

CO/498/2017

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

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 29 June 2017

B e f o r e :

MR JUSTICE OUSELEY

Between:

**THE QUEEN ON THE APPLICATION OF ASSOCIATION OF BRITISH
COMMUTERS LIMITED**

Claimant

v

SECRETARY OF STATE FOR TRANSPORT

Defendant

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WordWave International Limited
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(Official Shorthand Writers to the Court)

Mr J Hodivala and Mr D Patience appeared on behalf of the **Claimant**
Mr C Sheldon QC and Mr H Mussa appeared on behalf of the **Defendant**
Miss C Darwin appeared on behalf of the **Interested Party**

PROCEEDINGS
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1. MR HODIVALA: Yes, my Lord. I appear on behalf of the Claimant in this case together with Mr David Patience who sits behind me. The Defendant Secretary of State is represented this morning by Mr Clive Sheldon QC and Hanif Mussa who sits behind him. The Interested Party, Govia Thameslink Railways Limited, is represented by Miss Claire Darwin of counsel.
2. MR JUSTICE OUSELEY: I thought she was not attending. It does not matter. You are here.
3. MR HODIVALA: I should also say that the court may have a letter from Transport for All indicating that they may be attending. The letter supports, effectively, the section 149 argument.
4. MR JUSTICE OUSELEY: Right.
5. MR HODIVALA: Miss Catherine Casserley of counsel is present in court, but there we are.
6. MR JUSTICE OUSELEY: They are not, I think, permitted to intervene and there certainly is not going to be an intervention at this stage.
7. MR HODIVALA: My Lord, can I start by first of all, I hope, cantering through the background facts? The background facts are really most appropriately summarised for the purposes of this renewed application in the first witness statement of Miss Emily Yates, which is found at tab 8 of volume A. Effectively, the Association --
8. MR JUSTICE OUSELEY: Incidentally, Mr Hodivala, I read with some dismay the time estimate you had given for reading in this case, three and half hours, which, allied to an hour and a half hearing time, is one whole judicial sitting day. I do not when it was adjourned because of an inadequate time estimate before whether that time estimate of reading of three and a half hours was, in fact, made to the judge or listing. But when papers come down, as they do, comparatively shortly before and reading is not the only thing that is on the judge's agenda for that day, I think it is impertinent.
9. MR HODIVALA: Well --
10. MR JUSTICE OUSELEY: Anyway.
11. MR HODIVALA: I apologise for that.
12. Can I, I hope, canter through the background facts in this way? Miss Yates has set out in her witness statement, starting at paragraph 3, effectively the purpose of the Claimant being formed in the first place. So it is incorporated in September 2016. It was incorporated for the purpose of advancing commuters' interests in relation to railway travel and provides some sort of structure to the campaign group as a result of the problems ongoing on the Southern Rail network.

13. Part of the remit of the Claimant involves analysing and advancing the law surrounding passenger rail services. The object at paragraph 5 is set out. It involves the promotion of transport services. That includes the sustainable use of transport services as well as advancing the passengers' rights who are disabled in the terms of their access to and use of passenger rail services. It is an independent, nonpartisan organisation. It is made --
14. MR JUSTICE OUSELEY: You have 90 minutes, Mr Hodiala --
15. MR HODIVALA: Yes.
16. MR JUSTICE OUSELEY: -- for everything.
17. MR HODIVALA: Yes.
18. MR JUSTICE OUSELEY: Right. I do not need any more of this. Thank you.
19. MR HODIVALA: Certainly.
20. My Lord, I am addressing what I hope are two preliminary issues that I can deal with relatively briefly for the purpose of this renewed application in terms of the standing of the Claimant.
21. MR JUSTICE OUSELEY: I do not, for the moment -- I will hear what Mr Sheldon or Miss Darwin has to say about standing --
22. MR HODIVALA: Thank you.
23. MR JUSTICE OUSELEY: -- but for present purposes, move on.
24. MR HODIVALA: Yes.
25. In terms of the justiciability of the claim itself, in my submission, the two cases that are relied upon by the Claimant in this particular case demonstrate that the issues raised by the claim are justiciable. (**Inaudible**) and Supporter Ways (?) case. In particular, perhaps I can draw my Lord's attention to support ways case, which is tab 4 of volume C, Mummery LJ's comments at page 80, paragraph 52, in our submission, encompasses the arguability of the claim as presently advanced. His Lordship indicated that issues of the enforcement of a contract or the issues regarding the contract where there is a contract between local authority and a private company for the provision of services may in some circumstances be amenable to judicial review and amenable in the sense of the intended beneficiaries of that service being entitled to bring judicial review proceedings.
26. We would say that that is authority for the proposition that is fundamentally at the heart of this particular case, which is, namely, that the Claimant seeks to monitor, using public law principles, the Secretary of State's enforcement of the franchise agreement with Govia Thameslink Railways. We say that that in itself demonstrates that the issues are justiciable.

27. Can I move on then to the meat, as it were, of the actual facts of the claim. The franchise agreement itself has some history. Again, I am taking this really from the witness evidence of Miss Yates, but I can paraphrase it in this way. Initially, there was a tender document. That tender document required any franchise winner to implement driver-owned operation. That is in contrast to ASLEF's charter. So from the outset of the tendering process, the Claimant simply observed --
28. MR JUSTICE OUSELEY: Can we cut to the chase, please?
29. MR HODIVALA: Yes.
30. So having granted the franchise agreement and the franchise agreement itself containing various provisions regarding performance benchmarks, and we can look at those, if my Lord wishes, but in broad terms, the performance benchmarks form performance obligations. Breach of those performance obligations entitles the Secretary of State to take enforcement action. It is a power according to both the statute and according to the franchise agreement.
31. However, we would say that there are other aspects of the facts of this particular case that mean it is amenable to judicial review in a Supporter Ways sense. Firstly, this is the provision of a public service, passenger train service. Secondly, the enforcement policy adopted by the Secretary of State recognises that the Secretary of State himself is under a duty to secure performance of the franchise obligations in the public interest. Thirdly, the fact of performance benchmarks is an indication of an adequate passenger train service. Therefore, there is at least an inference that the reach of those performance benchmarks amount to an inadequate passenger train service.
32. So taking those three principles together, it is not in dispute from the Secretary of State that the evidence put forward suggests that approximately 300,000 passengers a day use Southern Rail. It would be immensely inconvenient for what the Claimant would say is an unreasonable period of time whilst the Secretary of State determines whether or not Govia Thameslink Railway is in breach of its franchise agreement. In other words, is in breach of its performance obligations.
33. The Claimant would say that that inconvenience to passengers is not simply the fact of cancelled trains or the fact of there being insufficient carriages to take commuters at peak times, but the inconvenience, as set out in the evidence, includes dangerous overcrowding. It includes violence. It includes loss of jobs and education opportunities. It includes loss of family time. It includes loss of access to the provision of health services.
34. In addition, the evidence, we suggest, discloses that there are real hurdles over the 14 month period of time by which the Secretary of State has failed to determine whether or not they think there is a breach of the franchise obligations. There have been real hurdles in disabled passengers continuing to use the trains on a day to day basis.
35. That is the factual background against which these two grounds are now advanced.
36. MR JUSTICE OUSELEY: One and four.

37. MR HODIVALA: One and four, correct.
38. So we would say as far as ground one is concerned and the delay, there is scant evidence provided by the Secretary of State with regards to what has been done and in terms of looking at the situation --
39. MR JUSTICE OUSELEY: Well, can we just make sure we have got the factual background correct? There is no provision in the contract for a particular time or, indeed, a time expressed as a reasonable time within which an issue about whether force majeure is responsible for part or all of breaches of performance benchmarks should be determined. Is that right?
40. MR HODIVALA: That is correct, yes.
41. We would say that there are time stipulations with regards to the submission of evidence by GTR that goes to that issue, but correct, there is no time limit with regards to when the Secretary of State must determine that.
42. MR JUSTICE OUSELEY: Is there anything in his enforcement policy about that?
43. MR HODIVALA: No, there is nothing in the enforcement policy about what would constitute a reasonable time.
44. MR JUSTICE OUSELEY: What is the basis for the reasonable time? Are you saying that that is a term of the franchise agreement necessarily implied?
45. MR HODIVALA: Correct. It is a public law principle that the Secretary of State must act reasonably.
46. MR JUSTICE OUSELEY: No, I --
47. MR HODIVALA: Yes, and we say --
48. MR JUSTICE OUSELEY: That is not what I am asking. I am not asking about a public law principle. I am asking about an implied term in a franchise agreement, the basis for which would not be the same.
49. MR HODIVALA: Yes.
50. MR JUSTICE OUSELEY: But for present purposes, I just wanted to be clear about the legal basis upon which you are making this submission. It is that there is necessarily to be implied in the franchise agreement for business efficacy a term that the Secretary of State will determine the issue within a reasonable time.
51. MR HODIVALA: I am not sure I would go so far as to say it is an implied term in the franchise agreement, but --
52. MR JUSTICE OUSELEY: I do not think this is addressed in your --

