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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1258/5/7/16

Victoria House,
Bloomsbury Place,
London WC1A 2EB

21 July 2016

Before:

THE HON. MR. JUSTICE ROTH
(President)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

UKRS TRAINING LIMITED

Applicant

- and -

NSAR LIMITED

Respondent

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Mr. Tristan Jones (instructed by Berkeley Square Solicitors Ltd) appeared on behalf of the Applicant.

Mr. Gordon Wignall (instructed by Greenwoods Solicitors) appeared on behalf of the Respondent.

HEARING

1 THE PRESIDENT: Yes, Mr. Jones.

2 MR. JONES: Sir, I appear for the applicant, Mr. Wignall for the respondent. Sir, we received a
3 letter from the Tribunal floating the possibility that this question of whether or not the
4 respondent is an undertaking should be dealt with by way of preliminary issue, and both
5 parties are agreed that that would be a sensible approach. I understand from a discussion
6 with Mr. Wignall a couple of minutes ago that on that basis the respondent is content to
7 continue its undertaking until such a hearing.

8 There are a few points which flow from that, but of course, if that is the route which is
9 taken, it means that I need not address you on the application before you today.

10 THE PRESIDENT: If I can just interrupt you, I think it is sensible because, of course, if
11 Mr. Wignall persuaded me today that there is no way that the defendant was an undertaking
12 that would be that. If he did not and you then had to satisfy only that it was arguable, that
13 would leave the questions open, and of course it would then be open for the defendant at
14 trial to establish that it was not an undertaking. It does seem that we can arrange a quick
15 hearing. Of course, the defendant has taken out, or wants to take out an application to strike
16 out, but he would embrace that in a preliminary issue, and that would be heard by a full
17 Tribunal.

18 MR. JONES: Yes, precisely, Sir, and you will have seen from the various documents that both
19 parties before you have an interest in keeping costs as low as possible in these proceedings,
20 more perhaps than in other proceedings in this forum because of the nature of the parties.
21 Sir, there are a couple of points which I should pick up which flow from that. The first is
22 that Mr. Wignall has suggested - I understand this is not a *quid pro quo*, as it were- that my
23 client should give a cross-undertaking in damages, as would be given in an ordinary interim
24 injunction. Sir, we have some difficulty with that. You may have seen that we have asked
25 in correspondence for an explanation of why the respondent might suffer any damages.
26 There has not been any answer to that, apart from this morning it was explained to me that
27 in the event that Network Rail decides that the respondent should no longer carry on
28 operating the concession, then NSAR might in those circumstances incur redundancy costs.
29 We do find that somewhat hard to understand because we do not quite follow why Network
30 Rail would decide such a thing on the hypothesis which is here in play that my client loses
31 its challenge.

32 We have some difficulty with that, and we would say, Sir, it would not be appropriate to
33 give such an undertaking in those circumstances. Nonetheless, I can confirm that, if you

1 consider, Sir, that my client should do so then it would be prepared to make that
2 undertaking. We leave it in your hands on that basis.

3 THE PRESIDENT: Yes, I will hear from Mr. Wignall.

4 MR. JONES: Sir, that is the first point.

5 The second point, there will obviously be a need to set directions for the preliminary issue.
6 It may be that we should come back to that, but could I just flag one particular point, which
7 is that I am not available in September. I appreciate that is not the only question for you.
8 My client would, however, for obvious reasons because I have been involved up to now,
9 prefer me to be involved in that. On that basis, I would ask for it to be listed some time
10 from the second week in October.

11 THE PRESIDENT: I can interrupt you. You are asking for fast-track in this case?

12 MR. JONES: We are eventually.

13 THE PRESIDENT: When you say 'eventually'?

14 MR. JONES: Sir, I say eventually because----

15 THE PRESIDENT: Fast-track is not normally done 'eventually' for obvious reasons.

16 MR. JONES: I appreciate that, Sir, and we have an application for it to be allocated today to the
17 fast-track. Mr. Wignall suggested to me that that would not be necessary today because, as
18 I understand it - I should say I think I have overstated the respondent's position, but I had
19 said that they have agreed it is suitable for fast-track, Mr. Wignall has corrected me and
20 said, somewhat lower than that, they can see that it may be that they have not established
21 their position on it yet. He has suggested that that question could be dealt with after the
22 preliminary issue has been resolved. Obviously it is no longer necessary for my purposes
23 for it to be dealt with today, because the real reason I wanted it to be dealt with today, as
24 you will have seen, was so that we would not have to give the cross-undertaking in the
25 damages.

26 THE PRESIDENT: There is also the cost cap.

27 MR. JONES: Yes, although that was not before the Tribunal today, but that is what then leads to,
28 and maybe that is why Mr. Wignall does not want it allocated to the fast track.

