Neutral Citation Number: **[2019] EWHC 2922 (TCC)**

Case No: HT-2019-000158 A v B, HT-2019-000160 A v B, HT-2019-000173 A v B, HT-2019-000187 A v B

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: **30 October 2019**

2019 Rail Franchising Litigation
Before:

Mr Justice Stuart-Smith

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Between:

Stagecoach East Midlands Trains Limited and others	**Claimants**
- and -	
Secretary of State for the Department of Transport	**Defendant**
-with-	
First Trenitalia West Coast Rail Limited and others	**Interested Parties**

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Mr Philip Moser Qc, Mr Joseph Barrett and Mr Jack Williams (instructed by Stephenson Harwood LLP) for the Arriva Claimants
Mr Tim Ward Qc (instructed by Herbert Smith Freehills LLP) for the Stagecoach Claimants
Mr Jason Coppel Qc and Mr Patrick Halliday (instructed by Ashurst LLP) for the WCTP Claimants

Mr Rhodri Thompson Qc, Ms Anneli Howard and Ms Niamh Cleary (instructed by Eversheds Sutherland (International) LLP and others) for the Defendant

Ms Valentina Sloane Qc (instructed by Burges Salmon LLP) for the FTWC Interested Party

Hearing dates: **30th October 2019**

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APPROVED RULING

Mr Justice Stuart-Smith **Wednesday, 30 October 2019**
(14:09 pm)

Ruling by **MR JUSTICE STUART-SMITH**

MR JUSTICE STUART-SMITH:

Introduction

1. The background to this litigation is well known. From the outset, all parties have emphasised the desirability of bringing matters to trial as soon as reasonably possible and very great efforts have been made on all sides to enable that to happen. The trial is fixed to be heard for three weeks in January 2020. The defendant now applies to adjourn the trial and vacate the trial date. The claimants resist the application to vacate the trial date, but they recognise that dealing with all liability issues would not be feasible by January. They therefore propose that the January trial period should be used to determine what may broadly be described as the pensions issues, leaving other grounds of challenge to the defendant's decision to disqualify their bids over to another date.

Principles

2. The general principles when a party applies to adjourn a trial date are well-known and are conveniently summarised at paragraphs 7 to 9 of *Elliott Group and others v GECC UK and others* [2010] EWHC 409 (TCC), which I do not need to read out again here, save for paragraph 9 where Mr Justice Coulson, as he then was, said:

"In essence, on an application of this sort, the court is faced with a balancing exercise between, on the one hand, the obvious desirability of retaining a fixed trial date which promotes certainty and avoiding any adjournment which can only add to the costs of proceedings and, on the other, the risk of irredeemable prejudice to one party if the case goes ahead in circumstances where that party has not had proper or reasonable time to prepare its case."

3. It also axiomatic that "parties and the court have a legitimate expectation that trial fixtures will be kept", and that there is a heavy onus on a party seeking an adjournment to justify it as regards his own position, that of other parties to the litigation, and that of other litigants in other cases before the court.

The Present State of the Rail Franchising Litigation

4. The trial date was fixed when two of the franchise competitions that are subject to challenge, namely for the South Eastern franchise and the West Coast franchise, were still "live" in the sense that no decision had been taken by the defendant to contract with one of the non-disqualified bidders. The fact that the claimants each sought orders framed in a number of different ways that would have the effect of quashing the process adopted by the defendant and specifically of quashing his decision to disqualify them was a major consideration behind the urgency which all parties, including the defendant, pressed upon the court as justifying expedition and an early trial date. In June 2019 the defendant strongly encouraged the court to list the trial in November 2019, though that has proved not to be feasible.

5. The position has now changed materially because the defendant has cancelled the South Eastern competition and he has awarded the West Coast franchise to First Trenitalia, who are currently engaged on transitional work to take over the contract. WCTP sought an interim injunction to prevent the defendant from entering into the agreement with First, but their application was refused by Cockerill J because of WCTP's unwillingness to offer an adequate undertaking in damages.

