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Case No: CC-2023-MAN-000031

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS IN MANCHESTER**  
**CIRCUIT COMMERCIAL COURT (KBD)**

Manchester Civil Justice Centre  
1 Bridge Street West,  
Manchester M60 9DJ

Date: 18/08/2023

**Before:**

**HHJ CAWSON KC**  
**SITTING AS A JUDGE OF THE HIGH COURT**

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**Between :**

<b>DIAMOND BUS LIMITED</b>	<b><u>Applicant</u></b>
<b>- and -</b>	
<b>TRANSPORT FOR WEST MIDLANDS</b>	<b><u>Respondent</u></b>

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**Stephen Connolly** (instructed by **Backhouse Jones**) for the **Applicant**  
**Giles Maynard-Connor KC** (instructed by **Addleshaw Goddard LLP**) for the **Respondent**

Hearing date: 27 July 2023  
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**Approved Judgment**

Remote hand-down: This judgment was handed down remotely at 10.30 am on Friday 18 August 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

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HHJ CAWSON KC

## HHJ Cawson KC:

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### Introduction

1. By its application dated 24 April 2023 (“**the Application**”), the Applicant, Diamond Bus Limited (“**Diamond**”), seeks an order for pre-action disclosure pursuant to CPR 31.16 against Transport For West Midlands (“**TfWM**”).
2. Diamond is a bus operator which provides bus services to the general public in and around the West Midlands comprising the administrative areas of Birmingham City Council, Coventry City Council, Wolverhampton City Council and the Metropolitan Districts of Dudley, Sandwell, Solihull and Walsall (“**the Principal Area**”).
3. TfWM is part of the West Midlands Combined Authority and is responsible for the making, implementation and operation of travel concession reimbursement arrangements for the Principal Area under the Transport Act 1985 (“**the 1985 Act**”) and the Transport Act 2000 (“**the 2000 Act**”) (collectively “**the Acts**”) and the Travel Concession Schemes Regulations 1986/77 (“**the 1986 Regulations**”) and the Mandatory Travel Concession (England) Regulations 2011/1121 (“**the 2011 Regulations**”) (collectively “**the Regulations**”).
4. Diamond and TfWM have been in dispute for a number of years over sums which Diamond claims should have been reimbursed to it in respect of the provision by it of concessionary services for the periods 1 April 2018 to 31 March 2019, and 1 April 2019 to 31 March 2020. The sums in question fall into two categories, namely:

- i) Additional costs that Diamond alleges that it incurred in the provision of concessionary services that Diamond alleges fall to be reimbursed (“**the Additional Costs Claim**”); and
  - ii) Fare income that Diamond alleges that it has foregone by reason of its provision of concessionary services that Diamond alleges falls to be reimbursed (“**the Fares Foregone Claim**”).
5. The Application is brought in anticipation of proceedings by Diamond against TfWM to recover the sums the subject matter of the Fares Foregone Claim. Diamond maintains that the jurisdictional thresholds under CPR 31.16 are satisfied, and that the Court ought, in the exercise of its discretion, to make an order for pre-action disclosure in the terms sought.
  6. The Application is opposed by TfWM, whose case is that the jurisdictional thresholds under CPR 31.16 are not satisfied on the facts of the present case, and that the Court ought not, in any event, to exercise its discretion in favour of making an order for pre-action disclosure.
  7. Stephen Connolly of Counsel appeared on behalf of Diamond, and Giles Maynard-Connor KC appeared on behalf of TfWM. I am grateful to them both for their very helpful written and oral submissions.

### Evidence

8. The Application is supported by two witness statements, dated respectively 28 April 2023 and 9 June 2023, of Simon Lee Dunn (“**Mr Dunn**”), a director of Diamond (“**Dunn 1**”) and (“**Dunn 2**”). In addition, Diamond relies upon the witness statement of Andrew Meaney (“**Mr Meaney**”) of Oxera Consulting LLP (“**Oxera**”), an economics and finance consultant, dated 26 April 2023, and the witness statement of Philip Timothy Lashford (“**Mr Lashford**”) of Phinancial Consulting Limited, an expert in concessionary fare reimbursement, dated 26 April 2023.
9. TfWM relies upon the witness statement of Matthew Lewis (“**Mr Lewis**”), a Technical Director responsible for Swift at TfWM.

### The Statutory and Regulatory Framework

10. By section 93 of the 1985 Act and section 149 of the 2000 Act, TfWM was obliged:
  - i) To reimburse Diamond for free or subsidised bus travel that it provided to eligible passengers; and
  - ii) Subject to any regulations made by the Secretary of State, to formulate arrangements for such reimbursement.
11. By paragraph 4 of the 1986 Regulations and paragraph 6 of the 2011 Regulations, TfWM was required to have as its objective in formulating such arrangements that the providers of free or subsidised bus travel to eligible passengers (such as Diamond) were “*no better or worse off*” from providing such free or subsidised bus travel and that they were reimbursed for the costs incurred in so doing.