29 THE PRESIDENT: If you are not asking for it, then I will not pursue it. I only would say that
30 when a case is being expedited in this way, whether it is formally in the fast track or just
31 expedited to have a trial ready in September, convenience of counsel has to take second
32 place.

33 MR. JONES: I appreciate that.

1 THE PRESIDENT: And this would be heard, as I said it has to be heard, by a full Tribunal, that
2 is to say getting three members together at short notice, and we have very limited
3 availability; we have offered you, I think, two alternative dates. I know that if you were
4 going for the second week in October it will not be heard in October, and we will struggle
5 to get a slot in November at the moment. We may have some dates in November, we will
6 have to make inquiries of the other members. I am disinclined to put it back beyond
7 September even if it means your client has to instruct other counsel, but it is an early stage
8 of the case, and it is clearly one there will be other competent counsel who could do it.

9 MR. JONES: Yes, Sir.

10 THE PRESIDENT: While, normally, we do try and accommodate availability of counsel,
11 certainly when fixing hearings far ahead that, I say, cannot be the priority when it is a quick
12 hearing arranged urgently and we are very limited in getting Tribunal members together.

13 MR. JONES: The other point which I should raise is that my client is considering applying to
14 amend the claim form, and I raise this now because I think it is right to highlight it, because
15 I would not want it to be said that we had somehow kept this back and then tried to do it at a
16 later stage after we had set out on a particular course.

17 It is considering amending to argue the Chapter I point, to say that if essentially the
18 respondent is not an undertaking it is an association of undertakings and its decision to
19 suspend my client is a decision of an association of undertakings which has restriction on
20 competition.

21 The reason I raise that is, of course, if that application is made and it is allowed then it could
22 conceivably mean that this proposed preliminary issue would not entirely resolve the issues
23 in the case.

24 THE PRESIDENT: Unless it is denied. Clearly it would have to expand to cover the alternative
25 allegation unless that is accepted. I do not think one can expect Mr. Wignall to respond to
26 that today.

27 MR. JONES: No.

28 THE PRESIDENT: He will need to consider it. You say you are considering amending, or
29 applying to amend, when are you going to reach your decision.

30 MR. JONES: That is why I was raising it, because one obvious solution would be to give us a
31 deadline to do that, and we can see in light of the way this is playing out that that would be
32 a sensible course.

33 THE PRESIDENT: You know a lot about the defendant now, Mr. Robertson has put in a very
34 full witness statement, so you have all the information.

1 MR. JONES: That is absolutely right, and it is that information which has caused us go back to
2 this question. Sir, we could do it within a week.

3 THE PRESIDENT: When you say you are considering doing it, do you mean you are going to do
4 it, but you have not got the draft yet, or do you mean that you are not sure whether you will
5 do it.

6 MR. JONES: I mean my client still needs to decide whether or not to do it, Sir.

7 THE PRESIDENT: Yes, I see. As you say, that does make it slightly difficult for today because
8 if you do not do it, no problem, if you do that, if it is admitted that it is an association of
9 undertakings, albeit the defence is to the alleged anti-competitive nature of the decision,
10 your justification for the decision is put forward, the preliminary issue has less force if it is
11 disputed that it is an association of undertakings then that could be embraced in a
12 preliminary issue.

13 MR. JONES: Yes, Sir.

14 THE PRESIDENT: But it means it is slightly difficult to determine it today, and at the end of
15 next week I am not here and there will not be anyone to deal with this until late August.

16 MR. JONES: In which case, Sir, we could do it more quickly.

17 THE PRESIDENT: This is Thursday morning. We will not be having a full hearing today. I
18 think I will require you to do it by - it seems to me there is no reason you cannot do it,
19 Mr. Jones, by the end of Monday.

20 MR. JONES: Yes, Sir.

21 THE PRESIDENT: I will not require you necessarily to plead it by the end of Monday, but if you
22 could plead it---

23 MR. JONES: We can, Sir.

24 THE PRESIDENT: If I say by 5 pm on Monday with an application to amend, it seems to me
25 that that application at such an early stage of the case is likely to be granted. I will give you
26 until 5 pm on Monday. Mr. Wignall, you will see the nature of the allegation. You will
27 know on Monday how it is put. You can no doubt take instructions and consider it. If it is
28 alleged in the way that has been floated, will you be able to indicate by the end of Tuesday
29 whether it is disputed?

30 MR. WIGNALL: Yes, I would hope so.

31 THE PRESIDENT: I am not saying you have to plead an amended defence, but just to inform the
32 Tribunal whether it is disputed.

33 MR. WIGNALL: Yes, Sir. The other option for the Tribunal would be to have the application to
34 amend listed at the time of the preliminary issue.

