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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Thursday, 27 March 2025

(10.30 am)

MR SAUNDERS: Good morning, gentlemen. I'm not sure whether we have to do the streaming guidance again, or do we?

MR JUSTICE MILES: I'm told not. I'm told there's no need for that.

MR SAUNDERS: Thank you. And I'll go to --

MR JUSTICE MILES: I'll take my instructions.

Order on the amendment application

MR SAUNDERS: Gentlemen, the first order of business for today is the consequentials order from the amendment application. And then --

MR JUSTICE MILES: Yes, just finalising the order.

MR SAUNDERS: Yes, exactly. If I may give way to Mr Went on our side for that.

MR WENT: Good morning, gentlemen. I believe that there was handed up a draft order yesterday. Do you have that?

MR JUSTICE MILES: No, because I thought we were told that there was going to be yet another one, so I've not brought that. I thought we were told yesterday that, for example, it would deal with the decision on permission to appeal and so on, which obviously wasn't in the last draft that we saw. But I don't know whether that has happened.

MR HARRIS: Sir, that's right, we have produced another version. I'm told it's being printed as we speak.

MR JUSTICE MILES: Right.

MR HARRIS: So it does deal with things like (inaudible) costs (inaudible) yesterday.

MR JUSTICE MILES: Right. Well, we might just wait for that, but is there anything you can say in the meantime?

MR WENT: I think it's worth just waiting --

MR JUSTICE MILES: All right.

MR WENT: -- to have that in front of us, if that's all right.

MR JUSTICE MILES: Yes. (Pause)

MR HARRIS: Sir, might it assist if I explain what the colouring is?

MR JUSTICE MILES: I think I can see that actually, because it says it at the top.

MR HARRIS: Save that on page 2 and 3, you'll see actually there's some type on 4 and 5, some words in purple.

MR JUSTICE MILES: Oh, right.

MR HARRIS: They are simply to identify what was added.

MR JUSTICE MILES: Since the last time.

MR HARRIS: Since the iteration you had last night.

MR JUSTICE MILES: All right, thank you.

MR HARRIS: Thank you. (Pause)

MR JUSTICE MILES: Right. (Pause)

Right, which bits do we need to ...

Submissions by MR WENT

MR WENT: Yes, so there's hopefully not too much that we need to focus on, sir.

MR JUSTICE MILES: All right.

MR WENT: Just briefly going through the first recital at the top of the second page. We just don't think that the addition there is accurate, because Davis 4 doesn't set out the loss of flexibility actually suffered by class members. That, of course, is one of the reasons why the tribunal refused permission in relation to that. He does deal with loss of flexibility actually suffered by those in the market who purchased single-brand fares, but not class members.

In the next recital --

MR JUSTICE MILES: Yes.

MR WENT: -- down, I think 1, we're fine with "introduce" there. In (ii), the only point I think we take there is that we'd prefer "case" instead of "abuse", but (inaudible) an alternative case as opposed to abuse, but we don't mind the other wording there.

MR JUSTICE MILES: Yes.

MR WENT: Over the next page, the penultimate recital is, of course --

MR JUSTICE MILES: So the purple bit there is just explaining what the --

MR WENT: (Inaudible).

MR JUSTICE MILES: -- what those applications were.

MR WENT: Yes, that's fine.

MR JUSTICE MILES: Right, those are the bits we haven't yet ruled upon; is that right?

MR WENT: Yes.

MR JUSTICE MILES: All of them, yes?

MR WENT: Yes.

MR JUSTICE MILES: Okay. So the next page then is further recitals in green. Are you happy with those?

MR WENT: Yes. The first one is absolutely fine. There's a question as to what happens in relation to the expert reports, but we will come on to that in clause 8 in a moment -- paragraph 8.

MR JUSTICE MILES: Yes, okay. So you're happy with the green recitals?

MR WENT: Well, so the very final recital -- yes, I mean, it's accurate that a request was made. That's fine.

MR JUSTICE MILES: Yes, okay.

MR WENT: I think the main question, really, is paragraph 8, sir. If I can just briefly address you on that. I think our first point is that we don't believe that Davis 4 requires amending as regards the loss of flexibility claim; Dr Davis was explicitly instructed not

to assess that claim when producing Davis 4, and you can see that in his instructions. And of course, the tribunal found that he hadn't dealt with the loss of flexibility claim in terms of calculating that for the class. So if --

MR JUSTICE MILES: I thought he had done some of it, though, hadn't he? I mean, there are passages where he explains some of the steps he's taken in relation to that, but doesn't come up with a defined figure.

MR WENT: Yes, sir, but I think that then comes to the effects amendment point, because it's all in the context of effects -- if he deals with loss of flexibility, that's the reason he's dealt with it, (inaudible) other reason. He deals with it from the perspective of the market, so any passenger who purchased single brand fares. Of course, as I said, this is part of the reason as to why the tribunal didn't allow the loss of flexibility claim.

So all I was saying initially is that in terms of the loss of flexibility claim, we don't think there's any amendment that is required to Davis 4 in relation to that, because he was specifically instructed not to calculate damages for the class in relation to loss of flexibility.

But then there's a question as to the effects amendment. From the perspective of the effects of amendments, I think we say that there's the question as to whether it made sense for a further report to be provided now, particularly when the class rep has renewed the application for permission to appeal to the Court of Appeal. So there's a question as to that process running its course.

But we also say that, assuming we're moving to a preliminary issues trial, both parties are of the view that there's no requirement for any expert evidence in relation to that. So any updating that might be required may be entirely redundant.

I think we'd also say that it won't necessarily be a simple matter to produce a further report. If we were to go through this process, I think what we would propose is actually

that we would write to the defendants to explain which parts of Davis 4 weren't being relied on, as opposed to the report.

But some of the effects section within the report actually bleed into the damages element of the report. So, for example, Dr Davis sets out the counterfactual scenarios in the effects section; those counterfactual scenarios are then used for calculating damages. So it's not simply -- because he does have sections in his report (overspeaking) damages.

MR JUSTICE MILES: Calculating the damages for the fares being too high?

MR WENT: Yes, is it worth just quickly turning to --

MR JUSTICE MILES: Well, try and explain it to us briefly so that we don't have to look at too much. But if we need to, we will.

MR WENT: In the effects section, he sets out what the counterfactual scenarios might be, because that can be part of the effects analysis. So he sets out four potential counterfactual scenarios: one, for example, is harmonising down to plus 5 per cent; and then there are a couple of others as well. Those are set out in the effects -- what he's labelled the "Effects" section of the report. It's those counterfactuals on the basis of which he then --

MR JUSTICE MILES: Why is that called effects? I mean, I don't understand that. I mean --

MR WENT: Well --

MR JUSTICE MILES: His analysis is -- I'm really simplifying things -- as I understand it, he says that what the differential pricing meant was that people who got, say, a multi-brand ticket paid too much. That's step one.

To work out the amount of the loss of the class, you have to compare that to what would have happened in a fully competitive counterfactual, and he says there's a number of possibilities there: that all prices go right down to, as it were, the cheapest

fare, or they're somewhere in the middle, as I understand it.

MR WENT: Yes.

MR JUSTICE MILES: Well, one can understand that. Why is that tied up with what you call effects?

MR WENT: Well, so I think that there are two points. One is just in the way the report is being set out. Dr Davis sets out details on the various counterfactuals in the sections that are titled "effects". But of course, Dr Davis, when he was analysing effects, he analysed as part of the effects, of course, the impact on prices, that's part of the effects. Then the second element he analysed was the loss of flexibility, but from a market-wide perspective.

Those were the two pieces of effects that he analysed. That's why, when he discusses that the pricing effects within the effects section, that's where he sets out the counterfactuals.

MR JUSTICE MILES: Okay.

MR WENT: So --

MR JUSTICE MILES: But anyway, your proposal is that he shouldn't have to put in another report at the moment because of the potential appeal, point one.

MR WENT: Yes.

MR JUSTICE MILES: Point two: it will take a bit of time anyway to work. If you don't get anywhere with the appeal, and you can't plead your effects case, it will take a bit of time anyway.

MR WENT: Yes.

MR JUSTICE MILES: And it's not just a question of saying this or that section goes, it may take a bit of rejigging or rethinking or whatever.

MR WENT: Yes.

MR JUSTICE MILES: On the other hand, I think we think that if you're not allowed to

run your effects case, ultimately, it would be more helpful to have something which crosses out the stuff that, Dr Davis is -- well, which is not in play, because it will be pretty unhelpful just to have a letter saying this or that paragraph is to be disregarded. It would be much more helpful to have a document which actually removes the stuff which is no longer in play. Partly for the other side to have that, simply, but also partly when it comes to the use of these documents by the tribunal, and in any hearing, because what one doesn't want to do is have to jump between the report and letters, trying to work out which bits are and aren't in play. So the ultimate goal would be to have something which tidies things up by removing the bits which are no longer in play, I think. Then it's a question of timing.

MR WENT: Okay, can I just --

MR JUSTICE MILES: Sorry, just give me a moment. (Pause)

We're talking, really, about Davis 4, because that's been ordered to be, as it were, the consolidation of everything.

MR WENT: Yes, but we weren't anticipating it would have any impact --

MR JUSTICE MILES: On the earlier reports.

MR WENT: Exactly. I was just going to -- to ensure the tribunal has the point, I would also explain that both parties have agreed that no expert evidence comes into play for preliminary (overspeaking).

MR JUSTICE MILES: No, no, I understand that. No, I understand that. Very good. Right, so what are you proposing for 8?

MR WENT: Well, I think, at the heart of it, we'd suggest that serving a revised version of Davis 4 shouldn't happen until there's been a decision on the preliminary issues trial. It would come within a short period after that. If you're not with us on that, then at least until the (audio error). Of course, rather (audio error). But otherwise, the language is fine. So it comes down to timing, sir.

MR JUSTICE MILES: Yes. (Pause)

Right, and then what about the other additional bits; are you happy with those?

MR WENT: Let me just check. Yes, we don't have any further comments on those.

MR JUSTICE MILES: Right. Okay. Thank you.

Submissions by MR HARRIS

MR HARRIS: Thank you. Sir, briefly then on page 1, I understand (i) at the top, under that recital, is agreed, that we delete the words in blue and have the word in green, "introduce". I should just note that two words later it says "a new" and then it says "of". That's a typo; the word "of" should be deleted -- corrected.

MR JUSTICE MILES: I think there was a point about the recital --

MR HARRIS: Yes, sorry, you're quite right. Let me deal with that.

MR JUSTICE MILES: -- above that, is it?

MR HARRIS: You're quite right. I just overlooked that. My learned friend objected to the words in green (ii), "the loss of flexibility allegedly suffered", and that's because he said that one of the faults of Dr Davis's report, of course, was that he'd not introduced a loss of flexibility allegedly suffered by class members. Instead, he'd done it for another group, some of whom aren't class members. But there's an easy fix to that, which is replace the word "class members" with "passengers". The point is that, as we know from the judgment of this tribunal on the last occasion, Davis 4 did seek to introduce an anti-competitive effect, that's (i), and a loss of flexibility.

MR JUSTICE MILES: Right, I'm going to deal with this brutally by just saying that the recital should just say:

"AND UPON the class representative filing Davis 4 on 31 July 2024."

MR HARRIS: Understood. No problem. And I beg your pardon, I skipped down to the next one.

MR JUSTICE MILES: Yes.

MR HARRIS: So I think we're agreed that we had the word "introduced" in green, not the words "in relation" in blue, but then it goes on "a new of lot of". And the first "of" should be deleted.

MR JUSTICE MILES: Yes.

MR HARRIS: The next one I think we're now agreed, because my learned friend agreed that we delete "in relation" we include "introduce", we delete "the", we include "a new", and we're then happy for it to say "alternative case".

MR JUSTICE MILES: Yes.

MR HARRIS: So that one.

MR JUSTICE MILES: Okay.

MR HARRIS: All the purple was agreed. Then next page was all agreed. Then item 8 on the fourth page.

MR JUSTICE MILES: Yes.

MR HARRIS: We agree, essentially, with the point put by the tribunal, which it's going to be unsatisfactory not to have this material actually deleted. It did include, as you know, both material on effects -- the effects amendment -- and on loss of flexibility, albeit was defective in those regards. So that should all be crossed out.

We understand the point about, well, on effects, there's at least in theory, an outstanding permission to appeal application, and so it would be open to this tribunal to say, well, say within 14 days of the resolution of the appeal -- which may finish quite soon, if permission is denied by the Court of Appeal -- then this report gets updated in the manner that we've -- and we can live with that.

The only thing, of course, is that that can take quite a long time. Seeking permission on the papers, I mean, my experience has been that can take a year, and that would be even later than my learned friend's point, which was that you would update it knowing the outcome of the first round trial that we're going to talk about in a moment.

So our preference would be, given that it can just take such a long time, and given that this is just crossing things out -- and this report is not going to be of any particular use unless it's crossed out -- we suggest that the better course is for my learned friend to cross out everything, and then, lo and behold, if he gets permission and then he succeeds on appeal, it'll be easy enough to then reinstate; just delete the crossing out. So that's what I suggest. I may remind the tribunal as well, if I can, that one of the other problems with the material in Davis 4 as regards effects as it stands is that, per the judgment from last time round, it was said that it's legitimate for my learned friend to make some points "in reply" to a case on objective justification, say. But of course, as you point out in that award, members of the tribunal, critically, what then is allowed to go in from the class representative is limited to a proper reply to that which we happen to put forward, which we haven't yet done. That's another reason why Davis 4, as it stands, is not useful and should be crossed out.

So my respectful contention is that we should do what is said in 8. We're relaxed whether it be seven days from today or 14, or whatever, and my learned friend didn't address (b), the table of corrections and clarifications, but part and parcel of tidying up what it is that Dr Davis actually wants to do is the class representative, in our submission, should actually now decide what are the points in that 36 page document that came out of nowhere last time. He should update them, and that's including because there might be a dispute about some of them -- hopefully there won't be, but there might be. We need to know exactly what his case is.

MR JUSTICE MILES: All right. This is to do with Davis 4; we don't think that there's much point in going back to the earlier reports?

MR HARRIS: Then the last point on that, I think it's agreed within 28 days, the interim cost order.

MR JUSTICE MILES: Yes.

MR HARRIS: I think my learned friend has agreed to that, and then we've obviously left 13 blank, pending the ruling of the tribunal on those other cost applications.

MR JUSTICE MILES: Okay. We'll come back to -- I'm so sorry, I should have said, do you want to say anything more in relation to that?

MR WENT: (Overspeaking).

MR JUSTICE MILES: Yes. Of course.

Reply submissions by MR WENT

MR WENT: Obviously, the point we're making about providing a further version of Davis 4 is that there's a costs issue. It's obviously (several inaudible words), but I've explained it's not a simple process; it's going to require the expert to think carefully about it, possibly involved. We see no purpose in doing that now when there's potential for the appeal.

Equally, there can't be any need to have this done now, moving to a preliminary issue trial where expert evidence isn't in issue. So it's a cost issue, and the idea that we strike stuff out now only to unstrike it following the appeal, that's even further burden of costs, so we find that very unattractive. But that's our (overspeaking).

MR JUSTICE MILES: Right. Well, we'll think about that because one of the things we want to also hear about is, in relation to what people have called the preliminary issue, whether and if so, what further steps should take place anyway in relation to the other bits if we do order a preliminary issue and it may be related to that also. So, we'll just park that. (Pause)

Right, so we'll move on now to the question of case management.

Case management

Submissions by MR SAUNDERS

MR SAUNDERS: A draft order was being prepared and was bounced back and forth between us. Both sides have had a very limited amount of time on this, so it will be

a slightly exploratory process, I suspect, for both us and the tribunal.

MR JUSTICE MILES: We've actually had quite a lot of time on it because it was raised at the last hearing, so it's a bit disappointing if you're saying that it's all ...

MR SAUNDERS: Well, the draft, this particular draft is. But you will have seen our proposal in the papers previously which was to call out certain of the issues that are identified between the parties and in particular those relating to whether there's an exemption under chapter two. So, it may be convenient, gentlemen, if you go to the penultimate page of the draft, because that sets out the alternative approaches on the issues.

The way that this was set up in correspondence was that the class representative's solicitors suggested a number of issues. The defendants suggested a sort of omnibus paragraph, but not by reference to particular issues within the list of issues. Then, just this morning, we've had in red at the top of the page, a slightly alternative formulation which again isn't by reference to the specific issue numbers that are in the list of issues and it does seem to us that a couple of them are missing. So, that is where we are as of this morning.

But maybe it'd be convenient just to address you more on the shape of this, I think, before we get into the specifics of what's in it.

Subject to the tribunal, I think both of us are agreed that there should be a preliminary issue trial. Whether one calls that formally a preliminary issue or a sort of sub-trial before the other aspects of the case is perhaps a matter of semantics more than anything else.

But the benefit of having a preliminary issue, as I think everybody or certainly the class representative and the defendants see it is that it is potentially dispositive because it is establishing regulatory breaches accepted by the class representative to be a condition precedent of the class representative's claim. And so, if the class

representative fails, then that is potentially determinative of the entire case.

There is going to be addressing broadly the sort of criteria in Steele v Steele, the well known list from Mr Justice Neuberger as he then was, so it's likely to lead to a significant reduction in cost and time, because at least on any view, we will have cleared out these regulatory questions.

Obviously, the enormous benefit is that it won't be necessary to have economic evidence in advance of that trial. We would hope and it would seem that any factual evidence would be relatively limited. There may need to be factual evidence in connection with the state compulsion issue on, for example, communications between the defendants and the Department for Transport, but that is unlikely to be very extensive, we suspect. Otherwise, it can happen in large part through agreed facts. It is in large part, I think, as both sides' formulations show, a question of construction of the various agreements and the relevant statutes and how they may apply to the particular ticketing practices that are in this case.

Now, it is unlikely that there is going to be, we would submit, an enormous factual dispute. Obviously, one says that with a certain amount of hesitation at this stage, but it's difficult to see what that could really entail because there is not a vast dispute, as far as I can detect on the pleadings, as to what is actually going on. The real fight is whether that amounts to an abuse or whether it amounts to a breach of these regulatory conditions. Therefore, it should be possible to do this in a circumscribed and efficient way. Ultimately, it is going to come down to a series of issues about construction of the ticketing and settlement agreements, the national rail conditions of travel and so on.

Now, the court may need a certain amount of, as it were, matrix of fact in order to determine the proper construction of those agreements and also how the paragraph in schedule 3 of the Competition Act applies, but that is a question of submission

largely; it's unlikely that there is going to be a huge amount of disputed factual matrix, or at least not admissible factual matrix when construing those. So, we would consider that this is a convenient way forward.

Now, it is also, we would submit, if you consider the case overall, unlikely that whichever way the proposed preliminary issue is decided that it would increase costs substantially overall because these are quite discrete issues within the case as a whole. If the defendants are correct, which obviously we say they're not, then that obviously saves potential for a lot of costs and tribunal time. If we're right, then we've decided this and those later issues can be progressed with the benefit of the tribunal's rulings on the regulatory framework, and whether these practices amount to a breach of it. So, there will be a streamlining of what both sides have seen, I think, to be expensive economic evidence going forward, regardless of the outcome of this.

For that reason, we submit that this is, as it were, when applying the usual sorts of points that get considered under Steele v Steele and looking at the case as a whole, this is a sensible way forward. Obviously we're in the tribunal's hands as to how you see the issues to be shaped up and there are questions of mechanics, as you may see from a quick perusal of the order as to how this is to be done, but those are our submissions on just the overall shape of the idea of a preliminary issue and then I can address you on ...

MR JUSTICE MILES: I think what we would benefit from is a slightly deeper understanding of how exactly this case is put in relation to the relationship between the alleged breaches of regulation and the Competition Act complaints. What's the logical shape of the case? You've accepted and Mr Hollander before you accepted that it's necessary to show a regulatory breach as a condition precedent of your case, so that's clear enough. How does it work, exactly? How does the case work? Because the two things aren't necessarily synonymous.

MR SAUNDERS: No. So, you could have a situation in which somebody in the dominant position is nevertheless abusing their dominant position --

MR JUSTICE MILES: Yes.

MR SAUNDERS: -- and it matters not what regulation sits there. However, because of the way that this is a heavily regulated framework, and in particular GTR have pleaded and rely upon the get-out in chapter 2, paragraph 5, schedule 3 of the Competition Act, they would say it doesn't apply to conduct in order to comply with the legal requirement.

The way that they have framed their defence is essentially that they're forced through this network of regulation to act in a particular way and they say, well, if we are forced to do so, we're not acting as an independent economic entity and insofar as that amounts to a breach of competition, it's not our fault because we shouldn't be treated as an economic entity abusing its dominance by acting in the way that we're required to do through the regulation.

At a very high level, that's how the regulatory framework sits into the claim. Now, it would be good to see a theoretical case wherein the abuse was run more generally than that, but because of the way that the law protects somebody who doesn't act as an independent commercial operator, potentially, and (inaudible) that's a live issue, that is how the regulation fits in.

For the purposes of this case, the class representative, as, sir, you reflected through Mr Hollander, has accepted that this is a condition establishing a breach of this regime as a condition precedent for the abuse claims that are being run.

One then has to look at whether the conduct that is complained of, the particular ticketing practice, is fully compliant with the various elements of the regulatory framework which have been imposed. Now, they derive from a series of agreements and also the statutory framework in which those are imposed. Those provide, by

reference to particular routes and then the franchises entered into, certain flexibilities and other constraints.

So again, at a very high level, if the defendant's practices are fully compliant with that particular framework, then it's potentially within the safe harbour of the schedule 3, paragraph 4 exemption or under some of the other chapter 2 exemptions. If it doesn't, then as it were, it stuck its head outside the safety of the Competition Act and then it's liable.

That is why, as a preliminary matter, working out the scope of that regulatory framework on its proper construction and whether the ticketing practices as to which I alluded a moment ago, there doesn't seem to be that much factual dispute about what is actually happening. The question is, are they allowed to do what they're doing? If it turns out that the regulatory framework permits that and that actually all of the ticketing practices are fully compliant and so there's no breach of the regulatory framework, then as Mr Hollander has already explained, the class representative accepts that there's no abuse. It's almost as if you have a sort of Venn diagram protecting certain behaviours in one sense, is there a little part of their behaviour or some other aspect of their behaviour that peeks out from the circle, the penumbra of protection that they're afforded under the legislation? When you're --

MR JUSTICE MILES: I mean, I think when we're asking this question, it goes to this question of whether this is going to be potentially dispositive or not one way or the other. When one looks at some of these -- put it this way. If one starts simply from the question, the way it was put by you today and Mr Hollander before is that you've got to show a regulatory breach as a condition precedent.

Now, in normal language, one would think therefore that to establish a breach, one reads the relevant instruments, which are, as you say, agreements against the background of a framework and you ask yourself a question: have the defendants

breached, let's call them the agreements.

MR SAUNDERS: Yes.

MR JUSTICE MILES: The instruments. In traditional legal parlance, that means you look at the contracts, the agreements, and you say, does this conduct comply with the agreement? That's one thing and fairly straightforward, simple to understand, at least conceptually. No doubt there'll be real arguments about and difficult arguments about --

MR SAUNDERS: (Inaudible) construction and everything else.

MR JUSTICE MILES: There will be questions of construction and then there'll be questions of: does the conduct in question which is being complained of breach those contracts? That's, as I say, conceptually straightforward.

Then, one looks at a question like: do the defendants benefit from the exemption at chapter 2, paragraph 5(2), schedule 3 of the Competition Act? That begins to look like a more, if I can put it this way, a bigger picture question. Or do you accept that if there is no breach, then they are within that exemption? And if so, why are we asking that question separately? Or is there then going to be someone saying, ah, okay, perhaps they're not actually in breach, but for some reason they can't rely on that exemption. What's the logic of this?

MR SAUNDERS: Well, so the point about chapter 2, paragraph 5(2) I've made is that what that provision provides is that conduct to the extent it's engaged in order to comply with a legal requirement does not result in a breach of the chapter 2 prohibition. I may have slightly incorrectly paraphrased it, but it's something along those lines.

Therefore, if one can, on the proper construction of that paragraph of the Competition Act -- obviously one has to get into a certain amount of genealogy to understand where it comes from, but the tribunal is perfectly able to do that in the normal way -- first, you

have to identify what, first of all, what is the conduct in question, and then determine whether it is engaged in order to comply with a legal requirement through the various agreements that have been entered into as they affect the defendant.

