022] EWCA --

MR JUSTICE MILES: We're going to try and deal with this today.

MR SAUNDERS: Yes, let me, if I may, just read out the paragraph of Lord Justice Males.

MR JUSTICE MILES: Give me the reference then, Samsung --

MR SAUNDERS: Samsung Electronics v LG display, [2022] EWCA Civ 466, and it's the judgment of Lord Justice Males with Lord Justices Lewison and Snowden agreed. So Lord Justice Males looks at the rates. So this was dealing with the cost of an appeal, he says:

"LG is not attempted to justify its solicitors charging at rates substantially in excess of

the [guidelines]. It observes merely 'that its hourly rates are above guideline rates, but that's always almost the case in competition litigation'."

I quote paragraph 6 of the judgment:

"I regard that as no justification at all. If a rate in excess of the guideline rate is to be charged to the paying party, a clear and compelling justification must be provided. It is not enough to say that the case is a commercial case, or a competition case, or that it has an international element, unless there is something about these factors in the case in question which justifies exceeding the guideline rate."

Then he goes on to say, in that appeal, there isn't.

So that is a factor, certainly, to be taken into account when assessing if you're going to make a summary assessment of costs.

There are a number of points concerning part 2 of the schedules, in particular June and July costs, you'll see in paragraph 6 of the letter, £64,000 seems excessive; minimal correspondence during that time.

Paragraph 7. Counsel costs in September and October also seem excessive; £48,233. There are various questions about that.

I've already dealt with the point in paragraph 8.

Part 3. There's the increase in costs, which my learned friend's just addressed you on, so that's that. An apportionment of the fees, I think he explained that that's because the way that they had addressed it, but when one looks at the overall figures -- just on the final page -- to get the sort of overall feeling for, for quantum, £584 using 25 March cost schedule.

The CR's costs are set out there. So the cost of actually making the applications -- and this is on a full fee basis -- are £330. So they are, we would submit, even though my friend didn't have to make the running on the applications, considerably higher. You see the comparison there, paragraph 13 and 14.

MR JUSTICE MILES: Where it's that figure of 584?

MR SAUNDERS: So the £584 figure is, I think, the figure in the earlier versions of (inaudible). It should be 571 now.

MR JUSTICE MILES: It should be 571, now.

MR SAUNDERS: And the other figure, I think it should be 277.

MR JUSTICE MILES: Which one?

MR SAUNDERS: So the part 3 figure.

MR JUSTICE MILES: Was 277.

MR SAUNDERS: Was 277, that's what's now claimed.

MR JUSTICE MILES: So they're now claiming 571-odd.

MR SAUNDERS: Yes, not 584.

MR JUSTICE MILES: But your point is that --

MR SAUNDERS: Our point is: look at the overall figures, the class representative's costs for making the running were 313 as against 571. (Pause)

So we say in the circumstances, particularly given the uncertainty in relation to the Oxera costs, the costs should go for detailed assessment, but if you're against me on that, then we invite you to summarily assess them. But, we would submit that the significant deduction is appropriate from the 571 overall bill in the circumstances.

Reply submissions by MR HARRIS

MR HARRIS: So very briefly, three short points: first of all, it's been pointed out to me on the government websites that for the two year period in question, which the rates went up, the CPI was 10 per cent in each year, so there's a slightly more when you compound.

MR JUSTICE MILES: So hang on, what's that?

MR HARRIS: That's CPI in both years between 2023 and 2025, when my learned friend says, "Hang on, why have the rates gone up?" It's in part because it's just the

CPI indexation. I'm not saying that explains it all, but it's relevant to your assessment of whether it's somehow wrong for the rates to have gone up for the partners and the senior associates. This is the first time in some decades when people even have to take account of inflation. Lucky us, but it happened to be the last two years. So that's the first point.

Secondly, my learned friend says, "Oh, well, look at my letter that I've handed up and your costs of opposing these applications are higher than my costs of making them". But with great respect, of course, we had to do quite a lot of work in order to point out why the amendments shouldn't be made, and we succeeded, and it won't have perhaps escaped your attention that on several occasions at the last hearing, I had to point out what in fact the other side was saying, because it wasn't clear to the other side what was in their case.