1 THE PRESIDENT: I think the amendment is likely to be allowed at this stage. I have not seen it
2 and one would need to look at it, but it normally would be. We need to know the scope of
3 the preliminary issue. As I say, if it were not disputed and if, instead, your line was, yes, it
4 is a decision of an association of undertakings, but it does not distort competition, or it is
5 within the justification, then the preliminary issue falls away to some extent. It does not
6 advance the case.

7 MR. WIGNALL: We can tell the court by Tuesday.

8 THE PRESIDENT: If you can tell us by 5 pm on Tuesday, then I think what we will do is
9 proceed on the basis that there will be a preliminary issue and I can revisit on Wednesday.
10 Wednesday is my last day here, because I am leaving two days before the end of term. So it
11 will have to be decided on Wednesday. So we will proceed on the basis that there will be a
12 preliminary issue and that issue will be - and I am not drafting off the cuff, one will need to
13 set it out - whether or not the defendant is an undertaking or an association of undertakings,
14 if that is alleged, and it will refer to the sections of the Competition Act that set out the
15 Chapter I prohibition or the Chapter II prohibition. At the moment it is s.18 of the
16 Competition Act. If you are alleging association of undertakings, then is s.2 of the
17 Competition Act 1998, something along those lines. It is not a difficult issue to crack.

18 MR. JONES: Yes, and I think it may be - I suspect Mr. Wignall will want to add that it may be
19 helpful to clarify in respect of the functions exercised in this case.

20 THE PRESIDENT: Yes, you are quite right. The other possibility, I think, but I just do not
21 know, when you said after mid-October, is towards the end of the first week, the week
22 commencing 3rd October. Are you saying that is no good either?

23 MR. JONES: Sir, I would be able to do that, Sir.

24 THE PRESIDENT: You would, because you said mid-October.

25 MR. JONES: I did say mid-October. I am busy in September, and I was leaving myself some
26 time to prepare, but, yes, the end of that week would be better than September.

27 THE PRESIDENT: I cannot offer it now, but we will investigate whether that is available, the 6th
28 and 7th, and let you know. Mr. Wignall, when giving dates to help Mr. Jones, it is important
29 you should be free as well. Is that a problem for you?

30 MR. WIGNALL: I do not know at the moment, I am afraid, but I think that it is not a problem.

31 THE PRESIDENT: We will liaise with you and your respective Chambers later today. So we
32 have three alternatives at the moment, 20th/21st, 26th/27th, and I do not know whether we can
33 offer the 6th/7th, because I only know my availability and we have not checked with the
34 other, as it were, candidates to be the other two members of the Tribunal.

1 MR. JONES: Sir, other directions for the preliminary issue: there is a question of disclosure and
2 a question of witness evidence. On disclosure, Sir, we have not put together a full list, and
3 indeed we would need to liaise with the respondent to see what documents may be relevant,
4 they will know better than us.

5 I do have a few documents which we know will be relevant. One is the concession which
6 was granted by Network Rail to NSAR to operate the RTAS scheme, which is mentioned in
7 the documents. We have a memorandum of understanding but we do not have a concession
8 which----

9 THE PRESIDENT: The memorandum of understanding is quite recent, and the concession goes
10 back to 2012.

11 MR. JONES: Yes, I think that is right, Sir.

12 THE PRESIDENT: So the agreements between NSAR and National Rail from 2012 whereby
13 NSAR carries out the quality assurance.

14 MR. JONES: Yes. There is that category of documents. There is then accounts and obviously
15 we see the statutory accounts are publicly available, but there is this question of how
16 income is treated and allocated, because one of the points which is made in Mr. Robertson's
17 statement from the respondent is that it is essentially a self-financing scheme. We would
18 like to see the documents which demonstrate that.

19 THE PRESIDENT: The last two years would be sufficient.

20 MR. JONES: Yes, Sir. The third category which occurs to us is documents relating to
21 membership or accreditation and which show the benefits thereof, so there may be
22 documents which talk about the benefits to training providers of being a member and then
23 having access to services such as accreditation, and any documents of that nature we think
24 would be relevant.

25 THE PRESIDENT: Your client, because it pays a membership, became a member, indeed.

26 MR. JONES: That is right, Sir.

27 THE PRESIDENT: So it will have some prospects, presumably, of becoming a member itself.

28 MR. JONES: If it has any, it will disclose them, but if there are any others then we say they
29 should also be identified.

30 THE PRESIDENT: It is a slightly vague category, that is why I am questioning you. I do not
31 know if NSAR publishes an annual report, other than a sort of formal report and accounts
32 then it has this membership status, whether it publishes a report of its activities, or
33 something annually to its members – Mr. Wignall, does it? That is not in the bundle, I
34 think. It struck me that it might do that. Do you know?