So, that is, as it were, a slightly more omnibus way of looking at the issues, but it is an element of the defendants' defence which arises solely from whether or not there is a breach of the regulatory framework or not. If some of the conduct that they have carried out is outside the scope of the regulatory framework, in my submission, it would be rather difficult for them to then say, well, we get the --

MR JUSTICE MILES: I understand that way of putting it, but that engages this question, well, why are we asking this further question? Because you've accepted that -- why are we asking it for the purposes of this trial, because you've accepted that you've got to show a breach? Shouldn't this just be about: you've accepted that that's a condition precedent, so shouldn't the only question be, has there been a breach?

MR SAUNDERS: Well, it depends. A breach of the agreement is one thing; a breach of the legal requirements is a slightly different thing. So, there are two aspects to the framework. There are a series of specific agreements --

MR JUSTICE MILES: Yes.

MR SAUNDERS: -- and there is also a regulatory aspect which arises under our various statutes and so on. It is not necessarily that the legal requirement flows from the agreements. They may say, for example, that the chapter 2 prohibition does not apply to the extent they're required to do something under a statutory requirement. So, the two are not necessarily -- I mean, it is part of the overall what we're calling the regulatory --

MR JUSTICE MILES: That would have been identified in the pleadings. If anyone was saying -- if the defendants' case was, "Okay, we accept that this may have been a breach of the agreement" -- I know they don't say this, but "but we've got a get-out

under some provision of a statute", shouldn't that have been identified?

MR SAUNDERS: Sorry, what do you --

MR JUSTICE MILES: What I'm concerned about is, looking at some of these questions, they appear to be actually quite broad questions rather than narrow questions. I certainly don't like, I may say, although I haven't heard from the defendants at the moment, some of the questions are very vast. I mean, to ask, "What is the true meaning effect of the TSA" is a hopeless question.

MR SAUNDERS: We'll be here till Christmas.

MR JUSTICE MILES: Equally, what's the true meaning and effect of paragraph 5(2) of schedule 3 of the Competition Act? We're not going to write an essay on what that section means and so they don't work at all as I see it.

But what I'm asking about is this, because I don't quite get the logic of what's being said here: you say that you've got to show a breach of the regulatory requirements. You've pleaded the things which you say are a breach.

MR SAUNDERS: Yes.

MR JUSTICE MILES: And you've accepted, as I say, it's a condition precedent of your case. Why do we need to go beyond the question, then, have they acted in breach of the requirements which you've identified?

MR SAUNDERS: Sir, I think that what we had intended by calling out the individual -- so the list of issues that's been prepared in the case also contains with it links to the relevant paragraphs of the pleadings in which that issue is raised --

MR JUSTICE MILES: Yes.

MR SAUNDERS: -- and that may be what may give you, sir, a certain amount of comfort in terms of the constraints, because it certainly isn't intended to be a sort of nebulous, "let's revisit sorts of other arguments that haven't been pleaded".

If you take, for example, issue 3, which is the general exemption from chapter 2, the

relevant references are the paragraph 30G of the defence, paragraph 18E of the reply, and paragraphs 97 to 106 of the statement of intervention. So, it may be that we do it by reference, we incorporate into this list the specific --

MR JUSTICE MILES: I'm not sure that really helps me because --

MR SAUNDERS: It's not -- it doesn't address perhaps your concern about the way it all fits together, I think.

MR JUSTICE MILES: I mean, one's trying to find a way of having -- the purpose behind this suggestion was to have a relatively self-contained trial that only -- and it arises from the acceptance by the class representative that a breach is a precondition of the claim and that's the reason why it appears to be a fairly self-contained question, which is potentially dispositive.

MR SAUNDERS: Yes, if decided against us, yes.

MR JUSTICE MILES: Yes.

MR SAUNDERS: Yes.

MR JUSTICE MILES: I mean, obviously if you win, then there are all sorts of other issues that need to be decided. But that's the nature of the preliminary issue. (Pause) I mean, can I come at the question another way so that counsel can understand it and think about it. You could have a situation, it seems to us in theory at least, and this may be wrong, but you can tell us (inaudible) where within a contractual framework, a party has a pretty broad range of discretion as to how to behave and the contract might be very broad in its definition of the activities that the other party can undertake.

MR SAUNDERS: For example, if a contract said something like "will use its reasonable efforts to provide a good service".

MR JUSTICE MILES: Yes.

MR SAUNDERS: (Inaudible).

MR JUSTICE MILES: Something like that and then at least in theory, some of the

things which that party then chooses to do could, I suppose, still be complained about as a matter of competition law. But that's not the way you're putting your case, you're saying --

MR SAUNDERS: So we rely on quite specific things in -- so this is particularly in relation to issuing affairs, restricting travel to only one of -- So GTR operates a series of brands. What we say -- sir, it may be convenient if I do this through the pleading. I don't know what's the best way of -- but I can address you at a high level on the case.

MR JUSTICE MILES: Yes.

MR SAUNDERS: We say the regulatory regime does not entitle the defendant to issue fares that restrict travel to only one or two of the three main train brands it operates on the London to Brighton mainline. And the effect of that is that they unlawfully -- and we say "unlawfully" relative to the regulatory regime, taken as a whole, the various agreements and everything else -- they limit the passengers' rights that that regime grants to those passengers to travel on any of GTR's trains on permitted routes.

So, effectively, the starting point is that the passengers are granted certain rights to travel how they see fit; GTR, in breach of that regime, is segmenting that travel. It's subject to one carve out for first-class fares. And it is therefore restricting a passenger's right to travel as they see fit. So that's one head.

They also have Southern-only fares or Thameslink-only fares or Gatwick Express or non-Gatwick Express fares; I think Gatwick Express is the top tier of ticket. So they charge higher prices for fares permitting travel on any three of their brands, as compared with a single brand or a dual brand fare. And we say that again is in breach of the regulatory regime. You're just not allowed to do this.

Now, how are they able to do that? Well, because they're the ones that run down that track on the main line down towards Brighton and there's nobody else. The passengers have no choice but to pay what they're required to pay. And because

there are differences in the prices between these different tickets and because the regulatory regime does not permit them to segment pricing in the way that they seek to do through these different brands, we say that that is an abuse.

Now, one doesn't get through this preliminary issue to the ultimate question of whether they have abused their dominant position, or even the question of whether they are formerly in a dominant position, but what we will know is whether the regulatory regime permits them to behave as they are behaving.

Now, they say, "Actually everything we're doing is within the scope of what the regime permits us to do" and they also say, "Insofar as we are wrong about that the legislation's deprived us of our commercial autonomy, so don't hold it against us. We're not actually acting as a dominant undertaking because we're stuck by this regulatory regime telling us what we have to do". And they were expressly required by the Secretary of State to set the fares in the manner that they did. That's what they pleaded.

MR JUSTICE MILES: Do they say that as a matter of the contracts --

MR SAUNDERS: So they say --

MR JUSTICE MILES: -- or do they say, just as a matter of fact?

MR SAUNDERS: The Secretary of State's exercise of her power, or his powers at the time, under the Railways Act 1993.

MR JUSTICE MILES: Will you show us that, please?

MR SAUNDERS: Yes. So that's pleading in the defence, page -- We need the February supplemental bundle.

MR JUSTICE MILES: Yes.

MR SAUNDERS: Tab 27, page 805 in the bundle, page 80 ... I'm sorry.

MR JUSTICE MILES: Not the February CMC bundle.

MR SAUNDERS: No, February supplemental. My machine is determined to do

a Windows update, which is not good timing. Do we have a hard copy?

MR JUSTICE MILES: Sorry. Can someone come and sort out the computer again? I don't have the February supplementary bundle, I don't think.

MR SAUNDERS: It's page 805 in the bundle, PDF 809. Sir, I can hand up a paper copy, but it's got some markings on it which --

MR JUSTICE MILES: Have you got that?

MR SAUNDERS: -- don't say pejorative things.

MR JUSTICE MILES: We don't seem to have the supplementary February CMC bundle.

PROFESSOR NEUBERGER: It is online CMC bundle, amended 24 March.

MR JUSTICE MILES: Okay, so it's March. Okay. So which page is it, sorry?

PROFESSOR NEUBERGER: 809.

MR JUSTICE MILES: Okay.

MR SAUNDERS: 805.

MR JUSTICE MILES: Right, thank you. So this is part of the defence?

MR SAUNDERS: I mean it may be convenient just to have it -- if we just step back to the previous page. 804 in the bundle. Sorry, 808. Yes, we're plus four --

MR JUSTICE MILES: Yes.

MR SAUNDERS: -- in this bundle.

MR JUSTICE MILES: So --

MR SAUNDERS: So you'll see, this is the defendants' plea back to the summary of the case. First of all in subparagraph (a), they just don't admit that there is a dominant position, but let's leave that to one side. Even if they do hold a dominant position, they deny that the ticketing practices are contrary to the various contractual provisions on which we rely. So they say, "You don't even get off the ground" [as read]; (i).

And then over the page, it says, "even if found to be a breach, there's no abuse" [as

read]. They say at (iii), "ordinary competition on the merits" is another line of defence. (iv) says -- so this is where we start:

"GTR is entrusted by the Secretary of State for Transport with the operation of services for general economic interests and therefore benefits from the exemption." [as read]

I don't think that's part of the proposed list.

"(v) They were expressly required to set the fares in the manner they did pursuant to an exercise of powers by the Secretary of State under the Railways Act." [as read]

So that's their plea in relation to paragraph 5.2.

"(vi) They are denied to the effect of the legislation as to stop them being a true commercial entity, acting freely in the way that a commercial entity could do." [as read]

And so therefore their hands are tied, in effect, (inaudible) were saying that they're acting in a way that is abusive; that's not their fault and they shouldn't be held liable for it and so they get the benefit of that exemption. And then you see, just over the page, they deny any breach of statutory duty and so on. That's in relation to --

MR JUSTICE MILES: Is there any detail given of the way that the Secretary of State required them to do this?

MR SAUNDERS: Yes. There's a statement of intervention and it may be that I could give way to my learned friend who's probably more familiar with which paragraphs. Would it assist to have that explained?

MR JUSTICE MILES: Yes, just as a matter of explanation.

MS HOWARD: If I could just take your Lordships to the statement of intervention. It's in the core February bundle, for the hard copy -- it's page 1957 in the electronic version, it's tab 14, 1945, in the hard copy. It's in the core February bundle.

MR JUSTICE MILES: Yes. (Pause)

MS HOWARD: We've set out at various points throughout the draft -- there's a summary at paragraph 3(d), which is just an overview; that's at page 1960 of the

electronic version.

We explain that:

"... the Secretary of State, [acting] through the Department, took steps to limit fare increases, for the benefit of rail passengers."

But there's a kind of balancing between the revenues from the fares and if there's any shortfall in the revenues then it has to be topped up through state subsidy. So there is a balancing mechanism between the interests of passengers and the interests of taxpayers. And the department is in charge of balancing all the considerations that feed into that assessment. So obviously if fares go up, that's going to impose more cost on passengers but will reduce the burden on the public purse. Conversely, if prices go down, then there's going to be a higher degree of subsidy for the taxpayer.

We explain further down at paragraphs 39 to 41, that's at page 1975. (Pause) I think it's worth reading all of -- our statement of intervention is an unusual document because we weren't quite sure of the extent of our involvement so we've set out a very lengthy explanation of how the various agreements interrelate with the regulatory regime and then, essentially, a sort of summary of the evidence of what actually happened with the department giving directions to GTR.

So, paragraph 39 explains that although the TSA sought to manage competition between different operators, it didn't try to regulate the actual amount that would be charged for a specific fare and that was left to the Secretary of State through the franchise agreements. And under section 28 of the Railway Act 1993, that's the statutory basis for its powers, it had the Secretary of State, acting through the department, has a wide discretion as to the amount and the prices that may be charged to passengers.

And so I've just set out that those statutory considerations are then fed into the franchise agreements and the department has a discretion, a broad power, both to

prescribe caps on price, on fare increases, but also to direct or impose obligations on the franchise operators and to essentially approve any fare increases that they intend to impose or to constrain the extent of any fare increases.

And at paragraph 41, over the page, again explains the interaction between the NRCOT and the discretion that the Secretary of State exercises under its statutory powers.

And then later in the draft, paragraph 58, that's at page 1981, we set out about the start of the franchise where there was a proposal to level up fares. What had happened with this new franchise is that three franchises had effectively been brought together under one roof. So there was the Thameslink, the Southern and the Gatwick Express that were rolled together and the original franchise, ITT and the bids, proposed harmonising the fares across the three routes but then the Secretary of State's approach changed because it didn't want passengers to pay more for services being provided.

Paragraph 58, and if I give you the notes for your pen, paragraphs 71 and 78 to 87, just set out the considerations that the Secretary of State took into account during this period to why it directed GTR not to impose fare increases and not to harmonise these fares across the three franchises. And that was because at the time it was concerned, you'll see at paragraph 71 on page 1986, that it didn't want fares to go up with the rate of inflation because it was concerned about imposing fare increases on passengers and commuters at the time.

And then again at paragraphs 78 to 87, which is on page 1993 and forwards, we explain how although the original tender and the original fares policy did envisage these fares would be harmonised and GTR did propose fare increases, the department did not want to raise off-peak fares on the Brighton main line. And as we've just set out a description of the factual events there, in those paragraphs 78 to 87, about the

interactions between the department and the defendant and why it was restrained in the amount of fare increases that it could impose. (Pause)

In summary, we consider it would be artificial to try and segregate off the franchise agreements and the TSA and apply a purely commercial lens to analysing the existence of any breach because this is a regulatory breach, which necessarily involves sort of public law considerations.

It depends how you want to manage this and how you want to chunk it up. But if you have a hearing just on the sort of contractual commercial analysis, and if you find that there is some discrepancy, you're then very shortly thereafter going to have another short hearing on the legal requirement issue, which might not actually give you any efficiencies in terms of procedural economy or expedition, because I think by hearing them together, you'll probably just add on an extra couple of days of legal argument and witness evidence. I think it would be more efficient to run the two together because they're so interrelated. If you try and separate them, I think you'll just have a lot of duplication and you might have the risk of reaching a decision on the first contractual analysis without the full picture.

MR JUSTICE MILES: I mean, this is really a question of definition of issues and so on. But my concern is that actually these are quite broadly, potentially, quite broadly stated, some of these issues.

MS HOWARD: There may be a way to narrow down the issues; whether we do that in the list of issues or just in the annex here. But for instance, you know, there are issues of law and construction. So when we're looking at paragraph 5(2) of schedule 3, there is a legal construction issue as to what does the phrase "legal requirement" actually mean and does that just refer to statutory requirements or does it refer to a direction from the regulator. I don't think we need -- that's not necessarily going to broaden things, but we can be more specific, I think, about the issues and

how they're framed. And we can, as my learned friend said, link it to the actual relevant provisions of the various agreements and the statutory provisions.

MR JUSTICE MILES: I mean, as I understand the submissions which are being made so far, they seem to come to something like this: that, one, there are these various agreements which are part of the regulatory regime, the claimants are saying -- the class representative is saying that there is actually a breach of those, that's the first step, and says, putting it at a very high level, that having these differential fares is actually a breach of that agreement. You read the agreement. You can see there that it says you can't do this. That's fairly traditional stuff. But then there's a question of the defendants' saying, "Well, even if the agreement," I think this is right, "even if on the face of the agreement this isn't allowed, nonetheless, we were required to do this by the Secretary of State". Is that right?

MS HOWARD: That's right. Yes. It's a little bit like is there a prima facie breach that then is kind of justified or excusable because of the requirement direction from the Secretary of State.

MR JUSTICE MILES: Part of the concern is that, as I say, experience shows that when you're dealing with issues of this kind, you need to have them really tightly defined, because otherwise what happens is you have a trial of all of these issues, and then at the end of it, one of the parties says, "Oh, but we've still got a case here because, for example, that wasn't really a requirement; that was an indication", or something of that kind. Without spelling out what the requirements actually were, I'm concerned about whether this is something where at the end of it, there's still no answer.

MS HOWARD: I mean, that's why, as a caution, we would support the proposal that these issues are brought together. I think if you isolate just the --

MR JUSTICE MILES: No, I can see that. I can see the force of that and everyone

seems to agree on that, but it's a question of definition of the issues. I don't, at the moment, feel that they've been sufficiently, tightly, or specifically framed. (Pause)

I mean, some of them are, and some of them aren't, but I can't at the moment, for example, see in the issues which have been -- I mean, where in these issues is this point about the Secretary of State telling the defendants that they've got to do something actually included?

MS HOWARD: So it's partly covered by a combination of, well, in the red text, issues 4.

MR JUSTICE MILES: Well, that doesn't help. I think that's no good. I mean, that's just a perfectly general question about a statutory provision.

MS HOWARD: I mean, it's issue 4 in the blue, which is the same wording in issue 7. That is the nub of the issue, because there can only be an infringement of the Competition Act if it's the autonomous conduct of an undertaking.

MR JUSTICE MILES: Right, but that's expressed at the moment by asking, "Does the legislation create this framework?" But it doesn't actually tell you what requirements it's said that the defendants acted under, or identify the requirements.

That's a kind of really interesting academic question: does this create a particular kind of regulatory framework? But cases aren't decided by asking questions like that, they are decided by asking, "Was there a breach of the agreements? Even if there was", I mean, this isn't drafting, obviously, "Were the defendants nonetheless told what to do by the Secretary of State in a way that is legally relevant?"

Something like that.

MS HOWARD: Yes.

MR JUSTICE MILES: I mean, I just don't feel this is capturing what you're trying to achieve here.

MR SAUNDERS: So I think there are probably two (inaudible) exchange a second

ago, but there are, I think, subject to the tribunal, certainly having the underpinnings of the statutory framework is a necessity for understanding --

MR JUSTICE MILES: Yes, I understand that.

MR SAUNDERS: I mean, as a matter of construction, we would probably be there anyway --

MR JUSTICE MILES: Yes.

MR SAUNDERS: -- because that is the matrix against which these individual agreements were entered into. So, I mean, you can't construe them without one and the same.

MR JUSTICE MILES: No, but when legal disputes happen, one never has an issue saying something like, "What is the effect of a statute?" The question that courts or tribunals decide is: has someone acted in accordance with the statute?

MR SAUNDERS: So to do that, we need to identify the specific events for the tribunal to rule on the issues of construction that arise in respect of those specific events.

MR JUSTICE MILES: Yes.

MR SAUNDERS: I think that that is -- so we are under a certain amount of difficulty on this side of the room, because -- although this is pleaded in a rather generic way by the defendants, and they want to advance this -- we don't know if there are specific acts of, or specific directions that were given, on 3 March some particular year, something happened, then we have no particulars of what those things are. That is, it would seem to us, to be the thing that needs to be tested. Then the question is what happened on 3 March, and is it consistent with this framework and this and that, and does it therefore give the defendants a safe harbour?

That requires some particularisation, because the Secretary of State obviously hasn't intervened and has just given the grounds for doing that. We don't see that in the --

MR JUSTICE MILES: That may be something that needs to be spelt out in the

process, I think.

MR SAUNDERS: Yes, I agree.

MR JUSTICE MILES: But a question could probably be framed which was along the lines of: were the defendants required to act in a particular way?

MR SAUNDERS: As a result of --

MR JUSTICE MILES: As a result of directions or instructions or whatever phrase is given by the Secretary of State?

MR SAUNDERS: No, and we don't --

MR JUSTICE MILES: And I don't think that's in here at the moment. I mean, I don't want to sort of quibble about the drafting too much, but I just don't think it quite is framed in the right kind of way at the moment.

MR SAUNDERS: So I see the concern. I mean, certainly you don't want to cause the tribunal an insurmountable job writing a textbook on (overspeaking).

MR JUSTICE MILES: No.

MR SAUNDERS: Which there was a risk of doing otherwise.

So I mean, as I mentioned before, the full version of the list of issues does identify some paragraphs of the pleadings. Having just looked at those while my learned friend was on her feet, I'm not sure even those paragraphs will actually do what it is that you've just been identifying.

MR JUSTICE MILES: No.

MR SAUNDERS: The material is in the pleadings in some part, not so much as far as specific directions. If there are specific dates, or a particular direction given on a particular date, that hasn't been spelled out.

MR JUSTICE MILES: No.

MR SAUNDERS: But, I mean, what we see in the list of issues, the references seem to be to the sort of rather the kind of omnibus summary paragraphs, something like

that, rather than the individual particulars of the underlying thing.

It may be that a sensible job for the parties is to see if we can come up with a much more precise list, by reference to specific paragraphs of the pleadings as a first step. Then from there, we work out if there are things missing that actually need to be spelt out, in which case direction needs to be given for further pleading on that, I would have thought.

MR JUSTICE MILES: Yes.

MR SAUNDERS: Then that way, hopefully we'll deal with the concern. We are, of course, sensitive to the problem with which, sir, you've identified, which is obviously nobody likes a loss. So the ingenuity of lawyers to come up with something is something best dealt with earlier, rather than on the last day of the preliminary issue hearing when you've heard all the evidence.

MR JUSTICE MILES: Yes.

MR SAUNDERS: But that is a question of going through and trying to give this some particularity, I suspect, on both sides.

MR JUSTICE MILES: Right. I think what we'll do now is take the break, if that's a convenient moment. Then we'll hear further on this, and also on the question of how the parties envisage the rest of the case either going or not going if this order is made. Thank you.

(11.50 am)

(A short break)

MR SAUNDERS: Sir, would it be of assistance if I go to the other issues in relation -- I mean, unless you want to hear further from me in relation to specificity and pleadings?

MR JUSTICE MILES: No, why don't you --

MR SAUNDERS: Maybe it best --

MR JUSTICE MILES: -- say what you want to say. I mean, what I think we're most interested in at this stage, because we're still trying to decide whether to go down this route, is what you say happens to the rest of the case, and how it should be dealt with.

MR SAUNDERS: Yes. So if you have the draft in front of you, so the blue text is the class representative's position, the red text is the defendant's. I don't know to what extent that's also the Secretary of State's position as well. You've only just seen that, so that's -- but I'll ...

So there are some questions of mechanics on the second page of the draft in terms of whether there are documents to be provided -- witness statements and expert evidence -- but as far as the remainder of the case is concerned, you'll see in paragraph 11, what the class representative proposed was staying the remainder of the proceedings until that's decided; everything is put on ice and we get on and do this and decide it.

Now, that, because it's in blue and not black, is objected to by the defendants. My learned friends will no doubt explain why. We don't have a particular problem with, obviously, them progressing matters in the meantime, but this is a preliminary issue which, if ordered, should be determinative of the case, on their case. So what we don't want to find is that if the tribunal is with me on this course, that there's then an extra £1 million worth of expert costs coming at the door of the class representative for work in the intervening period, none of which would have been necessary on my learned friend's case.

So the intention in doing this is in part to save the extremely high expert costs, which would be attributable to doing a lot of the other work, and park that expenditure. So if my learned friends don't want to stay, because they want to tinker around with pleadings or whatever else, then that's one thing. If they want to spend an awful lot of money on experts generally, and then will be saying, if they're successful at the

preliminary issue trial, that that's all to be parked at the class representatives door, then that's quite another. That's the intention.

Now, whether that needs to be a formal stay or just a direction that the economic expert evidence is to be put on hold, something we can -- but perhaps I should give way to my learned friend on that.

MR JUSTICE MILES: Why is there to be expert evidence on this part of the case?

MR SAUNDERS: Well, so there's some evidence from Mr Lee, who, as it were, sets out the shape of the regulatory landscape and how it all fits together. I think that that report has already been served, hasn't it? So, I mean, that is in the case already. Given that that is likely to be of some utility to the tribunal when trying to decide these issues, it seemed sensible to us that using that report for these purposes and updating it in the light of any additional documents that were to be produced was a sensible thing to do. What we see is that, in paragraph 7, in the draft, the defendants and intervener have just added in a provision about rejoinder evidence.

Now, obviously, I'm not quite sure if they're intending to call separate experts, but it's a question, really, of what their intentions are. We haven't seen I haven't heard an explanation as to that.

Just while I'm going through, sir, I can just very briefly address you on the other aspects of the mechanics. You'll see --

MR JUSTICE MILES: Wait a minute.

MR SAUNDERS: I'm sorry.

MR JUSTICE MILES: Sorry, does this provide ... (Pause)

It's a bit of an odd idea to call it "rejoinder evidence", but that's its wording.

MR SAUNDERS: Yes, that's --

MR JUSTICE MILES: I mean, that's their first round, is it?

MR SAUNDERS: Well, I think it would be. So there's a report from -- so Mr Lee is the

former executive director of the Office of Rail Regulation. So he was a member of the office of passenger rail franchising and ticketing, and was involved in the development of the Ticketing and Settlement Agreement, the TSA, and its fare setting provisions. So he knows the -- he may be rather a helpful guide to --

MR JUSTICE MILES: He's not going to talk about what he thinks it means, is he?

MR SAUNDERS: Well, that's a question for the tribunal, I would have thought, because it's a question of construction of the relevant provisions.