Finally, just for the sake of completeness -- if you're not with us on a summary assessment for this schedule, for whatever reason -- we would, again, be happy with interim on a 65 per cent basis.

MR JUSTICE MILES: Right. Just give us a moment.

Okay. I'll give a brief ruling now.

(4.01 pm)

**Ruling on costs applications (submitted to the tribunal for approval)**

(4.10 pm)

MR HARRIS: Sir, thank you. So I think on your list next might be the PTA.

MR JUSTICE MILES: Yes

Application by MR SAUNDERS

MR SAUNDERS: Sir, I was just asking my learned junior if we needed something in relation to time to pay, but we'll come back in relation to that with you.

Permission to appeal. I don't know whether, gentlemen, you've had an opportunity to

see the draft grounds.

MR JUSTICE MILES: Yes.

MR SAUNDERS: I'm assuming your consent to entertain an oral application along those lines very briefly.

MR JUSTICE MILES: Yes.

MR SAUNDERS: I'm trying try not to use too much time but let me just find the costs a moment.

So, there are three grounds advanced. Just for those following along, it's the March core bundle, tab 32, page 621, page 653 of the PDF. There are three grounds advanced. The first is that the tribunal erred by eliding the loss of flexibility and the effects of amendments and didn't fully consider the circumstances of the effects amendments.

The second is that there was an error of law. There are two legal meanings of anti-competitive effects for these purposes: market effects, and abuse for the purposes of abuse and effects as a head of loss and damage. They have to be kept separate.

Thirdly, that the effects amendments were already an issue and so therefore it was proper that they should arise at trial. So, it was a case of the pleadings affecting the evidence, as it were.

If I could address you briefly on the second ground first and then the others. The second ground, you'll see just that the skeleton at paragraph 28. So this is page 631 in the bundle, page 653 in the PDF.

What it explains is that there are two distinct meanings to anti-competitive effects: market effects, so effects of the conduct on the market relied upon to establish breach of the Chapter 2 prohibition and those have to be weighed in the balance when you're assessing them relative to any efficiency defence raised by the defendant. So, obviously one of the things they say is that it's sufficient to operate in that way, and

that is pro-competitive. So, a market effect is relevant to determine the question of dominance and therefore liability.

A loss effect, on the other hand, is, as it were, the downstream effect of the conduct that's been established to be abusive and the actual loss and damage suffered by the class members. We say, what you have to do first analytically is look at the extent to which the conduct complained of has the potential to cause market effects -- I'll pick that up in the skeleton at paragraphs 12 to 14 -- and our case otherwise has been that a breach of the regulatory regime is the condition precedent to an abuse in this case or, in the alternative, that there are market effects that contravene the chapter two prohibition.

Those market effects are not to be confused with the loss effects. You'll see just on page 632 of the bundle, paragraph 30 to 31 some of the course of argument that my client maintains that those two points were elided by the tribunal in considering the analysis and that, we submit, led the tribunal into error.

So, that's the second ground. The first ground is --

MR JUSTICE MILES: Sorry, can I just ask you about that first ground?

MR SAUNDERS: Sorry, the second ground?

MR JUSTICE MILES: Second ground, I'm sorry, the first one you dealt with. Can we go to the pleading? Just because this is important, I think, that we understand this, clear what your argument is. So, 37 -- there are two paragraphs, as I understand it?

MR SAUNDERS: 37.4 and 64.6.

MR JUSTICE MILES: Right, so 37.4 is at page 145; is that right?

MR SAUNDERS: Steampower, 135.

MR JUSTICE MILES: So, the anti-competitive effects arising. So this starts with the words, "Common issues for certification", so this is, as it were, a sort of general description because this is just part of your general description of the case. And then

it says:

"Including whether and to what extent the abuse of dominance had an impact on the price of fares purchased by class members and service levels."

Then, the second one is 64.6, which is 163. The only pleading you've got here is, as I read it, that the imposition of the brand restrictions and differential pricing creates inefficiencies and is anti-competitive. So that's what's being said?

MR SAUNDERS: Yes.

MR JUSTICE MILES: But that's as pleaded in 2.5 and 55 because that's the only particulars you've given of it. It says, "as pleaded in paragraphs 2.5 and 55".

