Neutral citation [2025] CAT 23

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1404/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

26 March 2025

Before:

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

Sitting as a Tribunal in England and Wales

BETWEEN:

DAVID COURTNEY BOYLE

Class Representative

– and –

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

Defendants

– and –

SECRETARY OF STATE FOR TRANSPORT

Intervener

Heard at Salisbury Square House on 26 March 2025

RULING (COSTS AND PERMISSION TO APPEAL)

APPEARANCES

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

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

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

A. COSTS

1. On 6 March 2025 the Tribunal issued its judgment refusing an application by the Class Representative ("CR") to amend his collective proceedings claim form: [2025] CAT 16 (the "6 March 2025 Judgment"). This ruling concerns the costs of the application made by the CR to amend his collective proceedings claim form. They fell under two headings as they have been described by the parties: the loss of flexibility claims and the effects case. There was also another application to amend concerning the scope of the class, but nothing really turns on that for present purposes.

2. It is accepted that the CR should pay the Defendants' costs of the two applications which were unsuccessful. The Defendants seek summary assessment of their costs and rely on a schedule which puts the total at £571,516.53. In broad terms, the schedule operates on the basis that the costs of the loss of flexibility amendments and the costs of the effects amendments are the same.

3. There are a number of points made by counsel for the CR in relation to that schedule.

4. First, he observes that there are expert fees, described as Oxera fees, totalling £170,827.35 and that there is no narrative supporting those. He says that is a substantial number, and other than line items simply recording their costs, there is no further information or breakdown given.

5. Second, he points out that the hourly rates charged by Freshfields' various categories of solicitors were very much in excess of the Solicitors' guideline rates, both in respect of 2023 and 2025. All of Freshfields' current hourly rates are at least 1.5 times higher than the corresponding guideline rate. He refers to *Samsung Electronics Co Ltd v LG Display Co Ltd* [2022] EWCA Civ 466 at [6] which says that any claim above the guideline hourly rates needs to be supported by clear and compelling reasons.

6. He then raises a number of specific points about the level of fees in respect of the various periods. Counsel submits overall that there is insufficient detailed information in the cost schedule or the supporting witness statement to enable his client properly to scrutinise the fees or to enable the Tribunal itself to reach a firm view, certainly for the purposes of a summary assessment. He submits that the costs should go to a detailed assessment.

7. Counsel for the Defendants submits that the fee rates charged by Freshfields are appropriate. He submits that the case is a large and highly complex one with, on top of that, the unusual feature that it has been going on for several years and is still not approaching trial. He contends that the rates charged by Freshfields are, in the circumstances of this particular case, reasonable and that a departure from the guideline rates is justified. He relies on evidence from a partner in Freshfields to the effect that the calculation is reasonable and conservative.

8. We have reached the conclusion that it would not be appropriate summarily to assess these costs for a number of reasons.

9. First, the overall amount claimed is substantial; it covers a number of periods. It is not in our view appropriate for summary assessment.

10. Second, we do not think there is sufficient information to allow proper scrutiny of the amounts being claimed and it appears to us that there may be some force in a number of the points raised by counsel for the CR. These include the lack of information about the Oxera fees and the possible absence of any justification for rates for solicitors being well above the guidelines.

11. It also appears to us that this may be a case where the work carried out by the solicitors may be, at least in respect of some periods, on the top-heavy side in that a good deal of work seems to have been carried out at the senior level rather than being delegated further down the ladder.

12. In these circumstances, we do not propose summarily to assess the costs. We will however make an interim payment. It appears to us that there is sufficient information to allow a broad-brush approach to be taken. We will not try to

break this down in a scientific or detailed way. After careful consideration, we have decided to make an interim payment of £250,000.

B. PERMISSION TO APPEAL

13. The CR now makes an application to appeal against the 6 March 2025 Judgment. The application for permission to appeal is restricted to what is described as the "effects amendments", which concerns the proposal to amend paragraphs 37.4 and 64.6 of the collective proceedings claim form, to include an allegation that the ticketing practices of the Defendants on the London-Brighton mainline gave rise to anti-competitive effects, and therefore constitute an abuse of dominance.

14. The CR advances three grounds on which permission is sought.

15. First, that the reasoning of the Tribunal elided and confused the very different circumstances in which the loss of flexibility amendments were made from the effects amendments, and which did not apply to the effects amendments. In consequence, the Tribunal did not fairly consider the separate circumstances of the effects amendments.