1 MR. WIGNALL: Can you give me one moment, please?

2 THE PRESIDENT: Yes.

3 MR. WIGNALL: (After a pause) There is no such report of the nature floated in front of us, Sir.

4 THE PRESIDENT: I think if one sent the material that is sent by NSAR to someone who is
5 interested in becoming a member.

6 MR. WIGNALL: Would you give me a moment again, I am sorry?

7 THE PRESIDENT: Presumably there is something, if somebody writes in.

8 MR. WIGNALL: (After a pause) Yes, the representatives of my client behind me, they are
9 content to provide any such material they have.

10 THE PRESIDENT: Yes, thank you. Yes?

11 MR. JONES: Those are the documents which we would like to see. Witness evidence, there is,
12 of course, the statement from Mr. Robertson, it may be that NSAR wants to put in another
13 statement I do not know.
14 Evidence from my client is unlikely to be critical but, of course, my client has put in some
15 general evidence about the operation of the scheme, and so we would therefore ask for an
16 opportunity to put in a witness statement.

17 THE PRESIDENT: What I was proposing to order is that the witness statements that have been
18 put in stand as evidence-in-chief, and you can supplement an additional witness statement,
19 but I do not see any reason for either Miss Brown or Mr. Robertson to have to set it out all
20 again – it is there, the exhibits are there, they can stand as their evidence-in-chief,
21 supplemented if necessary.

22 MR. JONES: I suspect we would like the opportunity to put in a supplementary document.

23 THE PRESIDENT: You will have that, but you need not repeat what is there because that will
24 stand.

25 MR. JONES: And, Sir, just for the avoidance of doubt, we do not see this as a point requiring
26 expert evidence, it is a legal question.

27 THE PRESIDENT: I am not sure it will even need any oral evidence.

28 MR. JONES: That may be right, Sir.

29 THE PRESIDENT: There are some other documents which I think should be disclosed. They
30 concern your client, Mr. Wignall. First, the NTAR Joint Venture Agreement, that is referred
31 to by Mr. Robertson at para. 83 of his witness statement. Next, and this is for both parties
32 to provide, and it may be more for Mr. Jones, your client to provide, but I think we would
33 like clarification of the arrangements made by Network Rail to ensure the competence of
34 training schemes – I think there was a precursor to Sentinel – in the period 2010 to 2012. In

1 particular, what arrangements, if any, there were with Achilles, which I take it is 'Achilles
2 Information' that is referred to by your client.

3 It may well be that NSAR does not know that because it is before NSAR got involved, but
4 your client will know something about it because it was, I think, accredited in the period
5 2010 to 2012.

6 MR. JONES: Yes, Sir, and, indeed, you may have seen my client is involved in some industry
7 Bodies, so we will do what we can to get that information, but we may need to ask the
8 respondent's help as well.

9 THE PRESIDENT: You may need to ask Network Rail.

10 MR. JONES: And we may need to do that.

11 THE PRESIDENT: The Tribunal has power to request a document from a third party under Rule
12 56. I do not think there is any need to call Network Rail to give evidence, but I would be
13 minded, if it were necessary, to make an order that Network Rail answer any questions just
14 explaining what the arrangements were at that time. Also, and again these are probably
15 public documents, so it is not a matter for disclosure, but they should be obtained and made
16 available, which is Network Rail's licence from the ORR, any annual report of Network
17 Rail in the years 2015 and the present year if there is one; and thirdly, the Network Rail
18 Framework Agreement with the Department for Transport, which I think is 2014.

19 As you saw, my view was two days should be sufficient for this. No one has a problem
20 with that, I take it? It is largely uncontested fact, I think, and law.

21 Although we do not have a precise date, they are all in the same sort of broad area, so it
22 would be appropriate, I think, to give some directions for a timetable for this very limited
23 disclosure and for supplementary witness statements. I am conscious, of course, that
24 August is soon upon us but the disclosure to come from NSAR, which is fairly limited,
25 when can that be done, Mr. Wignall?

26 MR. WIGNALL: Would you give me one moment?

27 THE PRESIDENT: Yes, of course.

28 MR. WIGNALL: (After a pause) There are some holiday difficulties.

29 THE PRESIDENT: Yes, I understand.

30 MR. WIGNALL: If we were to supply them after about four weeks, would that suit the Tribunal?

31 THE PRESIDENT: Yes.

32 MR. WIGNALL: Towards the end of August?

33 THE PRESIDENT: Yes. They should not affect any evidence coming from the claimant, so if
34 we said by Friday, 26th August.

1 MR. WIGNALL: Give me one moment. (After a pause) Yes, thank you, 26th is fine, Sir.

2 THE PRESIDENT: Then, supplementary witness statement, if any, by 9th September?

3 MR. WIGNALL: Yes, thank you.

4 THE PRESIDENT: And that is for both sides.

5 MR. WIGNALL: While (a) I am on my feet, and (b) we are talking about witness material, it is
6 possible that Network Rail will want to put in a witness statement. If Network Rail does
7 want to do that then that would be a useful and convenient moment for it to adduce the
8 material to which you have been referring.

