

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 be addressed 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.