12. The arrangements that TfWM formulated that are relevant for present purposes are:
- i) Transport Act 1985, Older and Disabled Persons Travel (Bus) Concession Scheme (“**the 1985 Act Arrangements**”); and
  - ii) Transport Act 2000, Travel Concession Reimbursement Arrangements (“**the 2000 Act Arrangements**”);
- (collectively “**the Arrangements**”).
13. There are two sets of the Arrangements, one valid from 1 April 2018 and the other valid from 1 April 2019. They are in similar form, and so for the purposes of the Application it is sufficient to work from just one of the Arrangements, namely those from 1 April 2018.
14. In outline, the Arrangements were a scheme promulgated by TfWM pursuant to which bus operators, such as Diamond, obtained reimbursement from TfWM for free or subsidised bus travel (i.e., concessionary fares) which pursuant to, inter alia, the Acts and the Regulations, they were obliged to provide to certain categories older (persons of pensionable age) and disabled passengers in the Principal Area.
15. The provisions of the Arrangements of particular relevance for present purposes are the following:
- i) By paragraphs 8 of the 1985 Act Arrangements and paragraph 9 of the 2000 Act Arrangements, Diamond was required to provide, and did provide, travel concessions to eligible passengers as set out in Schedule 1 to the 2000 Act Arrangements on the eligible services that it operated.
  - ii) By paragraph 2 of the 1985 Act Arrangements and paragraphs 2 and 3 of the 2000 Act Arrangements, TfWM was obliged to reimburse Diamond for the provision of those travel concessions in accordance with the terms of the Arrangements.
  - iii) Paragraph 15 of the 1985 Act Arrangements provided that the objective of the Arrangements in relation to the reimbursement of operators under the 1985 Act was: “*to provide such that operators both individually and collectively are no better and no worse off financially than they would be if they did not participate in the [Arrangements] in accordance with the principles set out in the [Regulations]*”, subject to TfWM not being liable for any failure to achieve such objective.
  - iv) Paragraph 16 of the 2000 Act Arrangements provided that:

“The standard method for assessing the total number of journeys made by eligible persons under the Arrangements is set out in Schedule 2. The standard method for assessing the fares value to be attributed to those journeys is set out in Schedule 3. The standard method for calculating the reimbursement for revenue forgone due to the operator will be on the basis of the formula and parameters set out in Schedule

4. The standard method for calculating any costs additional to basic operating costs is set out in Schedule 6.”

v) Paragraph 17 of the 2000 Act Arrangements then provided that:

“In calculating the reimbursement due to the operator, the Authority will take into account any data supplied by the operator if it can be shown that the data supplied is more accurate than the standard method and is more likely to enable the Authority to meet the applicable, ‘no better, no worse’ objectives for reimbursement set out in the [Regulations] and EU Regulation 1370/2007.”

vi) Schedule 3 to the 2000 Act Arrangements sets out the “*standard method*” of determining the average fare that would be paid in the absence of the concession. This involves determining the “*Average Cash Fare*”, i.e., what passengers would have paid in cash for each journey, and to then apply a “*Discount Factor*”, the principal determinants of which are the relative prices of cash fares, daily tickets and weekly tickets as described in Department of Transport guidance (“**DfT Guidance**”). Operators are required to provide four specified values of data with regard to cash fares, daily tickets and weekly tickets to be used to estimate the average cash fare paid by commercial passengers for each journey, and the average price per ticket of daily and weekly tickets respectively (paragraph 4 of Schedule 3). Paragraph 5.1 of Schedule 3 then provides that the four values are to be input into a spreadsheet which draws on the data included in the DfT model or other local data if more applicable (“*the Look-up table*”) to populate a DfT Discount Factor calculation. Paragraph 5.1 provides that the specific values in the Look-up table are locally derived from all smart card concessionary journeys originating in the Principal Area over a representative time period. In this way the Discount Factor is arrived at, which is then applied to the Average Cash Fare to arrive at the “*Average Fare Forgone*”.

vii) Schedule 4 to the 2000 Act Arrangements then sets out the “*standard method*” for determining “*Revenue Forgone*”. In essence, this involves multiplying the total number of passenger journeys (which is not in dispute) by the Average Fare Forgone, and to then apply (i.e., multiply the total by) a “*Reimbursement Factor*”, being the ratio of the estimated concessionary journeys that would be made if commercial adult fares had to be paid, to the actual number of passenger journeys made using the concession. Paragraph 2 of Schedule 4 provides that the Reimbursement Factor is to be calculated in accordance with the DfT Guidance using a specified spreadsheet, subject to adjustment as provided for.

16. So far as using the “*standard method*” for determining the “*Revenue Forgone*” is concerned, this is, as I have already identified, subject to paragraph 17 of the 2000 Act Arrangements requiring TfWM to take into account any data supplied by Diamond: “*if it can be shown that the data supplied is more accurate than the standard method and is more likely to enable [TfWM] to meet the applicable “no better, no worse” objectives for reimbursement.*” In the course of submissions, Mr Connolly took me to various paragraphs of the relevant DfT Guidance (published in

September 2017) emphasising that it may be appropriate to deviate from the standard methodology set out in the DfT Guidance in order to give effect to the “*no better, no worse*” principle, if appropriate to do so having regard to more localised data – see e.g., paragraphs 1.10, 2.1-2.5, 3.1, 3.10, 3.17, 5.11-5.12, and 5.19-5.20.