53. MR HODIVALA: No, but what is addressed is the fact that, as a public law principle, the Secretary of State must act reasonably and within a reasonable time.
54. MR JUSTICE OUSELEY: Right. So I can just make a note and follow it through --
55. MR HODIVALA: Yes.
56. MR JUSTICE OUSELEY: -- it is not being said that there is an implied term in the franchise agreement about the time at which the Secretary of State should take to determine breach.
57. MR HODIVALA: No.
58. MR JUSTICE OUSELEY: Right.
59. MR HODIVALA: No.
60. MR JUSTICE OUSELEY: Because it is quite difficult without an implied term in the contract to be saying that the Secretary of State should be treated as enforcing a provision in the contract.
61. MR HODIVALA: We put the argument in this way. Clearly the franchise agreement has performance benchmarks and performance obligations --
62. MR JUSTICE OUSELEY: Yes.
63. MR HODIVALA: -- the breach of which (**Inaudible**) the Secretary of State to exercise the power.
64. MR JUSTICE OUSELEY: Yes.
65. MR HODIVALA: That power has to be exercised reasonably, in our submission. That is familiar public law principles. We would say that part of that public law principle involves the determination of whether there has been a breach of the franchise agreement within a reasonable time.
66. Moving on, I will follow --
67. MR JUSTICE OUSELEY: So it is an entirely public law obligation arising from the fact that he is a party to the franchise agreement to provide for public transport --
68. MR HODIVALA: Yes.
69. MR JUSTICE OUSELEY: -- to do what he is entitled to do under the contract --
70. MR HODIVALA: Yes.
71. MR JUSTICE OUSELEY: -- within a reasonable time.
72. MR HODIVALA: Yes.

73. So consistent with Supporter Ways, we are not suggesting that the public law duty to act reasonably cuts across the contractual provisions. In fact, quite the opposite. We would say that it reinforces the thrust of the contract if there is a public law obligation on the Secretary of State --
74. MR JUSTICE OUSELEY: Yes.
75. MR HODIVALA: -- to act reasonably.
76. We would say, going to the next stage, that the submission of force majeure claims has been tolerated in a dilatory manner by the Secretary of State. So to that extent --
77. MR JUSTICE OUSELEY: Well, this is a very fact-specific point then. You use the language "must decide in a reasonable time".
78. MR HODIVALA: Yes.
79. MR JUSTICE OUSELEY: Mr Sheldon says if that is your argument, then the question is a Wednesbury one. Have they taken a time which no reasonable Secretary of State could have taken to decide that issue? Do you accept that?
80. MR HODIVALA: We accept it to this extent. Clearly there is a statutory framework and, indeed, a franchise agreement which supports expedition, which is consistent with such decisions being made expeditiously. We would say that the dilatory determination of whether there has been a breach of the franchise obligations amounts to a frustration of the statutory purpose in section 57B. It requires the Secretary of State to formulate a policy taking into account, amongst other things, the consequences to passengers.
81. MR JUSTICE OUSELEY: Are you formulating a different test or is effectively the same threshold would emerge but put in a variety of different ways? So when Mr Sheldon says it is a period which no reasonable Secretary of State in the circumstances could take, is that not the same? It seems to me that it is the same as saying if you take more than that, that frustrates the statutory purpose, but if you take less than that, you do not.
82. MR HODIVALA: Yes. We would say it is context specific.
83. MR JUSTICE OUSELEY: Yes.
84. MR HODIVALA: The point that the Secretary of State has not grappled with, in our submission, is that, of course, what is reasonable or unreasonable, whether in a Wednesbury or irrational sense, has to depend on the context within which the decision was made because, for instance, if we are right and the statutory purpose combined with the franchise agreement and the thrust of the enforcement policy is that such decisions have to be taken expeditiously, then we would submit that the 14 month delay is not an expeditious decision.

85. MR JUSTICE OUSELEY: Well, hang on. On any view, it is not 14 months' delay. There is a lapse of time, but I think you are saying 14 months is a period of delay. But when you say it is not expeditious, that is not the test you are, in fact, saying is the lawful test. It may be that you would be right that it is not expeditious. I know not. But if that is not the legal test, what does it matter?
86. MR HODIVALA: Well, it infuses the test of what is reasonable in the circumstances. So in other words, if it is reasonable in the circumstances for a decision to be made expeditiously, then in our submission, there has been a breach of that duty.
87. MR JUSTICE OUSELEY: No, this goes beyond that. You have to say there was a legal obligation --
88. MR HODIVALA: Yes.
89. MR JUSTICE OUSELEY: -- that the Wednesbury test or the frustration test requires an expeditious decision.
90. MR HODIVALA: Yes, on the facts of this framework.
91. MR JUSTICE OUSELEY: Yes.
92. MR HODIVALA: Now, when we step back and look at the overall factual situation of where we are today, in support of our contention that there has been an unreasonable passage of time such that the public law duty has been breached, we would submit that the delay, whether it is 14 months or some lesser period, we take the 14 months from the date at which Govia started to submit applications for its force majeure claim which have remained outstanding. Applications for force majeure were first submitted on 28 April 2016.
93. MR JUSTICE OUSELEY: Yes.
94. MR HODIVALA: We would say that the 14 month delay or 14 month period is the relevant period by which the court should examine whether or not the Secretary of State has complied with that public law duty.
95. For instance, if the duration of a particular franchise agreement was a year and the Secretary of State took a year to determine whether or not the franchisee had breached the franchise, then, in our submission, that would clearly and obviously be an unreasonable period of time. Likewise, if the franchise agreement was for 100 years and the Secretary of State took a year to determine whether or not there was a breach of the franchise agreement, that may well fall on the right side of reasonable conduct.
96. MR JUSTICE OUSELEY: Well, I am not sure that is right at all. If you have got a year to go to the end of a franchise as opposed to five years to go to the end of a franchise --
97. MR HODIVALA: Yes.

98. MR JUSTICE OUSELEY: -- the issues might be just the same.
99. MR HODIVALA: Yes. Thank you.
100. We would say that it is the context in this issue that is so relevant. We would say that the franchise agreement itself was a total of seven years. The submission of force majeure claims within 28 April 2016, which remains undetermined today, is a passage of 14 months. We would say that against the factual background of the particular problems that have been experienced by the 300,000 odd passengers who use the Southern Railway service on a daily basis, that it is an unreasonable period of time that has now passed. **(Pause)**
101. We also rely upon the matters that are set out in the summary grounds of defence. The Secretary of State has set out at paragraph 28, so this is tab 3 --
102. MR JUSTICE OUSELEY: Sorry, paragraph?
103. MR HODIVALA: This is paragraph 28, page 51.
104. MR JUSTICE OUSELEY: Yes.
105. MR HODIVALA: So we have got headings and a table. You can see that the reporting period, relevant period, for the date to receive supporting claims of force majeure.
106. Looking over the page at page 52, in our submission, the kinds of delays that we are talking about here in terms of the submission of evidence by Govia in support of its claim for force majeure, they are immense. It varies from a two week delay, in our submission, to three or four months where the Secretary of State has tolerated that kind of delay in the submission of evidence in force majeure claims.
107. So we invite the court in considering this renewed application to holistically **(Inaudible)** position, to put the reasonableness or otherwise of the Secretary of State's conduct into its proper context in terms of the statutory franchise agreement.
108. Now, the franchise agreement itself has got terms that require Govia when it claims force majeure -- in fact, we will briefly look at those. The four --
109. MR JUSTICE OUSELEY: Well, just tell me what it says.
110. MR HODIVALA: Yes. Force majeure claims have to be notified within two business days or as soon as reasonably practicable thereafter.
111. MR JUSTICE OUSELEY: Right.
112. MR HODIVALA: In determining whether or not there is force majeure, the Secretary of State is obliged under the franchise agreement itself to consider as one issue whether the Secretary of State is satisfied that Govia has taken steps to minimise the disruption caused to passengers by the force majeure event.

113. MR JUSTICE OUSELEY: Yes.
114. MR HODIVALA: We would say that part of that consideration is accurately reflected in the summary grounds of defence at paragraph 38.
115. We would disagree with the suggestion that the Secretary of State has acted rationally or reasonably, but we agree that the time frame within which evidence has been submitted is a relevant feature of the determination of whether or not there has been reasonable or unreasonable delay. Of course, it is the Secretary of State who ultimately makes the decision as to whether he is going to accept evidence, whether he is not going to accept evidence, whether he is going to chase up Govia or whatever it may be.
116. But there is an acceptance by the Secretary of State at paragraph 30 of the summary grounds of defence that the analysis of the evidence as to whether there is force majeure requires him to assess two matters. First of all, whether there has been unofficial strike action. That is one of the issues that Govia are seeking to rely upon. But secondly and importantly, under the franchise agreement, the Secretary of State has to determine whether Govia has made appropriate efforts to mitigate the impact of any force majeure event.
117. MR JUSTICE OUSELEY: So Mr Sheldon says, "When should the decision have been made by?" What do you say?
118. MR HODIVALA: Well, my Lord --
119. MR JUSTICE OUSELEY: As I understand it, although you talk about 14 months, in fact, it is a rolling period in respect of which Govia claims force majeure for breaches, which I understand are essentially, or at least many are not disputed, breaches of the cancellation and short train obligations with the obvious consequences.
120. MR HODIVALA: Yes.
121. MR JUSTICE OUSELEY: But Mr Sheldon challenges you, I think, in the summary grounds of defence and in his skeleton to say why the decision should have been made by a specified earlier date, specified by you with reasons, which is not an unreasonable one.
122. MR HODIVALA: Well --
123. MR JUSTICE OUSELEY: The question --
124. MR HODIVALA: In my submission, it is not for the Claimant to say, "The decision should have been made by this date." That is not how the authorities address the question of unreasonable delay. But the authorities, if you look at unreasonable delay in an overall context and ask given the issues at stake, given the date when the decision was made, was it a decision that was made within a reasonable period?