MR JUSTICE MILES: Yes.

MR SAUNDERS: Yes, so I mean, it's almost as if you -- maybe this isn't a terribly good analogy, but it's almost like a foreign law expert who gives evidence on the framework under the foreign law, and then it's for the court to determine the proper construction of the agreement under that law. But having somebody who can help piece this together -- and, as I say, the report is already done -- we submit may be of quite a lot of assistance to the tribunal.

MR JUSTICE MILES: All right, but just looking at this, the first round of the defendants and interveners, "any expert evidence", is this right?

MR SAUNDERS: Well, it seems --

MR JUSTICE MILES: Or is it even not expert evidence?

MR SAUNDERS: Well, I think it's in the expert evidence section, so I assume --

MR JUSTICE MILES: Well, it kind of is, but the other bit is also expert and witness evidence.

MR SAUNDERS: Oh, no, that's expert and witness evidence. I'm not quite sure what they had intended.

So certainly, if I can address you very briefly on the blue bits and then perhaps give way to my learned friend. Our proposal was that we get some get the witness statements from the various witnesses on which they intend to rely, and any notices,

and at the same time as they do that, in paragraph 2, they give disclosure of the underlying documents they're relying on, to the extent they haven't already produced those. So we get, as it were, a package with the statements.

Now, I don't know how many witnesses, factual witnesses, my learned friends are collectively intending to call, but what we proposed was not to have too many witnesses. Now, that may mean that some witnesses have to deal with things that aren't within their personal knowledge, but have to, as it were, explain the background by reference to documents and so on. So it's a slightly more old fashioned style witness statement than the new regime, but that may be a rather more efficient way of dealing with it than having, for example, six different witnesses, each dealing with a one year period, and then saying that actually it was the witness that has just been cross-examined that actually knows about the thing that they're being asked about. That was our thought there.

Expert evidence, we've discussed, but as I say, I'm not quite sure whether the intention on the part of the defendants and the intervener is to have an independent expert that comes.

Then, as far as the shape of the trial is concerned, I think we're agreed that it's entirely feasible to do it all in two weeks. We would hope, on this side of the court, that it can be done in less than two weeks, but whether it is -- so we suggested seven, but I think I can see that they've just inserted ten, plus one day of prereading.

So that's, as it were, the shape of the additional issues. The question is really quite what the defendants intend to continue with in the meantime as far as the stay is concerned.

As I say, it may be convenient to sit down, sir, unless you --

MR JUSTICE MILES: Yes. Yes, Mr Harris?

Submissions by MR HARRIS

MR HARRIS: Mr Chairman, members of the tribunal, there are two completely conceptual sets of submissions I want to make: one is about the substantive issues in annex 1, the shape of a first round trial; and the second relates to how do we get there and what should be done, what are the steps, whether there should be a stay.

On the latter, which I will address second, can I just alert you now that there are two problems here that I would hope to be addressing you later today when it comes to the question of witness statement and/or cross-examination: the first one is the class representative doesn't have the money to do any of this, and so that is an issue that you have to bear in mind. They're inviting you to progress to a first stage trial. They haven't even addressed you on their lack of budget to do so. And it's relevant to the steps.

The second one is that we don't want a stay precisely because I have an outstanding application for a witness statement and potentially for cross-examination, and as you know, both of those are preludes to a possible decertification application. That plainly shouldn't be held up if we make such an application. So that's on timetabling.

But perhaps I can address what's understandably concerning the tribunal, which is if we go forward -- let's assume there is a budget and let's assume it doesn't get decertified, and we go to a first stage trial in, say, early next year -- what should it look like? If we look at annex 1 of the hand up, we respectfully contend that the red writing is a very useful place to start, though, in light of the remarks of you, sir, Mr Chairman, they those itemised entries can be adjusted.

So number 1 could be, we respectfully contend:

"What is the true meaning and effect of the clauses of the TSA of which the defendants are alleged to be in breach?"

MR JUSTICE MILES: No, I'm not going to order that.

MR HARRIS: No?

MR JUSTICE MILES: No way. The only way that preliminary issues work is if you ask the question, for example, "Is someone in breach of a contract?" You can't say, "What does a contract mean?"

MR HARRIS: The way we contend it, that's item 5.

MR JUSTICE MILES: I know, but we're not going to answer that question, "What is the true meaning of a contract or a clause in the contract?"

MR HARRIS: Perhaps they could be combined, sir. Taking number 5:

"Are the defendants in breach of the clauses of the TSA/NRCOT/GTR Franchise Agreement and/or GTR [that stands for National Rail Contract because technically it moved from a franchise agreement to an NRC] as alleged when given their true meaning and effect?"

MR JUSTICE MILES: Something like that.

MR HARRIS: Yes. Well, that one would be, in our respectful contention, a sensible starting point because it combines, "What do they mean?" With, "Are we in breach of them on the facts?" So we would put that forward.

But then, as has been explained, on the pleaded defence, even if we were to be in breach of any of these provisions, we have some other defences, which would be determinative. I'll explain why we would want them to be in trial 1 in just a moment. They have been identified.

One of them is: do we nevertheless fall outside the scope of chapter 2 altogether because of the words "legal requirement" in paragraph 5(2) of schedule 3 of the act? That's currently item 6.

Just so that we're clear, our case is that even if we're in breach of these various agreements as alleged, as pleaded, on their true meaning, nevertheless, we're not in breach of the law if we fall within paragraph 5(2) of schedule 3.

We accept, if you found it of assistance, that could be amended to make express

reference to the words "legal requirement", and/or it could say, "because you say that the legal requirements are ..." and it could be, if you like, set out in a little bit more detail. But I'll come back to that because we say the way to do that would be in the witness evidence, as opposed to any sort of further pleading. But I accept that that could be done, and that might address some of the possible concerns --

MR JUSTICE MILES: I think the identification of the point that it -- the question for the tribunal is whether there is a relevant legal requirement falling within the scope of that exemption, if I can call it that, is a very important point. The thing that we would then be concentrating on is whether there is actually a legal requirement, not just the terms of the Act.

MR HARRIS: Precisely, sir. That can be done; that's really the beginnings --

MR JUSTICE MILES: Sorry, that also requires the parties then to examine the facts of the case, to decide whether there was such a legal requirement and it was binding on your clients.

MR HARRIS: Yes.

MR JUSTICE MILES: So it's a combination of an examination of the meaning of the Act and the facts. This is what I mean by questions having to have some sort of real terminus; some conclusion to them on the facts of this case.

MR HARRIS: We agree, sir, and that can be done. The starting is in 6. We can update it exactly in line with what we've just said, and we agree.

Then again, just so that we're clear, item 7 in red is another legal defence. So even if it was said that we were in breach of, say, the franchise agreement on its true construction, on the facts that you'll hear at trial 1, nevertheless, our pleaded case is that if we're not acting in a commercially autonomous basis as adverted to by Ms Howard and my learned friend for the CR, Mr Saunders, then nevertheless, we say that's a defence.

MR JUSTICE MILES: How is that a separate point from the one in 6?

MR HARRIS: Separate for this way: you can be a commercially autonomous "undertaking" -- within the jargon, economic competition law jargon -- but nevertheless be bound by a legal requirement and hence you have an escape route. So that's 6. But in 7, what we're saying is competition law doesn't bite separately on somebody who's not a commercially autonomous undertaking. So it's another, if you like, defence, and it's been pleaded as such. So these are further and the alternative defences.

Now, the reason that they think --

MR JUSTICE MILES: Could it be enough -- Can 7 be -- again, just so you understand, what I'm concerned about is not just having these kind of academic questions. The question, surely, is not only what the national legislation and regulatory framework et cetera did, but also whether, is this right, your clients were also then required to do certain things, factually?

MR HARRIS: You're quite right. It would be the parallel, if you like, upgrade or next iteration of 7 parallel to what we've all just agreed we should do for 6.

MR JUSTICE MILES: Yes. And I think one --

MR HARRIS: Completely agree.

MR JUSTICE MILES: -- issue with these issues, if I can call it that, is that -- it might appear a small point, but I think it's quite an important point -- these are expressed in the present tense, whereas what the case is really about is, on the facts which are alleged in the facts that you allege in your case, are you in breach, ultimately? That's the question.

So, the way these are expressed is not very helpful because they're all expressed as being, again, these quite sort of general questions. The change of tense makes a difference: it's whether in the events which have happened, you were in breach of

the Act, or were you subject to requirements, or were you, under the regulation, not a commercially autonomous body, and were you required to do something? It's all got to be pinned down to the way that the case is brought and you defend it.

MR HARRIS: I respectfully agree again, sir. That can be taken on board and we'll produce another version, try to agree it and we'll submit it. But I agree with all of those points. Apologies that it wasn't done in a more helpful manner beforehand.

MR JUSTICE MILES: Well, it's a bit disappointing, I have to say, that we've had since 7 or even 6 February, and I think these could have been thrashed out more effectively, so it's a bit disappointing to be facing these, but there it is.

I mean, we agree with the idea that there's a clutch of points here, some of which are, as it were, points about the contracts; others are about, essentially whether -- I know this is shorthand -- your clients were nonetheless under certain legal requirements to act in a particular way. Then possibly this, I'm not quite sure at the moment whether it's really that separate a point about commercial autonomy, but there's also that.

So, we think that if we are going to go down this route, we should include these various questions but I think quite a lot more work needs to be done on formulation.

MR HARRIS: Sir, we'll do that and we'll do that rapidly. Again, apologies to the extent we're responsible and we apologise.

I think you have the point that one of the overlaps is that in explaining what the agreements mean, the various ones and whether they've been breached on the facts, the witnesses who will be giving evidence as to breach will also be the same sort of people who are involved in whether we were legally required or we were directed or we didn't have autonomy; that's both from the defendant side and from the DfT side. Mr Lee is a separate person because he's a sort of industry expert and if they want to rely on him, so be it. I'll come back to that.

So, I think, subject to us doing rapid further work and providing you with another

iteration, that's what I had to say about the substance of the issues for trial 1 should it go ahead.

MR JUSTICE MILES: Yes.

MR HARRIS: Just at a high level, we do not object at all to trial one going ahead in principle but there are some practical problems and they are the two to which I drew your attention a moment ago.

The first is that we say that we would like a witness statement and potentially cross-examination on the witness statement, because that's a prelude to a possible decertification application -- I do have much more to say about this; this is just the pennies version of it -- because plainly, if the case is going to be decertified, then we won't even need a trial one; the case will be gone.

What we say is that, conceptually and subject to the budgetary point that I'm going to come back to, were there to be a trial 1 of something like seven to ten days say, early next year, which seemed to meet a measure of agreement at least yesterday, then there would be plenty of time to have a decertification if so advised, preceded, subject to your view, on our application by a witness statement and/or by cross-examination.

The advantage of putting trial 1 into the early part of next year is that you could very well imagine a situation in which, say, a two-day decertification hearing preceded as necessary by a witness statement and cross-examination all takes place before the summer this year. It's all done and dusted, and if we succeed, that's it. End of case.

Some of the steps that have been put forward in this time --

MR JUSTICE MILES: It may be from your point of view that might be possible --

MR HARRIS: I accept that.

MR JUSTICE MILES: -- it's subject to availability, obviously.

MR HARRIS: I totally accept that. One hopefully constructive suggestion that we've made is that if in due course you were to be with me, either today or on a later day,

that there should be cross-examination, that wouldn't have to happen before the full tribunal. I'm not saying -- it could, but it wouldn't have to. We accept of course decertification would have to happen before the full tribunal, though we do think that could be a two-day hearing, just like the CPO was a two-day hearing. Anyway, I don't want to get ahead of myself.

MR JUSTICE MILES: I don't want to get ahead of that, but it may be that the availability problems have more to do with my position than my colleagues'. So, when I say that, your suggestion of doing it before the summer vacation, I think may be a bit ambitious, but there it is.

MR HARRIS: Well, I accept of course, diary constraints permitting. But the reason I advanced that point first is a timetabling one.

One, in our submission, would not want to front load, as this suggestion does, into June and July a lot of the heavy lifting for a trial 1, should that be directed by this tribunal, in circumstances where you haven't yet decided whether there's any merit in my application for a witness statement and/or cross-examination as a prelude to decertification.

The predication of these dates is because you will see that the class representative, a little bit to our surprise, says in item 8, a trial not commencing before 29 September 2025. We can't do that for availability reasons in any event, but the reason that the dates in blue are June and then July, and I think there's one in August, is because there's a date of September in blue in line 8.

But of course, this problem rather fades if in fact the first round trial is in, say, January next year, because then none of these things need to happen in June and July and then there might be some duplication of effort that that's then thrown away if we are successful in a decertification, but it would be minimal. We're obviously keen to avoid further --

MR JUSTICE MILES: I must say, at the moment, I think that whatever may happen on your separate application, I don't think we'd want to, as it were, hold up the process for this trial pending the possibility that you make an application for decertification, which hasn't happened.

MR HARRIS: We agree, sir. All I'm saying is that we do go ahead, but because the date shouldn't be 29 September, but should be, subject to availability, January next year, then the overlap is minimal. That's what I'm saying. I'm not saying --

MR JUSTICE MILES: There will still need to be a timetable set down for these steps to take place and I think that you say they're rather frontloading things. I think arguably you're rather backloading things, so I think the position will might be somewhere in the middle.

MR HARRIS: There may be a medium. It may be earlier. Anyway, that's the reason I raise it.

MR JUSTICE MILES: Yes.

MR HARRIS: That's one of the reasons why we say a stay is not appropriate. To put my learned friend's mind at rest, we do not say that there would be any need for us to put in millions of pounds worth of expert economist evidence prior to a first-round trial of the nature that we've just been discussing, should you so order. To the contrary, there's every reason not to do that; indeed, it's the reason that he gave, so he need not worry about that.

But there is this other point before -- I'll happily address you on any of the detail in this.

MR JUSTICE MILES: Can I just understand the position which I raised as regards the expert and factual evidence?

MR HARRIS: Yes.

MR JUSTICE MILES: Are you talking about putting in expert evidence?

MR HARRIS: No.

MR JUSTICE MILES: No, I thought not.

MR HARRIS: It's misread. With respect, I know this came late, but let me explain what our --

MR JUSTICE MILES: I think the heading may have been a bit misleading. So, the idea is that you've got Mr Lee's report, you then put in your witness statements, Mr Lee then has the ability to have another go in the light of all of that, and then you have another round of witness statement evidence?

MR HARRIS: You've seen it, sir, yes, that's what the order says. Just to be clear, the class representative has already put in his pleaded case on breach and a report from Mr Lee who's said to be the industry expert.

MR JUSTICE MILES: Yes.

MR HARRIS: So, they've already done that and that was said to be their full case. So, what comes next is us.

MR JUSTICE MILES: Yes.

MR HARRIS: We're going to adduce not expert evidence of any kind but factual evidence. I'll come back to outline ideas and numbers in a moment.

MR JUSTICE MILES: Yes.

MR HARRIS: Then, if they're advised, on a strictly reply basis, Mr Lee can have another go. That's our paragraph 6. That's why it says, "The class representative has permission to file and serve reply evidence", by which we mean genuine reply.

Then, whether or not one uses the word "rejoinder", the reason we inserted 7 as a suggestion was because what we're anxious to avoid is a situation where, as we have seen in some other cases -- this is no criticism of this class representative, but we've seen elsewhere -- if an industry expert then comes up with something new, then it can be left dangling unless there's an opportunity for us to put in properly so-called strictly limited rejoinder or reply to reply, whatever one wants to call it. So, that's our

conception and subject to the dates, that's how we see it working.

MR JUSTICE MILES: Yes. And the number of witnesses, you were about to tell me?

MR HARRIS: Yes. Our best guess at the moment is that there could be several from GTR, by which we mean something like three. One of the reasons for this, and Ms Howard can address you on how what she sees as being the witnesses for the intervener is (a) it spans a long period, this case, and we haven't been able to ascertain now whether, even on one topic -- I'll come back to what the topics are -- we would be able to have one witness who can deal with the whole period. It's just a long period.

Secondly, there is a number of topics. For example, per the pleading, we may need to adduce evidence upon how the franchise agreements came into existence and what we were told at the time by the Department. That's likely to be a separate person within our organisation from somebody who can tell you how the fare structuring was put together and why. That may well be a separate person from somebody who did, often, the liaison with the department. Again, that then may be split for time periods because it's a long period.

Just so that you know, my learned friend may be under a slight apprehension when he suggested things like, "Oh, well, what if on 3 March 2017, there was a direction to this effect?" With respect, that's not how it works in the real world. Of course, the CR and some people in his team know this because they've had full disclosure of all this, but this is very much an iterative day to day communication basis between a franchisee and the franchisor, the Secretary of State.

Indeed, in our case as pleaded, it's even more than that because for various bespoke reasons, in this particular franchise, the Department has been on revenue risk, which is distinct from some other franchises and it meant that the liaison was closer and more often.

When you think about that and you take a step back and then I say possibly three or so or possibly even four witnesses, that's the reason: different topics for a long period of time, where there's a concentration between those witnesses on different things.

It goes without saying, I hope, that we are not anxious to put forward more witnesses and expose them to cross-examination. Were it to be the case that potentially, subject to permission from the tribunal, Person A were given permission to say, "Well, I from personal experience can say this, this and this, but for the five years prior to that, when it technically wasn't me, but I have spoken to, possibly naming, B, C, and D", and the tribunal says, "Well, that's acceptable, we can have one witness on that understanding". We'd be open to that and it may bring down the number of days; we accept that.

That's why, in item 8, we think it's definitely going to be the case that this first-round trial that we're mooting would not take one week of court time; we think it would take more, definitely, because there need to be openings; there's a lot of different agreements; they're complicated -- with respect, they are horrendously complicated, they're very long and they've changed a lot -- and then multiple witnesses from us, I think probably several witnesses from the DfT. That takes you beyond one week. There's already an expert, Mr Lee.

So, we're agnostic as to whether the tribunal says now, look, there's more than one week, so we go for seven; or we set aside two weeks of court time in the hope that we don't use it and then, of course, if it's not full ten days of oral submissions and what have you, there could be a day off to write closing submissions and then there could be a day to consider them. By the way, we say the one day pre-reading time is part of the ten, it's not on top of the ten, if that isn't clear from the drafting.

MR JUSTICE MILES: I'm beginning to wonder from listening to you whether actually ten days is going to be enough.

MR HARRIS: Well, that's a slightly different -- our current position is that that is a significant chunk of court time and it should be made to fit within ten days. But we're in the tribunal's hands. I've done the best I can to explain how many witnesses, experts, the sorts of things that will be going on, the nature of the submissions. And these are, at the risk of repetition, enormously long, very difficult agreements and what will become apparent when you look at them, with respect, although --

MR JUSTICE MILES: That's why I'm saying I'm wondering whether ten days is enough, because you've said that --

MR HARRIS: We're in your hands.

MR JUSTICE MILES: How long was the estimate for the whole trial, trial 1?

MR HARRIS: I'm not sure there was.

MR JUSTICE MILES: I seem to remember that we had one last time.

MR HARRIS: If we can look that up. There was a trial in the diary, I can't remember. I think it was some recent in Michaelmas 2023.

MR JUSTICE MILES: I thought there was a trial estimate.

MR HARRIS: The trial, of course, was always going to be split.

MR JUSTICE MILES: Yes, I was asking about trial 1 there. (Pause)

MR HARRIS: For what it's worth, and I can only put it like this, my experience tells me as best I can, that definitely not one week. We ought to be able --

MR JUSTICE MILES: Four weeks?

MR HARRIS: Yes. Trial 1 of course, as it was then conceived of for Michaelmas 2023, was everything bar, as I recall it, abuse of dominance with all of that economic evidence. For what it's worth, nobody's, I think, now contending for such a compendious trial 2. Certainly on our side, we're suggesting a trial 2 and a trial 3. Neither of which, of course, will be necessary if the defendants prevail on trial 1.

In any event, that's my submission. My experience suggests to me it's definitely not

one week and if everybody is told, "You have to have done it within two weeks", then that's what will happen; that's what my experience tells me. But if the tribunal feels we should allow some further latitude, then plainly we don't resist. Four weeks, I'm told, was just the liability issues when it was originally conceived of.

MR JUSTICE MILES: Right, okay. Thank you.

MR HARRIS: Again, I don't want to develop the next point unless you ask me to do so, because it forms part of the reasoning for my application for a witness statement. But it's only fair for me to tell you that the CR is advancing this suggestion to you today of a first trial with all of these steps in circumstances where, as we thought four weeks ago, it had spent for just over £14 million -- that was four weeks ago, or when the February cost budget came out, which is certainly several weeks ago -- in circumstances where it's LFA. I can show you all these documents in due course. It says that it has a maximum allowed funding of £15.45 million. So, several weeks ago they had a latitude of call it £1.3 or £4 million and that's several weeks ago. Of course, a large chunk of that will now have been spent for the purposes of today's hearing. And --

MR JUSTICE MILES: Well, I hope not that much.

MR HARRIS: Well, I say a large chunk, because we've seen the figures that have been put forward by the CR for how much it spends on other CMCs and two day hearings, and they're into the hundreds of thousands of pounds. So that's why I say a meaningful part of that £1.45 million that was left some weeks ago, we apprehend may no longer be available.

One of the difficulties, of course, is that it's me on the part of the defendants who's drawing this to your attention. Even though this is a problem for the CR. What we say -- and you will hear this later if I get the chance to develop my application for the witness statement -- is that one of the unsatisfactory things going on in this case is

that the CR should be addressing you on these matters.

But in any event, I just draw it to your attention now that it is a curious position to find oneself in, that the CR is saying that this is the way we should proceed in circumstances where, on the face of it, the CR doesn't have the money to proceed in this manner. All that we have seen prior to this hearing is that the CR has said, "We are currently liaising with our funders as regards further funding", but with great respect, that's not good enough.

How can, I ask rhetorically, the CR come to this tribunal, especially against the background of what we contend is this multiple instances of mismanagement hitherto, and say we, "Invite you to order a trial of this type when we don't have the money for it"? The bare minimum, in our contention, that the CR should have done is draw this to your attention in advance and explain with evidence as necessary, "Don't worry tribunal, because actually we've now secured the following further monies", if that's indeed going to be the case, "And this is what trial 1 on our contention will cost, and this is where it appears in our actual committed budget".

But you don't have any of that. So we have a very profound reservation. I mean, everything that I've just said is subject to the caveat that we do not, with great respect, think that it is sensible for this tribunal to order this where it cannot be sure that the claimant has the money to pay for any of it.

MR JUSTICE MILES: I'm not quite sure where that suggestion goes, because it seems close to saying that the whole case should be stayed in its tracks.

MR HARRIS: Well, what it goes to, sir, is that we say, as part of my application for the witness statement, that that's one of the topics that needs to be addressed properly and with evidence --

MR JUSTICE MILES: Well, that's a different question. The suggestion that we shouldn't do anything --

MR HARRIS: Well, it might be that it's contingent. For example, let's say you agree with me that there should be at least a witness statement, then that can address this, and that should be done in short order. But an alternative would be for you to say, at least on this point, "We are prepared to order this, but on the condition that --" and then you set some conditions for the CR: "-- that you satisfy us within X days, that in fact you've got the money to do it".

Something like that. As I say, when it comes to that point when I mount my own application, I would like to show you, time permitting, those provisions which explain that there is a very serious responsibility on both the tribunal, with great respect, and particularly upon the class representative, including when it comes to budgetary matters, and that there is also a duty upon the class representative to be proactive in engaging with the tribunal on these matters. What you have already heard from what I've just submitted is that they have done neither. They're continuing not to act responsibly and in compliance with their obligations.

What worries us -- obviously, what worries us, if you like, on a selfish basis, is it might lead to further and wasted costs -- but what worries us, if you like, vicariously on behalf of the tribunal, is there's very clear law now about how the tribunal has to take an ongoing grip of the finances of the case, even if the CR is derelict in his or its duty. When I reach that part of the hearing on why I want a witness statement, this will feature; these are some of the matters that we contend that the CR simply has to address for this case to go forward. Of course, if he doesn't address them, it could lead to decertification. That's how the two points link.

MR JUSTICE MILES: All right.

MR HARRIS: Sir, unless I can assist further, that's what I have to say on the order. My learned junior, Ms Blackwood reminds me that there is an issue, actually, in the blue writing on page 2 of the draft order about disclosure.

Our position is that we have provided all of the disclosure. You may recall from the history that there was voluntary disclosure from both us and the DfT; that was some years ago; that was back in 2023. Then there was the full round of expert-led disclosure under the careful supervision of the former president during 2023 and 2024. The sensible course is for -- so we don't propose to adduce any more, and if and insofar as more materials emerge and then need to be disclosed, they should be handed over. That should be done in the context of our putting together our witness statement evidence.