9 THE PRESIDENT: It would not be Network Rail putting it in, it would presumably be your
10 client putting in a witness statement from Network Rail because they are not a party. So the
11 same date applies. If you are, through your solicitors, dealing with Network Rail that can
12 be done then. I do not think it is needed earlier. I have no reason to suppose your client
13 will have documents relating to Network Rail's dealings with training schemes before your
14 client got going, it would be surprising, so the other matters you can disclose. The public
15 documents, I imagine, can be obtained from Network Rail or downloaded from the internet,
16 such as the licence, and so on. These are all usually publicly available.

17 MR. WIGNALL: The publicly available documents, yes, and the arrangements by Network Rail
18 from 2012 would be----

19 THE PRESIDENT: Your client, if they have the material, the same date for disclosure will apply
20 to your client if they have details of the arrangements for authentication between 2010 and
21 2012.

22 MR. JONES: Yes.

23 THE PRESIDENT: Some documents concerning that. If I can just say that skeleton arguments
24 and bundles, seven days before the start of the first day of the hearing, which at the earliest,
25 the first possible date is the 20th, so that could be the 13th, with your witness statements on
26 the 9th. Is that too tight?

27 MR. JONES: Sir, I do not think that gap is too tight. If I am representing my client on
28 6th October, I do wonder whether three days for skeleton arguments would be sufficient,
29 because, as I say, I am occupied in September. I am in your hands and if seven days is
30 necessary then we will do it within seven days.

31 THE PRESIDENT: I can say five days, but we do read quite thoroughly. The two other members
32 of the Tribunal may not be lawyers, so absorbing references to case law, and so on, takes a
33 bit more time for them.

1 MR. WIGNALL: My only modest gloss, Sir, is whether it would be possible to have paginated
2 bundles before the skeletons are submitted?

3 THE PRESIDENT: That would certainly help, because you may cross-refer. That would be for
4 your side?

5 MR. JONES: Yes, Sir.

6 THE PRESIDENT: So witness statements on the 9th. Assuming there is not a great deal volume
7 of additional evidence - I do not want you all to have to re-copy everything we have already
8 got - I will not at the moment require you to re-lodge the bundles that we have got, but there
9 will be some additional bundles. There has also to be a defence pleaded, and I am coming
10 back to that, because this is now a trial, and then potentially replies. If we say bundles to be
11 lodged by when, Mr. Jones, it is your solicitors doing it?

12 MR. JONES: Yes, Sir, if it is simply the supplementary material then a week after the witness
13 statements perhaps?

14 THE PRESIDENT: The 16th, yes. And authorities bundles can follow with the skeletons, when
15 you can do a joint bundle of authorities.

16 MR. JONES: Sir, will the Tribunal need additional copies of the existing bundles for the other
17 members of the Tribunal?

18 THE PRESIDENT: I do not know how many copies we have got. The answer is we will, but we
19 will liaise with you about that, I will not make an order about that.

20 Can I go back, Mr. Wignall, to the defence? The defence can be confined to the preliminary
21 issue, so you do not have to deal with all the other matters, but we do need a defence on
22 that. If the claim is going to be amended, then the defence will cover the amended claim,
23 and that we are going to find out about by the end of Monday. What would be the time for
24 a defence? When can you plead a defence? What are your holiday arrangements?

25 MR. WIGNALL: I have none at all at the moment, Sir.

26 THE PRESIDENT: I think we do want to get that. So if we say defence by 12th August?

27 MR. WIGNALL: Certainly.

28 THE PRESIDENT: I doubt a reply is going to be needed, Mr. Jones, but a reply, if any, because
29 this is only on the preliminary issue, the defence, by when? What is your position?