MR SAUNDERS: Sorry, sir, yes, in terms of --

MR JUSTICE MILES: And --

MR SAUNDERS: And paragraph 64.6, those are the paragraphs referred to. Yes.

MR JUSTICE MILES: Yes. Right. But this is the only place where you've actually set out what your case is as to what these anti-competitive effects are. Well, and in the reply. But that's just the same.

MR SAUNDERS: Sorry, I think the reply also picks (overspeaking) --

MR JUSTICE MILES: Yes, that's the same point, then, in the reply as in 2.5 and 55.

(Pause)

Is that right? So these are the only details we've got.

MR SAUNDERS: I can certainly -- sir, let me just check with those. (Pause)

Yes, so sir, it is correct that that is all we have pleaded.

MR JUSTICE MILES: Yes.

MR SAUNDERS: But the point being made is that it's a distinction between object and effect.

MR JUSTICE MILES: No, I know.

MR SAUNDERS: But no, in terms of the actual mechanics of the pleading.

MR JUSTICE MILES: Then if one goes back to 55, and this is a point that we addressed at the hearing, if you go back to 55, which is then ...

MR SAUNDERS: That'll be in relation to the plea report.

MR JUSTICE MILES: -- which is page 157 soft copy, 147 hard copy. The only point about the market effects of this fare structure was that it was influencing demand in such a way that capacity was not optimally used, resulting in worse overcrowding and causing delays. So, what's said there is -- because that's the only bit which actually has any kind of teeth to it as regards service levels, the first bit is about people preferring flexibility, so it's overcrowding and delays.

MR SAUNDERS: Yes, as a consequence of the differential fare structure.

MR JUSTICE MILES: Yes.

MR SAUNDERS: So, people go on cheap trains, essentially.

MR JUSTICE MILES: Well, it says here that the differential fare structure causes overcrowding and delays. Yes? And the same point I think is made in the relevant paragraph of the reply and in paragraph 2.2 of this pleading. They're references, I think, to the Gibb report. It might be worth just checking the reply. But I think in 2.2 it's the same. Isn't that the Gibb report again? From memory. Is it 2.2? Sorry. I'm now 2.5. I'm so sorry. 2.5. Yes. So, that's the Gibb report again?

MR SAUNDERS: Yes, page 114.

MR JUSTICE MILES: Same point. Then the reply was paragraph ... where is that? 1884 of the reply. Where do we find that? In a different bundle?

MR SAUNDERS: I think it is.

MR JUSTICE MILES: In the same bundle.

MR SAUNDERS: The February supplemental bundle, tab 24, that starts at page 730 in the PDF, 726 in hard copy.

MR JUSTICE MILES: Yes, okay, so that's the same point because it's

a cross-reference back to paragraph 55 of the particulars of claim. Yes?

MR SAUNDERS: Sorry, sir, which page is it?

MR JUSTICE MILES: 474(iv). Because the only pleading that you've got there that makes any sense other than just the generalised --

MR SAUNDERS: Well, there's a sort of general plea, obviously.

MR JUSTICE MILES: Yes, but you can't just make a general plea, you've got to give some facts. What's alleged is that it causes overcrowding and delays. So, those are the effects; you can't just say it causes effects. You've got to say --

MR SAUNDERS: Well, we say that 37.4 of the amendment to the claim form is broad enough to capture anti-competitive effects generally.

MR JUSTICE MILES: But you can't just say, "There are anti-competitive effects" in a pleading sought to be introduced at this stage in a case. You've got to say what the anti-competitive effects are.

MR SAUNDERS: One of those where we don't have to plead the supporting expert evidence.

MR JUSTICE MILES: No, no, you have to say what they are. You have to say, "there are anti-competitive effects, ie overcrowding or delays", for example. And the only ones you've pleaded, as far as I can see, in any of these documents are overcrowding and delays, they're the only ones you've sought to plead. It seems to me it's completely unacceptable just to say there are anti-competitive effects without telling the other side what they're said to be.

MR SAUNDERS: Well, sir, as far as the adequacy of the pleading is concerned, obviously this is a slightly different -- I could see if this were a case in which that pleading had been advanced in a vacuum, then yes, of course, sir, your point would be entirely apposite. But this is also where there's expert evidence setting those out. We're not maintaining that anything different has been said. But Davis 4 deals with

the anti-competitive effect, so it's part of a package with that evidence.