Because in the real world, that's how it will work. We think we've handed everything over, but when we sit down and proof and interview and come up with witness statement drafts, if it turns out, ah, somebody says, "Well, actually, I've been looking further into this and I want to refer to that", that's when we would put it.

MR JUSTICE MILES: I think that's what they're proposing, funnily enough.

MR HARRIS: No, because the date there is by 27 June, and that's --

MR JUSTICE MILES: The same date.

MR HARRIS: Oh, is that the same date? I'm sorry.

MR JUSTICE MILES: I think that's what they're proposing.

MR SAUNDERS: Yes, that's what we had in mind, but --

MR HARRIS: Well, provided it's understood that any further thing comes appended to the witness statement on the date of the witness statement.

MR JUSTICE MILES: Well, just reading this in the blue text, I think that's what's proposed. It's not actually an order for disclosure, it's saying that if you want to rely on anything more, then it must be produced at the same time as the witness statement, which I think is your proposal.

MR HARRIS: That's my proposal. So it's only the date issue.

MR JUSTICE MILES: Yes.

MR HARRIS: And then we don't agree with a list of agreed facts, that seems to us to be inappropriate, because there are going to be disputes. There's going to be evidence --

MR JUSTICE MILES: No, I'd like that, actually. I'd like a list of the agreed and non-controversial facts. I do that habitually in the most hotly contested trials. I find it a very helpful document, funnily enough.

MR HARRIS: In that case, we're willing to do that and to be approximately -- maybe that this is what's intended -- a month after the witness statements; is that right?

MR JUSTICE MILES: Yes, it seems to be.

MR HARRIS: We're confused, though, as to the second sentence in blue under paragraph 3:

"Any outstanding issues between the parties as to the list of agreed facts."

MR JUSTICE MILES: I think that means if there are drafting points.

MR HARRIS: Okay, well, if it means drafting points --

MR JUSTICE MILES: As I understand it, because what often happens is that people say, "We're agreed to this extent, but not that". I think that's what must be meant. I mean, I would actually prefer the parties to be under an obligation to use their best endeavours to agree as many facts as they can in this document, and then if they don't agree, simply to set out the areas of disagreement.

MR HARRIS: Sir, we're happy with that. That seems --

MR JUSTICE MILES: But it's obviously not intended to cover points on which are hotly contested, so that if your position is that you're under a legal requirement and they don't agree that, then that's not going to appear in this list; this is intended to deal with those facts which are agreed and are not contested. And a lot of facts in this case, I suspect, will fall within that category.

MR HARRIS: Sir, it may be that that was my misapprehension. I had understood it to

be slightly different, but the way you explained it, we absolutely agree.

MR JUSTICE MILES: Yes.

MR HARRIS: So that's what I have to say about this, unless I can assist further, and it's all subject to the application. I wish to --

MR JUSTICE MILES: Yes, I understand that. All right. Thank you. Yes.

Submissions by MS HOWARD

MS HOWARD: My Lord, if I could just make some brief comments; we haven't had sight of this before this morning. On the disclosure, we're happy now that paragraph 2 has been reframed as reliance on further documents. We didn't want to get embroiled in yet another disclosure exercise, having handed up so many documents already.

MR JUSTICE MILES: Yes.

MS HOWARD: On the witness statements, I just want to make three brief points: the first one is the one that my learned friends have alluded to already, because I've raised it with them, which is the application of the practice direction. I think we do need a formal order for dispensation from that.

We raised this with the tribunal at the outset in the October 2022 CMC, and said that because of the long duration of the claim period, the lapse of time, and the lack of continuity of the staff within the department, we were going to find it very, very difficult to find one witness to be able to speak, from their direct knowledge, for all the relevant events, and we wanted to avoid having a fragmentary scattering across different witnesses. The reference for that transcript, if it helps you, we raised it -- it's the March bundle, the transcript is at tab 1. We raised it on page 88 at lines 23 and over the page.

The tribunal agreed with us at page 60 at lines 14 to 24, but the tribunal didn't want to make a formal order, and obviously it was quite premature at that stage. But I think it would be helpful to include formal wording for the Department, because it will have

a direct impact on the number of witnesses.

MR JUSTICE MILES: So what are you proposing?

MS HOWARD: We'll come back with some wording -- we haven't had a chance to feed that in -- but just to have a formal dispensation, because then that will reduce the number of witnesses. We don't intend to put in expert evidence in response to Mr Lee, but obviously the Department has its own internal expertise, and so we think this would be covered by the factual witnesses. So it wouldn't be expert evidence.

MR JUSTICE MILES: Do you have a feel for how many witnesses?

MS HOWARD: We're thinking at the moment between two and three? The problem that we have is that we have some availability issues in the autumn, with one of the witnesses being on maternity leave. Although we're trying to make enquiries, they're not back from maternity leave until the end of November or December, which is going to have an impact on finalising the witness statement.

Obviously, we'll try and progress things as much as we can and see if there's any flexibility, but we're exploring that.

The other thing we were going to suggest is obviously we're only an intervener and we don't want to duplicate. It might make sense, as we've had before, to have sequential witness statements and skeletons following after the defendant, so that we can have a short period of time to review their witness evidence or their skeleton, make sure that ours are non-duplicative, and in that case, that might be helpful to just have a short seven day period or something to review their -- obviously, we'll try and liaise where we can to minimise duplication.

So we would like to have sequential witness statements fed in both into paragraph 5 and 6 and 7, and for the skeletons as well.

In terms of the hearing, we thought that you're probably going to need longer than one day to read in, and it wouldn't do any harm to have even two or three days reading in,

to help your preparation. You've had one day reading in for the CMC, and the contracts are lengthy and you need to understand how they all interact. So even if you had three days reading in, I don't think that would be of any disservice.

We think probably ten plus two, and if there's any excess, then you can use that for judgment time. But again, we agree it would be useful for the parties to have time to produce substantive written closings for you. I think that would be of assistance.

MR JUSTICE MILES: Well, I think there would need to be that, so there'd have to be some more -- that would be, as it were, sitting days, but there'd probably be some flex built in for the parties to produce written closings and for the tribunal to consider them, which is often something that's overlooked.

MS HOWARD: Exactly. So, I mean, I was just thinking on my jotting, I was thinking, right, if you have two days reading, two days of openings between three parties, and then you've got potentially two witnesses from the defendant, two to three from the Department, plus Mr Lee, that's looking at three days. So that's week one taken up.

We then have the weekend and Monday, perhaps written closings. Tuesday for the tribunal to review them. Then you'd have Wednesday, Thursday, Friday for closings and reply.

MR JUSTICE MILES: I mean, I wonder whether that's a bit tight on the witnesses, if there are five factual witnesses, possibly more, and an expert on what we're told are very complicated documents.

MS HOWARD: I don't know how to cross -- would you need to be putting the same points to (several inaudible words). There might be some economies in the cross-examination. And in terms of timing, obviously the Department has other important policies on its agenda which are soaking up resources at the moment, most importantly the renationalisation programme. So trying to fit into a timetable, expedited timetable, before September, it's just not going to be feasible. We think,

you know, a date in January will be achievable. And obviously we'll do our utmost to co-operate with the witness evidence to fit in with that timetable.

MR JUSTICE MILES: All right, okay. Thank you. Yes.

Reply submissions by MR SAUNDERS

MR SAUNDERS: Sir, can I just come back on a few of the points my learned friends have raised. Firstly, the stay. Now, it seems that actually what's between us -- my learned friend said he won't put in an expert economist report, which was not quite my point, as you may have detected, which is that we don't want a lot of money being spent with consultants, economists, even though it may not result in something that has been served. His concern, as he articulated it, was that he wants to still be able to run his threatened decertification application, the same application which I gather from Mr Hollander has been threatened at every single hearing in this case. But I'm not going to shut him out from doing that.

He also wants to have his application heard in relation to the witness statements and cross-examination; we're not suggesting he is shut out from that. Obviously you've seen my position on that separately.

But those are the two things that he is concerned with and the answer is they should be ring-fenced off, but the rest of the case can be on freeze, pending this issue.

Now, the next point he made with a lot of rhetorical effect was that, leaving aside these points of mismanagement which he alleges and everything else which obviously we strenuously reject, he says there's not sufficient money to even do this January trial.

I checked with my instructing solicitors. We are currently in funds with sufficient funding at present to do this trial. So that is not a problem at present.

Now, one of the things which I did mention though, is that part of the strategy of litigation in this case is the constant spear chucking in relation to what might be seen as peripheral issues. Sir, one of the things that the tribunal may want to keep a bit of

an eye on is whether those are really progressing the claims. It's not the first time this has been said, in fact the previous president made the same point way back in the October hearing. And therefore obviously, every time those spears get chucked, they have to be caught and dealt with and that eats budget. So, there is a litigation strategy that is sometimes employed by defendants to exhaust budget through attrition. So again, we can come on to that in due course; I don't intend to take time with it now.

The witness statements. We did, I understand, send a request for further information asking for particulars of some of the -- how exactly the defendant was said to have been compelled. That wasn't met with a substantive response. It now seems that that information will be provided, it's envisaged, through these witness statements. That may be fine but that can't happen too late because otherwise we don't have an opportunity to properly consider it. My learned friend for the Secretary of State has identified the same -- the concern with statements. We don't have an objection to that being done, as it were, old style rather than new.

I think, if you think about the issues as they're probably going to arise, I suspect this is going to be a largely documentary exercise with people explaining the background to various things. That doesn't necessarily have to be done by a myriad of people all with tiny little slivers of knowledge.

MR JUSTICE MILES: The idea -- the mischief of old-style witness statements, if I can put it that way, was kind of twofold, which is, one, people talking about things they didn't really know about but, two, putting in a very long commentary on documents. And I'm certainly -- if we do say that the practice direction should not apply, it's not an encouragement then to produce huge volumes which -- because I would expect the submissions largely to cover the contents of the documents. So if there is a dispensation, it's really to cover the first point, which is that you don't necessarily have to be giving only first-hand evidence, but it's not an encouragement to do long

commentaries.

MR SAUNDERS: Long, quotation-like --

MR JUSTICE MILES: Yes.

MR SAUNDERS: -- mini skeleton arguments --

MR JUSTICE MILES: Yes.

MR SAUNDERS: -- (inaudible) statement which is --

One reflection on hearing my learned friend Mr Harris's submissions, is that -- Sir, you were correct in the interpretation of what we proposed in the order, which is that the documents come with the witness statements. Obviously, as I understand it, possibly he and also the Secretary of State may identify additional things as they do. We're certainly not suggesting a full disclosure round but in the course of doing that, if they come across known adverse documents, they should also be provided, we suggest, at the same time because if there is additional material coming in, then it is probably appropriate insofar as there is contrary material that's identified in the course of proofing those witnesses, that that is also to be provided. That is not an onerous thing to do because they'll have all that material when they're proofing and when they need to ask them the difficult questions, because that's how you prepare the evidence. So that's our proposal there. But as I say, that's really a reflection on hearing my learned friend explaining how this may arise.

In terms of the witness numbers, I mean, the key thing from our perspective is to keep this within manageable bounds as, sir, you've just indicated, it may be that people can talk about things outside their direct experience in order to keep the number of corporate witnesses smaller.

Having it for ten days, obviously, we're in your hands on pre-reading but we can assist with that as well.

MR JUSTICE MILES: Do you say that the suggestion of, say, two days plus ten days

is appropriate? Too short, too long?

MR SAUNDERS: Well, we think possibly slightly too long, but no one ever got criticised for --

MR JUSTICE MILES: No.

MR SAUNDERS: -- having a slightly too long window. So I'm always mindful that the tribunal's job is a slightly different one to the parties, because by the time the parties come before the tribunal, we all know exactly what it is we're arguing about and the tribunal has to catch up a little bit sometimes. No criticism, of course, of you gentlemen but it's just the nature of coming to something cold where the parties have been thrashing it out for some time.

MR JUSTICE MILES: Sorry. One point I should have perhaps raised with everybody is page limits of skeleton arguments. Do you have a proposal in that regard?

MR SAUNDERS: I don't know whether we -- we don't have an objection to that as a matter of principle but my slight hesitation is that sometimes -- certainly we weren't envisaging that there would be enormous tomes of opening old-style commercial court type things. But sometimes it is better to have slightly more space there than slightly less space in opening. But I would have hoped --

MR JUSTICE MILES: It's a very --

MR SAUNDERS: I'm sorry.

MR JUSTICE MILES: Judicial experience is that there's a very rapidly, there's a law of very rapidly diminishing returns --

MR SAUNDERS: Yes.

MR JUSTICE MILES: -- with the length of forensic documents and that's something that I would like some assistance on.

MR SAUNDERS: Sir, well, maybe 50 pages. I suspect if you get much more than 60 or 70, you're more engaged.

MR JUSTICE MILES: You're falling off a cliff at that stage.

MR HARRIS: Sir, we agree with 50.

MR JUSTICE MILES: 50, right.

MR SAUNDERS: The Secretary of State mentioned a moment ago that she would like to have an opportunity to see the defendants' position before putting in her own skeleton arguments. I don't think we have an objection to that as a matter of principle.

MR JUSTICE MILES: I think she was also saying, could she see the --

MR SAUNDERS: The stack of evidence, as well.

MR JUSTICE MILES: -- evidence as well.

MR SAUNDERS: But I don't think that's objectionable either from our perspective. The key thing being that that is all done with sufficient time for us to be able to prepare whatever it is that we need to do but we can liaise on that.

The other thing which the class representative has suggested is that skeleton arguments should be, generally, sequential. Not sure whether that is appropriate on this side of the (inaudible). It probably makes sense that both the class representative and the defendants exchange and then perhaps the Secretary of State follows on and then that way she can -- her representatives can see the full scope of the issues as they've developed. This is paragraph 10.

MR JUSTICE MILES: Yes, it can be helpful to have sequential exchange in my experience. Does it really matter to you?

MR SAUNDERS: I don't think it matters. I mean, so the key thing as claimants, there are two, as I say, I mean, you may agree with me, I'm sure, but the two pinch points are always immediately before trial if things come in late and at the point where cross-examination is finished to get the closing in where you've just got off your feet cross-examining and the people who haven't had to do the cross-examining are sitting there --

MR JUSTICE MILES: Yes, I think if you've got seven -- if you have them seven days before the hearing --

MR SAUNDERS: Yes, I think --

MR JUSTICE MILES: -- that should be sufficient. That's more than in some cases. All right. Anything else?

MR SAUNDERS: So I think those are the points. I mean, obviously I won't address -- as I say, you can take it that I certainly don't agree with my learned friends.

MR JUSTICE MILES: I've taken that on board.

MR SAUNDERS: Yes.

MR JUSTICE MILES: Yes. Only one question for you, Mr Harris, which is a fairly small point, which is known adverse documents. If you come across those in the course of preparing your witness statements, I think there's some force in the idea that those too should be handed over.

MR HARRIS: Can I take some instructions (several inaudible words)?

MR JUSTICE MILES: Yes, but that doesn't, just to emphasise, that doesn't require what might be called a full disclosure process to be undertaken. It doesn't require specific searches to take place or anything of that kind, but that if you, in the course of your witnesses preparing their evidence, known adverse documents, as defined in the rules, come to your attention then it seems right that those should be disclosed too but I'll let you take instructions on that.

MR HARRIS: Yes, I'm just curious -- you may want to reflect over the short adjournment -- my learned friend just said, "We're currently in funds, including for this trial". But of course, how does one know? Because there's no budgeting for this trial and we've got this problem on the existing documents about the lack of funding.

MR JUSTICE MILES: Well, I gather that you wish to say something more about those questions in due course. We've got this afternoon to deal with the application you've

indicated you wish to make by letter. So that's where we are.

MR HARRIS: Yes. Realistically, I mean, my side's position is we don't have sufficient time, but we have to be finished at 4.30. So in reality, that means an hour of submissions from me, approximately an hour for my learned friend for a very short reply. That's the way it is. I mean, that's not enough to do it justice but we are where we are.

MR JUSTICE MILES: We are where we are. Right. We will be back at 2.00.

(1.06 pm)

(The short adjournment)

(2.02 pm)

MR JUSTICE MILES: Mr Harris, just before you start, just so you know, at the moment, we think there's some prospect that we might wish to rule on this bit that you're about to move on to this afternoon. Now, time is limited. I know that you personally need to leave; it may be that we get to the point where we've had all of the submissions, we will give a ruling on this possibly this afternoon and it may be that one of your very capable team will assume your role, as it were. But just so you know.

MR HARRIS: Thank you for that indication.

MR JUSTICE MILES: But if you can then move off at 4.30 or whatever it is.

MR HARRIS: Thank you.

MR JUSTICE MILES: We may or may not take that view.

Case management (continued)

Submissions by MR HARRIS

MR HARRIS: Yes. What I propose to do is cut my cloth, obviously, to the time available and approach it in this way: to address you on some of the responsibilities that are now very clearly set out in the case law upon the CR, and then very briefly, a reminder with great respect to this tribunal that there are some clearly enunciated

responsibilities upon the tribunal as regards ongoing case management on topics that include things like the costs, but not limited to that. I'm going to do that extremely quickly and with your permission, I'm just going to read out some bits rather than turn up pages.

MR JUSTICE MILES: I think you'd better turn up the pages, I'm afraid.

MR HARRIS: I will -- yes.

MR JUSTICE MILES: We'll take on board that you're doing it at some pace but I'd like to see those as we're going along.

MR HARRIS: I'm grateful. What I would then propose to do, if you like, is the second part is identify for you what I hope ought to be, and in my submission ought to be, areas of concern on the part of the defendants that are shared by the tribunal in light of the duties that I will have identified in section 1. There will be substantive discrete points: for example, what we contend in our written arguments as being a misleading presentation to this tribunal of some former costs that led to a mistaken interim cost order in the favour of the CR; in other words, a serious matter, we say of mismanagement.

There will be other examples, including, for instance, how it looks as though the CR is about to run out of money, and how it looks as though the amount of money accruing on the face of the amended LFA, the litigation funding agreement, is rapidly eating into the amount of damages that are even potentially available, and how that impacts upon ongoing questions of suitability and cost-benefit analysis.

What I do not propose to do, given the time constraints, is deal at all with the suggestion that my application is so late that it shouldn't even be heard. I have full answers to all of them. We reject it completely.

It may not have escaped your attention that in the skeleton argument for last time, we said in terms at paragraph 65 that there may well be a moment at which Mr Boyle may

have to make himself available for questioning and we had a whole section in that skeleton argument about concerns on the part of the CR as a prelude to a possible decertification, but I don't have time to deal with any of that.

So, unless you have any initial questions, what I propose to identify for you in this first section is some rules that identify the responsibilities on the part of the CR.

The first one is that in the CAT rules at rule 78 -- you'll find that in the authorities bundle for today, the March authorities bundle at tab 6, rule 78 of the CAT rules and that's page 97 of the soft copy of the authorities bundle for today -- it is obligatory on the part of the tribunal, it shall consider --

MR JUSTICE MILES: Sorry, rule?

MR HARRIS: 78(2), under the heading "Authorisation of the class representative", the tribunal is legally obliged to consider, under the heading "authorisation", a number of matters including (a), I think it's a 78(2)(a), whether the CR would act fairly and adequately in the interests of the class members.

This, as I will show you in a moment, is an ongoing duty in this jurisdiction. That one is particularly piquant because in due course, I'll be showing you the racking up of the costs in this case by the CR and how that translates into the expected recovery of the funder. So, 78(2)(a), it's also relevant under 78(3)(c)(i) that the CR has to have a plan that satisfies you; the word there is ... Yes, that's (3)(c) at the top:

"Whether the [PCR] has prepared a plan for the collective proceedings that satisfactorily [ie to your satisfaction] includes ...

"(iii) any estimate of and details of arrangements as to costs, fees or disbursements which the Tribunal orders that the proposed class representative shall provide."

Just by way of reminder of that which we put in our skeleton argument, in a hearing that I did in this room only two or three weeks ago before the CAT, when I was acting for a class representative, the chairman there was Mr Malek. One of the things that

he said, in light of the ever-evolving jurisdiction in these sorts of cases, is that the tribunal has to be satisfied that there's not an undue return to the funder. Because if there is an undue return to the funder relative to the size of possible recovery, then that's not in the interests of the class.

The way that the CR satisfies the court that that isn't a problem is, amongst other things, to come to this court and proactively explain by reference to things like worked examples: here's what is now due to the funder; here's what we might have to hand over to the funder, subject always to the jurisdiction of this tribunal to make costs orders at the end of the case or when there's a settlement. But of course, none of that has happened in this case. We say it should have happened, but it hasn't.

Can I move on then, doing this rapidly, to the same authorities bundle but this time the next tab, which is extracts from the tribunal's guide and in particular para 6.29, the hard copy page is 96 and 98 is the soft copy page. What that says at 6.29, by reference to the just and reasonable test, is third sentence:

"The central purpose of this assessment is to ensure that class members are adequately and appropriately represented."

It goes on to say that "this is particularly important in opt-out proceedings" and of course, we are in opt-out proceedings. That's because the class representative and its lawyers will not be in contact with many members of the class or be subject to their instructions, and indeed, in many cases, not in contact with anybody at all, ever, at any stage, who are in the class. But they "must act in the interests of the class as a whole" and this is the point.

"Hence, being a class representative involves significant and serious obligations, and is not a responsibility to be taken on lightly."

We pray that in aid.

At 6.30, so just beneath, in the first bullet, under the question of whether they can be

fairly and adequately represented in the interests of the class, it goes on to say that:

"The Tribunal will consider whether the proposed class representative is competent to manage what is likely to be a large and complex piece of litigation, while also adequately representing the class. ... The tribunal is also likely to consider the suitability of the proposed class representative's lawyers. The [PCR] will usually be expected to have the ability to provide proper instructions to its lawyers and be capable of exerting sufficient control over the legal work conducted and costs incurred. Indeed, the tribunal may require the proposed class representative to demonstrate at least a basic understanding of the facts relevant to the claim [and so on]."

The verb there is important: the verb "demonstrate" or the synonym for these purposes "convince" is the word that was then picked up by the tribunal in the Riefa case, where the PCR was denied authorisation. The point that was there being made -- I'll come to this in a moment -- was that it's incumbent upon the PCR or, on the continuing basis when it or he is a CR, to continue to demonstrate where there are genuine question marks about whether this is being done under this heavy responsibility in a competent manner, there's a continuing responsibility to "demonstrate" to you, members of the tribunal, that it is being done properly. That's where we say that there's been a failing in this case.

Last one, 6.33 of the guide, two pages further over, another factor is the ability of the PCR to show his or its financial resources. There are two aspects of this. It's not just paying our costs on my side of the court, but do you see:

"By extension [it goes on] the proposed class representative's ability to fund its own costs of bringing the collective proceedings is also relevant. In considering this --"

MR JUSTICE MILES: Where is this?

MR HARRIS: It's halfway down paragraph 6.33 of the guide, second sentence, begins "by extension". Third sentence I'm reading now:

"In considering this aspect, the tribunal **will** [I emphasise that's a duty upon the tribunal] have regard to the proposed class representative's financial resources, including any relevant fee arrangements with its lawyers, third party funders or insurers."

Just pausing there, they are two of the substantive points that I'm going to come on to in section 2 of these submissions. My respectful contention is that you have a duty to continue to take a grip of this rather unique jurisdiction where there's a very heavy responsibility on the CR. You have a duty to continue to ask yourself the question, can the class representative fund his own costs and is he doing so? What are the relevant fee arrangements between the lawyers? Because that goes to whether or not he's continuing to be suitable.

That's all I have to say in the brief time that I want to take up on the rules and the guide. But Riefa, which is to be found in the authorities bundle for February, for last time, is at --

MR JUSTICE MILES: Sorry, wait. What is this? The authorities for ...

MR HARRIS: The authorities bundle for the February CMC.

MR JUSTICE MILES: Have you got that?

MR HARRIS: Tab 5.

MR JUSTICE MILES: Is it supplemental authorities?

MR HARRIS: No.

MR JUSTICE MILES: Well, no.

MR HARRIS: Last time there was an authorities bundle and a supplementary authorities bundle and now this time, there's a yet further authorities bundle. So, you want the original authorities for February of which there are five tabs.

MR JUSTICE MILES: Right, well, this might be a problem.

MR DURAN: What page in the soft copy is it, Mr Harris?

MR HARRIS: 234.

MR JUSTICE MILES: No. All right, what are we going to do? We need this bundle and we haven't got it.

MR HARRIS: Perhaps that could be located and I'll move on, given the time constraints. I will come back to Riefa. Riefa then sets out in very recent case law how onerous this responsibility is on the CR and how it's incumbent upon the CR to "demonstrate certain things to you". I'll come back to it when that bundle is found.