### **Diamond’s claim for reimbursement**

17. It is Diamond’s case that in its application of the Arrangements, TfWM has substantially under reimbursed Diamond for the periods 1 April 2018 to 31 March 2019 and 1 April 2019 to 31 March 2020, the under reimbursement claims falling under the two heads of the Additional Costs Claim, and the Fares Forgone Claim referred to in paragraph 4 above.
18. So far as the Additional Costs Claim is concerned, this has been articulated in pre-action correspondence with Diamond asserting claims to the value of £286,834 (2018/19) and £305,969 (2019/20) (totalling £592,803), and TfWM, in response, asserting that it has a liability of no more than £15,936 and alleging that Diamond has failed to produce the evidence to support its claim. Diamond does not seek pre-action disclosure in respect of the Additional Costs Claim and is content that it is able to bring this claim without pre-action disclosure from TfWM.
19. So far as the Fares Foregone Claim is concerned, it is Diamond’s case that it has not been possible for it to establish the viability or value of its claim to a sufficient degree as the documents and data required to do so are, it says, within the sole control of TfWM. Diamond says that its best estimate, based on its own data, and without reference to the data controlled by TfWM, is that its claims are worth in the region of £629,856 (2018/19) and £474,262 (2019/2020) (totalling £1,104,118). Diamond’s calculation of these amounts appears from a table at page 369 of the hearing bundle. It is in respect of the Fares Foregone Claim that pre-action disclosure is sought.
20. Diamond identifies that one key aspect of achieving the fundamental principle of putting Diamond back into the position of being no better, no worse off in consequence of providing free and subsidised travel is to compensate it in relation to fare income that it would have received but for the Arrangements implemented by TfWM, but which in consequence of those Arrangements it did not receive, i.e. fare income that DBL has foregone in consequence of the Arrangements as implemented by TfWM.
21. TfWM has applied the “*standard method*” for assessing the average fare that would be paid in the absence of the concession as provided for by paragraph 16 of, and Schedule 3 to the 2000 Act Arrangements, and it has then used the “*standard method*” provided for by paragraph 16 of, and Schedule 4 to the 2000 Act Arrangements for calculating the appropriate figure for “*Revenue Foregone*” for the relevant periods. As referred to in paragraph 15(vi) above, in calculating the Discount Factor to be used as a factor in the Revenue Foregone figure, TfWM will have prepared a spreadsheet or Look-up table as therein referred to.
22. It is Diamond’s case that the Look-up table used by TfWM is unrepresentative and does not represent the typicality of travel of passengers travelling on the buses of Diamond. In particular, it is Diamond’s case that the dominance of National Express as an operator in the Principal Area (where it operates 90% of all services) means that

the Look-up table formulated by TfWM is skewed out of favour to Diamond and that, in consequence, it results in a substantial under calculation in the level of fare income that Diamond has foregone in consequence of the Arrangements. In the course of submission Mr Connolly further explained this skewing as resulting from the fact that it is Diamond's case that passengers using National Express are likely to use more discounted, i.e., daily and weekly, tickets than passengers using Diamond's services. Consequently, it is Diamond's case that if the Look-up table is prepared using data from all operators across the Principal Area, this is bound to result in a lower Average Fare than if one had simply considered Diamond's own fares. This is because the Discount Factor applied is based upon a consideration of the data from all operators across the Principal Area and will, it said, therefore be greater than if based simply upon a consideration of data relating to Diamond's passengers and fares because fewer of Diamond's fares are discounted than the average (of which National Express represents 90%).

23. Diamond relies upon the considerations referred to in paragraph 16 above, and upon the overriding imperative underpinned by paragraph 4 of the 1985 Regulations and paragraph 6 of the 2011 Regulations, to the effect that the method used to arrive at the Revenue Foregone in Diamond's case must ensure that Diamond was "*no better, no worse off*" as a result of providing concessionary services, and that TfWM met such objectives for reimbursement. On this basis, given what it says is the skewing effect of National Express on the TfWM Look-up table, Diamond, using its own local data, has produced its own Look-up table, the application of which represents the basis upon which its own calculation of the sums due for Revenue Foregone referred to in paragraph 19 above has been prepared.
24. TfWM has, itself, challenged the accuracy of Diamond's Look-up table on the basis that the latter has taken account only of travel on Diamond's services and has taken no account of cross-operator travel and the reduction in average fare income that such cross operator travel would result in. TfWM has given the example of a passenger who makes a single journey on a Diamond bus, but thereafter makes a further four journeys on non-Diamond buses. In that example, the Diamond Look-up table would show that passenger as someone who was making only a single journey and would pay a single fare, but taking into account those other journeys, the passenger would, more likely, purchase a lower cost multi-operator daily or weekly ticket rather than a single Diamond fare. The effect of that example, says TfWM, is that Diamond's Look-up table will not represent the typicality of travel of passengers travelling on Diamond's services, will lead to Diamond's Look-up table overstating the average fare that it has foregone in consequence of the Arrangements implemented by TfWM, and thus lead to Diamond being overcompensated for the Fares Foregone Claim. I will call this issue "*the Cross-Operator Issue*".
25. Diamond submits that there is a straightforward solution to this, namely for TfWM to disclose to Diamond (or more specifically its experts/advisors) the anonymised passenger data for those passengers who have travelled on Diamond's services so that their typicality of travel can be established and, so far as necessary, Diamond's Look-up table can be adjusted accordingly.
26. Diamond suggests that the provision of that data, and the re-casting of Diamond's Look-up table using the same will achieve one of three outcomes, namely:

- i) It will vindicate TfWM’s use of its own look up table;
  - ii) It will vindicate Diamond’s use of its own look up table; or
  - iii) It will establish the extent to which TfWM’s and Diamond’s respective Look-up tables are unrepresentative of the typicality of travel of passengers travelling on the buses of Diamond, what adjustments need to be made to those Look-up tables so as to achieve something that is representative of the typicality of travel of passengers travelling on the Diamond’s buses, and what sum of money is required so as to put Diamond back into the position of being no better and no worse off.
27. Diamond argues that whichever of these three outcomes the provision of the data sought by the application achieves, it will avoid the need for the issue to be litigated at all or, at the very least, will greatly narrow the scope of any remaining dispute on this issue as between Diamond and TfWM and allow Diamond to serve focused Particulars of Claim in any proceedings that need to be issued.