MR JUSTICE MILES: But the way you've pleaded it is to tie it to the overcrowding and causing delays, as I read this pleading.

MR SAUNDERS: Yes.

MR JUSTICE MILES: Where do you then say what the anti-competitive effects are if they're not those?

MR SAUNDERS: Sir, I can't -- I mean, I can't suggest there's something there that isn't, it's a question of whether the generality that's pleaded there in the light of the fact that Davis 4 deals with that, whether that is an adequate plea in the circumstances of having that report.

MR JUSTICE MILES: Then, what do you say Davis says is the anti-competitive effect? He doesn't say it's overcrowding or delay.

MR SAUNDERS: It's the higher prices that passengers have to pay and the loss of flexibility when you buy the tickets.

MR JUSTICE MILES: So, this is a way of bringing the whole of the loss of flexibility claim back in, is it? Through the back door? Is that what's suggested?

MR SAUNDERS: No -- well sir, we entirely accept that we lost that and we're not seeking to reintroduce it by the back door.

MR JUSTICE MILES: But where does it say anywhere in this pleading that the loss of flexibility claim is sought to be relied on as an effect?

MR SAUNDERS: That is not said expressly. We don't maintain that because we're not really seeking to appeal in relation to the effects.

MR JUSTICE MILES: I know, but --

MR SAUNDERS: But I accept that a consequence of that is that we can't persist in that broader argument.

MR JUSTICE MILES: Where is the pleading then, that -- because it seems to me that

the defendants are entirely entitled, obviously entitled to know the case they have to meet. Where could they see in this pleading that it's being said that the so-called anti-competitive effect is the loss of flexibility?

MR SAUNDERS: Sir, beyond the amendments to 37.4 and 64.6, which we put to the tribunal ... These amendments were originally sought in March 2023, so at that stage, we didn't know exactly what the effects would be because we weren't in -- it was pre-disclosure, obviously, so this is the slightly odd temporal --

MR JUSTICE MILES: 37.4, it doesn't say anything, does it?

MR SAUNDERS: No, I mean those are the paragraphs we've just looked at.

MR JUSTICE MILES: And they don't say anything about flexibility, do they?

MR SAUNDERS: Not in the way that is developed in Davis, but following the disclosure.

MR JUSTICE MILES: Yes, but why -- it's not -- it's incumbent on you when you're bringing forward a pleading at a late stage in the case to set it out, and you haven't done so, which is one of the reasons why we dismissed it.

MR SAUNDERS: Yes, sir. As I say, my submission on that is essentially, given the circumstances of Davis 4, it was a general plea made at an earlier stage in March 2023, prior to disclosure, pending the analysis. The analysis is now in the case in the form of Davis 4 and that constrains the way in which it is advanced. Now, as we've heard in other parts today, there has been a progression in the way that that evidence has developed following issues of disclosure and so on.

MR JUSTICE MILES: It's worse, actually, looking at 37.4 because the change you've made at the end of it is actually to bring in this idea of service levels. Well, that's not flexibility is it? It's service level. Service levels means things like whether there's congestion or delay, I would think.

MR SAUNDERS: Yes, well, service level as a form of effect.

MR JUSTICE MILES: Yes, I know, but what is it then?

MR SAUNDERS: The nature of the service that is being provided by the company, and that is in my submission what we see in Davis 4.

MR JUSTICE MILES: All right.

MR SAUNDERS: I mean, the service levels is, in my submission, a general omnibus term, as it were, which is broad enough to capture it. It is, as it were, a catch-all. But, sir, you've heard my submissions on that and I suspect I'm -- there may be a limit to which I'm achieving traction.

MR JUSTICE MILES: All right. Well, we've considered your other points, I don't think it's necessary for you to expand on those unless you wish to say anything more.

MR SAUNDERS: (Inaudible) sir, I think, if you've had an opportunity to read them.

MR JUSTICE MILES: Yes. Right. Okay.

(4.31 pm)

**Ruling on permission to appeal (submitted to the tribunal for approval)**

(4.42 pm)

MR SAUNDERS: So we would like, if I may, just to be absolutely clear about what I conceded, which was that the flexibility couldn't come in as a back door through that pleading for the purpose of -- seeing as we weren't appealing it, we're only appealing effects. It wasn't a more general concession. I don't think it affects, sir, your reasoning in any way in relation to the ruling you've just given, but I just wanted to make it clear.