16. Second, that the Tribunal's decision to dismiss the effects amendments was vitiated by an error of law through eliding the two legal meanings of anti-competitive effects, namely: one, the analysis of anti-competitive effects in determining whether there was an abuse in the alternative, to a per se or object infringement described as market effect; and, two, anti-competitive effects as the head of loss and damage (the loss effects).

17. Third, that the Tribunal failed in determining whether to give leave for the effects amendments to consider what matters will be an issue between the parties and which would already arise at trial.

18. We do not consider that there is a reasonable prospect of the appeal succeeding.

19. It is not necessary to go through each of the separate arguments set out in the skeleton argument. It seems to us, though, worth emphasising one decisive point for the purposes of this ruling: the proposed amendment to paragraph 37.4 is that the anti-competitive effects arising from the abuse of dominance, including whether and to what extent the abuse of dominance had an impact on the prices of fares purchased by class members and service levels, is one of the common issues in this case.

20. The proposed amendment to paragraph 64.6 is as follows:

> "For the avoidance of doubt, as pleaded in paragraphs 2.5 and 55 of this Claim Form and paragraph 18.a.iv of the Reply, imposition of the brand restrictions and differential pricing creates inefficiencies and is anti-competitive."

21. Each of the pleaded three cross-references in this paragraph is to the June 2017 Gibb Report to the Department for Transport relating to the GTR Franchise (the "Gibb Report"). The only pleaded reliance on the report which is relevant is as follows:

> "The Gibb report expressed concern that GTR's fare structure (in particular cheaper Southern and Thameslink trains as compared with fares enabling travel on Gatwick Express) was influencing demand in such a way that capacity was not optimally used, resulting in worse overcrowding and causing delays."

22. Therefore it appears to us that on the proposed amended pleading, the only intelligible pleading of so-called "market effects", i.e. lower service levels suffered by all passengers in the market, is the inferential reference that somehow the pricing structure resulted in "worse overcrowding" and "delays".

23. There is nothing in the proposed amendments or anywhere else in the existing pleading to suggest that a loss of flexibility, that is to say, the flexibility that limited brand ticket holders had to use other trains on the surface, amount to market effects. It is not pleaded in that way in the proposed pleadings, and it was not pleaded in that way in paragraph 18.a.iv of the Reply. As we explained in the 6 March 2025 Judgment the reference to overcrowding and delays by reference to the Gibb report is entirely separate from the flexibility issues.

24. As we explained in the 6 March 2025 Judgment, it is incumbent on the party seeking to bring forward a claim by way of amendment at a relatively late stage

in proceedings to do so in a clear way, so that the case may be properly understood by the other parties.

25. Counsel for the CR accepted that the draft amendments do not refer to any loss of flexibility as being a relevant market effect. It seems to us that the only possible market effects referred to in the existing pleading, and therefore in the cross-references contained in 64.6, are to the contents of the report we referred to, and that these are at their highest are extremely general references to delay and overcrowding.

26. However, in the skeleton in support of this application, at paragraph 29, the CR accepts that the only market effects ultimately evidenced in Davis 4 were limited to the loss of flexibility market effects. These have not been pleaded at all, as we see it, in these paragraphs.

27. Counsel for the CR contended that it was sufficient in the circumstances simply to refer, in general terms, to inefficiencies and/or anti-competitive effects, without being required to tie the matter down more specifically. We do not accept that submission. As we have said, it is essential when pleading a case by amendment at a late stage in the case to set out the case with proper clarity and particularity. Had it been intended to plead that the so-called market effects were the loss of flexibility, that would have needed to be spelt out, and it has not been done. We repeat that the only market effects referred are the entirely different delay and overcrowding.

28. We made the point in the 6 March 2025 Judgment that it was entirely unclear what in fact was said to constitute the market effects, and that, in our view, remains the case. Indeed the point is if anything clearer in the light of the acceptance of the CR that he is not advancing a case based on delay and overcrowding. For this simple and straightforward reason, we do not think that the appeal could possibly succeed. But we also consider that the three grounds of appeal advanced lack real prospects of success in the circumstances, for the reasons given in the 6 March 2025 Judgment.

29. Accordingly, permission to appeal is refused.

The Honourable Mr Justice Miles Chair	Eamonn Doran	Professor Anthony Neuberger

Charles Dhanowa, CBE, KC (Hon)
Registrar

Date: 26 March 2025