### The Documents and Data sought

28. After some earlier correspondence dating back to 2018 relating to the quantum of the Revenue Foregone that it will be necessary to return to, a request for pre-action disclosure of the relevant data was made by Diamond’s Solicitors, Backhouse Jones, under cover of their letter dated 18 October 2021 which followed on from a letter before action dated 22 April 2021 that had enclosed draft Particulars of Claim (“**the Draft POC**”). The letter dated 18 October 2021 was responded to by TfWM’s Solicitors, Addleshaw Goddard LLP (“**AG**”), by letter dated 17 November 2021. Backhouse Jones did not respond to AG until they replied by a letter dated 31 January 2023 that maintained the request for pre-action disclosure.
29. The latter letter dated 31 January 2023 sought the following documentation relating to the following data:
- “a) Data period – 2018/2019 and 2019/2020.
  - b) Data limited to just those passengers who used a DBL Service during the data period.
  - c) Anonymised data at passholder level showing (1) journeys’ during the relevant periods and (2) the services taken (including point of boarding).
  - d) To facilitate iii), passholder numbers showing, each time a pass was used, (1) date and time; (2) service number and operator; (3) use on each operator’s services; and (4) point of boarding.”
30. It is Mr Dunn’s evidence that the scope of the data requested was formulated on Diamond’s behalf by its expert, Mr Meaney of Oxera, although Mr Meaney’s own witness statement does not confirm this.
31. In paragraphs 32 and 33 of Dunn 1, Mr Dunn maintains that the data sought is readily available to and providable by TfWM via its back office system known as ‘HOPS’



(Host Operator Processing System) which contains a database where details of each of the journeys undertaken are held, allowing TfWM to analyse and evaluate the journeys being undertaken. It is Diamond's case that the data requests that Diamond has made will all be captured in the database in the HOPS and will have been used by TfWM when they produced their scheme-wide Look-up table. Mr Lewis, on behalf of TfWM, whilst taking issue with Mr Dunn's suggestion that the data is available through the clicking of a few buttons, accepts, in paragraphs 46 and 47 of his witness statement, that TfWM are able to provide the data within a reasonable time frame and to do so via a single data report.

### **CPR 31.16 – Disclosure before proceedings start**

32. CPR 31.16 has its statutory basis in s. 53 of the Senior Courts Act 1981. It has survived the Disclosure Pilot in the Business and Property Courts, and PD 57AD. It is in the following terms:

#### ***“31.16***

- (1) This rule applies where an application is made to the court under any Act for disclosure before proceedings have started.*
- (2) The application must be supported by evidence.*
- (3) The court may make an order under this rule only where—*
  - (a) the respondent is likely to be a party to subsequent proceedings;*
  - (b) the applicant is also likely to be a party to those proceedings;*
  - (c) if proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure; and*
  - (d) disclosure before proceedings have started is desirable in order to –*
    - (i) dispose fairly of the anticipated proceedings;*
    - (ii) assist the dispute to be resolved without proceedings; or*
    - (iii) save costs.*
- (4) An order under this rule must –*
  - (a) specify the documents or the classes of documents which the respondent must disclose; and*
  - (b) require him, when making disclosure, to specify any of those documents –*

- (i) *which are no longer in his control; or*
            - (ii) *in respect of which he claims a right or duty to withhold inspection.*
  - (5) *Such an order may –*
    - (a) *require the respondent to indicate what has happened to any documents which are no longer in his control; and*
    - (b) *specify the time and place for disclosure and inspection.”*
33. As Mr Maynard-Connor KC points out, the Chancery Guide 2022 (June 2023 Revision), at paragraphs 7.31 and 7.32, provides some helpful guidance as to the application of CPR 31.16:
- “7.31 An order for disclosure before proceedings have started is made in accordance with CPR 31.16 in Section II of CPR PD 51U. It comprises a two stage test:
- (a) Parties must first satisfy the four-part jurisdictional test set out in CPR 31.16(3). This includes consideration of whether such disclosure is desirable in order to dispose fairly of the anticipated proceedings, or to assist the parties to avoid litigation, or to save costs; and
  - (b) If the court is satisfied that the application meets the jurisdictional threshold, it will then consider whether it is appropriate to make an order for pre-action disclosure as a matter of discretion, which has to be considered on all of the facts and not merely in principle but in detail: see *Black v Sumitomo* [2002] 1WLR 1562 ...
- 7.32 The jurisdictional criteria in CPR 31.16 still require consideration of whether the documents would fall within the scope of ‘standard disclosure’ under CPR 31.6. However, when considering whether to make an order, the court should take into account that if proceedings are brought they are likely to be subject to PD 57AD, where the court would work with the parties to define the issues for disclosure and apply the most appropriate disclosure model (paragraph 8 of PD 57AD): see also *Willow Sports Ltd v SportsLocker24.com Ltd* [2021] EWHC 2524 (Ch).”
34. The leading and seminal authority on the jurisdiction under CPR 31.16 is the decision of the Court of Appeal in *Black v Sumitomo* [2002] 1WLR 1562. CPR 31.16 has been the subject of a number of subsequent decisions, but the general principles to be applied in relation to applications for pre-action disclosure were helpfully summarised by Blair J in *Assetco Plc v Grant Thornton UK LLP* [2013] EWHC 1215 (Comm) at [17], as noted by Jacobs J in *Carillion Plc v KPMG LLP* [2020] EWHC 1416 (Comm) at [66]:

- “i) The respondent and applicant must both be likely to be parties to subsequent proceedings. It is not however necessary to show in addition that the initiation of such proceedings is itself likely: *Black v Sumitomo Corp* [2002] 1 WLR 1562 at [71 – 72], Rix LJ, which is the leading case on the rule.
  - ii) The documents sought must fall within the scope of the standard disclosure which the respondent would have to give in the anticipated proceedings. It follows that at the time of the application, the issues must be sufficiently clear to enable this requirement to be properly addressed.
  - iii) Disclosure before proceedings have started must be desirable (i) to dispose fairly of the anticipated proceedings, (ii) to assist the dispute to be resolved without proceedings, or (iii) to save costs: CPR 31.16 (3)(d).
  - iv) In considering whether to make an order, among the important considerations are the nature of the loss complained of, the clarity and identification of the issues raised by the complaint, the nature of the documents requested, the relevance of any protocol or pre-action inquiries, and the opportunity which the complainant has to make his case without pre-action disclosure (*Black v Sumitomo Corp* at [88]).
  - v) The anticipated claim must have a real prospect of success.
  - vi) In the commercial context, a pre-action disclosure order, even if not exceptional, is unusual.”
35. In *Kneale v Barclays Bank* [2010] EWHC 1900 (Comm), Flaux J (as he then was) emphasised that, although some of the jurisdictional questions may merge into matters of discretion, it is important to keep them distinct. Where the Court decides it does have jurisdiction, it should still only exercise its discretion to make an order where it is appropriate to do so.

### **Diamond’s case as to the application of CPR 31.16**

#### **Jurisdictional Threshold**

36. Mr Connolly, on behalf of Diamond, relying upon *Black v Sumitomo Corporation* (supra) at [73], submits that the jurisdictional threshold is not a high one, and that on most applications the Court is likely to be focused on the question of discretion.
37. As to CPR 31.16(3)(a) and (b), and whether the respondent and applicant are likely to be parties to subsequent proceedings, Mr Connolly, relying upon *Black v Sumitomo Corporation* at [72], submits that “likely” means “may well”, and given Diamond’s claim for under reimbursement as against TfWM, both are likely to be parties to subsequent proceedings.
38. As to CPR 31.16(3)(c), and whether, if proceedings had started, TfWM’s duty by way of standard disclosure, as set out in CPR 31.6, would extend to the documents or

classes of documents which the Application seeks disclosure, Mr Connolly points out that standard disclosure requires a party to disclose: (a) documents he relies on; (b)(i) documents which adversely affect his own case; (b)(ii) document which adversely affect another party's case; ((b)(iii) documents which support another party's case; and (c) documents he is required to disclose by a relevant practice direction. He submits that the documents sought by Diamond from TfWM will fall within, at least, categories (b)(i) to (iii) on the footing that either:

- i) As Diamond contends, they will demonstrate that the Look-up table relied upon by TfWM and the average fare derived from that Look-up are wrong and understate the liability of TfWM for fares forgone; or
- ii) As TfWM contend, they will demonstrate that look up table upon which TfWM relies and the average fare derived from that look up table are correct and that the liability to Diamond for Revenue Foregone is not understated.

39. In the case of i), the documents would be adverse to the case of TfWM and supportive of the case of Diamond. In the case of ii), the position would be reversed, with the documents being adverse to the case of Diamond and supportive of the case of (and relied upon by) TfWM.

40. As to CPR 31.16(3)(d), and the question as to whether pre-action disclosure is desirable in order to fairly dispose of the anticipated proceedings, assist the dispute to be resolved without proceedings or save costs, Mr Connolly submits that, at the jurisdictional stage, the Court is concerned with the question of whether there is a real prospect in principle of at least one of the three disjunctive limbs of CPR 31.16(3)(d) being satisfied – see *Black v Sumitomo Corporation* at [81]. Mr Connolly refers to the fact that Mr Dunn addresses each limb in Dunn 1 at paragraph 47(iii) and submits that Mr Dunn has thereby demonstrated that there is a real prospect in principle of each limb being satisfied as follows:

- i) *Fair Disposal* – at present, all relevant data is within the control of TfWM, but is reasonably readily available for disclosure. Provision of that data will not only allow Diamond to put its case on a certain rather than estimated basis, but it will serve to establish whether or not Diamond's case is well founded in whole or in part.
- ii) *Assist Resolution without Proceedings* – the provision of that data and the re-casting of the Look-up table is likely, it is submitted, to avoid the need for the Fares Foregone Claim to be litigated in that it will likely achieve one of three outcomes referred to in paragraph 26 above.
- iii) *Save costs* – the provision of the data, in addition to avoiding the need for later and costly amendment of the claim, will, it is submitted, serve to clarify and to narrow Diamond's case and/or avoid the need and the cost of the claim needing to be litigated at all – cf. *Carillion plc (In Liquidation) v KPMG LLP* [2020] EWHC 1416 (Comm) at [76].