125. MR JUSTICE OUSELEY: Well, no court can answer that question without having an end date which it says has been exceeded or not. I am afraid the judge, if you were to get permission, is going to look at you pretty early on and say "by when?" So I am going to do so now.
126. MR HODIVALA: I hope to assume the challenge, but in a rather indirect way, I am afraid, by simply highlighting that the first decision by the Secretary of State is to avoid giving any decision on a rolling basis. So in other words, this is collation of all of these decisions where the onus is submitted on the rolling basis and effectively storing up the decision to the end when a decision has still not been met.
127. Now, in response to our argument the Secretary of State says, "Well, I could not do it on a rolling basis because the mechanism that I adopted involved some sort of bottom up and top down analysis, so really I needed all of the material before I could analyse whether there was force majeure."
128. Now, we would say, first of all, that there has been a large lack of transparency in the publication of the performance benchmarks themselves. So for the Claimants to come to court here and be invited by my Lord, understandably, to say, "Well, when should have the decision been made", in the absence of any transparency around how this whole procedure has been operated is a little unfair and may, in fact, go to explain why the authorities take a rather more holistic approach and ask the question: has there been a passage of time which, given the facts and given the background, appears on its face to be unreasonable? If so, is there then sufficient evidence from the Secretary of State or any Defendant for us to be satisfied as a tribunal that in fact what appears to be unreasonable was not unreasonable?
129. So one of points that I really make at this early stage at permission is there has been simply no evidence with regards to how this has all been handled by the Secretary of State. There is assertions in the summary grounds of defence, but we take issue with the Secretary of State's assertion that he was required as part of a reasonable procedure to adopt a top down or bottom up approach to store up all decisions until a final announcement is going to be made in relation to the wrong --
130. MR JUSTICE OUSELEY: Well, Mr Hodivala, I do not know what Mr Sheldon will say about that, but let us suppose he says, "Well, I was not obliged to. This is the way I chose to do it. I thought this was the best way at the time. Maybe hindsight has proved me wrong, but I thought this was the best way to do it. This would enable me to reach a judgment about breach, reach a judgment about mitigation or adequacy of mitigation measures and I would be in a position to see what realistically could be done about it."
131. MR HODIVALA: Yes.
132. MR JUSTICE OUSELEY: Although, that might be a separate stage. I at least would not have to repeat the process in order to go to remedy.
133. MR HODIVALA: Well, yes.

134. MR JUSTICE OUSELEY: But that puts you -- you may say it is unfair, but that is the way the litigation goes when Claimants make assertions.
135. MR HODIVALA: Yes.
136. MR JUSTICE OUSELEY: Unless you can say that the Secretary of State adopted an approach which no reasonable person could, and that is why it has taken so long --
137. MR HODIVALA: Yes.
138. MR JUSTICE OUSELEY: I do not understand the detail of the difference between bottom up and top down at all and in some ways, I hope never to have to, but I do not see that one can say that the approach that was adopted towards getting the evidence in and then seeing -- and I remember the strikes were not predictable, but they just kept coming. Whether he was going to wait and see what happens in the hope there would have been a settlement and therefore things would get back to normal, breach or no breach thereafter. But it is difficult on the face of it to see how you are going to say that that approach was unlawful. In other words, he was required to do something different.
139. MR HODIVALA: Yes. Can I invite my Lord to look at one authority on this particular subject, because in my submission, it does inform the prism through which one looks at permission at this stage.
140. MR JUSTICE OUSELEY: Okay.
141. MR HODIVALA: So it is the case of Ms C. It is tab 5 of the authorities. This is a determination in relation to personal independence payments by the Secretary of State for Work and Pensions. Effectively, there had been a delay in making payments of some 30 months and 10 months, so delay on determination of eligibility for 30 months and 10 months. Really, the principles I am going to take up from paragraph 87, page 96. I am going to, please, focus on the nub of the Claimant's application in this case, which is the reasonable time. So the reasonableness of the procedures, or whatever it may be, are not the focus of this claim. It is the reasonableness of the time period. When we look at paragraph 87, we see that there is some synonymity with regards to the facts of that case and this particular case.
142. First of all, there is no statutory period set out within which the personal independence claims are to be determined.
143. MR JUSTICE OUSELEY: Yes.
144. MR HODIVALA: In that case, obviously no dispute that under domestic law, the Secretary of State has a public law duty to determine the application within a reasonable time.
145. MR JUSTICE OUSELEY: Yes.
146. MR HODIVALA: Then paragraph 89:

"What is a reasonable time is for the Court to determine depending on the circumstances in the case."

147. Which is obviously the Claimant's point here. The Defendant's submissions are then set out. At paragraph 91 there is a quotation from the case of FH which I am just going to rely upon for a moment. Paragraph 11 of the citation from FH about halfway through that paragraph. It is exactly my Lord's point that I am endeavouring to answer:

"What may be regarded as undesirable or a failure to reach the best standards is not unlawful."

148. Which is what the Defendant says in this particular case. My Lord's point:

"Resources can be taken into account in considering whether a decision has been made within a reasonable time, but (assuming the threshold has been crossed) the defendant must produce some material to show that the manner in which he has decided to deal with the relevant claims and the resources put into the exercise are reasonable."

149. So we would say that it is almost an evidential burden situation. We would say that the passage of time in this case, when you look against the factual background, is an unreasonable delay. Then it is a matter for the Secretary of State by evidence to demonstrate "these are the reasons why I have adopted the procedure that I have and why what may appear at first blush to be an unreasonable period of time, in fact, is not."
150. It may be that the Secretary of State relies on the lack of resources. It may be that the Secretary of State says, "I wish I had more resources. I asked for more resources. There were not any provided to me." It may be that he says, "Govia simply were not responding to my requests for expeditious submission of evidence." Whatever it may be. But we are just not at that stage at this point in time.
151. So in my submission, when one looks at the unreasonable delay arguments through that prism, it may help, I hope, to persuade my Lord that the lack of transparency does not operate against the Claimant, but rather operates against the Defendant in this particular aspect.
152. Then over the page, there is the reference to the court's function. So once the Defendant has produced some material with regards to relevant claims on the resources, the court's function is to consider whether what has produced the delay has resulted from a rational system.
153. So once the court is fully armed with regards to the system that was put in place, the resources that were allocated to that particular system, it is a position to determine whether delay is reasonable or unreasonable. But we would submit at this stage the only real burden --
154. MR JUSTICE OUSELEY: Who was the judge in FH?

155. MR HODIVALA: Forgive me. Who was the judge?
156. MR JUSTICE OUSELEY: Yes.
157. MR HODIVALA: Patterson J.
158. MR JUSTICE OUSELEY: No.
159. MR HODIVALA: Sorry, in FH. I beg your pardon. I will turn to my junior and see if we can --
160. MR JUSTICE OUSELEY: I just wondered. "Unacceptable" is being used there as another word for unlawful, is it?
161. MR HODIVALA: I think it probably is because when we look at the paragraph halfway through where I picked it up, "what may be regarded as undesirable or a failure to meet best standards is not unlawful", would tend to suggest that the use of "unacceptable" being a different word is unlawful.
162. MR JUSTICE OUSELEY: Odd.
163. Patterson J, however, appears to draw a distinction:
- "The question a whether the delay was not only unacceptable [which a not a matter for the court at all] but was unlawful."
164. MR HODIVALA: Well, looking at FH --
165. MR JUSTICE OUSELEY: Well, you might say "unacceptable" means prima facie inexplicable, but capable of being explained.
166. MR HODIVALA: Yes.
167. MR JUSTICE OUSELEY: So not unlawful or prima facie calling for explanation.
168. MR HODIVALA: Yes, exactly. Exactly. So at this permission stage, is the delay unacceptable?
169. We would say that all the evidence that has been submitted by the Claimant supports the conclusion that there has been an unacceptable delay in this particular case. In other words, there is a delay that requires an answer, not simply by the submission of summary grounds, but by the submission of evidence so that there can be an examination by a court as to whether or not this was a rational system with the reasonable allocation of resources and so on and so forth.
170. But we would say this is an arguable point on the authorities. This is an arguable point. It is not simply a question of saying, as the Defendant does, "Well, I am entitled to do whatever I like unless you can demonstrate that it is an unreasonable system." That is a wrong way to approach the authorities, in our submission and also, we would say as a matter of common sense would tend to discourage transparency around

franchise agreements in the sense of enforcement simply because the provision of details with regard to (**Inaudible**) franchise obligations if not publicised prevents the Secretary of State from challenge, bringing a meaningful challenge. But we would say that this case crosses the line in that sense.