6. The position has changed since the trial date was fixed in other respects too. First, a process of early specific disclosure applications was necessary because the defendant had failed to give early disclosure voluntarily, a failure which I described when ruling on costs as grossly inadequate.

7. Second, the defendant's application to strike out part of the claims failed after a two-day hearing. Permission has since been granted to the defendant to bring an expedited appeal which is listed to be heard over another two days in late November.

8. Third, the court having on 28 June 2019 ordered that there should be standard disclosure on 7 October 2019 as one of the steps towards trial in January 2020, the defendant sought and obtained a major concession at the hearing on 18 September which limited the scope of disclosure he was required to give. That concession was sought and obtained on the express ground that if the relief was not given, the trial date would be jeopardised because the defendant did not have the resources to comply with the order for standard disclosure until about the second week of November.

9. Fourth, in the event, the defendant gave some of the reduced disclosure on 7 October, with additional tranches being given in the period to 23 October 2019. It appears that the omissions were at least in part the result of human error in the carrying out of the defendant's reduced disclosure obligations. According to Mr Gilliam's seventh witness statement, the defendant has disclosed about 24,000 documents. The claimants have disclosed a lesser quantity. These numbers, though large, are by no means unusual in the context of significant commercial litigation in general or expedited claims in particular.

10. Fifth, the claimants have made amendments to their particulars of claim in the light of documents disclosed by the early disclosure process. To the extent that they make amendments relating to pensions, the amendments are essentially adding particulars to the existing claims, the core of which has been known since May or early June. However, Arriva has introduced substantial amendments expanding the scope of its challenge to the scoring of its bid and that of Abellio, and WCTP has introduced a new challenge to the scoring of its bid.

11. In briefest outline, the remaining steps to be undertaken are the preparation of witness statements and expert evidence and preparation for trial, which involves the orderly marshalling

of those documents which the parties consider necessary for inclusion in the trial bundle. I am told that there is agreement that there should be an electronic bundle, a decision which I fully endorse, not least because it will render document management during preparation and trial infinitely more efficient.

The Defendant's Application

12. The defendant's application is supported by the sixth and seventh witness statements of Mr Gilliam and the third witness statement of Ms Oudahar. It is based on the stated premise that the claimants' claims are now merely claims for Francovich damages. The primary reason given by the defendant is that it does not consider that it will be possible to maintain the existing timetable without compromising the fair determination of the case, for a number of reasons. First, it is said to be the scale of the disclosure it has had to give which is said to have occupied all of its available resources up until 14 October 2019. Second, it is said that the wide-ranging nature of the claimants' allegations requires the continued involvement of senior members of the defendant's external legal team, which has diverted them from other tasks. Third, it is said that there has been substantial amendment of the claimants' claims, as I have briefly described above. Fourth, it is said that the amendment of the non-pension claims requires the defendant to identify additional witnesses. Fifth, the scale of the issues in disclosure imposes an enormous burden on the defendant in the preparation of witness evidence and expert evidence. As a matter of fact, the claimants notified the defendant with a detailed draft of the issues to be considered by the experts on 25 October, a week ahead of the time required by the court's orders. Sixth, the defendant points out that it must prepare for the appeal to be heard on 20 and 21 November.
13. The defendant has evidenced specific examples of the long working hours being undertaken by counsel and more general evidence about the burdens on the 16 solicitors spread across three firms who are managing the litigation and those working in the Department. In summary, it submits that:

"The defendant's legal team has been working excessive hours for months on end. The same applies to the members of the Department who provide instruction in this litigation."

14. Turning to the steps to be taken to bring the case to trial:

    a. Witness statements. Mr Gilliam says that the defendant anticipates calling 15 to 20 witnesses. This number is the assessment if all liability matters fall to be decided. The number for pensions issues is said to be between two and seven. The defendant's evidence makes clear that a Mr Baghurst will be the main witness on pensions issues, though he is unlikely to be the sole witness and will need assistance from others. Ms Oudahar says that proofing Mr Baghurst is underway and has been for some considerable time. The defendant's written submission is that preparing witness statements will require the review of the parties' combined disclosure of 70,000 documents, though it is clear on the defendant's evidence as clarified by Mr Gilliam that this is a major exaggeration, for two reasons. First, the 70,000 itself is exaggerated; second, it is absurd to think that a witness or witnesses either could or should review all disclosed documents. What is required from a witness is their admissible factual evidence in relation to any genuinely material documents about which they can give proper admissible factual evidence. Witness statements are due to be exchanged on 15 November 2019;