## Discretion

41. Mr Connolly submits on behalf of Diamond that the discretion is not confined and depends upon all the facts of the case. Mr Connolly refers to Rix LJ in *Black v Sumitomo Corporation* at [88] having identified five “*important considerations*”, namely: (1) the nature of the injury or loss complained of; (2) the clarity and identification of the issues raised in the complaint; (3) the nature of the documents requested; (4) the relevance of any protocol or pre-action inquiries; and (5) the opportunity that the Claimant has to make his case without pre-action disclosure.
42. As to (1) (*nature of loss*) – it is Diamond’s case that it has been substantially undercompensated by TfWM under the Arrangements for fares that it has foregone by reason of its provision of concessionary travel. On the basis of Diamond’s Look-up table as currently prepared, the quantum of the claim is of the order of £1.104m, although Diamond recognises that this may be overstated for the reasons identified above, i.e., when the Cross-Operator Issue is factored in.
43. As to (2) (*clarity and identification of the issues*) – Mr Connolly submits that the issues have been identified and that there is a high degree of clarity as to those issues – i.e. the Look-up table used by TfWM, on Diamond’s case, skews and undercalculates the Revenue Foregone by Diamond under the Arrangements, whilst the Diamond Look-up table may very well overstate the Revenue Foregone by Diamond under the Arrangements once the Cross-Operator Issue is factored in. It is, says Diamond, only through the provision of the data sought that both Diamond and TfWM will be able to establish what the true level of Revenue Foregone by Diamond under the Arrangements actually is.
44. As to (3) (*nature of the documents*) – Mr Connolly submits there is no ambiguity as to the data that is sought by Diamond or as to TfWM’s ability to provide that data within a reasonable time frame and via a single report, reliance being placed upon Dunn 1, paragraphs 32 and 33, and paragraphs 46 and 47 of Mr Lewis’s witness statement, referred to in paragraph 31 above.
45. As referred to below, one of the objections taken by TfWM to the Application is that the data in question is confidential as it includes data regarding the operation of other bus operators. However, Mr Connolly maintains that there is an inconsistency between this objection, and the fact that TfWM has offered to disclose relevant data to Diamond as part of an expert determination – see paragraph 33 of AG’s letter dated 17 November 2021, and paragraph 65 of Mr Lewis’s witness statement.
46. Further, as to this confidentiality point, Connolly makes the points that:
  - i) Diamond, itself, has no need to see the data and is content for disclosure to be limited to its experts (Oxera) and its advisor (Phinancial Consulting) and legal advisors solely for the purposes of compiling a Look-up table and thereafter reformulating and, if needed, pursuing its claim, in circumstances in which both Oxera and Phinancial Consulting have offered express confidentiality undertakings to the Court.
  - ii) For the reasons given in Dunn 2, paragraph 17, (particularly sub-paragraph 17(v)), no collateral benefit could be obtained from the data in any event.

- iii) Any disclosure would be provided with the benefit and protection of an Order of the Court in any event.
47. As to (4) (*protocol and pre-action enquiries*) – Mr Connolly submits that the parties have engaged on a pre-action protocol and he points out that there has been an unsuccessful mediation. He submits that, in light of TfWM’s refusal to provide the data sought voluntarily, the Fares Foregone Claim is, in effect, now stymied unless and until the data sought is provided.
48. As to (5) (*opportunity to make claim without disclosure*) – Diamond seeks to make the short point that it cannot realistically make its claim without the disclosure. It says that, at best, it is able to put forward a case based on an incomplete Diamond only Look-up table in circumstances in which it acknowledges, itself, the likelihood is that the Diamond only Look-up table will be overstated. On behalf of Diamond, Mr Connolly submits that the data sought will allow an accurate Look-up table based on the actual travel habits of its passengers to be generated and for an actual and accurate claim to be formulated. He submits that an accurate Look-up table prepared with the benefit of the data requested will achieve one of the three outcomes referred to in paragraph 26 above.
49. Mr Connolly recognises that TfWM, apart from contending that the jurisdictional threshold under CPR 31.16(3) is not satisfied and also raising the confidentiality issue referred to above, objects to the Application on a number of further grounds. I will deal with Mr Connolly’s submissions on these further objections having dealt with TfWM’s case on them below. However, Mr Connolly submits that they do not provide a sound basis for the Court to exercise its discretion by refusing the Application and that, in all the circumstances the Court ought to exercise its discretion by granting Diamond the relief that it seeks by making an order for pre-action disclosure.
50. Mr Connolly submits that, ultimately, the Court needs to take a step back and take a “*big picture*” view of the Application – see *Carillion* (supra) at [68]. Mr Connolly submits that, in doing so, the Court ought to conclude that the sooner Diamond is able to put its claim on a certain footing with the benefit of pre-action disclosure the better. Not only will that enable the proceedings to be advanced expeditiously and fairly and without the need for unnecessary and costly interlocutory skirmishes, but it will allow TfWM, as a public body and as the promulgator of the Arrangements, to consider and to be advised at an early stage as to whether or not the Arrangements do meet the “*no better no worse*” objective of the 1986 and the 2011 Regulations. This will, Mr Connolly submits, allow the parties to have a more certain understanding as to the position, and allow informed decisions to be taken as to, inter alia, the scope, extent and value of proceedings and as to the principles and parameters of settlement.
51. On this basis, Mr Connolly submits that the Court ought to make order on the Application in the terms sought.