171. MR JUSTICE OUSELEY: Well, that is that then. What do you say about Mr Sheldon's point that it is all academic or about to be?
172. MR HODIVALA: Well, that has been threatened since March that this was all academic. We still do not have a decision or a determination on it. We would say that the reality is, as again, I am afraid, supported by the evidence that is been submitted by the Claimant. First of all, a fear that the ongoing continuation of this particular franchise, same issues may well arise again in the future, but not just this franchise, but other franchises around the country.
173. So we would say that there is clearly a public interest in how it is that the Secretary of State approaches, by his own enforcement policy, what he views as a duty to secure the public interest. There must be a public interest in that sense, we would submit.
174. MR JUSTICE OUSELEY: The existence of the public interest if an issue can arise again is a very two edged sword for a litigant in your position.
175. MR HODIVALA: I understand that. However, there is obviously evidence that has been filed. My Lord will have no doubt been fully aware from the newspaper reports of the difficulties.
176. MR JUSTICE OUSELEY: Well, I am aware of difficulties that --
177. MR HODIVALA: Yes.
178. MR JUSTICE OUSELEY: -- Southern have or whatever, Govia Thameslink, have had. They have featured reasonably regularly in the news.
179. MR HODIVALA: Yes.
180. MR JUSTICE OUSELEY: I do not know about what others have been doing.
181. MR HODIVALA: No, but again, the evidence is that this is a particular franchise model that there are concerns is going to be rolled out around the country --
182. MR JUSTICE OUSELEY: If it is --
183. MR HODIVALA: -- or in the future.
184. MR JUSTICE OUSELEY: -- and the problems emerge, the reason why it is a double edged sword is that where it emerges is that the obvious place for the issue to be ventilated.
185. MR HODIVALA: Yes.

186. MR JUSTICE OUSELEY: Where I have a feeling you may be looking for some form of costs capping, I have, I am afraid, reservations about cost capping orders for somebody to pursue litigation on behalf of somebody else, as yet unknown, in circumstances which have not yet arisen.
187. MR HODIVALA: Well, can I move back to the factors --
188. MR JUSTICE OUSELEY: Yes. I think your answer to it being academic, "They have been saying that since March," is one answer, but to say it is not academic because somebody else may want to raise the point sounds to me more like people **(Inaudible)** the advocate. They have got the bit between their teeth, let us put it that way, and they do not want to let it go.
189. MR HODIVALA: Well --
190. MR JUSTICE OUSELEY: I understand that, but it is not --
191. MR HODIVALA: It is not a legal basis on which to --
192. MR JUSTICE OUSELEY: No.
193. MR HODIVALA: No, I understand. I understand, my Lord, but we would say that this is not academic. A declaration that is sought as to whether the Secretary of State has sought to enforce the franchise obligation in a lawful manner is not an academic remedy. If the Secretary of State has acted unlawfully, in my submission, it is of clear interest that there is a declaration afforded here.
194. MR JUSTICE OUSELEY: Section 149 now.
195. MR HODIVALA: Section 149.
196. I have been very helpfully handed a note, sorry, before we leave this point, that the judge in FH was Collins J.
197. MR JUSTICE OUSELEY: Thank you very much.
198. MR HODIVALA: Section 149, can we deal with it in this way? My Lord may have, in the limited time available, had an opportunity of skimming across the problems with regards to disabled access to the trains.
199. MR JUSTICE OUSELEY: Yes.
200. MR HODIVALA: The way we put this case in our amended detailed grounds was we said that there is a section 149 duty on the Secretary of State when considering whether to enforce and in enforcing to comply with the section 149 duty.
201. Now, that was always intended to mean, in other words, whether the Secretary of State enforces the franchise obligations, a reference to the determination of whether there is

force majeure, because only a breach requiring enforcement is force majeure does not apply. We --

202. MR JUSTICE OUSELEY: That I understand, but I am not quite sure. What function are you saying the section 149 duty attaches to that the Secretary of State has or is yet to exercise?

203. MR HODIVALA: Yes.

204. MR JUSTICE OUSELEY: Is this to decide in a reasonable time? Does it go to that or is it what to do or what counsel is minimising? I find it hard to see how it can go to force majeure.

205. MR HODIVALA: I am just going to take my Lord to one clause for the purpose of explaining why it is that we say that one needs to be section 149 duty compliant. So it is volume B. Sorry, I beg your pardon. It is volume A, in fact. Forgive me.
(Pause)

206. Tab 11 and schedule 10 is page 581. Thank you very much.

207. MR JUSTICE OUSELEY: It is tab B.

208. MR HODIVALA: Sorry? It is in tab B. It is in volume B, I am sorry.

209. MR JUSTICE OUSELEY: Give me the page.

210. MR HODIVALA: 581.

211. MR JUSTICE OUSELEY: 581.

212. MR HODIVALA: 581, yes.

213. MR JUSTICE OUSELEY: Yes.

214. MR HODIVALA: So this is for determining force majeure, the principle that applies. So clause 1 of schedule 10.4:

"The following events shall constitute force majeure events."

215. I invite my Lord, please, to underline "subject to the conditions specified in paragraph 2 being satisfied", because we would say that that involves an exercise of the Secretary's function for the purpose of section 149.

216. So we then go through schedule 10.4. We can see page at page 583 at the very top:

"Any strike or industrial action is a force majeure event."

Then we to come paragraph 2:

"Conditions to force majeure events."

Then clause 2.1:

"The occurrence and continuing existence of a force majeure event shall be subject to satisfaction of the following conditions."

217. So just pausing for a moment, where there is otherwise a breach in the performance benchmarks, that will not be deemed to be a breach of the franchise agreement if Govia is able to claim successfully force majeure.

218. MR JUSTICE OUSELEY: Yes.

219. MR HODIVALA: One of the conditions of force majeure is that Govia has complied with clause 2.1 of schedule 10.4. We see (a) there. (b) is relevant here to the difference:

"Notification within two business days, alternatively as soon as recently practicable thereafter, of the occurrence or likely occurrence of the relevant event of a force majeure event and the effect or the anticipated effect."

220. So that is something for Govia to submit.

221. We then get to paragraph (c) of clause 2.1:

"At the same time as the franchisee serves notification, it informs the Secretary of State of the steps taken and/or proposed to be taken by the franchisee to prevent the occurrence and/or --"

Then we invite my Lord to underline:

"-- to mitigate and minimise the effects of the relevant event and to restore the provision of the passenger service."

222. Now, the reason that we say that clause 2.1(c) involves a function of the Secretary of State. It is because he is determining whether he is satisfied as a condition of force majeure whether or not Govia has submitted sufficient evidence that would mitigate or minimise the effects of the force majeure event.

223. MR JUSTICE OUSELEY: Well, presumably there is another paragraph that actually says, "It depends upon you mitigating and minimising the effects." This merely requires them to notify.

224. MR HODIVALA: This merely requires them to notify.

225. MR JUSTICE OUSELEY: Somewhere else will actually say that, "It does not constitute force majeure if you --"

226. MR HODIVALA: That is over the page at (e).

227. MR JUSTICE OUSELEY: Oh, (e). Thank you very much. **(Pause)**

228. Yes. Thank you very much.
229. MR HODIVALA: So we say this amounts to an exercise of the Secretary of State's functions for the purpose of the Equality Act. Now, functions are to be interpreted broadly.
230. MR JUSTICE OUSELEY: "The Secretary of State has to decide whether an event is force majeure." So you say he would also have to decide whether reasonable endeavours had been used to mitigate.
231. MR HODIVALA: Correct. We say the summary grounds of defence at paragraph 30, that I took my Lord to earlier in my submissions, is really in recognition by the Secretary of State that there is a function performed by the Secretary of State in determining force majeure. So it is tab 3, volume 8. Tab 3, page 52.
232. MR JUSTICE OUSELEY: Yes.
233. MR HODIVALA: Paragraph 30:
- "The Secretary of State has been required to assess."
234. So it is --
235. MR JUSTICE OUSELEY: So you say in the judgments he makes, he has to bear in mind --
236. MR HODIVALA: He has to comply with his section 149 duty.
237. MR JUSTICE OUSELEY: Well, have due regard to.
238. MR HODIVALA: Have due regard. Exactly, yes.
239. MR JUSTICE OUSELEY: Yes.
240. MR HODIVALA: So the section 149 duty, as I am sure my Lord will be familiar with, is broad in scope. Albeit it is confined to having due regard to certain matters, it is nevertheless broad in scope. In my submission, the requirement to have due regard to the advancement of equality of opportunity, the requirement to remove or minimise disadvantages suffered by persons, more importantly perhaps, to take steps to meet the needs of persons -- this is all section 149 and it is in the authorities, volume B, tab 14. I am just going through section 149 here.
241. MR JUSTICE OUSELEY: Yes.
242. MR HODIVALA: But effectively, we say that whilst it may be a relatively low burden, in other words section 149 is not designed to achieve particular outcomes, nevertheless there has to be due regard because in the assessment of the evidence that is submitted by Govia and the candid acceptance by the Secretary of State that he is assessing the material that is provided by Govia in order to assess whether there has

been mitigation of the force majeure event for the purpose of the passengers, we say that that is the exercise of a function.