So, that's all generic. I've done rules, guidance and a generic case that I'll come back to saying generally what people have to do when they're in the position of the CR in the tribunal. But let's not forget that Mr Boyle personally, in this case, including by the two wing members of the current tribunal, has already been told in this case that he has a particular responsibility. The reason that those remarks were made was precisely because in this case, this CR has already let the side down. So, in the CAT ruling of March 2023, which came after the loss of Mr Harvey -- you may remember this from yesterday, so unless invited to, I'm not going to turn it up.

MR JUSTICE MILES: No, you must turn it up.

MR SAUNDERS: Please turn it up.

MR HARRIS: It's February core bundle, tab 36, page 1545. Sir, that's 1557. And at paragraph 12(3) of that ruling, you may recall from yesterday that the tribunal recorded that the class representative should of his own motion have informed the tribunal and it went on to say:

"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 litigation."

In other words, Mr Boyle has been expressly reminded in this case that he has this particular greater responsibility, and then --

MR JUSTICE MILES: Sorry, date of this hearing?

MR HARRIS: That was on 24 March 2023. What you will recall also from yesterday is at subparagraph 4 on the next page of the ruling, that Mr Boyle was criticised because, picking up in the final two lines, he had shown "a regrettable reluctance on the part of the Class Representative to grasp the nettle".

All of this, you see, led -- I mean, we don't have time to go through all the remaining aspects given the time available -- to a situation in which the tribunal chairman, as he then was, himself said, not me, himself said that there was "a remarkably high chance of decertification". Let me show you that. That's in the same bundle at tab 40. It's a transcript of a case management meeting hearing. The hard copy number is 1666 and 1678 of the soft copy, I'm told.

MR JUSTICE MILES: Date?

MR HARRIS: That's a date of 7 March 2024. Just to be clear, this wasn't the two wing members, Mr Duran and Professor Neuberger, it was the chairman alone, but nevertheless, on behalf of this tribunal. And he said at line 20 to 22 as follows:

"Well, there isn't infinite time and it does seem to me that the chances of this proceeding being decertified in the summer is remarkably high, because we are just not going to be ready." [as read]

In other words, there's been a background -- I appreciate this tribunal doesn't want an extensive archaeological excavation of everything that happened before, but nevertheless, there are there is a relevant history to this, bearing in mind the duties on the CR and the tribunal. Even the former chairman of this tribunal had said, well, decertification is a very live possibility. So it's not a fair comment for my learned friend to say, oh, well, Mr Harris just moans on every occasion that there might be a decertification. There's a relevant history to why we are where we are.

Can I ask whether that Riefa judgment has now been located, because that would be

the sensible place next to go?

UNIDENTIFIED SPEAKER: (Inaudible)

MR HARRIS: Okay. Well, in that case, I'll go to a different case. In the Court of Appeal, there's the McLaren case that gives helpful guidance and that's the March authorities bundle, so the one for today, at tab 4. That's a 2022 Court of Appeal judgment. At paragraph 45, which is page 71 in hard, 73 in soft copy, what that reads is:

"The duty on the CAT --"

I don't shy away from that. There is an onerous duty upon the tribunal as well as Mr Boyle --

"The duty upon the CAT as gatekeeper in collective proceedings is proactive as well as reactive."

And I emphasise that. This is the sort of jurisdiction where, even if I hadn't mentioned a single one of the points that I am mentioning, it would be incumbent upon this tribunal itself to ask, well, is the CR continuing to adhere to his somewhat greater responsibility, onerous responsibility? That's what I get from 45.

Then in 46, it refers back to a case heard in the Court of Appeal, Gutmann, in this same jurisdiction. What it's said there is, picking up at the bottom:

"There are clearly established strong public interest benefits in the CAT performing an active elucidatory role which include: [and the two I rely upon] ensuring that large scale litigation is being run efficiently --"

As you know, we've got multiple contentions about how Mr Boyle has not run the case efficiently. Just to list one or two as I go past, he was at least materially, not solely but materially responsible for the vacation of the first trial in Michaelmas 2022, after the withdrawal of Mr Harvey. We saw that yesterday. He wasn't solely responsible, but he was responsible. He failed to grasp the nettle and tell the tribunal that which he

should have told them. Also, there's now ten expert reports in this case and we're nowhere near even the first trial. So they are just two examples of this large scale litigation not having been run efficiently. In due course, I'm going to show you that the costs have ballooned, but I don't so much rely for present purposes on the next one, "ensuring that the defendants are not confronted with baseless claims". But I do rely upon the third one:

"... and ensuring that potentially sprawling cases do not absorb an unfair amount of judicial resource."

MR JUSTICE MILES: That applies both ways, Mr Harris.

MR HARRIS: It does. I accept that, but I am not even making the suggestion about decertification in a vacuum. The former chairman himself said "remarkably high chance" and I feel perfectly well grounded to now take some limited amount of time of this tribunal to explain why --

MR JUSTICE MILES: This tribunal has over the last few days has been faced with a number of applications. It's now faced with this one. There is a danger of an unfair amount of judicial resource being used on satellite litigation as well. Now, you say it's not, but it is something you have to bear in mind.

MR HARRIS: I agree, and that's why I'm cutting my cloth to the limited amount of time this afternoon, even though my instructions are that it requires significantly more time. I'm nevertheless conscious of exactly what you said to me.

So, have we now found Riefa? This is not helpful. I can't make the submissions in the very limited time I have because the bundles are not available. In any event, I'll move on. I have to come back to Riefa.

MR JUSTICE MILES: Sorry. Just wait a minute. What's happening with the bundles?

UNIDENTIFIED SPEAKER: So, in order to get the bundle to work, IT will need to restart the system. It would be a small break for two minutes or so. The IT person

can come here and quickly do it in order to get that bundle onto the screen. (Inaudible)

MR JUSTICE MILES: Is it really two minutes?

UNIDENTIFIED SPEAKER: It would be a small amount of time, yes.

MR JUSTICE MILES: Right. Why don't you go and find them and then we will do that, but you carry on.

MR HARRIS: I'm grateful. I for my part, I can do Riefa at another stage so I can carry on and say we take the ten-minute break and say 3.00 before I'm out of time and I can do Riefa later.

Let me move on then, because the last part of section 1 would be what the tribunal has recently said in Riefa. Instead, what I'm going to do now is move to section 2, which is some concrete, substantive examples of where things have gone, we say, badly wrong, above and beyond the ones that I've already identified.

The first example relates to the costs that were claimed by this CR in something called the cost certification schedule, which was a document that I showed you yesterday and I want to go back to. It's in the supplementary bundle for this March CMC at tab 24, which is hard copy page 406. That's 438 of the soft copy. (Pause)

MR JUSTICE MILES: Sorry, this is the schedule of costs?

MR HARRIS: Yes, certification schedule of costs. You saw it yesterday, 438, and this was produced by my learned friend's team: after it won the CPO application, it was seeking costs from us.

You may remember that when I drew this to your attention yesterday, I invited you to note the dates. So this was the costs said to have been incurred exclusively between 4 February 2022 and 15 July 2022, and that was in respect of a certification hearing that took place in June and a judgment in July.

What happened, as again you saw yesterday when you looked at the reasoned costs order that led to the interim award from our side to them of £250,000, was that the

amount was awarded to them as a result of the opposition that we made at the CPO stage, which opposition failed. That's where the £250,000 order came from.

But now, one needs to keep that document available and have a look, ideally simultaneously, if you can, failing that, scrolling between the two, at the February 2025 cost budget that was produced as a result of your order on the last occasion. That's to be found at tab 4 of the same bundle.

MR JUSTICE MILES: Sorry, sorry. Right. This is page ... I don't think we can do it at the same time but --

MR HARRIS: It's hard copy 293 which is 297 of the soft copy.

MR JUSTICE MILES: Right. Okay. I think we're there.

MR HARRIS: Yes.

MR JUSTICE MILES: So this is a spreadsheet of some kind.

MR HARRIS: That's right. So this was produced as a result of your order a month ago.

MR JUSTICE MILES: This is the budget?

MR HARRIS: Yes. This is the latest budget. And what you'll see is it's split into phases of the action. Do you see there's 11 numbered columns.

MR JUSTICE MILES: Yes.

MR HARRIS: And then numbered column 3 is headed "CPO application" and that's of course historic as at the date that this was produced. And there are some numbers in there. The key ones are "Solicitors", "Counsel" and "Experts". So it's the 258, the 183 and the 45. What that comes to --

MR JUSTICE MILES: Sorry, it's 80,000 -- it's --

MR HARRIS: Do you see --

MR JUSTICE MILES: 258, 183 --yes.

MR HARRIS: And 45. And what that comes to is 487,000. The reason that's relevant

is because it's £106,000 less -- and these are all excluding VAT, these numbers, just for the ease of reference -- the reason that's relevant, it's 106,000, I beg your pardon, less than the numbers that were claimed for the CPO stage in the cost certification schedule for solicitors, counsel and experts. (Pause) So, in other words, a budget --

MR JUSTICE MILES: That was on page --

MR HARRIS: The CCS, cost certification schedule, was page 438.

MR JUSTICE MILES: Let's just have another look at that.

MR HARRIS: Yes.

MR JUSTICE MILES: And there the total is shown at where? There's 207 -- oh, I see so there's the economist as well.

MR SAUNDERS: I hesitate to interrupt my learned friend but this -- apparently I understand this schedule that we're now looking at was updated so you're not looking at the right document, I don't think. But --

MR HARRIS: Well, we don't believe we've ever seen an updated -- the CCS was the document that was put forward, pursuant to which the tribunal made its interim cost order against us.

MR SAUNDERS: I'm sorry. A revised version was submitted with a total of approximately half a million.

MR JUSTICE MILES: Sorry. Could you say that again?

MR SAUNDERS: I'm sorry, my understanding is a revised version was submitted with a total of approximately half a million. So that is --

MR JUSTICE MILES: What, so --

MR SAUNDERS: So we're looking at the wrong -- this is not the revised version of this (inaudible).

MR JUSTICE MILES: Your argument is or what your point is that the one that was before the tribunal, when it made the order for costs was not this one or what?

MR SAUNDERS: I --

MR HARRIS: Well, this is remarkable, sir, because this has all been set out in writing before the hearing.

MR SAUNDERS: Okay. Well, I won't interrupt my learned friend. Well, let me get to the bottom of this (overspeaking) --

MR JUSTICE MILES: Yes. Okay.

MR HARRIS: Thank you. The key comparison is if you look at within the CCS, at the figure for the CR's counsel, you will see that it is £279,017.92. Do you see that on the final page?

MR JUSTICE MILES: Just give me that again and I'm writing it down.

MR HARRIS: Is £279,017.92. That's said to be --

MR JUSTICE MILES: That's counsel.

MR HARRIS: That's said to be all of the counsel. But if you then compare that with what was then told to us in the February cost budget that we got only a few weeks ago, you can see the entry for counsel fees is £183,750.

MR JUSTICE MILES: Is that the main delta?

MR HARRIS: That's the main delta. There are two others that are admitted as being deltas but they come as smaller, a grand or so.

And we then said, well, hang on a minute, we don't understand this. This is serious because first of all, you put forward the CCS as the basis for a cost order, which we paid, and it was said to relate to that period for those things that we were ordered to pay. And bearing in mind that we were not, expressly not ordered to pay for anything other than the opposition to the CPO -- which we lost on, that's fair enough -- but what we were not ordered to pay was any other costs that led up to the CPO, for example, phase 1 in this February cost budget. This is important. The reason I'm telling you, this is important. Phase 1 --

MR JUSTICE MILES: We'd better get back to that.

MR HARRIS: Yes.

MR JUSTICE MILES: So that's at page --

MR HARRIS: 297 of the soft copy. So what you see there is phase 1 is a different type of work and critically it's on different dates. It's not the dates that were 2 February 2022 to 15 July 2022. And it's other things: pre-action and then drafting the claim form and the CPO application. And I just pause because not only are they conceptually different and on different dates, but of course a defendant is never responsible for those because they have to be incurred in any event in order to make the claim. And that's one reason why we weren't ordered to pay any of those. Okay. And that's relevant because in a moment, I shall explain to you that when we raise what we regard as a serious issue that may have not just misled us, but the tribunal to the tune of over £100,000, we were originally told, "Oh, well, we're not really going to look into it but we just assume that there may have been some part of phase 1 costs included in the CCS". I'll show you that letter in a moment. But that can't be right, conceptually. Different dates, different things, and we were never responsible for them.

Secondly, if you look at phase 2, you'll see that there was a first CMC and advertising the CPO hearing. On the latter, of course, we're not responsible for that; the advertising, they have to pay anyway. It is fair to say that at the first CMC that led to the CPO hearing, there was a separate cost order. So not the one that you saw yesterday that gave rise to us being obliged to pay the costs of the opposition to the CPO. But there was a costs order; so some part of the first CMC costs were costs in the application and we then lost that.

But what's important, I'm sorry this is so detailed, but what's important is that the CR then put forward a separate costs schedule for that, by reference to different dates. In

other words, it wasn't the CCS that you have on page 438. And this is important because what it means is that when the CR -- when we pressed on the first round unsatisfactory explanation of why there was this more than £100,000 responsibility in respect to the costs schedule where we were ordered to pay a quarter of a £1 million, we were first told, "Oh, well, we assume it might be something in phase 1". I've explained to you that can't be right and in any event, it's not good enough to simply assume. This is the CR's budget and the CR's cost and it doesn't show a grip on the costs to the requisite degree of responsibility that they seek to fob us off by saying, "Oh, we simply assume that there might have been something from another phase". So that's issue number 1.

But in issue number 2 is that when we pressed and said, well, sorry, that's just not good enough, why is it a discrepancy, it can't be anything to do with phase 1, we were then told, Oh, well, what we now say -- so a different story -- is that some part of counsel's costs from phase 2, so the second column, have been included in the CCS that I showed you a minute ago on page 438. But that again can't be right.

I'll just remind you the two reasons. It simply cannot be right, first, that relates to different dates. So they're not the dates of the CCS. So it can't be right for just that reason; it must be a false explanation. And secondly, as I said a moment ago, although some part of the phase 2 costs were costs in the application and we lost the application, it was then subject to a completely separate schedule that the CR put in to us, recognising that these were --

MR JUSTICE MILES: What was part of a separate schedule?

MR HARRIS: I'm sorry?

MR JUSTICE MILES: Sorry, what was part of a separate schedule?

MR HARRIS: That part of the cost of the first CMC that were costs in the application, including counsel's fees. I'll give you the page reference to that.

MR JUSTICE MILES: Sorry. You better just explain that.

MR HARRIS: Yes. So what I'm saying is it was perfectly legitimate and indeed ordered that we should pay the costs of opposing the CPO, at the CPO hearing.

MR JUSTICE MILES: Yes.

MR HARRIS: And that fell within this period, February 2022 to July 2022. And that's what the CCS presented to us. But when they subsequently gave us this February cost budget, we can see that actually they said that they'd spent far less, particularly (overspeaking) --

MR JUSTICE MILES: No, I understand that. Yes. It's just this point about -- you're making some point about the phase 2 costs being included. You said there are two reasons why that couldn't be right.

MR HARRIS: So the first reason is the dates; you've got that.

MR JUSTICE MILES: Yes.

MR HARRIS: The second reason is that although some parts of the CMC were costs in the application.

MR JUSTICE MILES: The CPO application?

MR HARRIS: Yes, exactly, which came a few months, well, several months later than the first CMC. And although therefore we are on the hook for those, they were then completely separately identified by the CR in a separate schedule. I'll give you the reference to that. March CMC bundle, tab 31, page 649 of the soft copy. And you can see, if you turn that up, 649 of the soft copy, that it has different dates and it includes counsel's fees, Mr Went and Mr Hollander.

MR JUSTICE MILES: What was the date of that CMC?

MR HARRIS: Must be within the period of the -- I think I noted it down. The first CMC was held on 18 November 2021 because I looked in my own diary yesterday for that date and it falls, of course, within the period that's on the cost schedule for that CMC.

MR JUSTICE MILES: Sorry, I just want to understand it. Part of the period covered by this was after the CMC.

MR HARRIS: That's right. Presumably, I mean, I don't know the detail, but presumably that's because --

MR JUSTICE MILES: This document, on the face of it, is not just costs incurred up to the date of the CMC.

MR HARRIS: And including the CMC. It doesn't look like it, but I can't speak to the detail because it's not my schedule. The important point for my purposes is it's quite clearly not within the period February to July 2022, which are the dates that appear on the face of the CCS.

And so to draw those strands together --

MR JUSTICE MILES: Sorry, those dates are --

MR HARRIS: They were 4 February 2022 to 15 July 2022. You find them on soft copy page, for today, 438.

MR JUSTICE MILES: Yes.

MR HARRIS: So drawing a few strands together because I'm so conscious of the time, this is only the first of my substantive points, is that there has been, on the face of it, by reference to the CR's own documents, a claim for which we paid an interim payment based on a document that has an inexplicable material difference of well over £100,000 between what was said then to be counsel's fees for a particular period and what is said now to have been counsel's fees for that period.

We wrote and said, well, hang on a minute, what's going on? Has the tribunal been induced to make a costs order in a certain amount by reference to an inaccurate cost schedule? Can you please explain.

What we have been met with, I regret to say, is a wholesale inability to explain and inconsistent answers, neither of which can be accurate, and a very dismissive, oh well,

why are you wasting everybody's time asking us about this? Why don't we just move on? Answer: because of the heavy responsibility, both upon the CR that I began with in section 1 and the heavy responsibility on this tribunal. We regard it as a serious matter that has been, on the face of it, misleading and overpayment, or at the very least, that the CR appears to be unable and/or unwilling to provide an accurate explanation if he can. So that's the first of my points. I'm going to have to move on, though, because of time.

What I say, secondly, is that it's easy to demonstrate that the costs of these proceedings under this so-called management of this CR have obviously spiralled and we say have spiralled out of control. So just to remind you that when the case was initially presented to the tribunal for certification, the cost budget -- so this is back in June 2021 -- the cost budget was £10,444,200.

MR JUSTICE MILES: Sorry, I'm just going to write this down.

MR HARRIS: £10,444,200.

MR JUSTICE MILES: Yes.

MR HARRIS: What you see if you look at the bottom of the document that may still be open in front of you, February 2025 cost budget -- so that's soft copy, page 297 in the bundle for today, the supplementary bundle for today -- you'll see that it's now 20 million. That's near doubling and we've got nowhere near even the first trial. So the cost is nearly doubled and what you will see --

MR JUSTICE MILES: Was the first one including VAT, that you gave me, that number? Just for comparison.

MR HARRIS: I'll have to check that.

MR JUSTICE MILES: Was that --

MR HARRIS: Yes, it was.

MR JUSTICE MILES: The ten --

MR HARRIS: It was. 10,447,200 --

MR JUSTICE MILES: Yes.

MR HARRIS: -- includes VAT and the 20 million includes VAT.

MR JUSTICE MILES: Yes.

MR HARRIS: We're comparing apples with apples.

MR JUSTICE MILES: Yes.

MR HARRIS: And what you will see, I don't have the time to go through it, but what you'll see is when the tribunal said, and I'm quoting here, that it had "considered quite carefully at certification in the June budget, and that it came to a conclusion on cost benefits by reference to that budget", [as read] actually, as we stand here today, this tribunal is now faced with a budget that is twice as big. If you look at the line in red, you'll see that nearly three-quarters of it has already been spent, so 14 million, over 14 million of the 20 million as at several weeks ago and we're nowhere near even first trial.

And what you can see is that the massive increase, the biggest increase has all been by reference to experts. Indeed, there has been no less than a 773 per cent increase in the expert part of the budget since June 2021.

MR JUSTICE MILES: You better give me the numbers.

MR HARRIS: Yes. Somebody will provide them to me. In June 2021, the expert budget was 875,000 and in the latest --

MR JUSTICE MILES: What, for the whole case?

MR HARRIS: Exactly, yes. That's the basis upon which the case was certified.

MR JUSTICE MILES: Yes.

MR HARRIS: And now the expert budget in this latest iteration, is 7,644,629. And I think I'm right in saying that that doesn't include all the experts, because somehow, in a manner that we don't understand, some of the other experts, I think Mr Lee was

one of them and there's another individual, accountancy, person who aren't even in that line. I think I'm right in saying, they're in other disbursements, lower down, which comes to another 756,829.

In the limited time available to me, I just want to draw out why this is important particularly by reference to the duty, both on the CR and on the tribunal. There's two, I say, very material consequences.

When you look at the amended litigation funding agreement, LFA, in this case, you will see -- and I will show you this in just a moment, I'll just explain the point -- that the funder is said to be due returns as a multiplier of what the funder has spent on the litigation. You may recall that's why we asked for the line in red, last time round, and it was given. They are very significant multipliers and therefore, with this ballooning of the budget, prima facie -- though I accept always subject to the control of the tribunal when it makes cost orders -- prima facie, the money that would otherwise be going to the class member alleged victims of this alleged abuse is actually being taken up in increasingly large measure, very substantially increasingly large measure by the prima facie rights of the funder under the amended LFA.

Can I just show you that, so you know what I'm talking about. It's in the February core bundle, volume 3, page 2039, which in the soft copy is 2051. And if you move within that document to clause 9. Luckily you don't have to know the detail, you just have to know the concept. You'll see that there's a heading, on hard copy 2051, 2063 in the soft copy, and you'll see that at 9.5:

"In the event that a Tribunal approves the payment of the Funder's Fee otherwise than wholly from Undistributed ... [then it] shall be calculated."

You don't need to look at the details.

MR JUSTICE MILES: Sorry, which clause?

MR HARRIS: That's 9.5 and 9.6.

MR SAUNDERS: Which page are you on?

MR HARRIS: 2051 hard copy; 2063 soft copy.

What you can see is in circumstances where it's otherwise than wholly from undistributed, then you will get -- and then every six months there's a multiple of capital deployed, and you can see it ramps up quickly.

We are years into this litigation, so we're already well down this table. You now know that several weeks ago the capital deployed was already over £14 million. You of course know that we're into, I think, the fifth year of this case -- something like that. So we're already well into multiples, just of capital deployed, on the face of it, the return to the funder.

If you look at 9.7 and 9.8, you can see that in the event that the tribunal approves of the payment of the funders fee "wholly from" undistributed damages, then the multiples are even higher.

Sir, the specific details don't matter enormously for us, save that our calculation, on the back of a sort of a doing the best we can, given that we're not the CR, is that that at present, under the amended LFA, gives a funder a prima facie return due of between £72 million and £102 million.

What we say is this is truly extraordinary. Why hasn't this been brought to the attention of the tribunal by the class representative? And why, at the same time -- this is a slightly different point -- was it due to me to explain to this tribunal -- notwithstanding the duty upon the CR, not me -- to explain that he's not going to be able -- if you look at those figures in the February 2025 cost budgets -- to be able to afford even the first-round trial that he was advocating through his counsel earlier on.

These are four-square responsibilities upon the CR, and we know this is against the background where the CR has already been properly, I may say, admonished by the tribunal for failing to be proactive with the tribunal about case management. For

instance, not telling the tribunal that Mr Harvey had disappeared and they were having real problems obtaining a new person and it might need to lead to a trial being vacated. So this is not the first time they've not been forthcoming, and this is against the background of very clear duties on the part of the CR to be telling you these things, but they're not.

MR SAUNDERS: Is there any other example you're relying on other than that?

MR HARRIS: I'm going to move on.

MR JUSTICE MILES: That's not intervened.

MR HARRIS: Thank you, sir, I'm grateful. So one of the two very material consequences that I point to is that this escalation and ballooning, that has never been brought to your attention by the CR, is, on the face of it, directly to the disadvantage of the class members -- subject, I accept, to the overall discretion of this or a settlement tribunal making a costs order.

But it's also to be viewed in the context of Mr Davis 4, the table of so-called corrections, you may recall, altered the damages that were said to be available. The Davis 4 table of corrections said that damage -- and I'm quoting here:

"I estimate total damages from GTR's abuse of its dominant position ranges from [what's critical for today's purposes is the bottom] £40.6 million."

I accept it then goes up to £333.4, but what you now have is a situation that is fundamentally different from what was certified. Yet this has never been brought to your attention by the CR. So on our calculations, relative by reference to their LFA, potentially the funder is already owed between £70 and £100 million, and yet recently you were told by their expert in the most up to date so-called correction that the damages may be as low as £40 million. Well, that's unbelievable.

MR JUSTICE MILES: Well, only if they get £70 million.