## **TfWM's response to the Application**

### **Preliminary considerations**

52. Mr Maynard-Connor KC refers to David Steel J in *Pineway Ltd v London Mining Company Ltd & Anor* [2010] EWHC 1143 (Comm) having highlighted at [56] that pre-action disclosure applications raise case management issues which require judges to take “a big picture view of the application in question” including a broad view of the merits of the potential claim underlying the application. Mr Maynard-Connor KC further refers to David Steel J, at [52], having noted that in almost every dispute it could be argued that pre-action disclosure might be useful for achieving a settlement or saving costs, and having emphasised that in order to justify an order for pre-action disclosure, circumstances must exist that are outside “the usual run”.
53. Mr Maynard-Connor KC, relying upon *Black v Sumitomo Corporation* (supra) at [88], stresses that whether the Court should exercise its discretion to order pre-action disclosure must depend on all the facts of the case including the merits of the suggested claim. This, he submits, requires the Court to consider the discretionary question in detail, such that this will usually call for an examination of each of the categories of documents requested – see *Hands v Morrison Construction Services Ltd* [2006] EWHC 2018 (Ch) at [29]. He submits that it therefore follows that the documents, or classes of documents, sought should be circumscribed, and the application limited to what is strictly necessary – see also the Chancery Guide (supra) at paragraph 14.80.
54. Whilst recognising that each case is fact sensitive, Mr Maynard-Connor KC identifies a number of factors of relevance to the present case which, he submits, militate against the making of an order for pre-disclosure, including:
- i) Where the parties have agreed to resolve disputes by a dispute resolution procedure. Thus, in *Taylor Wimpey UK Ltd v Harron Homes Ltd* [2020] EWHC 1190 (TCC), Fraser J refused to grant pre-action disclosure of three categories of document where the documents were obtainable under a contractual expert determination provision;
  - i) Where the applicant already possesses sufficient material to plead a claim – see eg. *First Gulf Bank v Wachovia Bank* [2005] EWHC 2827 (Comm) at [23]-[27], per Christopher-Clarke J;
  - ii) Where the disclosure sought would involve providing commercially sensitive information – see eg. *Hays Specialist Recruitment (Holdings) Ltd v Ions* [2008] EWHC 745 (Ch) at [48], per David Richards J.

### **Jurisdictional Thresholds**

55. Mr Maynard-Connor KC realistically recognises, and TfWM accepts, that if Diamond issues proceedings as threatened, then both Diamond and TfWM are likely to be parties, this being the appropriate test and not whether it is likely that such proceedings will in fact be issued. Further, Mr Maynard Connor KC realistically recognises, and TfWM accepts, that the classes of documents sought by diamond would in principle fall within its disclosure obligations should Diamond issue

proceedings as threatened in respect of the Fares Foregone Claim. There is therefore no real issue with regard to the ability of Diamond to satisfy CPR 31.16(a) to (c).

56. The battleground between the parties relates to CPR 31.16(d), and whether disclosure before proceedings have started is desirable in order to: (i) dispose fairly of the anticipated proceedings; (ii) assist the dispute to be resolved without proceedings; or (iii) save costs. TfWM submits that Diamond is unable to meet this jurisdictional threshold.
57. Mr Maynard-Connor KC submits that Diamond's case as to this jurisdictional hurdle is superficial and all too easy to make, and that the present case is not a case that can properly be described as outside "*the usual run*".
58. He submits that this is demonstrated by Diamond's Draft POC and the material set out in Mr Dunn's witness statement which, so it is said, shows that Diamond already has enough information to plead its case. Mr Maynard-Connor submits that Dunn 2 downplays this, but that when the Draft POC are considered, Diamond's case with respect to the Fares Foregone Claim is clearly pleaded and specific relief is sought. Calculations may currently be "*estimated pending disclosure*", but, so it is said, such a scenario is commonplace and does not justify the relief sought by the Application.
59. Further, it is TfWM's case that it is evident from Mr Dunn's and Mr Lewis's witness statements, and the correspondence between the parties, that there are real differences of principle between the parties as to the proper approach to be taken which are not going to be resolved or abandoned even if the disclosure sought is provided at this pre-action stage. This is said to demonstrate the fallacy of the contention that pre-action disclosure will assist the dispute to be resolved without proceedings or result in costs being saved. On this basis, TfWM submits that there is no real prospect of pre-action disclosure of the data sought producing any of the outcomes referred to in paragraph 26 above, and therefore no real prospect, even in principle, of any of the disjunctive limbs of CPR 31.16(3)(d) being satisfied in the present case.
60. TfWM's position is most clearly articulated in paragraphs 76 and 77 of Mr Lewis's witness statement, where he said:

“76 Based on DfT's guidance, it is TfWM's view that the accuracy of the Look-up table used for calculating Average Fare Foregone increases with the amount of data that is included. As such the current approach used by TfWM is to use data based on the entire West Midlands area passenger data. DBL's Average Fare Foregone claim, as set out in its draft Particulars of Claim, is based on an assumption by DBL that demand from concessionary fare passengers is lower on its services than the average demand from concessionary fare passengers for all bus operators across the West Midlands areas. The level of demand from concessionary fare passengers plays a significant role in the calculation of a number of elements of reimbursement under the scheme, not just in the calculation of the Average Fare Foregone. If the disclosure of the requested information supports the assumption that demand on DBL's services is lower, and Oxera produce an updated Look-up table to reflect this, with a higher Average Fare Foregone, the lower demand would mean that DBL



would be entitled to lower reimbursements in relation to other elements of the Scheme reimbursement calculations. By way of an example the base level of demand used within the generation factor element of the reimbursement calculations under the Scheme is based on averages across the West Midlands area. If DBL's demand is lower than average, then this would need to be applied to this element of the reimbursement calculations. The result of this would be a smaller number of journeys paid at the Average Fare Forgone cost rate and larger number at marginal cost rate, reducing the reimbursement rate and therefore overall level of reimbursement that DBL receive.