243. MR JUSTICE OUSELEY: But he is not asking himself, is he, whether Govia did remove or minimised disadvantages suffered by a person who shared relevant protected characteristics that are connected to that characteristic? He is asking whether they minimised or mitigated the problem faced by all rail users, including the problems faced by the disabled.
244. MR HODIVALA: Correct. Correct. That is an assessment. If he had --
245. MR JUSTICE OUSELEY: But he does not need -- there is a lot in section 149 that is, in many contexts, completely unnecessary. But in looking at his job, as you have explained it, reasonable steps to minimise and mitigate, why do you suppose the Secretary of State would not -- if section 149 had never been passed --
246. MR HODIVALA: Yes.
247. MR JUSTICE OUSELEY: -- but with disabled passengers recognise that overcrowding, cancellations, unpredictable train running are more problematic for disabled and may require particular steps which may not have been taken.
248. MR HODIVALA: Yes. The section 149 duty is of a higher order, in my submission, than simply saying, "Well, why would the Secretary of State not take into account all passengers?"
249. MR JUSTICE OUSELEY: No, what he is judging is not his own function. He is judging Govia. In judging Govia, he cannot directly use section 149. All he can say is, "Have you minimised or mitigated the effect on rail users, including disabled people with their particular problems?"
250. MR HODIVALA: But it is the judging that we say is the function.
251. MR JUSTICE OUSELEY: He is judging whether Govia had done it.
252. MR HODIVALA: Yes, exactly. We say that the judging is the exercise of a function.
253. MR JUSTICE OUSELEY: Yes.
254. MR HODIVALA: Well, my Lord, the authorities point to the fact that a function is to be interpreted very broadly.
255. MR JUSTICE OUSELEY: Yes, but it is not a question of whether it is a function of his. The question is what does that function entail?
256. MR HODIVALA: Yes.

257. MR JUSTICE OUSELEY: That function does not entail imposing on Govia section 149 and asking them whether they behaved with due regard to it. What it requires is asking whether they minimised the problems for all rail users, including disabled.
258. MR HODIVALA: Well, no. First of all, the clause does not require specific reference to disabled passengers, which is why we say section 149 is so relevant.
259. MR JUSTICE OUSELEY: Well, if it does not require it, section 149 does not bring it in. Mr Sheldon may be able to say, as a matter of true construction of the franchise agreement, disabled passengers are excluded from those whose interests have to be mitigated. I shall be a bit surprised to hear him say it, but of course I will give him a short opportunity to do so. But if that is the way he thinks he is going to avoid an arguability issue, he is wrong.
260. MR HODIVALA: My Lord, any decision by a public authority that effects the public has an impact on disabled users. The whole purpose of section 149 is that it has that higher status. It requires specific reference to the duty. It requires specific attention to the issues and the criteria that are set out in section 149.
261. So in my submission, it is wrong to say that section 149 does not add anything. It does. It is an onerous obligation to the extent that there has to be consideration of the section 149 duty. Again, we can look at the authorities if necessary.
262. MR JUSTICE OUSELEY: I just do not see that.
263. MR HODIVALA: Can I approach it in a different way?
264. MR JUSTICE OUSELEY: Yes.
265. MR HODIVALA: I will approach it in a different way. Let us say the Secretary of State is confronted with material from Govia that simply does not address the difficulties by disabled passengers.
266. MR JUSTICE OUSELEY: Yes.
267. MR HODIVALA: The Secretary of State is asking himself the question, "Well, for the purposes of force majeure, determining whether Govia can rely on force majeure, am I satisfied that Govia has taken all reasonable steps to mitigate the effects of the industrial actions on its passengers?"
268. MR JUSTICE OUSELEY: Yes.
269. MR HODIVALA: Without specific reference to section 149, of course, they will turn round and say, "Well, yes, I am satisfied for whatever reason, but I am satisfied."
270. The section 149 duty impinges on a decision like that in the following way, in my submission. That the Secretary of State who is determining whether or not there can be reliance on force majeure bases his decision on the evidence. Like any public authority, they base their decisions on the evidence that is available to them. Like any

public authority, when making a decision there has to be compliance with the section 149 duty.

271. We say that any decision, whether it is the exercise of a policy, whether it is the determination of a particular decision in an incident case, whether it is closure of a library, whether it is termination of a franchise, these are decisions that amount to the exercise of a function by the Secretary of State.
272. MR JUSTICE OUSELEY: The only one I am concerned with here is the judgment, as I understand it, about whether circumstances amounted to force majeure by reference to the steps taken to minimise and mitigate.
273. MR HODIVALA: Yes.
274. MR JUSTICE OUSELEY: Yes.
275. MR HODIVALA: So the section 149 duty obliges the Secretary of State when determining whether or not adequate steps have been taken to mitigate by Govia to take into account those matters that are set out in section 149.
276. MR JUSTICE OUSELEY: Well, anyway --
277. MR HODIVALA: In my submission, it is --
278. MR JUSTICE OUSELEY: -- you have made that point.
279. MR HODIVALA: My Lord.
280. MR JUSTICE OUSELEY: Is there anything else on section 149?
281. MR HODIVALA: Can I finish, perhaps, on section 149 by simply saying this: that in the event that the Secretary of State has not got evidence of compliance with section 149, there will be a breach. In the event that section 149 has not been taken into account by the Secretary of State in determining force majeure, there will be a breach of that duty.
282. We would say the reason it is called the public sector equality duty is at the very least that the passengers on Southern Rail, who include obviously disabled passengers, have a right enshrined in section 149 to have those particular public sector equality duties taken into consideration by the Secretary of State when he is exercising a function.
283. We say, very simply, that the determination of force majeure is the exercise of a finding. So that is, I think, all I wish to say about that.
284. MR JUSTICE OUSELEY: Yes. Thank you very much, Mr Hodivala.
285. I need not trouble you about ground four.
286. MR SHELDON: My Lord?

287. MR JUSTICE OUSELEY: I need not trouble you about ground four.
288. MR SHELDON: You need not trouble me.
289. MR JUSTICE OUSELEY: No.
290. MR SHELDON: No.
291. My Lord, I would just want to add one bit to it. You will be aware that the language is actually the impact on passenger services, not on passengers. Passenger services is defined elsewhere in the franchise agreement. You do not have the page, but I can hand it up.
292. MR JUSTICE OUSELEY: Yes.
293. MR SHELDON: Passenger services is defined as:
- "The franchisee railway passenger services as specified in any timetable."
294. So it is not about the impact on passengers. It is about the impact on the timetable itself.
295. My Lord, I will not say any more about **(Inaudible)**.
296. MR JUSTICE OUSELEY: No.
297. MR SHELDON: My Lord, as I understand it, grounds two and three are no longer being advanced.
298. MR JUSTICE OUSELEY: Yes.
299. MR SHELDON: So I am going to address you, therefore, on ground one.
300. My Lord, the Secretary of State says the matter is not even arguable in a number of different ways. Firstly, we refer to standing. Secondly, we refer to non-justiciability. Thirdly, we say academic and premature. Fourthly, we say in any event, it is just not arguable when one looks at the meat of the argument.
301. The Secretary of State is fully aware of the inconvenience experienced by commuters on Southern Rail and accepts that completely. What I am told is the matter as to whether or not there has been force majeure and whether that is satisfied is currently sitting with the Secretary of State and a decision is expected imminently. I was hoping to get something today --
302. MR JUSTICE OUSELEY: Yes. Well, that is, in a sense, part of Mr Hodivala's point.
303. MR SHELDON: Well --
304. MR JUSTICE OUSELEY: I understand these things can take some time, but he says it was initially March. You have been saying it is academic. You know soon in this

court things are going to be decided, but in fact, Ministers have their own timetable. Some of them have other concerns.