30 MR. JONES: The end of August, Sir, two weeks after the defence?

31 THE PRESIDENT: 26th August?

32 MR. JONES: Yes.

33 THE PRESIDENT: Mr. Jones, have you supplied a copy of the claim form to the CMA?

34 MR. JONES: No, Sir, we will do that.

1 THE PRESIDENT: Rule 33(7), you must do that. Is there anything else?
2 MR. JONES: Sir, there is the outstanding issue for you to decide about whether my client should
3 give an undertaking.
4 THE PRESIDENT: In terms of directions?
5 MR. JONES: No, Sir.
6 THE PRESIDENT: It is proposed that the undertaking will continue in the same form - is that
7 right, Mr. Wignall - as the order?
8 MR. WIGNALL: It is, yes.
9 THE PRESIDENT: What is the position on cross-undertakings. You were not, I know, pushing
10 for the period until today. We are now looking through to, effectively, judgment, or
11 possibly we may announce our decision at the end of the hearing, but it will clearly be a
12 reserved judgment. What do you say about that?
13 MR. WIGNALL: It is true that I would find it difficult to quantify the nature of any loss which
14 the defendant organisation might suffer. On the other hand, we are, one might say, in rather
15 uncharted waters. There is the possibility that Network Rail might choose to take auditing
16 an assessment back in-house. That would mean the likelihood of redundancies, so there is a
17 potential loss there.
18 THE PRESIDENT: Why would they do that if you are successful? The cross-undertaking only
19 arises if it turns out that your undertaking to delay any suspension is given unnecessarily,
20 because you were entirely right.
21 MR. WIGNALL: I quite see the force in that, but we are not party to all the workings of the mind
22 of the officers of Network Rail, I am afraid. I do know there have been discussions in the
23 past in any event with Network Rail, and Network Rail have suggested there are
24 circumstances in which they would want to take this function back in-house. They are very
25 nervous, as I understand it, about the simple fact that these proceedings exist. One just does
26 not know. I am just speculating, but it may be they think that if there is this claim, then
27 there are further claims, whatever the prospect of success on anybody's view, that
28 nervousness on their part might cause them to take assessments back in-house.
29 THE PRESIDENT: Yes, it might cause them to think, "Thank goodness we are in-house", if
30 there are lots of claims.
31 MR. WIGNALL: There may be losses with other contractors and suppliers, other trainers,
32 assessors, who have entered into arrangements with NSAR. We have not examined all the
33 possible details, but we would be disappointed if there is a continuing undertaking at least
34 until the judgment is given.

1 THE PRESIDENT: What is your position on the fast-track proceedings, because it has an impact
2 on the cross-undertaking?

3 MR. WIGNALL: Our reservation about the fast-track matter is indeed the cap on the recoverable
4 costs.

5 THE PRESIDENT: Recoverable costs, yes.

6 MR. WIGNALL: We would like to see the matters dealt with quickly, but the provision that costs
7 be capped at this stage is, we say, too early. It may be that the Tribunal dismisses this part
8 of the claim in strong terms, and in those circumstances we would think it unfair that our
9 costs are limited, especially since it would seem that the costs are likely to have to be
10 disseminated amongst all the other trainers and assessors.

11 THE PRESIDENT: Are the costs likely to be enormous? You may know from the first cost
12 capping decision, the cap that is placed looks at the costs budget and has regard to that to
13 avoid unfairness to defendants. Costs capping does not mean that you get very limited
14 costs. It just stops them, as it were, going out of control. It works both ways. It is in your
15 client's interests as well.

16 MR. WIGNALL: Of course.

17 THE PRESIDENT: That is not really the basis on which we decide whether to put something in
18 the fast-track. The basis for deciding whether something goes in the fast-track is whether
19 the case, as such, in terms of its time estimate, complexity, and so on, is one that can be
20 dealt with in the fast-track. This would be two stages. We have got a preliminary issue, we
21 have a later issue, and your suggestion, as I understand it, is that that should be held over
22 until after determination of the preliminary issue - is that right?

23 MR. WIGNALL: Yes. I appreciate that would be unusual, but the preliminary issue has a
24 considerable degree of complexity itself. Once that is dealt with then one can see that the
25 fast-track procedure would be very beneficial to both sides.

26 THE PRESIDENT: Yes.

27 MR. WIGNALL: Our preference is to wait until the end of the preliminary issue and then to
28 reconsider the matter.

29 THE PRESIDENT: Mr. Jones, I think that has some force, that it would be sensible to review
30 after the preliminary issue because then one will know the sort of things the Tribunal needs
31 to know in deciding whether or not to go fast-track. Assuming the case goes on, and you
32 succeed on the preliminary issue, as you of course tell me you will, then how many
33 witnesses are needed for the main hearing, does it involve expert evidence, all sorts of

1 things that we do not know and will have to consider which are relevant to the
2 determination of whether it should be fast track and how long the trial would be.

3 MR. JONES: Yes.

4 THE PRESIDENT: So, I think it is preferable to delay that. If it is delayed then the provisions
5 under Rule 68, about capping cross-undertakings do not apply, I think that the risk to your
6 client, Mr. Wignall, himself indicated is very unlikely to materialise, and it is a short period
7 as well, but to have that protection there does seem right in principle.

8 MR. JONES: Sir, the provisions of Rule 68, of course, would not be in play anyway because we
9 are not making an injunction so you are not ordering an injunction. The legal position is the
10 same as at the last hearing at which, of course, an undertaking was given by the respondent
11 but no undertaking by my client. So, that said, it is entirely a matter for you and I
12 explained, my client, for reasons I have given does not see that it is necessary. But, my
13 client is prepared to give one and----

14 THE PRESIDENT: I think I will say that your client should give a cross-undertaking in damages
15 for the undertaking. While we are on the Rules, perhaps bear in mind I think you referred in
16 your skeleton argument to Rule 24, I think the application for an injunction is actually under
17 Rule 68 not 24, 24 deals with appeals. I just mention that in case it arises again with the
18 hearing.