    b. Expert evidence. It appears from the defendant's submissions that no expert has yet been appointed to act on his behalf. This is a surprising state of affairs, given that the pensions issues have been in play for a considerable time and permission for expert evidence was given on 1 July with a direction for service by 11 December 2019;

    c. Trial preparation. The defendant points out that the trial date is only six weeks after reply statements and four weeks after the exchange of expert evidence. The defendant submits that trial bundles would need to be with counsel by the end of November, which

is not achievable as things stand. The gist of the submission is that there is insufficient time to prepare properly for trial, not least because of the interpolation of Christmas and New Year holidays.

d. ADR. The defendant submits that extending the time to trial will give greater opportunity for exploring ADR.

15. As a separate point, the defendant submits that three weeks is inadequate time to try all issues. This is effectively conceded by the claimants. The concession appears to be appropriately made. The defendant's final position is that the January trial date should be vacated and that liability issues should be split with pensions-related liability issues tried first over three weeks, later in 2020, and other liability issues, if still live, even later in the year.

16. In response, the claimants largely speak with one voice:

a. First, they assert that the January trial period can and should be used for pensions-related liability issues. These issues are submitted to be within a relatively narrow compass, readily isolated for a coherent trial of issues and within the power of the parties to prepare adequately for a fair trial;

b. Second, they accept that other liability issues will have to go off, not least because three weeks is insufficient time for all liability issues to be tried. WCTP makes a virtue of this by pointing out that the other liability issues are not common to all parties and would require some wasteful attendance if heard all at the same time. On behalf of First Trenitalia, Ms Sloane points out that even if WCTP succeeds on pensions, they may lose on one or more of the other grounds for WCTP's disqualification so that a split trial as contemplated would not be determinative. Mr Coppel does not agree, but the position is at least arguable. However, if the claimants lose their pensions challenge, the subsidiary issues fall away as their disqualification was justified;

c. Third, the claimants submit that there has been no change in circumstances that justifies a further relaxation in the timetable laid down by the court in June. Specifically, they submit that the scope of disclosure was foreseeable in June and has not changed and that in any event disclosure turning out to be more burdensome than expected is not a good reason for adjourning a trial, relying on paragraph 14 of *Elliott.* Furthermore, disclosure is now at least substantially complete and was in any event much narrower than contemplated in June because of the major concession in September reducing the width of the defendant's disclosure obligations. Both these points, in my judgment, are well made, though they are far from decisive on their own;

d. Fourth, the claimants are critical of the defendant's management of the litigation, which they say has imposed self-inflicted burdens. In this regard, they cite the defendant's inadequate response to earlier requests for disclosure which necessitated contested applications, which the defendant substantially lost; the bringing and subsequent abandonment of applications for specific disclosure from the claimants; diversion of resources into the unsuccessful strike-out application; tardy acceptance of the need for CROs and the CCRO, and a failure to resource the management of the litigation effectively and efficiently, despite, or perhaps even because of, gross overwork by committed individuals and the availability of resources from three leading firms of solicitors. The difficulty with this submission is that even if the criticisms are well-founded, about which I make no finding, quantifying their effect, either singly or cumulatively, is impossible;

e. Fifth, the claimants submit that it would be unsatisfactory for the defendant, having secured a major concession in the scope of its disclosure obligation on the basis that it was necessary to protect the trial date, now to avoid the trial date despite having been

granted that major concession. The court is reminded of the defendant's submission in September that:

> "The emerging picture appears to be that there is in reality a choice to be made as to the future conduct of this case. If the January trial date is to be retained then it will be necessary for a more restrictive approach to disclosure to be adopted, failing which it will be impossible for the volume of evidence that is being generated to be absorbed and addressed over the few months that now remain to trial."