305. MR SHELDON: My Lord, all I can say is the matter is currently sitting with the Secretary of State and a decision is expected imminently. That decision is to whether or not the force majeure claims are satisfied. Are they made out by Govia? If they are and if they are not, what the impact of that will be on the performance benchmarks. Then the question is what, if any, enforcement mechanisms need to be addressed after that?
306. MR JUSTICE OUSELEY: What is the decision that is imminent? Is there going to be a separate, this is not or this is, force majeure to the following extent or is it going to be, "This has arisen force majeure and I am minded to take one or remedial steps"?
307. MR SHELDON: My Lord, my understanding is the decision is whether force majeure has been made out. If so, what is the impact of that on the performance benchmarks?
308. MR JUSTICE OUSELEY: Yes.
309. MR SHELDON: Following that, assuming that force majeure has not been made out in respect of everything or that, even if there has been force majeure, it does not justify all of the breaches of the performance benchmarks, then the question will be considered by the Secretary of State as to what enforcement action to take.
310. MR JUSTICE OUSELEY: But --
311. MR SHELDON: So there is a primary decision that is --
312. MR JUSTICE OUSELEY: The decision that you are expecting imminently is the first two, that is to say force majeure has not been made out and it has or has not had the following impact in relation to breaches of performance indicators.
313. MR SHELDON: That is the imminent decision that we --
314. MR JUSTICE OUSELEY: The question of remedy, if breach, will be a later decision.
315. MR SHELDON: It will be a later decision, but my instructions are not a significantly later decision.
316. MR JUSTICE OUSELEY: Yes. Is this just arriving perhaps? Oh, no. **(Pause)**
317. MR SHELDON: My Lord, I am told that is correct.
318. MR JUSTICE OUSELEY: Yes.
319. MR SHELDON: My Lord, the first question, therefore, to consider is the issue of a force majeure. We say why the --
320. MR JUSTICE OUSELEY: Just before you get to it, can I just be clear? So far as standing is concerned, are you looking really to push standing at this stage?

321. MR SHELDON: Well, my Lord, we have made our point in writing.
322. MR JUSTICE OUSELEY: Yes.
323. MR SHELDON: I do not think there is much more for me to say about that.
324. MR JUSTICE OUSELEY: No. Thank you very much.
325. Are you going to do justiciability later or do you want to do it --
326. MR SHELDON: Well, my Lord, I can do it now.
327. MR JUSTICE OUSELEY: No, I am happy for you to take it in whichever order. I just want to keep in mind what you are going to cover.
328. MR SHELDON: My intention is to deal with the issue of unreasonable delay first --
329. MR JUSTICE OUSELEY: Right.
330. MR SHELDON: -- and then come back to the issue of non-justiciability. However, just to --
331. MR JUSTICE OUSELEY: No, no, that is fine.
332. MR SHELDON: -- signpost it, because it is entirely relevant, what is force majeure? That, it has been satisfied, is a contractual decision because it does not appear in the statutory regime. It appears in the franchise agreement.
333. MR JUSTICE OUSELEY: Yes.
334. MR SHELDON: That, my Lord, is entirely relevant to the issue of amenability to judicial review. It is the second point I will deal with because if it is a purely contractual matter in terms of interpretation of a contract and application to a contract, then this is not a matter for determination by this court sitting as the Administrative Court. That is supported by the authorities in the bundle, (**Inaudible**) and Supporter Ways.
335. But let us assume that there is an issue of justiciability arising --
336. MR JUSTICE OUSELEY: I am not actually sure that that is really what Mr Hodivala's point is in relation to force majeure and justiciability. What he is saying is effectively he is not taking issue with the terms of the contract, although he might have been vaguely in relation to section 149. But in relation to the force majeure argument, he is not debating whether particular circumstances are or are not force majeure or the effect which force majeure may have on the performance benchmarks breaches.
337. What he is saying is he is not even saying that there is a contractual obligation in relation to time, which he is saying was breached. So --
338. MR SHELDON: Well, then, my Lord, there is not even a public law question at all.

339. MR JUSTICE OUSELEY: Well, that is where you --
340. MR SHELDON: If the issue is about whether or not the -- the starting point here has to be whether or not force majeure is made out, because that is a condition of the franchise agreement, if there is an obligation expressly or defined, as my learned friend correctly accepts, as to the time which that needs to be considered.
341. Therefore, the question is: is there superimposed on that any kind of public law obligation? We say no. There is nothing in the statute that requires it. There is nothing that demands it through just general common law principles. Therefore, and in a sense this ties in with the standing point, it is, in a sense, none of the business of the Claimants as to whether or not the Secretary of State in dealing with his contractual arrangement with Govia has acted quickly, expeditiously or not.
342. MR JUSTICE OUSELEY: Well, that is the first point then that you need to persuade is not arguable under that head. But anyway, I have the way you put it.
343. MR SHELDON: You have the way I put it.
344. So my Lord, let us assume there is justiciability, that there is some public law or at least an arguable public law question around this.
345. MR JUSTICE OUSELEY: Yes.
346. MR SHELDON: We say that the only test that there could be as a matter of public law would be the Wednesbury test, which is, as your Lordship phrased it (**Inaudible**), is could no Secretary of State have reasonably taken this amount of time to consider this force majeure matter?
347. My Lord, the authority that you were referred to is entirely inapt because it is dealing with very, very different circumstances. All the cases deal with individual rights where the failure to make a determination impacts on either entitlement, potential entitlement or some other civil right or important matter for them.
348. Here we are dealing with what enforcement mechanism or remedies should or should not be used against a railway operator. We are not dealing with, for instance, in the C case that you were taken to, disability relating to benefit. Should someone get that or not?
349. MR JUSTICE OUSELEY: I am not sure that Mr Hodivala has the right case for his point, but I seem to remember there were one or two cases possibly 10 years or so ago now, also involving Collins J, where the Home Secretary had policies in relation to the timing of which she would make immigration decisions which were effecting everybody. Although an individual or individuals brought the claim, in effect what it was was whether the whole process for dealing with a number of immigration related issues. It may indeed have been right to work pending resolution of asylum claims.

350. But the whole question was, although they were each individuals, whether the way in which the Secretary of State had set things up, if I can put it that way, was achieving reasonable decisions in a reasonable time.
351. MR SHELDON: My Lord, they are decisions that **(Inaudible)** and I am, of course, familiar with those cases. I think Medical Justice were the Claimants in those cases. There is a series of them, but the decisions that were being produced by that system affected individual rights or asylum with right to work.
352. MR JUSTICE OUSELEY: Yes.
353. MR SHELDON: The decision that would be produced at the end of this process is a decision in terms of the relationship between the Secretary of State and their rail operator. It does not have any, certainly no direct, effect on any individual passenger, commuter or anyone related to them. It is a question around enforcement, ultimately, of a contract. So an entirely different terrain.
354. One can certainly understand, with respect, an individual claim to work or some other entitlement. They need to know that within a reasonable period of time. The question is what is reasonable in the circumstances? But that does not matter here. It is an entirely different situation.
355. One can see that, in fact, in the C case that you were referred to. One has a very similar circumstances in the Medical Justice cases.
356. My Lord, if we look at, I think it is, tab 5 in the authorities bundle at volume C, if we just look at the reasons of Patterson J, paragraph 94, why she found that there was unreasonable delay. A series of points were given. The first one is:
- "Both claimants' cases called for expeditious consideration. They each suffered from significant disabilities. They were each properly to be regarded as amongst the most vulnerable in society."
357. Of course, when a disabled person learns about whether or not they are going to receive any disability related benefit, it is fundamentally important to them.
358. Then we look at, over the page at (viii):
- "The prejudice and distress of both claimants of having to wait for the protracted period of time to have their claims determined was considerable and unnecessary."
359. MR JUSTICE OUSELEY: Yes.
360. MR SHELDON: At the bottom of (x), my Lord:
- "The scale of the project is a cogent factor in the defendant's favour but it has to be balanced against the fact that the PIP scheme is intended for the most vulnerable members of society and fit for purpose has to be

construed with that service user in mind."

361. So we are dealing there -- and we say similar things in the immigration context or the Home Office context. That is not what we are dealing with here. We are dealing with is there force majeure? Has it been satisfied? What is the impact thereafter upon enforcement mechanisms between the Secretary of State and their operator?
362. MR JUSTICE OUSELEY: Well, what Mr Hodiala says is that there is an obligation on the Secretary of State to decide the issues under the contract within a reasonable time, not by necessarily **(Inaudible)** in the contract though. It is a another issue, but a duty owed to the public at large because the Secretary of State is entering the franchise agreement in order to procure an efficient public transport system upon which he knows that large numbers of people depend for a whole variety of reasons and he has a policy. I forget where I have seen it. He actually has a policy, a **(Inaudible)** policy, for his enforcement of the obligations, which includes taking a decision within a reasonable --
363. MR SHELDON: No, my Lord, it does not, in fact.
364. MR JUSTICE OUSELEY: Could you just take me --
365. MR SHELDON: My Lord, I think it is in tab 13 of volume D. I think it is there.
366. MR JUSTICE OUSELEY: I saw an extract.
367. MR SHELDON: It is attached to that.
368. MR JUSTICE OUSELEY: Okay, tab 13.
369. MR SHELDON: Tab 12, my Lord.
370. MR JUSTICE OUSELEY: 12.
371. MR SHELDON: It is in tab 12, my Lord, of volume D.
372. MR JUSTICE OUSELEY: Yes.
373. MR SHELDON: I do not recall where. My learned friend certainly did not refer to anything there about reasonable time.
374. MR JUSTICE OUSELEY: Well, he set a --
375. MR SHELDON: He thought about expeditious. That was his assertion.
376. MR JUSTICE OUSELEY: Okay. Well, there is an extract from it in one or other of the skeletons, I think, or maybe it is in the grounds. If any of you can lay your hands on it now and save me going through.
377. MR SHELDON: My Lord, I do not believe there was anything in there drawing to the attention therein which talks about the time in which the --