19 You can draw up, I think if the undertaking that you are getting – I am looking at the
20 previous order – is it pending the determination of the preliminary issue or further order,
21 would that be right, Mr. Wignall? If you look at the terms of the undertaking after----

22 MR. WIGNALL: Yes.

23 THE PRESIDENT: So, pending the determination of the preliminary issue or further order, and
24 there will be a cross-undertaking in the usual form from the applicant or, now, the claimant.
25 If we draw up that order and we can send it to you, perhaps, first in draft for you both to just
26 consider, I hope by the end of the week. If you have any comments to make, they can be
27 made at the beginning of next week.

28 MR. WIGNALL: Sir, there are two matters I would like to canvas. The first is the actual
29 definition of the ‘preliminary issue’, and whether the Tribunal would be content to define
30 the precise nature of the preliminary issue. It is difficult to see that it would really be a very
31 complex process.

32 THE PRESIDENT: We will. We cannot define it precisely until we have had your response, and
33 until Mr. Jones has clarified any application to amend and your response at 5 pm on
34 Tuesday, but we will, because we will draw up the order. So, when I said “by the end of the

1 week” we will have to leave the definition of the preliminary issue to be inserted in it next
2 Wednesday.

3 MR. WIGNALL: Thank you. The other matter is the matter of dates. You will not be surprised
4 to hear, Sir, that the defendant is concerned about the matter drifting on, it does have
5 concerns about the standards of assessment on the part of the claimant. It may be, however,
6 that we can accommodate Mr. Jones himself, but I would like a very brief discussion with
7 him, and I wonder if you would----

8 THE PRESIDENT: Yes. First, I am not sure we can offer those dates that I mentioned in early
9 October and we would not put it back further.

10 MR. WIGNALL: We certainly would not want that.

11 THE PRESIDENT: If Mr. Jones cannot do it, so be it, his clients will have to instruct someone
12 else.

13 MR. WIGNALL: Let me be entirely open, and I have not mentioned this to Mr. Jones I do not
14 think; if the claimant felt able to provide some further reassurance by way of an
15 undertaking, for instance, as to the current training position of – the gentleman I think is
16 known as the main verifier, for instance by way of a process of assessment by another
17 organisation which is referred to us, it may be that undertakings of that nature would help us
18 see that the matter could be heard in early October if the Tribunal can accommodate
19 everybody. I have not mentioned that to Mr. Jones, but that is the thinking behind the
20 defendant, because it would be reluctant to have a training assessment provider in a market
21 – to use that expression – if it has concerns about its reliability.

22 THE PRESIDENT: I understand that. The dates we have been talking about, 20th, 26th 27th, and I
23 think, is it 6th/7th, so there is not a huge difference.

24 MR. WIGNALL: We would like 21st/22nd.

25 THE PRESIDENT: It is 20th/21st.

26 MR. WIGNALL: I am sorry, 20th/21st, we would much prefer the earlier dates. It may be that we
27 can accommodate Mr. Jones personally, but I would like to have a brief discussion with him
28 to see if there is some form of reassurance that can help us.

29 THE PRESIDENT: Would you like me to rise?

30 MR. WIGNALL: It would be convenient, I think, if you could give us 10 minutes.

31 THE PRESIDENT: Certainly. Shall I come back about half past eleven, or would you like
32 longer?

33 MR. WIGNALL: Thank you.

34 (Short break)

1 MR. JONES: I am afraid, Sir, that that has not been a productive break. Could I explain, in brief,
2 why? You will have picked up that one of the essential complaints of my client in the case
3 is that the rules do not necessarily provide for a fixed term suspension. The relevant rules
4 provide for a suspension during which time my client could seek to address any identified
5 shortcomings. There has, in light of that, been open correspondence from my client, I am
6 told dated 12th July, in which they sought to enter into a discussion about what sort of steps
7 would need to be taken, and so that has not been engaged with, but my client remains keen
8 to follow that process, so there is certainly no unwillingness on my client's part to look at
9 steps which should be taken.

10 The problem with the steps which have been suggested, there is no 'in principle' objection
11 but Mr. Wignall's clients have now suggested some steps and, frankly, they involve a series
12 of practical questions which would need to be worked out, about precisely who is supposed
13 to be doing what and when. Moreover, these are things which would, ordinarily, be done
14 confidentially not in the glare of a court hearing.