f. Sixth, the claimants submit that the difficulties between here and trial are exaggerated by the defendant, both as to the number of documents in play, which is established, and as to the number of witnesses and experts who would be required even if all issues were in play, let alone if the January trial slot were to be limited to pensions-related issues;

g. Seventh, the claimants reject the suggestion that the litigation is now purely about money claims. Stagecoach seek a declaration that the award of the franchise to Abellio was unlawful and that, accordingly, the contract award to Abellio is void. WCTP submits that its primary objective in this litigation is still to secure a fair chance to compete for the West Coast franchise, and seeks the quashing of its disqualification and of the FTWC franchise agreement. As I made clear during the hearing, I am not in a position to make and make no observation or finding about the strength or otherwise of this aspect of their claim. For present purposes, it is only material that I cannot ignore it;

h. Eighth, Stagecoach takes the separate point that its disqualification has caused it reputational damage which can only be fully remedied by a finding that the disqualification was unlawful;

i. Ninth, the claimants assert the almost eternal truth about adjournments, namely that they lead to an increase in expenditure of costs which are seldom, if ever, recoverable in adequate measure by adversely affected parties;

j. Tenth, the claimants reject the suggestion that an extended period would enable ADR and in any event do not accept that giving the parties an opportunity to settle would be a good reason for adjourning a trial date, relying on paragraph 28 of *Elliott*;

k. Eleventh, the claimants submit that there's still a public interest in expedition, not simply because there is always such an interest in procurement claims, but because the size and significance of these franchises means that a decision adverse to the defendant may have implications, both strategic and political, for the future organisation of the railways in general and these franchises in particular;

l. Twelfth, the claimants point to the evidence of Ms Oudahar, which includes something of a pre-emptive strike against the granting of injunctive or quashing relief. Her evidence makes it clear that the defendant would wish to argue that any delay militates progressively and cumulatively against the making of such orders because of the major disruptive effect of having to reverse, rewind or review the operation of franchises that have been awarded. During the hearing, Mr Thompson said that the defendant would be prepared to disavow reliance on any increased disruption attributable to the delay caused by an adjournment. On reflection, that is not a full or satisfactory solution because the court could not ignore the realities of the circumstances and potential disruption when it came to consider whether to impose a quashing order or not. That is so whether or not the defendant disavows reliance on additional disruption attributable to delaying the trial process;

m. Thirteenth, and finally, the claimants point to the difficulties that were experienced in identifying the January trial date because of the many other commitments of busy lawyers. They rightly remind the court that it was necessary, though undesirable for the other case in question and the interests of the administration of justice as a whole, to

postpone another trial in order to clear the decks for this litigation to take the January period.

17. From the court's perspective, a three-week trial could be accommodated during the window from 2 June to 5 July 2020. As it happens, the first three weeks of that period are relatively clear, with Mr Moser QC being the only leading counsel with a major clash. November and December are also relatively clear, with October being more seriously congested.

Discussion

18. To my mind, the decisive question is whether trying the pension-related issues in January gives rise to a real risk of an unfair trial. Any such risk must then be balanced against the undoubted interest, both public and specific, in maintaining the present trial date, even if not all liability issues can be decided during that period.

19. In my judgment, the public interest in maintaining the trial date is to be given substantial weight. First, as Lord Justice Coulson observed in giving permission to appeal on the strike-out application, there is repeated emphasis on the need for speed in procurement cases to be found in EU regulations and case law. Second, the need for speed is greatest where a party seeks to set aside decisions, rather than merely pursuing a financial remedy, as remains the case for Stagecoach and WCTP in this litigation. This is at least in part because delay is likely to increase the potential disruption caused by a quashing decision, which the court could not ignore, even if the defendant disclaimed reliance on the incremental disruption caused by a delay. Third, even where a quashing order is not being sought, there is a public interest in the swift determination of the lawfulness or otherwise of decisions by public bodies, and delay in determination acts as a continuing clog on the freedom of contracting authorities to pursue what they perceive to be in the best interests of the public they serve. This is particularly so where, as here, the litigation concerns a ministerial decision that has broad potential ramifications. It is highly desirable that the ministerial decisions in this case should be declared to be lawful or