MR JUSTICE MILES: It doesn't really matter --

MR SAUNDERS: What was intended, at least --

MR JUSTICE MILES: It doesn't really matter. I'll accept that whatever you said, you're not intending to make that concession. It doesn't affect.

MR SAUNDERS: It doesn't affect your reasoning, sir.

MR JUSTICE MILES: No. Right, so where are we now?

MR SAUNDERS: Well, so I think there's some points on the order.

Housekeeping

MR JUSTICE MILES: Right, well, we're going to rise now, but, yes, just tell me what we've got for tomorrow. Points on the order.

MR HARRIS: Sir, can I just take one minute to identify what I think is left, and then make one personal plea about tomorrow?

What I think is left is: the number of days for the interim payment; we say 28 up; secondly, the need for the CR to update Davis 4 in his pleadings, post your ruling; most importantly, thirdly, the trial structure going forward; and then finally, fourthly, our application for a witness statement and cross-examination.

Are you minded, sir, to give an indication of whether you'd prefer to, for example, start with trial structure tomorrow or something else?

MR JUSTICE MILES: Well, we'll finalise the order to begin with --

MR HARRIS: Yes.

MR JUSTICE MILES: -- including any directions that need to be given as to Davis 4 as any further pleadings and that sort of thing, which I hope we'll be able to deal with quite quickly. Then we will deal with the structure of the trial, and then we'll deal -- depending on where we've got to -- with your application in relation to the witness statement.

MR HARRIS: Thank you, sir, and in light of your indication, you want to finish tomorrow, and on a personal level, I have a 5.00 pm medical appointment over by Gray's Inn.

MR JUSTICE MILES: Tomorrow?

MR HARRIS: Tomorrow. I have no obviously no real reason for thinking we can't do everything I've just identified by 4.30 pm, in any event, but I leave it to you. Would you prefer to start at 10.00 am and therefore be sure, or would you prefer to start at

10.30 am on the clear understanding upon everybody that everything has to be done by 4.30 pm?

MR JUSTICE MILES: The latter.

MR HARRIS: Yes, I'm very happy. If it assists --

MR JUSTICE MILES: Everyone must work to that timetable.

MR HARRIS: And it probably falls on me most, because probably the time that will come down is anything I want to say about the witness statement and cross-examination. If it assists you, there are four copies here of a draft order marked up in red and green with the rival wording. You'll be pleased to see it's not much, and that may save you some time overnight, because I don't think this is yet in the bundle. And Ms Howard -- overnight, this one could be updated to reflect the ruling you've just given as regards the interim payment of costs, and so we can do that.

MR JUSTICE MILES: Well, why don't you do that?

MR HARRIS: Yes, and I'll present another one tomorrow, but there we go.

MR JUSTICE MILES: Yes.

MR HARRIS: Ms Howard reminds me that were there to be a possibility of a tribunal to give any indications overnight, or at least tomorrow, about any trial window for what the parties are broadly aligned should be a trial 1, that might prove beneficial, but that's plainly a matter for the tribunal.

You may recall on the last occasion a very provisional reference was given to 26 January, and I think -- I'll be corrected if I'm wrong -- that that suits the parties. But it was very provisional.

MR JUSTICE MILES: For the short trial?

MR HARRIS: For what broadly, for present purposes, can be called a breach of regulatory provisions trial, but I leave that --

MR JUSTICE MILES: That would -- I mean, we'll go away and think about it, but from

your point of view, or from the party's point of view, a trial of that kind of length would be good at that period?

MR HARRIS: Yes, we have to address you on length tomorrow.

MR JUSTICE MILES: Yes.

MR HARRIS: But a trial 1, circumscribed in that period, I think we're broadly ad idem on that.

MR JUSTICE MILES: All right. Well, don't anyone else say anything about that now. You can talk among yourselves and then you can report back to us --

MR HARRIS: I'm grateful, thank you.

MR JUSTICE MILES: -- tomorrow on that.

All right, good. Thank you all very much.

**(4.47 pm)**

**(The hearing adjourned until 10.30 am on Thursday, 27 March 2025)**