15 So, for that reason, we are not prepared to undertake to do the things which were asked by
16 way of undertaking. Where that leaves us is that we are essentially back in your hands as to
17 the listing date, whether it be September or October.

18 I say that really a couple of weeks cannot make any real difference.

19 THE PRESIDENT: I do not think it does make a huge difference, but I do not know if October is
20 possible, we have started making inquiries but we have to hear back from the potential
21 members. If it is available, and it saves your client changing counsel, I do not think two
22 weeks is going to make a substantial difference, but if it is not, it is not.

23 MR. WIGNALL: Sir, from the defendant's perspective, the notion of providing this undertaking
24 which, in fact, allows the claimant to trade without limitation is stretching the defendant to
25 the end of its tolerance.

26 THE PRESIDENT: Yes.

27 MR. WIGNALL: You will remember, Sir, that there was a police raid on 1st July 2015, and some
28 officers of the claimant, as I understand it, are still on bail. Frankly, the defendant has great
29 concerns about the quality of training assessments that are being provided. At the same
30 time, they have certain obligations to those who are said to be competent to work on the
31 Network Rail infrastructure. Two weeks may not seem like a long time but, as I say, the
32 defendants really are at the end of their tolerance. There is the risk that Network Rail will
33 take the matters back in-house.

1 Without some real reassurance that something could be done to qualify or test the ability of
2 those who are assessing these courses there is a real fear that there are providers, not
3 necessarily these, who are simply accrediting people and letting them have access to
4 Sentinel, whereas they have not even done any training. In those circumstances, although it
5 may be a matter of regret on a professional level from me, the defendant wishes to have the
6 earliest possible date.

7 THE PRESIDENT: I understand that, but if you had said they are not prepared to continue the
8 undertaking we would have heard the matter today, but given that it may be that, you say,
9 you are stretching your tolerance for the matter to be heard in late September, I do not think
10 that an additional two weeks, given the totality of the period, is going to make an
11 appreciable difference. As I said, if it can be 6th/7th, but it may well be that it cannot, so it
12 may be an academic discussion anyway. I did say, I think, that there are three potential
13 candidates, as it were, to provide the other two members of the Tribunal, we have
14 established in the short break that one of them is not available, so we are down to two, so
15 we just do not know.

16 MR. JONES: Sir, could I raise this one final point, by way of a marker. My learned friend stands
17 before you and makes some quite serious allegations about what he says now are his client's
18 safety concerns. None of that is in evidence. If they were genuine concerns, one would
19 have to ask why, a month ago, did his client agree to extend the undertaking.

20 THE PRESIDENT: I can see all that, but we are not hearing the substance of the case now and
21 whether or not the concerns that led to the suspension and are in the decision of suspension
22 are what are said to reflect the serious concerns, but they have been prepared to grant an
23 undertaking until today and, as I recall, there was considerable goodwill in listing for today.

24 MR. JONES: Sir, the reason that I said I was raising a marker is this: I raised with Mr. Wignall at
25 the outset of this, what is going to happen in September if my client wins, because we have
26 not had the injunction application today, I was ready to argue it – I am ready to argue it –
27 and what was floated was that we should continue to operate on a pragmatic basis. If it is
28 now being said, with no evidence, all of a sudden we have this major safety concern, then
29 one does wonder what is the point of us not having the hearing today. I am not now trying
30 to reopen it but I put it as a marker, because if, in September, we end up having to have the
31 hearing that we could have gone ahead with today, and we have all incurred costs to have
32 today, and we have to have another hearing----

1 THE PRESIDENT: Well, a different hearing, because the evidence today is more directed from
2 the defendants to the question of whether or not, as it were, they are within the scope of
3 competition or at all. That is the defence they have put forward.

4 MR. JONES: Yes, that was the only point they have chosen to take, Sir. They could have taken
5 any number of points.

6 THE PRESIDENT: Indeed, but therefore if, at the end of the hearing of the preliminary issue,
7 when it is decided, if it is decided in their favour then that is the end of the case in this
8 Tribunal. If it is decided in your favour, then presumably if an undertaking is not offered
9 you will ask for your injunction.

10 MR. JONES: As to the injunction, we will also be having to reconsider the cost of the
11 proceedings to date, because one would wonder in those circumstances why, if it is going to
12 be objected to on safety grounds, why we could not have that argument today.

13 THE PRESIDENT: As I say, that issue is not before us today; all I am concerned with is fixing
14 the listing, and it is obvious to everyone that if the preliminary issue is decided in your
15 favour, either the undertaking is then continued or renewed, or you will seek an injunction,
16 that is clear. So we will let you know, it may not be today but I would hope tomorrow,
17 when this will be listed. We will send you shortly a draft of the order, omitting the
18 definition of the preliminary issue for which we await your amended pleadings and Mr.
19 Wignall's response.

20 MR. JONES: I am grateful, Sir.

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