MR HARRIS: Well, I accept, but what happened -- I simply don't have the time to do

this, but -- in the hearing that I did in this room only three weeks ago, in the bulk mail claim, before Mr Malek and his colleagues, was, by reference to this up to date case law, including McLaren, including Riefa, including the guidance, was a very clear exposition of the need for the tribunal to be having a grip on this balance between funding and returns, at all stages, to the point where the tribunal said that my then client, since I was for the PCR, wouldn't get certified unless they put in worked examples of what was prima facie due to the funder in different scenarios, precisely because it's relevant, and on an ongoing basis, to whether this jurisdiction is to be allowed to be used in circumstances where really it may be just a means for generating fees for lawyers and experts and funders.

So what I'm saying is -- but I don't have the time to develop it -- that's the state of the law, and this CR is woefully inadequate. It's not facing up to it, and not for the first time. This CR has failed to face up to his responsibilities on multiple previous occasions.

MR JUSTICE MILES: What are those?

MR HARRIS: Well, they include, for example, not telling the tribunal about the withdrawal of Mr Harvey, insufficient time to having even the chance of avoiding the --

MR JUSTICE MILES: Yes.

MR HARRIS: Let me see if I can find an itemised list. That he's breached the order to put in his case in full by the 31 July, with which you agreed, that he's in breach of the practice --

MR JUSTICE MILES: I'm not sure I did agree. I'm not sure I did agree with that.

MR HARRIS: Well, it was said in --

MR JUSTICE MILES: It was a reason why the CR was not allowed to amend. I mean, you can show this if you like, but I don't recall saying that there was a breach of that order.

MR HARRIS: I think it's at paragraph 63, that will be (overspeaking).

MR JUSTICE MILES: All right.

MR HARRIS: There's a breach. This is not in order of importance, but because I'm in such a hurry, I just want to rattle them off. It's in breach of the practice direction for today's hearing about the bundles, which has caused annoyance and extra cost. There have been two costs applications --

MR JUSTICE MILES: Sorry, what's that one?

MR HARRIS: Paragraph (a) to the practice direction about bundles.

MR JUSTICE MILES: What, bundle numbering?

MR HARRIS: Yes, you just asked me for a list, so I'm --

MR JUSTICE MILES: Well, I know, but the reason is that you said that he's woefully failed to live up to his responsibilities on multiple occasions, so I'm asking you for a list. You know, are we really going to get into an argument about whether the failure of the solicitors to do proper numbering in the bundles is a reason for the order that you're seeking?

MR HARRIS: What I would have been able to show you, had it been available, was that in Riefa it says "in terms", an accumulation of mismanagement --

MR JUSTICE MILES: Yes, but come on, there's such a thing as de minimis.

MR HARRIS: Well, sir, I'm feeling like I'm not having the time available to develop these points.

MR JUSTICE MILES: No, you're using the time available to make points, and I'm saying that I regard that as trivial; it's annoying but it's trivial; it's not a reason for the order that you're seeking.

MR HARRIS: So another point is that Mr Boyle made a late application to re-amend his claim form prior even to the CPO hearing, and that's why that one was refused.

Paragraph 63, that I said I'd come back to, your judgment from the last occasion, you

say, on behalf of the tribunal:

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

And since the order was to file his case in full and you found that it didn't, that's why I characterise that as a breach of the order.

Mr Boyle failed not just to make his applications for loss of flexibility and effects amendments on time, but then failed, with no reason, on multiple occasions, to explain why he had put it in so late.

Mr Boyle and the team was criticised on multiple occasions by the former chairman in respect of the expert-led disclosure process. So, for example, he was accused of adopting and "a shotgun blunderbuss approach". He was accused of doing little but "producing a lot of paper". He was accused of making requests for disclosure that were described as "remarkably unspecific and hopelessly vague" in circumstances that led to what he admitted himself had proved to be a massively costly exercise.

On top of that, as I said before, there have been no less than ten expert reports, many of which are completely otiose; have been overtaken and form no part of the pleading.

So what I say is by reference to Riefa, which I can't take you to, where it says in terms --

MR JUSTICE MILES: You can show us.

MR HARRIS: Is that now available? Oh, great. (Pause)

MR JUSTICE MILES: What's the bundle called?

MR HARRIS: My reference says it's the February authorities bundle, volume 1, tab 5, page 234.

MR JUSTICE MILES: How many pages are there in this bundle?

MR SAUNDERS: 275. (Pause)

MR JUSTICE MILES: It's still not here. (Pause)

Okay, well, we've got a hard copy, so can I just. Right. So Riefa.

MR HARRIS: So just on this point, if you were to please turn to the judgment, paragraph 91 of Riefa. It says:

"We reiterate at this stage that our concerns were cumulative. It is not necessarily the case that any one of them would have been fatal to the PCR's application; but taken together they caused us to have considerable doubts about whether we could be satisfied that the PCR would fairly and adequately act in the interest of the class members, for the purposes of the authorisation condition."

That's my case as well. I say that some of them are really substantively important by themselves: for example, the CCS point; for example, the multiple; for example, the failure proactively to draw things to your attention that it now instead falls to me; for example, running out of money and not drawing that to your attention and not coming to you -- it's not just that the budget suggests that they haven't got enough money to do trial 1, even though they were advocating for you that that's what they want to do, but that they haven't come to you today and explained that that's the position.

Worse, they haven't come to you today and said, "But don't worry, tribunal, I still should be authorised because here's some evidence about how I'm going to get some more money. This is how much I'm going to get. This is when I'm going to get it. Here's a letter from the funder", and, "Don't worry, tribunal, because trial 1 is going to cost x million, and I've got that".

Instead, all we have is Mr Saunders, with great respect to him, saying on the hoof this morning, "I'm told that I've got enough money for trial 1", but that's not good enough. On the face of it, it doesn't have enough money for trial 1, and we've been pointing this out for some time, and the CR keeps ducking the issue. We say that the duties upon him are such that he can't duck the issue.

What I could do in the time available, I'm just going to finish off by, I think, referring

you to some parts of Riefa. We've got a spare copy that can be handed up, I'm told. Hard copy. (Handed)

I'm going to give you one more substantive example of something that's gone wrong, and that's not acceptable given the onerous duties, and then I'm going to just finish off with Riefa, unless you've got any questions, and then I'm afraid we'll have used up my time.

The other substantive example is that back in the certification judgments, this tribunal, with a different chairman, said that -- I'm just trying to find the reference, "Mr Boyle would be well advised to have a consultative panel".

Mr Boyle doesn't have a consultative panel, and he's had years to do it, and all that we've got, despite this tribunal having made that remark and us having pressed on it, is we're repeatedly told simply, blithely, "Oh, we're looking into it".

Again, I go back to three weeks ago in this room, as a condition for having the authorisation of a CR that I was then representing, we were told, "You have to have a consultative panel", and indeed we did. It was a very eminent consultative panel, former member of the competition commission and a former competition litigation partner.

Okay, so the judgment where the tribunal said that Mr Boyle would be something like "well advised" to have a consultative panel. It was the February core bundle, page 1431, the soft copy.

So what I was saying was back in the Bulk Mail case, it was said, "No, no, this is essential. Because of the onerous duties and responsibilities on a CR where you don't actually have any clients of your own, you can't speak to them, they essentially don't exist for your purposes".

Bearing in mind the genesis of some of these claims, including this one, Mr Boyle doesn't have -- if you were to look back at what happened at the first round CPO, when

we criticised both Mr Boyle and Mr Vermeer, and Mr Vermeer was not allowed to participate as a CR -- some of the things we said about both of them -- and this was a common ground -- was that they don't have any experience of big scale litigation; they're not litigators; they're not lawyers, neither of them. Now, there's only one of them.

What was said in Bulk Mail, and in these other claims, is, "How is it then that you can demonstrate, to use the verb from Riefa, that you are acting independently and robustly in the interests of your class, when you're just all by yourself, you don't even have a consultative panel?"

Indeed, in Bulk Mail, what was said was, "No, you need to go beyond even a consultative panel, and you need to have some kind of specialist cost input. You, the person who's running this thing -- not your lawyers, not your funder; they've got potentially conflicts of interest here. You need to have some independent expertise to assess the bills as they come in, to see whether they're reasonable".

The reason that that is so important is because otherwise you get this problem about the escalation of the fees due to the funder under these uncapped multiple fee arrangements, and that's the case here.

So Mr Boyle has just put his head in the sand as regards this. What we say is it demonstrates a lack of appreciation of the responsibilities that are on him, and that contributes -- it's one of these accumulation of points as to why he's looking like he's not suitable, and he should be asked to answer these things in a witness statement.

So all the points I've raised so far go to areas of concern where he should have been proactive and he should have done things, and there are substantive problems, and he either hasn't been proactive, hasn't answered, and doesn't understand the problems, or has got the answers wrong.

That just takes me then in the time available, just to Riefa. What you'll see is that there

was a series of points there that were said to give rise, firstly, in that litigation to the need for a further witness statement from the PCR, Professor Riefa, and then to cross-examination. As you know, following the cross-examination, authorisation was denied, because, with respect to her, she wasn't able to demonstrate to the tribunal -- "demonstrate", there's that verb again -- that she was able to act "independently and robustly" in the interests of the class.

One of the factors -- this is a judgment 89(1) -- that concerned the tribunal was that the LFA in that case had "an uncapped multiple of the funder's costs". Well, so far as we can tell, that's exactly the same in Mr Boyle's case.

MR JUSTICE MILES: Did you say just now that she was ordered to put in a statement?

MR HARRIS: She was. The way it works.

MR JUSTICE MILES: Where is that?

MR HARRIS: Those assisting me will find it. The way it works in that case, was -- and indeed, my instructing solicitors were in the case -- is that concerns were expressed about the first witness statement -- this is a point I'm about to come to. The learned chair, Mrs Justice Bacon, said, "Therefore, you need to put in a further witness statement", and that's paragraph 14, line 4:

"The Tribunal, therefore directed --"

MR JUSTICE MILES: Sorry, I just want to follow this.

MR HARRIS: Yes.

MR JUSTICE MILES: So she had already put in one statement, and then --

MR HARRIS: She'd put in the standard one that one puts in for the CPO application.

MR JUSTICE MILES: Yes, okay.

MR HARRIS: It wasn't good enough. The tribunal saw that it wasn't good enough and said:

"The Tribunal therefore directed the PCR to file further evidence to address these points."

That's lines 4 and 5.

MR JUSTICE MILES: Yes, okay.

MR HARRIS: Then what happened was that was an unsatisfactory witness statement, and it led to cross-examination, and then the case was -- it wasn't technically decertified, but it wasn't allowed to be certified. So one of the concerns was the uncapped multiple of funder's costs. Well, that's in our case.

The next one, at 89(2), was an error in the understanding of the LFA. Well, we've been asking the CR in correspondence to explain his understanding of the LFA, including, for instance, what are the worked examples of how much the LFA is going to accrue to the funder? We've been met with, "No, essentially, we're not doing it. That's not a legitimate question. We're not we're just not going to do it".

We say, "No, with great respect, that's exactly what you should be doing". On the face of it, looks like there's a massive mismatch between prima facie --

MR JUSTICE MILES: Just explain to me what the worked example would do other than follow the terms of the agreement. It seems it's something you're able to do on your side.

MR HARRIS: Well, we've done our best. That's the £72 million to £102 million, by reference to the budget. But the worked example is slightly more involved, and what the tribunal said a few weeks ago, and this was picking up on what something that had happened four days earlier in the Merricks CPO case that was settling, was, "Well, hang on a minute. In order for us to assess on an ongoing basis whether it's right for us to allow you to employ this unusual and expansive jurisdiction where there's a heavy responsibility, you have to explain to us, if you only recover, say, £100 million, but it looks as though your funder, prima facie, under his agreement, that you've

agreed to seek payment for -- that's another part of the LFA -- prima facie is more than £100 million, then there's a serious question mark whether we would even allow you to carry on, or be certified in the first place".

That's worked example number one, low recovery, potentially even below the amount on the face of the LFA. Worked example number two --

MR JUSTICE MILES: Well, aren't these just hypotheses? I mean, I don't quite understand why you're saying that it's particularly for the CR to do the work -- can't you do the worked example? You just say, "Look, I know what the terms of this agreement are. Prima facie, the funder is entitled to, on your calculation, between £70 and £100 million in various scenarios, and we also know that on Dr Davis's report, quite a few of those -- the damages amounts -- are actually less than those figures".

MR HARRIS: And the witness statement --

MR JUSTICE MILES: So what does a worked example do -- just so I understand, beyond that.

MR HARRIS: (Overspeaking) whether it be by way of a worked example, whether it be by way of elucidation to this tribunal. Given that problem, what the CR has to do is explain to you how he is nevertheless acting robustly and independently in the interests of the class, and not in the interests of his lawyers and his funder. That's what he has to do, and he has to do it on an ongoing basis, and my respectful submission is that you have to keep a grip of this on an ongoing basis to make sure that you also agree.

So, for instance, he now has to explain to you -- we've done the work; we've said it's between prima facie £70 and £106 -- he's been silent, he said, "I'm not doing this". But he now has to come to you and say, "Well, actually, when it gets to the end of the case, if I only recover £50 million or £100 million, nevertheless, I understand robustly and independently my responsibilities, and I can demonstrate to you how I understand

them because this is how I will behave. I will" -- I don't know, whatever he'll say, I have no idea what he'll say, but he has to be able to demonstrate to you on an ongoing basis that because there are these --

MR JUSTICE MILES: How often does he have to do this?

MR HARRIS: Well, he has to do it in circumstances where, for example, we finally, after years of asking, got an updated cost budget, which he never put forward, and it's revealed big problems. If you recall, in your judgment --

MR JUSTICE MILES: Okay, so do you say that -- I mean there's a genuine question, you don't have to, you know, bark back. It's a genuine question. How often does he have to do it? Are you putting it at the point where he put in his revised cost budget, for example, which might be a logical time to say it should be done? I mean, I can't believe it's necessary to do it weekly, monthly, or even six monthly.

MR HARRIS: No, a sensible course would be in advance of any meaningful hearing. In this case, there have been meaningful hearings over several years, and this tribunal itself said that the CR "should" have put in this cost budget prior to the last hearing, and he didn't. The problem with this, and I'm sorry if it sounds like I'm barking and I'll dial it down, is that there has been years of this and it's led to already expenditure on their side of £14 million.

We say more in sorrow than in anger, that unless there's a grip of this and unless the CR can now demonstrate to you that he is doing this properly, then there is a danger that this case will spiral further out of control.

In Riefa -- so just to finish off then -- what happened was that's why the tribunal said, "You have to put in this further witness statement". And that's why, "When I don't think you've demonstrated it enough, I'm going to allow cross-examination", and lo and behold, the PCR couldn't demonstrate. Then, just to finish off, you'll see in 89(3) of that judgment, that one of the accumulation of things that concern the tribunal was the

brevity of the description of the LFA and Professor Riefa's witness statement, but I just quote to you that all that Mr Boyle said in his CPA witness statement on this question of finances is:

"I have read what Mr Vermeer has set out in his witness statement in respect of funding and agree that we have adequate funding in place to pursue these proposed collective proceedings." [as read]

So leaving aside that that's terribly brief and requires elucidation, and of course, it's now hopelessly out of date. There is no Mr Vermeer, and the cost budget has doubled. Nearly three-quarters of it, several weeks ago, had already been spent, and you have those points.

Last but not least, as a part of an accumulation of concerns that led to the need for a further witness statement, was -- that this is 89(4):

"There were other indications of a lack of attention to detail, such as the errors in the ATE policy. Taken individually, they gave us less of a concern. However, cumulatively ..."

But I've got more than just relatively minor errors. On the face of it, I've got this really serious point about the CCS that I began with.

In 89(5), what that tribunal said was, taking this in the round:

"It was not clear to us that Prof Riefa alone ..."

So they had another point in that case about consultative budget. What Mrs Justice Bacon and her two co-members said on that occasion was, "That's another reason why we won't certify you. You've come to us on certification day and said, 'I'm thinking about a consultative panel', but you haven't done it".

In paragraph 107 she says, that's "much too late". Now, that was much too late as at certification. But in our case, this CR was told as at certification, "Oh, you really should do this", and several years later, we were just told, "Oh, I'm still thinking about it".

Sir, I'm going to have to sit down, because --

MR JUSTICE MILES: Yes, just one question. What are you actually asking for? This is the witness statement.

MR HARRIS: Yes.

MR JUSTICE MILES: You're asking the CR to answer a series of questions; is that right?

MR HARRIS: The way I put it is this: as in Riefa, I accept entirely you wouldn't have to decide on the cross-examination part today; you could receive the witness statement, that bit could be adjourned, and we wait and see. That would be acceptable as a sensible proportionate course, but it would be addressing in the witness statement the topics upon which I've expressed these concerns today.

I would happily list them out into a short form, if that would assist you, but they include one that I've not been able to mention, which is the apparent declining involvement of the CR in this case. So, for example, Mr Boyle wasn't here on the last occasion. I don't think he's here today. And he said in the paperwork leading up to here that there's actually a significant reduction in what he’s going to do on the face of it, when you look at the hours.

There's the management of the proceedings, for example --

MR JUSTICE MILES: Sorry, what would be I think quite helpful would be a list of the points that you say should be covered.

I'm just looking at the time, shall we rise for five minutes, and when we come back, you can give me a list of the points that you say should be addressed.

MR HARRIS: Yes, and then I'll finish because I'm --

MR JUSTICE MILES: Yes.

MR HARRIS: Yes, very grateful.

(3.16 pm)

(A short break)

(3.27 pm)

MR HARRIS: (Audio error) say that Mr Boyle should address are the following:

His apparent declining level of involvement in the proceedings, that requires an explanation to demonstrate that he is in control of the case. On the face of it, when one looks at the February 25th cost budgets, being reimbursed for 180 hours so far, but going forward there appears to have been a decrease in the number of hours from 500 to 290, circumstances where we say there's already insufficient management. He needs to, we say, explain that and demonstrate that he's still taking robust and independent decisions.

Secondly, he needs to explain, in our submission, why he's not being proactive and he's not being proactive with the tribunal on, amongst other things, including, updating the budget, (a); (b) what he's doing about the problem of apparently running out of money very soon; and (c) explaining how he is nevertheless acting robustly and independently in the interest of the class members in light of the uncapped multiples of costs in clause 9.

Just while I'm here, for your reference, the funding limit that I mentioned earlier of £15,450,000, that's to be found in clause 1.31 of the amended LFA, hard copy page 2044, soft copy page 2056.

Next, the CR should address this problem that I identified with the apparently misleading nature of the certification cost schedule, including how he personally is on top of that and including how it came to be that there were inconsistent and wrong explanations given previously.

Next point is that he should explain more generally how he can demonstrate to this tribunal that he's in charge of the budget, given its ballooning nature -- nearly twice as big as at the outset.

Then there were some other, more granular points. I'll just identify them, I obviously don't have time to expand upon them, but they are that there is a new cost of, I think, £155,000 for some external litigation advisers. He should explain to the tribunal how that has come to be the case.

Secondly, how it has come to be the case that there's been an apparent reduction of £470,000 for the cost of class notification by a professional notifier.

In each occasion he needs to, in our respectful submission, demonstrate or convince -- to use the two verbs from Riefa -- notwithstanding what appeared to be difficulty, given the heavy responsibility, he's nevertheless acting robustly and independently in the interests of the class.

But unless I can assist further, that's what I say. It should be addressed in a witness statement, and then decide on a later occasion whether there needs to be questioning about it.

MR JUSTICE MILES: Yes.

MR HARRIS: Thank you for indulging me.

Submissions by MR SAUNDERS

MR SAUNDERS: Gentlemen, I think the starting point with -- well, this is, one might term, a genealogical -- or an archaeological -- application, in the sense that it seeks to traverse quite a lot of different parts of this litigation that have occurred at different times, draws certain points, often out of context in relation to those, a lot of it was made in rather hyperbolic terms at times without, we would say, the correct context. So some real care is needed with my learned friend's submissions.

What is very striking at the outset, my learned friend took you to the various things, the rule 78, the tribunal guide and so on, about the process for certification. Those rules set out the requirements for certification. Riefa that we've just heard about was a case about what is needed at the certification stage so that the case can progress.

What they are not about are about checkpoints in a precertified case that is continuing; they are about whether or not that test for certification has been met.

But the tribunal's question hit the nail on the head when you asked my learned friend, how often does this have to happen? Obviously not every month, every week, perhaps not even every year. My friend's answer was "in advance of any meaningful hearing". Now, obviously that in itself is not really an answer because it doesn't tell you when something is meaningful or not.

This is, on any view, a developing area of the law. We've had a decision in Merricks fairly recently in which there was something of a dispute between funders and the class representative in that case, and whether a settlement should proceed or not. It is also, through Riefa, an area in which the law has developed. What is not appropriate is to wind the clock back in the way that my learned friend is trying to do, and suggest that those types of principles which are being developed through case law -- and it seems even as my learned friend refers a second ago to a hearing he did here three weeks ago or something -- have effect retrospectively.

So the rules simply don't address this in terms. And there's nothing he took you to, because those are checklists for authorisation. His submission was that this gives rise to a continuing duty to demonstrate. But the real question is how is that to be flushed out? I mean, certainly if you are in a situation where there are such egregious breaches of what should happen, that the tribunal loses confidence in a class representative and his professional representatives, that is one category in which it may be necessary to interrogate these things.

But here, with respect to my learned friend, when challenged to provide details of exactly what he said has gone wrong, actually, his submissions fell rather flat. The reason they fell rather flat is because although bundles have caused us problems at this hearing and in this litigation, that is not a basis on which to impugn the way that

the certification system works.

If he is so concerned about these matters, it's very difficult to see why he can't just bring an application for decertification, if that is what he wants to do. We cannot shut him out from bringing an application for decertification; it would be improper for us to suggest that he shouldn't be allowed to do that, if that's what he wanted to do, but we say there's just absolutely no proper basis on which to do it here, and I'll take you through in a second the various things that he relied upon just now. But when you see them, you'll see that they actually don't really amount to very much.

My learned friend took you to two things first of all. So, he made various submissions about Riefa, onerous responsibility on CR, incumbent on the CR to demonstrate certain things to you. Absolutely, when it comes to an application for certification.

The real question raised by his application is what is the extent of the continuing duty, and how is that to be manifest?

My learned friend then took you to two things. First of all, he took you to the March 2023 ruling of this tribunal. That's the February core bundle, page 1557 in the PDF.

Now, you'll recall that, my learned friend has made this point, I think, at least four times in the last two days about the criticism of the class representative in relation to the change of experts. The point that Mr Justice Marcus Smith or, sorry, the tribunal there is making is that they:

"also consider the class representative should of [their] own motion have informed the tribunal that a case management conference in December was highly desirable, even necessary."

So, the breach, as my learned friend would put it, was that having learned at the beginning of December about the expert withdrawing, the class representative didn't immediately call on a December CMC. Now, as on page 1558 of the judgment, paragraph 3, the tribunal notes:

"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 of either the Class Representative or Maitland-Walker in this case. But, for the future, we want to be clear."

So, they are setting out -- the criticism is a criticism perhaps largely for the benefit of future cases, but they don't want -- and I can't, obviously, suggest that it is anything else other than the terms there -- to suggest that that is a proper basis.

So page 1558 in the PDF, the paragraph at the top of the page, paragraph 3. It's important that the tribunal's aware of the full extent of those paragraphs. That was, as the tribunal recognised, an area where the law is being articulated and they don't wish to be too critical of either my client or my instructing solicitors. So, that's the first one.

The second one was the point -- so, the PDF at page 1678, same PDF, which is the point in the transcript about us not being ready.

MR HARRIS: So sorry, I can't follow this because I'm not being provided the hard copy bundle numbers.

MR SAUNDERS: I'm sorry. Let me go back to it. The page is 1546 hard copy bundle, 1558 PDF. That's the one we've just looked at. The one I'm just going to take the tribunal to is PDF page 1678 and bundle page 1666. Again, your other reference that you took the tribunal to.

Look at the context for this second one that my learned friend relied upon. These are his greatest hits. Here we are in the middle of disclosure. Mr Justice Marcus Smith says:

"It looks like a disclosure exercise normally run by lawyers being run by economists and I can't think of anything worse than taking a lawyer to find process and handing it over to non-lawyers to operate. Seems to me it's the worst of all worlds [and so on]. This is why I deliberately asked the lawyers to take a step back [at line 13 to line 15]. Of course, there is going to be defendant inertia in this area because it's in your interest

to go slow. And I say that without criticising, but my job is to keep your feet to the fire [the defendants' feet, that is]. What is troubling me is that the area where we should need to push, namely on the class representative's side, there seems to be a sense that there's infinite time. Well, there isn't infinite time and it does seem to me the chance of these proceedings being decertified in the summer is remarkably high because we're not going to be ready." [as read]

So, that was the tribunal essentially giving both sides a bit of a fireside chat about getting on with things. Now, again, is that the high point of my learned friends submissions? The chances of this --

MR JUSTICE MILES: This is the hearing where he says there's a very high chance?