378. MR JUSTICE OUSELEY: Well, I am sure he has got the bit he relies on in one or other of his --
379. MR HODIVALA: My Lord, I am so sorry to interrupt.
380. MR JUSTICE OUSELEY: No.
381. MR HODIVALA: I will find the passage (**Inaudible**), but effectively, the first --
382. MR JUSTICE OUSELEY: Here we are. It is paragraph 1(1).
383. MR HODIVALA: Yes, that is it.
384. MR JUSTICE OUSELEY: Yes. "Has a duty to protect the public interest by securing compliance." It is not a time as such.
385. MR SHELDON: Yes, but securing compliance with the agreements. My Lord, there is nothing in there about to do that in a expeditious time or within a reasonable time frame. He is just saying there needs to be securing compliance with the agreements.
386. Now, from there we say it is not possible to draw a public law duty to act within a reasonable period of time.
387. MR JUSTICE OUSELEY: Yes. (**Pause**)
388. It is not necessarily implicit.
389. MR SHELDON: My Lord, my submission is no. The duty to ensure compliance, but whether or not that means there has to be a duty to carry out determinations expeditiously or within a reasonable period of time is not required.
390. MR JUSTICE OUSELEY: If there is a time limit, whatever it is loosely, within which compliance has to be secured, does that not rather gut the obligation in force?
391. MR SHELDON: My Lord, there are a whole variety of ways in which compliance can be secured. It does not require it to be done in a particular time frame as it is exactly the same.
392. So my Lord, that is our primary point. But assuming that there is a duty not to act in a way which provides undue delay, the question then is what is the yardstick by which the court assesses that? That, we say, has to be a Wednesbury test. There is nothing within the legislation, nothing within the policy. There is nothing within the agreement which provides any particular time frame.
393. What we have explained here in our summary grounds of defence, which is a supported by a statement of truth, is the variety of factors that have been taken into account. My Lord, I refer to some of them in particular at paragraph 38.
394. MR JUSTICE OUSELEY: Yes.

395. MR SHELDON: My Lord will find that at page 56 of the bundle.
396. MR JUSTICE OUSELEY: Yes.
397. MR SHELDON: My Lord, my learned friend referred to at least one of these points, but the Secretary of State are saying it has acted rationally in the Wednesbury sense, having regard to the time frame that within which information supporting the claims has been provided, the scale of those claims, the volume of the data, the complexity of the analysis proposed claimed, including the requirement to assess whether as a matter of fact there has been unofficial strike action in addition to official strike action, the requirement to quantify the extent to which any strike action accounted for incidents of other forms, the need to address as a matter of priority continuing industrial action and proposed further industrial action and a need to ensure that any finding of breach is properly considered and properly defensible.
398. We say when one takes that into account, it is clear that we have not acted in a way which is arguably unreasonable in the Wednesbury sense. There is considerable explanation in the summary grounds of defence of the scale and the complexity of the task. We see that from paragraphs 29 through to 33. Just looking at paragraph 29, for instance:
- "The period to May and late July 2016 GTR had provided the Secretary of State with information seeking to claim force majeure at the level of individual train services in respect of no less than 10,000 separate incidents and 70,000 delay notices."
399. That was just in respect of one time period, one reporting period, and one can extrapolate from that the overall scale of the problem.
400. Now, my learned friend says, "Well, prima facie there has been an unacceptable delay," using the language of Collins J. Therefore, the Secretary of State is called upon to provide an explanation. Well, my Lord, firstly, we say that is not the right way to look at it. The court has to consider it this way: is there even an arguable unreasonable delay?
401. MR JUSTICE OUSELEY: Yes.
402. MR SHELDON: If so --
403. MR JUSTICE OUSELEY: Is it arguably prima facie?
404. MR SHELDON: My Lord, we say no. We say no and we explain given an explanation which is supported by the statements that you have seen as to what the process has been and why it has been so complex, why it has been so difficult and why a decision has not been made until about to be made now.
405. Then, my Lord, one considers possible justiciability. One considers the academic pressure of the claim. In fact, as I am instructed to tell you, the matter is sitting with

the Secretary of State at this very moment and a decision is due imminently. What is the purpose of this litigation? What would be the purpose of the grant of any relief?

406. MR JUSTICE OUSELEY: I think what Mr Hodivala would say about that would be that if, in fact, there has been unlawful delay, you should not be able to escape the consequences of a judicial finding to that effect by producing the decision late. Fine, thank you for the decision, but that does not provide a defence to the amount of time you have thus taken. That is his most compelling argument.
407. MR SHELDON: My Lord, what was the purpose of that? What purpose does that serve? It is very different in the **(Inaudible)** case, for instance, that you have seen or in the Home Office type cases where the question then becomes there are lots of other people in the system who need to get an entitlement, receive a benefit or whatever else it is. Here we are dealing with one period of time in respect of one franchisee with their own particular circumstances. What happened there in respect of considering force majeure and then enforcement?
408. In a sense, what difference does it make? You will get a decision. The decision is going to come out very shortly. How does it serve the public interest to know that the Secretary of State took too long to rely on it and obviously the time and the resource that will have to be thrown into addressing that?
409. It is purely academic because it actually does not have any carry over to any other circumstance, to any other case, to any other consideration because each one will have its own peculiarities. It is not about assisting failure. It is about how this particular matter was considered.
410. So a finding of fault or possibly would say it would find us, the finding of fault that there was undue delay in righting that, how does that help anyone? How does that serve the public interest?
411. My Lord, we say, first, no lawful case of unreasonable delay. Secondly, it is entirely academic in terms of the relief that will be afforded even if permission is granted and even if a substantive finding is made against the Secretary of State. Then we say, in fact, the matter is not even justiciable. But we are at this point in time dealing with a contractual matter that the Secretary of State is considering. The Secretary of State has to consider have these contractual provisions been complied with or not?
412. MR JUSTICE OUSELEY: What if I took the view that the proof of the imminence pudding is in its eating and that if you cannot do it imminently, it is about time the Claimants have a crack at showing you are acting unlawfully? I am sure you can devise a mechanism of achieving such a result, but holding you to an imminent decision which you say is coming, I am sure on instructions. I am sure the Minister would not have permitted instructions to be given without having satisfied him, or is it a her, that you could do it.
413. MR SHELDON: My Lord, I --
414. MR JUSTICE OUSELEY: It is Mr Grayling, is it?

415. MR SHELDON: My Lord, it is.
416. MR JUSTICE OUSELEY: He has familiarity with the courts.
417. MR SHELDON: My Lord, he does. He certainly does.
418. My Lord, if you were considering something on the lines of the application for permission is adjourned for a period of X days or X weeks or whatever it is for the Secretary of State to provide or to announce his determination, if no determination is made within that period, then permission is granted.
419. MR JUSTICE OUSELEY: Yes.
420. MR SHELDON: If the decision is made within that time period, permission is refused, I am sure that -- I will just take instructions -- my instructing solicitors can probably live with. It will just be a question of what the time frame would be. My Lord, let me just turn my back. **(Pause)**
421. My Lord, I am told that that would be something that could be suggested as a way of --
422. MR JUSTICE OUSELEY: Well, I would be troubled, supposing I was otherwise saying "permission refused" and the weeks go by and the weeks go by and the weeks go by and my decision has been shown to be misguided on the basis of your instructions.
423. MR SHELDON: My Lord, we would certainly would not want that to be the situation.
424. MR JUSTICE OUSELEY: No.
425. MR SHELDON: My Lord, our primary submission is, of course, permission should be refused and there is no arguable case.
426. MR JUSTICE OUSELEY: Yes.
427. MR SHELDON: However, I am told that some form of order which is conditional on the announcement of a decision within 14 days of today would be an alternative.
428. MR JUSTICE OUSELEY: Let us move on to the other points.
429. MR SHELDON: My Lord, I think I have touched on academic. I have sought to refer to justiciability.
430. MR JUSTICE OUSELEY: Yes.
431. MR SHELDON: My Lord, I think those really are our points on ground one. Grounds two and three are not being pursued and ground four you are not asking me to speak about.
432. MR JUSTICE OUSELEY: Yes.