unlawful as soon as possible, even if the end result of the litigation is not that the decisions are set aside. Fourth, the impact of an adjournment on other litigants and the court is a material consideration which militates in favour of holding the trial date if that can be done without causing irremediable unfairness. Fifth, the court is not able to accommodate the parties in March/April as was proposed by the defendant, the first three-week slot that would be available is six month's later, in June 2020. Sixth, there is a public interest in bringing the pensions issues to a conclusion as soon as possible, for two main reasons. First, they appear to be the issues of widest general importance and it is highly desirable that the lawfulness or otherwise of the defendant's decision be determined as soon as reasonably possible, whether or not that determination results in a quashing order. Second, if the claimants fail on pensions, that is assumed to be determinative of the outcome of the litigation as a whole.

20. In my judgment, the evidence does not discharge the onus that rests on the defendant to show that there is now a real risk of an unfair trial if the case goes ahead on pensions liabilities in January. I accept that this is substantial and demanding litigation and that work is required to bring it to trial, but it is not outside the range of what may be described as heavy commercial and public law litigation, either in terms of disclosure, witness requirements or expert evidence requirement.

21. The specific evidential justification in support of the defendant's position is contained at paragraph 64 of Mr Gilliam's sixth witness statement, where he makes two points.

    a. First, he states that the pensions issues, which are accepted as being common to the parties, raise far-reaching issues as to the history and context of the issues as they have developed across the railway industry over a period of years, and the interaction of the Department's policy objectives with external constraints. I accept that the issues go wider than what has been described as the "red card" moment of the decision to disqualify the claimants, but I do not accept that the evidence about the formulation of policy so far as

relevant renders the period for witness statements unfeasible, particularly as it is acknowledged that Mr Baghurst, who is the lead witness on pensions issues, is knowledgeable, and that the proofing process is already underway. I do not exclude the possibility that difficulties might arise in future in relation to evidence from other departments, but that is not a present reality and it would be wrong to describe it as giving rise to a real present risk of an unfair trial when it may never arise. As I have already made clear, I reject outright suggestion that proofing Mr Baghurst or any other witness requires review of all disclosed documents. No one has yet made a submission to the effect that the material documents will not be well-known and within a much more limited compass.

b. Second, Mr Gilliam submits that evidence will be required about the background to develop the PSRM and the advice it relied upon in doing so and that the defendant will need to give evidence in relation to the advice provided by GAD and PwC and the reliance placed upon it. In my judgment, the evidence before the Court does not begin to demonstrate that appropriate evidence of this type cannot be marshalled within the time limited by the current orders.

22. I have already stated that the absence of a retained expert to act for the defendant is a surprising state of affairs, given that the core issues have been known since May or June. However, that does not demonstrate that the timings presently set for the expert evidence will not be capable of compliance. I note that the claimants have gone beyond what was required of them by the orders of the court by their letters dated 12 September and 25 October 2019. Clearly, if, despite the application of reasonable competence and diligence, it subsequently transpired that no expert could be instructed at all or in time to comply with the court's deadlines, then different considerations might then arise, such that there was then a real risk that no fair trial could be conducted, but that is not the position now.

23. The area that has caused me most concern is the administrative burden of preparing bundles so that the parties may start preparing. As to that, those with experience of preparing electronic bundles will be well aware of the advantages that brings. Some bundles can at least start to be established now with incremental additions as, for example, witness statements and experts reports become available. The real bugbear is the overall number of documents. I will hear counsel on what steps can be taken to ensure that the documents that are really material for the trial be identified at the earliest possible moment. However, I am not satisfied that the logistical burdens that lie ahead give rise to a present and real risk of an unfair trial.
24. For these reasons, I consider that the balance lies firmly in retaining the January trial period for pensions liability issues, not including the issue whether any breach that may be proved is sufficiently serious to justify the granting of remedies. In my judgment, the public interest in retaining the trial date for this slimmed-down trial is and remains strong, while the existence of a real risk that a trial will be unfair has not been demonstrated at present.