MR SAUNDERS: Yes. So, this is line 20 to 22 on that page, page 1678 in the PDF. Essentially, he's saying because we're not going to be ready. There's inertia on the part of the defendant, they're going slow, he understands that; the class representative, there seems to be a sense that there's infinite time. Well, there isn't infinite time and he wants to everyone to put their feet to the fire and get on with it. That's the tribunal extorting both sides to get on with things.

Now, that is the context for the chance of decertification. It's not a -- you know, with great respect to my friend, it's quite improper to suggest that that is something thrown at my client, he's actually having a go at both sides when you read it through.

This is a long running and complex case. Now, the tribunal has quite properly made critical comments at times about the conduct of the parties and, on occasion, both the class representative and the defendants have been criticised. But how does it assist to go through picking out little nuggets, little gobbets of criticism out of context and trying to make this kind of archaeological point to cast the class representative in a negative light? This is truly a satellite dispute.

Now, the next point, my learned friend moved on to say, well, the case is not being run

efficiently. He said materially, it's not solely responsible -- he did accept, I think, that the class representative was not solely responsible for the vacation of the trial, so I think even my learned friend could see at that point cut both ways and the drop out of the expert was a big part of that.

He then made the point that there were ten expert reports. Well, we've been through those and the genesis of the various Davis 1, 2 and 3 and the necessity arising from the change of expert, so that's not a good point either. It's particularly difficult to see how that has any particular probative force in circumstances where part of those reports were written at his client's instigation.

He then gives various concrete, substantive examples of where things have gone wrong. First one is the cost claim by the class representative in the cost certification schedule. So, he went to the latest budget and said it's 106,000 less than the numbers claimed for in the CPO stage in the cost certification schedule.

Now, what he is doing there, the difficulty is that they are comparing the original version of the cost certification schedule that was then subsequently updated by the class representative. The original version claimed overall certification costs of £715,673, including VAT. That was reduced to £553,699, including VAT in the revised version. When the cost order was made --

MR JUSTICE MILES: How much?

MR SAUNDERS: Sorry, the first one was £715,673 including VAT. That was reduced to --

MR JUSTICE MILES: That's the one he showed us?

MR SAUNDERS: That was the one that he showed us. That was reduced to £553,699 in the revised version. The difficulty with this issue in the budget is that the defendants -- this has been explained to them, I understand -- is that that budget -- I'm sorry, that's a different point.

The difficulty is that the updated schedule was placed before the tribunal prior to it making an award of costs. Strikingly, it is that updated one that forms the subject of one of their questions, question 3. So definitely, the defendants are using the correct, figures, the updated figures, but for whatever forensic purpose, I think my learned friend seems to be relying on the earlier version of it, not the version that was sent to the tribunal as the update prior to the costs order being made.

MR HARRIS: Sorry to interrupt, but my instructions are that's just not true. That's just not correct that the updated version was put before the tribunal when they made the order.

MR SAUNDERS: Well, so this is a letter of 12 September 2022. I have copies of it here.

MR JUSTICE MILES: Well, we'd better see this.

MR SAUNDERS: Yes.

MR JUSTICE MILES: I mean, it's unfortunate if there's a dispute of this kind about what documents were put before the tribunal. (Handed)

MR SAUNDERS: I'm sorry (several inaudible words). So, that is the revised schedule and you'll see the final line item for 553.

So, I mean, there seems to be a suggestion, I'm not quite sure if they ... well, so anyway, that's the answer to that one. It was placed before the tribunal.

Now, the class representative has previously explained there are liable to be some differences between cost schedules and the budgets. In particular, when you're coming to the 2025 February budget, that carried over budgeted elements from the previous budget without amending them by stage in the proceedings. It provides a forecast from the outset, but the forecast is then not necessarily updated by the particular stage in the proceedings as and when the stage has been completed. To do that would be a waste of quite a lot of time and cost.

When a cost schedule is prepared for the purpose of seeking costs, that is done on the basis of the specific records of the costs that have been incurred. So, some care is needed before comparing cost schedules seeking a payment of costs with budgets, which are obviously prospective in large part and you don't seek to adjust the budgets up and down like that.

Now the other, it seems, confusion is that --

MR JUSTICE MILES: I don't quite follow that point. If you've revised your budget in 2025, looking back, say at column 3, which is the one they concentrated on, are you saying that column 3 has not been reconsidered from the original budget?

MR SAUNDERS: I'll have to take instructions.

MR JUSTICE MILES: Because that seems a bit surprising --

MR SAUNDERS: Well, yes.

MR JUSTICE MILES: -- particularly if the actual figure is less than the thing that you'd originally budgeted.

MR SAUNDERS: Yes, unless something has been done to reduce it, but the reason for the reduction is because in some cases they are CFA rates rather than full rates. That is what you have sometimes, full rates in the previous budgets and CFA rates in the February 2025 budget, and it is that slice.

Now, so we say that's the answer to that one. But again, I mean, it is unfortunate that we're doing this like this live before the tribunal, and obviously we can detect that they are the defendants are working from in fact that updated schedule as well because one of the figures that they're quoting is the updated figure from this. Anyway, we are where we are.

The next one was the phase 2 dates point. And my learned friend said, well, that's clearly not within the period 4 February to 15 July. That was added to the bundles at the last minute and wasn't previously raised in the skeleton argument, that point, so

I don't know off the top of our heads whether we have a response to that. Again, it just illustrates the difficulty with doing this kind of thing on the fly in a way as to invite the tribunal to form a conclusion where these sorts of points are being picked out.

The next point of my learned friend was he said that costs have "spiralled out of control". He said originally 10 million, 10.4 million-odd in the budget, costs nearly doubled. He looked at the budget and made the point about cost benefit and I need to address you on that.

Now, in June 2021, the budget was £10,447,200. Now, what actually happened was that the tribunal directed the class representative to submit a revised cost budget as part of the claim form amendments and the provision of a second Davis report, which were provided in May 2023. This was then on the basis before the tribunal in October 2023, where the class representative was ordered to submit his full case by 31 July 2024. That budget before the tribunal --

MR JUSTICE MILES: (Overspeaking).

MR SAUNDERS: I'm talking about the one -- so this is the revised --

MR JUSTICE MILES: October 2023.

MR SAUNDERS: Yes, the budget before the tribunal in October 2023. The total for that came to 15,439,808.

So, this last budget is a 30 per cent. So, the original budget was 10-odd, it's now 20-odd, and the interim budget was 15-odd. So this latest budget, it is true, is a 30 per cent-odd increase over the revised budget that was already before the tribunal back in October 2023.

My learned friends say in this, they do acknowledge that I think in paragraph 21 of their skeleton argument, although I think erroneously they say it was a 20 per cent increase; I'm not sure if their maths is quite right. But in any event, that is the stepping up in the budget. So, it is not a sudden jump from 10 to 20, it is a jump from 10 to 15

to 20. So, that's the position in terms of budgets.

Now, my learned friend took you to the litigation funding agreement and he said, well return to due based on --

MR JUSTICE MILES: What are we to make of the large increase in the amount of the budget?

MR SAUNDERS: Well --

MR JUSTICE MILES: I mean, ultimately this these questions seem ultimately to have something to do, if I can put it in very broad terms, with the grip that the CR has over the process. Can one draw an inference from the ever-expanding budgeted costs that the CR in this case lacks grip? That's basically the --

MR SAUNDERS: Unsurprisingly, I say no.

MR JUSTICE MILES: No, but why? What we should draw from the --

MR SAUNDERS: The answer is we --a big increase in costs was due to the expert-led disclosure process, plus the production of all these various expert reports. And in this litigation, the economic experts are a substantial component of the overall sums. So, I mean, now obviously one can, when one's looking at the archaeology, you may find that digging in the particular hole looking for disclosure treasure, it may not have been necessarily the best course, but that is what it is and we are where we are.

Also, Dr Davis needed to obviously familiarise himself with the case and get on with that and at least two of his reports were not anticipated. So, it's not unusual, and that includes the very substantial third report, and Davis's second report had to be produced according to updated pleadings and so on.

So, it's not unusual for budgets to increase through the life of collective proceedings when they last longer than was anticipated at the outset. Again, when you're looking at the budgets, one of the important points to bear in mind is that the class representative, by being required to put his full case before the tribunal, including his

full expert evidence, has done the bulk of his work. This is not a case in which there has been the usual sort of interplay of expert reports and various other things; the whole package has been set out, and that is why cost has increased, because it has accelerated costs rather than having them accrue incrementally over time.

So, my learned friend made a number of points about the litigation funding agreement. One of his points was he said that we can't get to trial in January. I've already addressed you on that in connection -- I've taken specific instructions on that, and there is enough money in the pot to do that. So obviously, if we need to give more information about how that will work, we can, but those are my instructions.

As far as the ballooning of budget is concerned, my learned friend's point was he says, well, money in the class is going to be eaten up by the funder. He's done -- I think I'm just going to describe it in slightly pejorative terms -- his calculation between 72 and 102 million. And he says, well, hang on a minute. Look at Dr Davis. Dr Davis's fourth report says damages could be as low as 40.6 million. And obviously, by our calculations, he already owes 70 million, so therefore, the whole thing could, in one scenario, be a nonstarter or at least it should be that you won't get back the money that the fund is going to slice off.

Well, two answers to that. Firstly, and this has been pointed out to the defendants in correspondence, but they keep on using some incorrect figures from Davis, and I'll explain why in a second. The second point is, in any event, as we saw from the Merricks litigation, what the funder gets paid out is ultimately under the control of the tribunal. When a settlement is reached, sometimes very live disputes can be curtailed.

Now, let me go back to the first point, Davis. The errata list to Davis 4 has the updated damages numbers. So, for that, we need the February core bundle, page 864 in the PDF, let me get my learned friend the ... 852 in the bundle printed page. So 864 PDF.

You'll see in the 40.6 figure in the middle of the table, roughly, revenue neutral, no

arbitrage. That is not the claimant's -- that is one of four counterfactuals that Dr Davis has considered in his report. That is not the class representative's case. Our case is harmonised down or harmonised down plus 5 per cent. The reference for that is Davis 4 paragraph 18.

Just while we're on this page, let's not move for a second, the damages figures are the first two rows in the table, and you'll see they range from 183.6 million to 333.4 million.

MR JUSTICE MILES: Sorry, where are we looking?

MR SAUNDERS: I'm looking on the table on PDF page 864 -- I'm sorry, 183, sorry I misread it. PDF page 864. Look at the top two rows in that table and you'll see harmonised down plus 5 per cent. The bottom figure with no cluster harmonisation is 183.6. Then, if you look at the top right-hand figure in the table, harmonised down without a 5 per cent uplift is 334. So, that is the range: 183.6 to 333.4.

Now, we pointed this out in correspondence to the defendants, so it's a little bit surprising to hear my learned friend making the same point again. He says, well, the prima facie return is in the range 72 to 102. I'm not sure if we've seen the details of that calculation, but he's obviously been able to do it, as, sir, you observed. But these are things as to which the class representative and his advisers are obviously taking considerable care, I would submit. Right, so that is the Davis damages point.

The next point my learned friend made was that the tribunal has to have a grip between funding and returns at all stages and then he criticised us for a late application to amend the claim form prior to the CPO. So actually, yes, we were getting on to various, I think on the probing by the chair, as to various reasons that the class representative should be criticised for the conduct of the litigation. He made the point, there has to be a balance between funding and returns at all stages. Well, that's true, but we're not in that territory. When you actually take the correct figures, as opposed

to the incorrect figures that have already been pointed out to him.

He then said, "Well, there was a late application to amend the claim form prior to the CPO". So we're now back in really real prehistory. That is in some ways said to have been a criticism of the conduct of the litigation. That's rather surprising in itself to be a criticism because if you -- I mean, you may or may not be right about amending your case late but to suggest that that is in some way something that should then come to bite you after certification is a little bit surprising; the tribunal has already considered that and ruled upon it.

He then made criticisms of the expert-led disclosure.

MR JUSTICE MILES: Was that late? Did you just say --

MR SAUNDERS: It was the late -- I think that --

MR JUSTICE MILES: Is this a --

MR SAUNDERS: This is presumably Davis 4, was it, I think which is it? Harvey 4, I'm sorry, I've got the wrong expert. Just before the CPO hearing, there was a further expert report from --

MR JUSTICE MILES: That was a business -- yes, okay.

MR SAUNDERS: Yes, and so --

MR JUSTICE MILES: No, I understand.

MR SAUNDERS: The tribunal wasn't impressed by that.

MR JUSTICE MILES: Yes and they said (overspeaking).

MR SAUNDERS: Stung the CR (overspeaking).

MR JUSTICE MILES: Yes.

MR SAUNDERS: But again, I mean, that's something that was dealt with back then by the tribunal whilst considering the checklist of things for the purposes of whether certification should take place, quite properly. I mean, it was on the list to consider all of the various things my learned friend's just taken you to, and decide, not withstanding

that, to certify.

MR JUSTICE MILES: Yes.

MR SAUNDERS: Anyway, this is now said to be some factor which is appropriate to, in some way, resurrect now.

The expert-led disclosure approach. He said, "There were criticisms of the former chair in respect of requests by our former expert". Well, the answer is there were criticisms of everybody by the former chair to a certain extent. But again, it was an expert-led disclosure approach. Whether it was right or wrong in hindsight to have gone down that route is debatable. But again, it's difficult to see how that is a criticism which should sit at the CR's door.

Riefa, the next thing. Now, we say this analogy that the defendant seeks to draw with Riefa, the class representative in Riefa, is by-the-by and quite inappropriate. If we could go back to -- I don't know if -- I slightly hesitate, but if you have got a hard copy of the authorities. Oh, yes. That's good.

So, the background to Riefa -- so this was a CPO application, so we're engaging the rules because the tribunal has to consider to tick off the various requirements. There, Mrs Justice Bacon had to consider whether that checklist had been met in accordance with the tribunal's guidance and so on. The tribunal permitted cross-examination in that context and in the context of having identified deficiencies in the evidence submitted on behalf of the proposed, underlined, proposed class representative.

This is not this case. This case, the tribunal has already determined that the class representative meets the authorisation criteria. And as I think Mr Hollander has said a number of times previously, this is -- my learned friend has raised this decertification sceptre a number of times in these proceedings and been met, certainly on one occasion, by the tribunal telling him to stop wasting their time with peripheral matters, back in October.

In Riefa, what the tribunal's concerns, in essence, were the fact that the litigation funding agreement into which she had entered included:

"... unqualified obligations to seek an order for costs, fees and disbursements and that Professor Riefa had misunderstood that obligation, given that she had stated in her witness evidence that the obligation to make an application to the tribunal was limited to unclaimed damages." [as read]

It appeared from her own evidence that she'd misunderstood the agreement, the funding agreement, that she's entered into.

Tribunal was also concerned that:

"Professor Riefa had not properly described in her evidence multiple changes to the litigation funding prior to the first certification hearing, that there were errors in the ATE insurance policy to the effect it didn't cover all the proposed defendants, and that Professor Riefa had subjected herself to a confidentiality obligation as far as the litigation funding agreement was concerned, so that that could only be waived at the unilateral discretion of the funder." [as read]

She was bound by confidentiality to not even reveal what the terms of the funding agreement were. So the punchline is, in Riefa, having seen the documents and seen the evidence, the tribunal considered that Professor Riefa had made a mistake in her evidence. She said that all the costs and disbursements, including the funder's fee, would be paid post-distribution to the class. But in fact, when you looked at the agreements, they in fact entitled payment to be made pre-distribution. So there was a priority in the funder being paid out; that was the fundamental mistake. And that is a very different case and that's why she was called on to be cross-examined, to make sure that she actually understood what on earth it was that she'd signed.

Just to make those points good. There's a section in the judgment entitled, "The Tribunal's concerns ...", which sets out the specific things.

Let me just find it. I'm sorry, I'm --

MR JUSTICE MILES: Paragraph 89.

MR SAUNDERS: Yes, that's correct. There's a section of five or six subparagraphs where they go through the various things. In the context of a certification hearing, evidence been submitted, materially wrong, and the solution was to call on the proposed class representative for cross-examination. That is not this case by a thousand miles. I mean, it's not even the same procedural stage.

Now, the next point, my learned friend said is, "Well, this class representative has not got a consultative panel". That never used to be a requirement; it is something which is being developed in the case law as being something which is of benefit. And I understand on instructions that my instructing solicitors have taken steps to get one together at present. They're working on that at the moment, but --

MR JUSTICE MILES: It has been said before.

MR SAUNDERS: I'm not sure whether that -- have we said that before about the consultants? So the last hearing we said that.

MR JUSTICE MILES: That's what I mean.

MR SAUNDERS: Yes.

MR JUSTICE MILES: So what's happened in that regard since then? I mean, that was a little while ago, a month or so ago.

MR SAUNDERS: Just while my instructing solicitor is sending me a message about that, can I just --

MR JUSTICE MILES: Yes.

MR SAUNDERS: The point being that that is a developing area of law. It's not a certification requirement. It seems to be being developed at the moment.

My learned friend said that the class representative wasn't involved yesterday or today: he is, in fact, following online. And as far as the consultative panel is concerned, I'm

instructed that we identified a number of individuals and are discussing their involvement that would be required and checking their experience and so on. So they're in the process of identifying that.

MR JUSTICE MILES: Is that a firm or is it exploratory, an intention, a commitment? What do we take from that?

MR SAUNDERS: Well, I think it's not a formal commitment to do it because we don't say that it is a requirement, but if the tribunal has concerns from my learned friend's submissions then it is something that, certainly on this side of the court, we can certainly see the sense of setting up and we're planning on setting it up.

MR JUSTICE MILES: At the moment, you're advancing it essentially as an answer to his point and so that's why I asked the question, because it may be, and I put it no higher than that at the moment, that it's a material consideration in relation to the view we take of this application. So if, for example, you were to say, "Well, we're well on our way to doing it, it is something we're definitely doing", that might give the tribunal a degree of comfort. It's an obvious point. So I mean, how far does it go? And perhaps you can just take instructions on that.

MR SAUNDERS: Yes, I agree. (Pause)

I understand on instruction we can commit to doing this. In terms of timeline, we expect in the next two to three weeks. There is a line item on the latest budget for doing it. So if it assists the tribunal, we can make that a commitment, obviously subject to the individuals in question. But that is not just, as it were, a pipe dream.

So that's the consultative panel. Now, then my learned friend finished with various points that he says should be put into a witness statement. It was slightly difficult to follow his list because previously there had been an enumerated list of a large number of points, I think 32 different questions, and I'm not quite sure which questions relate to the various specific topics he'd identified. He, obviously, makes a point about

"declining involvement in proceedings" and "demonstrating taking robust and independent decisions". How on earth is that supposed to be satisfied by, without waiving privilege, in connection with a class representatives in the --

MR JUSTICE MILES: I did think when I saw the list of points in the letter that at least some of them -- maybe this is a point I'll have to address in a moment with Mr Harris -- but some of them certainly look to say they might be straying into privileged material.

MR SAUNDERS: Yes. I mean (overspeaking) --

MR JUSTICE MILES: How do you, for example, they seem to be saying, and I'm paraphrasing, demonstrate to us that you have essentially done things contrary to the advice which your solicitors have given you?

MR SAUNDERS: (Overspeaking) you disagreed with the advice (overspeaking) --

MR JUSTICE MILES: How could that be done without straying into privileged material? It seems impossible, but there it is.

MR SAUNDERS: I mean, but it is, I mean, it's rather in my submission, indicative of the sort of exercise which is being contemplated.

The other aspect of this which my learned friend touched on very lightly in his submissions but it has been squarely raised in the way that this application has been brought, is essentially what seems to be a question of capacity, as far as the class representative is concerned, in terms of various quite serious medical allegations, and this seems to be based, as far as we can tell, upon an email that was sent by a former agency paralegal who'd been working at my instructing solicitors and now, as you may have seen from our skeleton argument, has pursued something of -- well, has made -- to put it as neutrally as possible -- a number of very, very serious allegations against the class representative's solicitors and counsel and has been herself the subject of litigation before this tribunal in respect of a laptop containing confidential

information.

She has also attempted to judicially review the tribunal, it seems under the mistaken misapprehension that, in fact, by doing so, it will evaporate the previous orders that had been made against her.

Now, again, I don't -- that is an absolute sideshow for present purposes, and I'm not seeking to ask you to rule on any aspect of that. But that is part of the genesis of this application and was referred to in the letter bringing the application as "information received from a third party". What the letter bringing the application neglected to provide was the full context in which that third party had provided that information, which -- sir, I don't know whether you've had an opportunity to see our skeleton argument.

MR JUSTICE MILES: Yes.

MR SAUNDERS: The context is quite remarkable. It included visiting the class representative and his family just around Christmas.

I mean, again, that isn't something that it is necessary for the tribunal to rule upon, the correctness or otherwise of those various allegations, but it is something that is very striking about the way that this application has been brought. To bring an application which is not supported, which is a last minute application, that was not even mentioned in the agenda for the hearing, filed just before the deadline, I mean, a number of hours before the deadline for skeleton arguments, based on information received from a "third party" without even explaining who the third party was and putting before the tribunal the factual evidence that is really necessary for the tribunal to have a proper view on how much weight should be given to those allegations, is just an extraordinary way to bring an application.

One of the reasons -- it is, we would say, quite striking, that there was no solicitor who had put their name to a witness statement setting all of this out. One might infer that

the reason for that is that if they had to do that, they may have to be rather fuller in the way that they presented this application. And those are --

MR JUSTICE MILES: Was there actually an application or --

MR SAUNDERS: Well, there was a letter that was --

MR JUSTICE MILES: Just a letter.

MR SAUNDERS: -- that was received. I mean, in the Competition Appeal Tribunal.

MR JUSTICE MILES: Yes. I know. But sometimes there aren't, sometimes there are.

MR SAUNDERS: But no. So --

MR JUSTICE MILES: So when you talk about the application, you mean the letter.

MR SAUNDERS: Yes. There is a letter which brings the application. But what there isn't is a supporting witness statement signed by in the (overspeaking) the solicitor with their own obligations to the court.

MR JUSTICE MILES: Yes.

MR SAUNDERS: And you know, in these rather extraordinary circumstances, one can deduce why perhaps that was not something that particularly attracted itself to my learned friend's instructing solicitors.

Again, what is very striking about this is that, and again, I don't know if it's convenient to do it by reference to my skeleton argument, if you have that; I can just direct you to a couple of paragraphs. This is our supplementary skeleton. It is in the bundles, but that may or may not be a good way of getting it. I'm grateful. So it's the PDF. So it's the March core bundle. (Pause)

MR JUSTICE MILES: Yes.

MR SAUNDERS: PDF 472 is the beginning of the skeleton. And I'll just invite the tribunal to read paragraphs 11 onwards. I mean, I'm not suggesting you do it now, because I'll sit down to let my learned friend respond. But it is important that you understand the background to the genesis of this and how it is an extraordinary way

to bring a last-minute application, in circumstances where there are a number of very, very unusual features of this background.

Now, obviously the defendants chose their course and there's no shortage of lawyers. They decided to put their foot forward in the best way they saw fit. But actually, what they didn't include is highly material to the basis on which this application has been brought.

I've dealt with my learned friend's specific points which he relies upon for the purposes of the application. This is also important background, which we would invite the tribunal to bear in mind. We say that, actually, in these circumstances, the list is originally as you observed, raises a number of difficulties with privilege. But actually this is not an appropriate thing to order at this stage in the proceedings, and we resist the application.

Unless there's anything further I can --

MR JUSTICE MILES: Right.

MR SAUNDERS: -- address you on.

Reply submissions by MR HARRIS

MR HARRIS: I'm grateful to both my learned friend and the court for giving me the opportunity to finish, which I will by 4.30. I have some very short points of reply.

My learned friend's submissions started off on the wrong premise because what he essentially said was there's no ongoing duty, "All the things that Mr Harris relied upon were about the CPO stage", and with respect to him, he's just wrong.

I already showed you one, which was at paragraphs 45 and 46 of McLaren. I read out the line that said, "Once the CAT has decided to make a CPO, that is not the end of the gatekeeper role". So I've already showed you that one.

And then at paragraph 6.36 of the guide, which is at the March authorities bundle, so for today, at tab 7, page 98, in hard copy. And the page number in the soft copy -- and

we'll find that -- it reads as --

MR JUSTICE MILES: Did you say page 98?

MR HARRIS: In hard copy, it's page 98 of tab 7 of the authorities bundle.

MR JUSTICE MILES: It's page 100.

MR HARRIS: Page 100 and it reads:

"Although the tribunal ..."