433. MR SHELDON: So I do not think there is anything more to say, but I will just check. My Lord, I have no further submissions.
434. MR JUSTICE OUSELEY: No.
435. MISS DARWIN: My Lord, I will be brief, no more than 10 minutes. I should, my Lord, start by saying that Govia is very concerned to ensure that disabled passengers do not experience difficulties or inconvenience using their services. Govia, of course, take obligations under the Equality Act extremely seriously and has made a number of policies and procedures to alleviate the effect of reasonable working action on its disabled passengers. I can stand on those policies and procedures, my Lord, would you want to do so. For now I should, of course, make it clear that Govia does not accept that it has committed any act of disability discrimination.
436. My Lord, Govia agrees with the submissions made by Mr Sheldon on behalf of the Secretary of State for Transport, which it gratefully adopts.
437. You have, my Lord, heard a lot about the relevant factual background to this case. There is just one or two factual matters I wish to address you on and then I have one additional point in relation to ground one.
438. MR JUSTICE OUSELEY: Yes.
439. MISS DARWIN: My Lord, in relation to the factual background, as we have heard this morning, Govia has been operating the Southern Rail franchise in extremely challenging circumstances. It has been said often both in writing and this morning another thing has been said about Govia's performance. But my Lord, I am pleased to say that Govia's performance has improved substantially since December 2016 by reference to the public performance measure, which is the industry standard measurement of performance.
440. Further, Govia --
441. MR JUSTICE OUSELEY: Are the London Bridge works part of the force majeure argument?
442. MISS DARWIN: My Lord, well, Govia's performance against the benchmarks in the franchise agreement, so delay, minutes, cancellations, short formation, those have all improved significantly since December 2016 as well. As a consequence, Govia has been making less force majeure claims. It does continue, and my Lord referred to earlier, make force majeure claims on a rolling basis because, as you may have seen in the papers, there has been some unofficial industrial action. By way of example, there have been unprecedented moments of --
443. MR JUSTICE OUSELEY: I have seen somewhere specifically the London Bridge works, which are ongoing, as I understand it, but just as a matter of fact, are they part of the force majeure issues or is it the strike action?

444. MISS DARWIN: My Lord, I can take instructions, but my understanding is that the main force majeure events relied on are the official and unofficial industrial action and there was also an issue in relation to stock. Those are, as I understand it, the major causes.
445. MR JUSTICE OUSELEY: Yes.
446. MISS DARWIN: So my Lord, whilst the difficulties regarding Southern Rail services have not, of course, been fully resolved, and it is also right to say that further industrial action has been announced, Govia is hopeful that the worst is behind us.
447. My Lord, I said already that I adopt the points made by Mr Sheldon in relation to ground one, but if I may just briefly make a few additional points.
448. Firstly, my Lord, there was a new point raised by the Claimant in relation to the delay by Govia in providing information. My Lord, Govia is, of course, not the target of this judicial review. But if I can briefly dwell on that, I think my learned friend's point referred to the supporting information provided by Govia rather than the notification of force majeure claims.
449. MR JUSTICE OUSELEY: Yes.
450. MISS DARWIN: There is, of course, a distinction.
451. But my Lord, so that you are clear on this, there is no suggestion that Govia has not complied with its duty under the franchise agreements to either notify the Secretary of State of the kind of force majeure claims or to provide the supporting information.
452. MR JUSTICE OUSELEY: No, I do not think that is the point. I think it was more the Secretary of State has tolerated seemingly larger gaps between the provision of information and the event than he has others. If you look at the schedule in the summary grounds of defence, sometimes it is pretty quick after the events have concluded. Sometimes it has been some months.
453. MISS DARWIN: My Lord, all I can say is that of course these force majeure events have differed quite significantly between events and that may well explain the difference in time in providing information.
454. My Lord, as we have heard, the challenging circumstances have meant that it was kind of impossible for Govia to comply with the performance benchmarks and that is why Govia has exercised its contractual right to make the force majeure claims.
455. My Lord, whilst one appreciates if the Secretary of State determines those claims against them, then Govia will be held in breach of the franchise agreements. It will then be open to the Secretary of State to get enforcement action against Govia. It is right to point out, my Lord, that that enforcement action could take the form of terminating the franchise agreement.

456. So my Lord will understand why these force majeure claims needed to be investigated and determined properly by the Secretary of State. As you will have seen, my Lord, in Govia's summary grounds we have elaborated on some of the many public law duties that the Secretary of State was under when investigating the force majeure claims or considering whether to take, enforcement action.
457. So my Lord, we say given the scale of the issue and the complexity of the issues and its importance for Govia's interests, given the potential enforcement action available to the Secretary of State, it cannot be said that the Secretary of State's delay in acting is Wednesbury unreasonable. So we say, like Mr Sheldon, that ground one is simply unarguable.
458. My Lord, unless I can assist you any further.
459. MR JUSTICE OUSELEY: No. Thank you very much.
460. MR HODIVALA: My Lord, if I may just respond very briefly, please, because it is of some concern that the Secretary of State's position is to be that there is no timetable whatsoever in terms of enforcing the agreement and that there is no breach of any public law duty as a result.
461. Can I just, first of all, start with section 57. It is at tab 13 of the authorities. Well, I think so. The authorities, tab 13, page 621.
462. So this is the policy point that my Lord was directed on. 57B requires the Secretary of State to have a policy as an absolute right that there is no timescale in the franchise agreement. That is right that there is no timescale in enforcement policy as well, which is the premise upon which Mr Sheldon made the submission that there is simply no public law policy point arguable here.
463. We would invite my Lord, please, to just look at section 57B(2) because we say that there is an inferential, as it were, requirement for the Secretary of State to act in a neutral manner. That includes a requirement to act in a reasonable timescale. When one looks at the criteria there, we say there is clear support for that. It is a great concern that the Secretary of State is not alive to that particular issue.
464. When one looks then at the enforcement policy itself at tab 12, back one tab, page 588, my Lord has already had attention drawn to the way in which the policy views the Secretary of State's requirements under the relevant Act. In other words, it is a duty to secure the public interest by securing compliance with the franchise agreements.
465. Well, we would say again, whilst it is right that there is no timescale envisaged in this policy, it must be right as a matter of public law that the Secretary of State has to act reasonably.
466. In particular, over the page, page 589, towards the bottom of that page, paragraph 2.7:

"The department adopts a stepped approach to enforcement in order to ensure that any action undertaken is proportionate to the contravention.

The aims of the Secretary of State's enforcement policy are."

467. Then first bullet point:

"Ensure that franchise commitments are delivered and franchise agreements are complied with."

468. Then over the page, paragraph 3.9 refers to the franchise agreement itself. Then we have over the page at 591 reference to enforcement orders. Paragraph 20 now at page 592. There is reference in the Act itself to the Secretary of State taking the view that a breach of the franchise agreement is trivial. Paragraph 3.9 on page 592 sets out that there is no definition of what is trivial. However, a contravention may have aggravating features.

469. So we would say that when one again steps back and looks at the statutory framework, the policy and the franchise agreement, it must be a necessary inference that the Secretary of State is required to act within a reasonable time because otherwise the statute and the enforcement policy and the franchise agreement come to nothing. Effectively, the performances and the performance obligations can be discharged at whatever pace or whatever timescale the Secretary of State and Govia see fit, then in my submission, it simply drives a coach and horses through what would otherwise be an adequate passenger rail service. So that is the first point that we make in regards to the enforcement policy.

470. The next point was with regards to the suggestion that the Secretary of State has set in summary grounds of defence the scale and complexity of the task at hand. I am not going to go through them in great detail, but I would like to draw my Lord's attention to paragraph 58 of our skeleton argument. **(Pause)**

471. My Lord has that. My Lord, I have a spare copy.

472. MR JUSTICE OUSELEY: No, I have got it somewhere.

473. MR HODIVALA: My Lord, as I say, I am not going to go through that line by line, but we would say the general thrust of these points is that the Secretary of State has used breach of contract to impose on Govia certain performance obligations and we assume the responsibility for determining force majeure. That is a relevant feature in determining what is reasonable and unreasonable in terms of timescale.

474. This is not a question of Parliament, for instance, imposing on the Secretary of State a requirement for things to be determined. He has freely chosen to adopt that role. So it lies in the mouth of the Secretary of State, in my submission, to say that it was a very large task to undertake when this is precisely the set of circumstances which the franchise agreement cater for. So those are our points in relation to that.

475. The justiciability point, my Lord, we have made our points in writing. In relation to the justiciability point, we appreciate and adopt my Lord's view effectively the threshold at this point is to ask whether it is a prima facie arguable case because --

476. MR JUSTICE OUSELEY: Arguably prima facie.
477. MR HODIVALA: Yes, sorry. I beg your pardon, yes. Arguably a prima facie case.
478. When one looks at the case of Supporter Ways and (**Inaudible**), in my submission, there the courts were looking at the very issue that has arisen in this case. So it supports the suggestion that it is an arguable case. Whether it ultimately succeeds after full argument and so on, consideration of evidence, is a different question.
479. Then finally, whilst we are obviously relieved to hear that Govia has improved its performance since December 2016, again, it goes to the transparency point. Were it not for these proceedings and scrutiny that these proceedings are endeavouring to bring to the enforcement of the performance franchise agreement, the performance obligations of the Govia franchise simply, in my submission, would go completely unchecked.
480. That is effectively the thrust of the submissions made by the Secretary of State that this is not a justiciable claim because it is a contractual private arrangement between he and the franchise provider. In my submission, as a matter of public law that is both concerning and wrong.