MR JUSTICE MILES: Sorry, which paragraph?

MR HARRIS: 6.36.

MR JUSTICE MILES: Yes.

MR HARRIS: Part of which I think I took you to but if I didn't read this bit, I apologise.

"Although the tribunal is formally required to consider the suitability of the PCR only at the stage of making CPO, the tribunal will." [as read]

I thought I'd read this out, perhaps I didn't.

MR JUSTICE MILES: I don't think you did, actually.

MR HARRIS: Yes. "Will", so there's the duty:

"... continued to have regard to the requirements throughout the proceedings." [as read]

And then thirdly --

MR JUSTICE MILES: Sorry, let me just --Yes, I don't think we did see that. Let me just read that. Sorry.

MR HARRIS: Yes, and the next sentence, please. (Pause)

MR JUSTICE MILES: Yes.

MR HARRIS: Okay. So it says, "Tribunal may on its own initiative" and that's the point I made.

Thirdly, in this particular case, the point has been made to Mr Boyle by the tribunal, so in the February core bundle, volume 2, tab 36, which was --

MR JUSTICE MILES: Yes, you took us to that.

MR HARRIS: Yes, that's the one where, amongst other things, he says in turn:

"Impose particular responsibilities on the Tribunal, both in terms of initial certification and in terms of ongoing supervision."

So my learned friend's starting point was wrong. And indeed, if I may put it like this, it's perhaps because the CR is not getting the correct advice about ongoing duties, that he's not living up to their responsibilities. If he's being told, "Oh, don't worry, you don't have this ongoing duty", little wonder that he's not doing it.

Second point of brief reply: my learned friend sought to somehow pray in aid that the almost doubling of the budget from £10,447,000 has come in two massive chunks, rather than in one. With respect, I simply don't understand the point. My point was, as you put it to him, isn't this indicative? Can't the tribunal draw an inference that the CR is not getting a grip under this ongoing duty of the costs, because it's almost doubled? It's nothing to the point that it might have, in halfway along, only gone up by 1.5; the point is, it's now at two.

As to the CCS, I am told, again on instructions, that in fact there was a revised version of the documents compared to the one I showed you. Little wonder it took me by surprise because we've raised this with the CR over the last few weeks twice and we've never been told this.

As I said to you before in correspondence, we've been told that there was some phase 1 costs, we "assume" -- that was the verb that was used. When we pressed on that saying, "That can't be right", we were told, "Oh, no, well, it's actually some phase 2". So now we've had a third explanation.

Be that as it may, it seems as though a letter had been written before the reasoned order, but if you looked at that, you would see that there's still a discrepancy between counsel's fees in the CCS, as I'm now told was revised, and the February cost budget.

I accept that it's not as large, it's not 195; it's now 26, but that's still material; it's no explanation.

Next point is that my learned friend said, "Well, look at Dr Davis's various counterfactuals, and in fact, what he says is the damages go from --" something, I think it was something like 130-odd to 330-odd --

MR JUSTICE MILES: 186 to 333.

MR HARRIS: Yes. What you may recall, however -- certainly my recollection of Davis 4 -- was that Dr Davis doesn't say, "These are the counterfactuals". What he's saying is that it's a list of possible counterfactuals, which include the one that on the correction was at £40 million. So he wasn't putting them forward and saying, "Oh, here's a hopeless counterfactual. You could never go there", he was saying, "These are live and realistic counterfactuals", and one of them is significantly below the figure that we've already calculated.

What's more, you may recall that, strictly speaking, Davis 4 gives a one counterfactual giving a £0 damages figure, and it was the £0 that was then the subject of the table of correction. So it went from £0 to £40 million.

The next point was that it was said, "Oh, well, Riefa is very different". I note, of course, that Professor Neuberger, as well as those instructing me, were in the case. What we respectfully contend -- and perhaps the professor recalls -- is that there was a general lack of confidence in that PCR because of the accumulation of dissatisfaction on the part of the tribunal as to her ability to "demonstrate" independently and robustly acting in the interests of class for a whole accumulation of reasons.

So I accept one of the reasons is not identical in that case compared to this, but that doesn't matter. What one has to ask oneself, I respectfully contend, is can the tribunal now, given its ongoing duty, be satisfied because this CR has "demonstrated" to it that it has got a grip? For the reasons I gave before, it can't do that.

As it happens, my learned friend said, "Oh, well, one of the points in Riefa was that Professor Riefa's LFA was confidential and couldn't be revealed to the class", but this is a point that does arise in our case. There are confidentiality provisions in clause 1.21 of the LFA in this case. We've made this point to the CR and we said, "Well, what are you doing about this?" And we note that it's still not been published to the members of the class, so it is still withheld from them.

Pre-penultimate point, we're suddenly told on my learned friend's feet that in fact there is now all of a sudden a commitment to this consultative panel. We've been pressing for that for a long time, and it was as long ago as the CPO certification judgment, paragraph 16, where this tribunal with the former chairman said:

"We consider that Mr Boyle would be well advised to establish an advisory panel, although (we make clear) this is not a requirement for certification."

That was back in July 2022. What we say is it's indicative of the failure to recognise the ongoing responsibilities. We've now been told on several occasions, and this tribunal has been told on at least one occasion, "We're thinking about doing it", and even today where suddenly we're told there's now a commitment, this is out of the blue, as far as we're concerned; we've never been told that there's a commitment.

What you don't have is who these people are, how they could relevantly contribute, what's their skill set, what are their complementarities, if any? And where's the evidence of this? What stage of these discussions at?

As to the penultimate point, the question of inquiring into matters that are privileged, we've said in terms, in writing, if anything is privileged, you don't have to tell us.

MR JUSTICE MILES: So how do you demonstrate that you've done something which is different from what your lawyers have advised you to do?

MR HARRIS: You don't necessarily have to choose that as a particular example, when I gave you what I said should be the subject of a witness statement, what I said was

in the context of these themes, it's incumbent -- that's what the case law says -- upon the CR to demonstrate to this tribunal that he can act robustly and independently in the interests of the class. So an example might be, where he's acted differently, if he can explain that without waiving privilege --

MR JUSTICE MILES: How would you do that?

MR HARRIS: Well, no --

MR JUSTICE MILES: I just can't understand how it would be done.

MR HARRIS: What I'm saying is, if he could do that one without waiving privilege, then that would be some --

MR JUSTICE MILES: Well, how would he do it, you say "if".

MR HARRIS: Well.

MR JUSTICE MILES: How could it be done?

MR HARRIS: It's not for me to -- with respect, I say --

MR JUSTICE MILES: No, but it is for you, because you've asked him to answer these questions.

MR HARRIS: What I say is that he has to demonstrate to you, by reference to the themes that I've identified, how he is, in fact, continuing to act robustly and independently. If he chooses to do that by not referring to any example in which he's taking a decision different to that of his lawyers, because that's a privileged answer, then he could perhaps do it by reference to something that was said to him by his funders, or something -- if he had had a consultative panel -- that the other two had said, "Oh, we should definitely do this", but he's independent and fearlessly so, and he said, "No, that's not right". None of that would be privileged. What I'm saying is it's up to him, but the onus (overspeaking).

MR JUSTICE MILES: I'm not sure about that.

MR HARRIS: There we go. That's my submission.

MR JUSTICE MILES: I don't know about that. I don't know whether there's been any learning on this, but I suspect if you have a consultative panel as a CR, it's very likely that that is going to be part of the cloak of privilege.

MR HARRIS: Sir, as I say --

MR JUSTICE MILES: In fact, it'd be quite surprising if it wasn't, wouldn't it?

MR HARRIS: In the one minute left to me, what I propose to do is deal with the final point, but just on this point, as I say, our contention is -- if you don't share the concerns, then that's the end of it, but if you share the concerns by reference to the duties ongoing that I say apply, and therefore you agree with me that there should be a witness statement on some topics, the thrust of it -- the point of it -- is he has to demonstrate to you that he is in fact acting robustly and independently in the interests of the class, by reference to things like the budget, the uncapped multiples, and what have you.

It's up to him to choose how he does that. That's what I say. He says he can't do it in a certain manner because it's privileged, so be it. We've never asked for him to reveal privileged information, and --

MR JUSTICE MILES: It seems to me there may be -- I find it a genuinely difficult idea that when you've got someone who's actually engaged, that he's expected to show that he's acting independently from his lawyers. I don't understand at the moment how that is something that you can do otherwise in the most general terms, by saying, "I'm the sort of person who is capable of standing up for myself, and I'm not going to be pushed around or just do what I'm told", but what's the point of that, now, given where we are? I can see that it's the sort of thing that you look at when you're deciding whether someone should be a class representative; are they the kind of person who could do this?

MR HARRIS: Let me give you, I hope, a constructive example. So let's take the

uncapped multiples, giving rise to what we've been able to calculate is prima facie £70 to £106 million, by reference to the recoveries in Dr Davis. We say it is incumbent upon this class representative to explain to you how, notwithstanding the obligations that he's taken upon himself in the amended LFA, to ask for those amounts -- that's a legal obligation that he's taken upon himself in the amended LFA to ask for those amounts -- how he has satisfied himself, robustly and independently, that even to ask for those amounts is actually in the best interests of the class.

MR JUSTICE MILES: Well, that's something that was before the tribunal at the time he was certified.

MR HARRIS: But the case --

MR JUSTICE MILES: I know you say there's a continuing duty, but it seems to us, at least at the moment, that there is a difference between the situation where someone has been certified, and has been running a case, and we're into the case, and the situation -- and one can understand that, of course, there's the possibility, as the rules explain, someone being decertified.

But it also seems to us at the moment that it's quite a strong step to do that. You know, what are you actually saying? If this person is decertified, is that the end of the case? What happens?

MR HARRIS: With this CR, yes. But the reason it's relevant and how it applies now to this case, is because we're not any longer back in July 2022, when the case was certified, when the budget said it's £10,444,000, and the timetable for litigation was it would be finished -- or could be finished -- by Michaelmas 2023. That's a sea change. What we now have is a budget of £20 million, which doesn't seem to be adequate to take us through to the end, and we're five years or so -- or well over four years -- into the multiples. That's the difference. And my learned friend's client has signally failed to recognise that in that fundamentally changed context, he needs to continue to come

and demonstrate to the tribunal, especially when we've pressed on it and we've drawn it to the tribunal's attention. This tribunal needs to grapple, we say on a continuing basis, with the fact that that is a different territory.

So where he could robustly and independently demonstrate to this tribunal that he is acting in the class's best interests is to explain, "This is what the amended LFA says. Although on the face of it, I'm legally bound to do the following, and notwithstanding that the costs are now twice as high, and notwithstanding that my own expert has changed, quite radically, the possible damages figures, nevertheless, it is in the class's best interests that I do what I've committed to do in the LFA".

Those are the sorts of things that were going on, both in the Merricks case and the Riefa case.

MR JUSTICE MILES: I think that the danger is that -- if you're right, and there's this sort of continuing review process -- you end up with just endless satellite litigation in these cases.

MR HARRIS: Well, the reason --

MR JUSTICE MILES: Is the tribunal required to keep calling people to come back and say, "Now, look, things have moved on a bit, we're now six months further on, there's a bigger multiple, the costs have gone up, you've made some adjustments to your damages".

Explain to me yet again how this works; is that really how this should work?

MR HARRIS: Well, first of all --

MR JUSTICE MILES: It's very expensive, this litigation. I'm looking around this court now at the number of people who are sitting here thinking that the hourly rate of this case is enormous, and is this really how this kind of litigation is to work?

MR HARRIS: The answer is yes, and let me explain, very briefly, two reasons: first of all, the Court of Appeal has reviewed this jurisdiction on several occasions; McLaren

was one, Goodman is another, and of course it went to the Supreme Court before that. What they have said is it's a very novel new and different jurisdiction, and it involves great resources on the part of the court, including this ongoing review, and it's very different because there aren't any actual clients.

They further said that many of these claims are generated by lawyers and funders, not by actual -- it's not that victims come forward and say, "Will you do this for me?" It's lawyers and funders who dream up the ideas, and then they go off and find a CR. So that's one of the reasons why there has to be this careful grip on an ongoing basis. That's answer number one.

Answer number two is: it says in terms, including in the guide 6.3.6, that that's a duty upon this tribunal to carry on looking at it.

Answer number three -- there are in fact, three answers, not two -- is in Bulk Mail, just a few weeks ago, we were told exactly that. Ongoing basis. "I'm going to need before any major hearing a revised cost budget, and I'm going to need to be satisfied that there continues to be a clear grip by the CR of the costs that are being incurred because of things like --"

MR JUSTICE MILES: By the provision of continuous witness statements?

MR HARRIS: But by the provision of ongoing worked examples, ongoing, regularly updated cost budget, proactively advanced by the CR. Not like in this case, where we've had to drag it out of the CR.

So yes, my answer to your question is it sounds odd, but that's because it is an odd and novel jurisdiction, and it really is. Merricks makes that very clear; we've gone from a situation in which there's individual compensatory liability to aggregate damage, and in Gutmann, in the Court of Appeal, they said it was aggregate liability. This is very, very different, and that's why the tribunal has this ongoing requirement to grip. So that's my answer.

The final point -- I'm grateful for the indulgence -- is, my learned friend, I say very curiously, tries to suggest that actually all my applications are based upon complaints that have been made by a former paralegal of his instructing solicitors. But you'll have noted that I didn't mention her a single time, and it's not right. All the points that I developed have got nothing to do with her. You will recall that indeed, in our first CPO opposition document, we drew attention to the likelihood of Mr Boyle not being a suitable authorisation candidate and how we would keep it under review.

Last but not least, my learned friend sought to criticise us on the basis that somehow we were at fault for not having been sufficiently forthcoming about this former paralegal, but you will note that we said in terms in our application, which is at tab 18 of the supplementary bundle for today's hearing, beginning at hard copy page 368, paragraph 7 -- I'll give you the soft copy in a moment -- we draw the attention of the tribunal in terms to the fact that the tribunal -- I'm reading out aloud here:

"The tribunal responded to the third party in question on 30 January 2025 to inform her that it did not consider that there were grounds for any further action to be taken to emails sent by her to the tribunal."

Then we list them. So, it's just not right to say that we somehow improperly failed to draw attention to that. And in any event, it's a sideshow.

MR SAUNDERS: Well, it's relied upon in paragraph 6.

MR HARRIS: We don't.

Page 400 in soft copy. So, as I say.

MR JUSTICE MILES: Page ...

MR HARRIS: 400 in soft copy of the supplementary bundle for today's hearing. Tab 18. If anyone's working on.

MR JUSTICE MILES: Sorry.

MR HARRIS: I beg your pardon. So, the actual paragraph 7 is on page 403 in the

soft copy.

MR JUSTICE MILES: I think I'm in the wrong bundle here. Sorry, what are we looking at now? We're looking at your letter?

MR HARRIS: This is our letter of application. My learned friend criticised us and said, oh, there's not a witness statement in support, and you've been insufficiently candid about the nature of the former paralegal.

MR JUSTICE MILES: Yes.

MR HARRIS: But it's not right. You can see here that we say in terms, we draw attention as part of our own application to this tribunal, that the tribunal had formally responded to the third party in question on 30 January to inform her that it did not consider that there were grounds for any further action to be taken in relation to emails sent by her to the tribunal on various dates.

MR SAUNDERS: Well, that's something different.

MR JUSTICE MILES: I mean, in paragraph 6 it does appear as if Freshfields are relying on the email from the third party.

MR HARRIS: Yes, but what I'm saying is my learned friend seeks for forensic reasons to suggest that the bulk of my application is founded upon, the genesis of it lies in, these materials from the third party. And that's not right.

MR JUSTICE MILES: Why did they refer to it?

MR HARRIS: Well, because -- I'm sorry, I'm finding it difficult to make these submissions because I'm being chatted up from the side. But it was a part of the context in which our concerns about the CR have crystallised. You will have seen the allegations that were made by this lady, but as I say again, it's no accident that I didn't develop any of those orally and in fact, they are not the focus of the skeleton argument either. In fact, I'm told they're not in the skeleton argument at all. So, it's wrong, forensically, to seek to suggest that we're relying upon something that the tribunal has

already dismissed.

MR JUSTICE MILES: Well, this letter is your application, as I understand it?

MR HARRIS: That's right. And you can see that paragraph begins, "In addition to the above".

MR JUSTICE MILES: Yes. Well, that seems to be part of the application, but there it is.

MR HARRIS: Well, precisely so. It is part of the context. But it goes on to say --

MR JUSTICE MILES: Well, it's not really context. It says "in addition to the above".

MR HARRIS: Well, I agree. I'm not suggesting (overspeaking)

MR JUSTICE MILES: I have to say, this correspondence heightened the defendants' existing concerns. So, Freshfields here are saying that they have concerns as a result of this email.

MR HARRIS: The concerns that we've got and the issues of substance are heightened, and I stand by that. But it's not correct to say that we then don't tell the tribunal that it responded; we do in terms.

So, with the tribunal's permission, those are my points. And with the tribunal's permission, I'd prefer to be excused, but of course, I'm entirely in the tribunal's hands.

MR JUSTICE MILES: All right. Thank you very much indeed. Yes.

Further submissions by MR SAUNDERS

MR SAUNDERS: Sir, just one point, I won't detain my learned friend, but just for your reference, the email in question, the exhibit which was exhibited to the application is in the core bundle at 2488 to 2489. I mean, it is -- well, I don't want to detain you anymore with a sideshow, but.

MR JUSTICE MILES: Right. Can I just ask you -- because there was a new authority, which was the guide at paragraph 6.36, which is page 100, I think of that. It's page 100 of the authorities bundle.

MR SAUNDERS: Yes, I'm just trying to find you. Yes, I've got it, so it's the March authorities bundle on page 100.

MR JUSTICE MILES: Yes, yes.

MR SAUNDERS: So, the guide, the -- sir, you raised a number of questions with my learned friend about whether some of the fit and proper type aspects of this are temporally limited because, to put it I suppose colloquially, the proposed class representative has the sufficient capacity to be sufficiently questioning and understand their duties.

You could imagine if you had a proposed class representative that was a fraudster, or someone who had a conviction for dishonesty, that might suggest that they're not the best person to be doing this on behalf of the class. Those kinds of things, if there was some other change of that nature during litigation, that might well be something which the tribunal needs to be concerned of, you know, if there were a criminal conviction for a class representative or something of that ilk.

That the tribunal will continue to have regard to those requirements is, in my submission, a part of -- it is not envisaging an interrogation, it's not envisaging a continuing process monthly or any major particular hearing. What it's envisaging is that that is something which the tribunal will keep under review and here, we have a defendant raising a series of allegations.

We say that actually when you go through them, most of them amount to an absolute hill of beans and/or are completely matters of archaeology and/or are based upon somebody who has got a very obvious axe to grind and has behaved in a very unusual way, I put it as neutrally as I can.

So, you know, is that a good basis on which the tribunal should exercise that sort of review where there's nothing else said and there's no other question? We say no.

But the comfort of the tribunal should have, and as I've just said on instructions

a moment ago, we do commit to a consultative committee. That, we say, is a proportionate and sensible way forward at this stage of the proceedings and if there are future concerns then no doubt my learned friend will be jumping up and down in relation to them.

MR JUSTICE MILES: Okay, thank you.

MR SAUNDERS: I'm sorry.

MR JUSTICE MILES: Yes, of course.

Submissions by MS HOWARD

MS HOWARD: I'm sorry. I did want to just make a couple of observations before Mr Harris, but I wanted to make sure he had his time. Obviously, we're sitting here as the sort of invisible party for much of these proceedings, but I just wanted to express the Secretary of State's concerns at the ballooning costs on both sides of this litigation. Obviously, the tribunal is concerned about that and we do rely on the McLaren ongoing supervision by the tribunal. Regardless of this application, which we're neutral on, we do think that there needs to be rigorous cost management.

The two points I wanted to make on costs were just to flag from the provisions that we made in our statement of intervention, I'm not sure whether you've seen the paragraphs 111 to 112, but there is a risk that ultimately the costs of all this litigation could land on the Secretary of State and therefore be brought by the taxpayer. I'm not saying that's definitely the case, because it will depend on the construction of the franchise agreements; there'll probably be another satellite issue on that.

But regardless of who wins, to some degree, there's a risk that the Secretary of State is going to either have to reimburse GTR for costs and liabilities, or they have to bear any costs that are not recoverable by the claimant, as well as bearing their own costs. Ultimately, all of those costs are going to be borne by the taxpayer. We think that gives a very important public interest dimension to this litigation and the need to keep

a cap on costs.

MR JUSTICE MILES: I mean, I suppose that that feeds into something we discussed earlier on, which is this idea of this preliminary issue trial, which was really to some extent inspired on the part of the tribunal by this very concern about the expansion of costs on both sides. The thinking behind it was to try to find a way which would, potentially at least, avoid quite a lot of costs. So, that is a factor that we have well in mind when considering a way of seeking to deal with certain issues earlier rather than later.

MS HOWARD: We would be strongly in favour of that.

MR JUSTICE MILES: I mean, are there any other specific points on costs?

MS HOWARD: On costs, one of the points I want to put a marker down on, regardless of our cost application, which you haven't ruled on yet, but the Secretary of State does intend, if the claim is unsuccessful at the end of this whole process, to make an application for their costs. At the moment it's not clear at all from the ATE insurance policy whether there is any provision for a potential liability to pay the intervener's costs, should the tribunal make an order. But I do want to put that marker down.

MR JUSTICE MILES: Is that something that -- that's not something we can really say anything about at this stage.

MS HOWARD: No, I just wanted to make it (inaudible)

MR JUSTICE MILES: But it's something, no doubt, that you may wish to explore further with the CR's team.

MS HOWARD: Yes. We have made an application for clarification, but I do think it's (inaudible) in correspondence with them. No doubt they'll say, you're an intervener; the ordinary rules of intervention apply.

This can probably be a matter for a later date, but there is an established line of case law, both in this tribunal and in the TCC, that where there are interested parties, which

is effectively what we're like in a procurement claim, where our reputation or our -- we're involved in the facts, interveners or interested parties are entitled to recover their costs where they add value and have a --

MR JUSTICE MILES: I mean, is it --

MS HOWARD: -- take a role in the proceedings.

MR JUSTICE MILES: This is just not anything remotely like a proposal, but really, should you actually be parties to these proceedings?

MS HOWARD: Well, I think we have to -- this is where we made our original intervention because of the involvement in the factual matrix of the instruction.

MR JUSTICE MILES: Well, you're obviously interveners, but should you actually be a party?

MS HOWARD: Oh, you mean made into a party rather than an intervener. I mean, I think the Secretary of State is happy with the intervener status that we were given at the outset. And we're trying to sit at the tribunal --

MR JUSTICE MILES: Anyway, you say that the tribunal has jurisdiction to --

MS HOWARD: Yes, there's a number of cases where --

MR JUSTICE MILES: -- award costs and you're laying down a marker at this stage that that's something you'll be seeking at the end of the day?

MS HOWARD: Yes.

MR JUSTICE MILES: Understood. Is there anything else?

MS HOWARD: No.

MR JUSTICE MILES: You're not saying anything on this particular application?

MS HOWARD: No, we're sort of neutral on it, but we would support having some control over costs of this litigation as part of the tribunal's ongoing case management panel.

MR JUSTICE MILES: Right.

MS HOWARD: So, to that extent, we would support either the working examples or regular updates, a proactive approach to keep the tribunal informed of where the budget is going and what distribution is going to look like at the end of the day.

We're aware of other cases where the tribunal is taking a robust approach on that line to ensure consistency with the approach of other panels, other cases.

MR SAUNDERS: Can I just say?

MR JUSTICE MILES: Yes.

MR SAUNDERS: I'll just say, sorry, very briefly, this is the first time we've heard that submission in relation to the Secretary of State seeking her costs, but --

MR JUSTICE MILES: It's not really a submission, it's a marker.

MR SAUNDERS: Yes, I mean, in the nature of markers made by counsel, we'll have to consider it.

MR JUSTICE MILES: Well, they're helpful because they're on the record.

MR SAUNDERS: Yes, exactly. And so we have now received the message, but that's something we can explore with the Secretary of State.

Just in relation to costs in the litigation generally, we have asked a number of times for the defendants' costs, and they've always declined to provide. That is the position as far as we know it; just that we don't know it. The Secretary of State, however, presumably from what she was saying, has, or her client has, a much better view of this than we do, perhaps. But who knows?

MR JUSTICE MILES: Okay. Right. It's now 4.55 pm, I won't give a ruling now. I think what we will do is, in the usual way, set out our ruling on the various points in writing, and so you'll have an opportunity to, in the usual way, provide any typographical corrections. Right, thank you all very much for your submissions.

(4.56 pm)

(The hearing adjourned)