- 77 Accordingly, if TfWM were to accept an alternative look up table produced by Oxera, then it would also be necessary to recalculate wider elements of reimbursement under the Scheme Arrangements. It is for this reason that TfWM consider that the Average Fare Foregone dispute should be determined by an independent under the Dispute Resolution Procedure, looking at the calculations as a whole. On that basis, it is therefore unlikely that disclosure of the data and production of a further Look-up table in relation to one element of reimbursement under the scheme will be of use to the parties in either disposing of or narrowing the Average Fare Foregone Dispute as it will not capture the wider ramifications of such changes to reimbursement as a whole.”
61. TfWM’s position had been explained in similar terms in paragraphs 24 to 27 of AG’s letter dated 17 November 2021, which rejected Diamond’s request for the data sought. However, at paragraph 33 of that letter AG stated that TfWM was willing to agree to provide some limited information in response to the request for data on the basis that: (a) the parties agreed confidential terms for the disclosure thereof; (b) the data was used for the purposes of an Expert Determination pursuant to Schedule 7 of the 2000 Act Arrangements; and (iii) when using the data, Oxera’s analysis included consequential amendments to other scheme calculations, for example if the proposed Look-up table reflected the position that Diamond’s customers had lower than average demand, this was reflected in other components of the reimbursement tool such as the Reimbursement Factor.
62. On the above basis, it is TfWM’s case that Diamond has failed to satisfy the jurisdictional threshold, and so the question of discretion does not arise.

### **Discretion**

63. If, contrary to TfWM’s primary case, it is appropriate for the Court to move on to consider the exercise of its discretion, then for a number of reasons, TfWM submits that the Court should exercise its discretion against ordering pre-action disclosure. The reasons advanced on behalf of TfWM are considered in turn.

### *Desirability*

64. Even if it can be said that there is a real prospect of the pre-action disclosure sought achieving one of the objectives set out in 31.16(d), thus satisfying the jurisdiction

threshold, TfWM relies upon the fact that Diamond has been able to prepare Draft POC, and as to differences of principle between the parties with regard to the matters identified in paragraphs 76 and 77 of Mr Lewis's witness statement, as being factors that, taken together with other discretionary considerations, ought to weigh in the balance against the Court exercising its discretion in Diamond's favour.

65. Allied to the question of fundamental differences in principle, and as touched upon in paragraphs 76 and 77 of Mr Lewis's witness statement, are TfWM's complaints that Diamond is "*cherry picking*" its use of data by not having adequate regard to the fact that the matters identified, whilst potentially skewing the position against Diamond, could potentially at least work against Diamond in respect of other aspects of the relevant calculations behind the Revenue Foregone figure. Allied to this is a concern on TfWM's part that Diamond is impermissibly "*fishing*" for data that might assist its case.

#### *Dispute Resolution Procedure*

66. Paragraph 27 of the 2000 Act Arrangements provides that certain disputes between Diamond and TfWM in respect of the level of reimbursement should be the subject matter of the dispute resolution procedure set out in Schedule 7 to the 2000 Act Arrangements ("**the DRP**"). The disputes in question include: "*(a) the fares value to be attributed to journeys by persons eligible to receive concessions on the operators (sic) eligible services covered by the Arrangements.*". Schedule 7 is included as an Appendix to this Judgment.
67. Mr Maynard-Connor KC points out that although regulatory in origin, the Scheme Arrangements were voluntarily agreed to by Diamond, and they are binding on it. Mr Connolly did not seek to argue to the contrary.
68. By a letter dated 18 July 2018, Backhouse Jones, on behalf of Diamond, sought to initiate the DRP by requesting a meeting as provided for by paragraph 1 of Schedule 7. Following a meeting that did not resolve the matter, an expert was approached but as referred to in an email from Backhouse Jones dated 26 October 2018, the expert ultimately declined an invitation to act, and the DRP has proceeded no further.
69. However, it is TfWM's case that it is entitled to invoke, or perhaps rather resurrect, the DRP, and if necessary to seek a stay of any proceedings that might be issued by Diamond in respect of its claims. Although there is a dispute between the parties as to this, TfWM's position is, as stated in AG's letter dated 18 July 2023, that there are a number of suitable experts available who could make a fair determination of the Additional Costs Claim and the Fares Foregone Claim.
70. Mr Maynard-Connor KC recognises that the provisions of Schedule 7 of the 2000 Act Arrangements are not as detailed and comprehensive as those considered by Fraser J in *Taylor Wimpey UK Ltd v Harron Homes Ltd* (supra), and therefore the grounds for seeking a stay to any proceedings, and the basis for objecting to pre-action disclosure on the basis of the existence of the DRP, are therefore not as compelling as in that case. Nevertheless, Mr Maynard-Connor KC submits that the existence of the DRP is still a compelling consideration in the exercise of the Court's discretion, particularly in the light of TfWM's offer, as contained in AG's letter dated 17 November 2021, to provide a limited amount of the data for the purposes thereof.

### *Confidentiality*

71. Mr Maynard-Connor KC submits that TfWM, as a public body, simply cannot consent to the disclosure of what is said to be the wide ranging data sought by Diamond given that it relates to third party competitors of Diamond and is commercially sensitive. He submits that even if documents are anonymised, the disclosure sought would provide Diamond with access to passenger volumes and demand on particular bus routes, time of journeys and stop levels which could readily provide Diamond with a competitive edge as it could revise its routes and services accordingly.
72. Mr Maynard-Connor KC submits that, whilst undertakings have been proffered, there is a difficulty in TfWM policing those undertakings, and that, in any event, TfWM, as a public body, should not be obliged to police the same when there is a DRP available which, so it is said, would enable “safe” disclosure if required. TfWM has not elaborated on what it means by “safe” disclosure.
73. Thus, it is submitted that these issues regarding confidentiality are discretionary factors which militate against ordering the pre-action disclosure sought.

### *Delay*

74. TfWM takes the point that Diamond’s complaints of under reimbursement go back to 2018, and that it is well over two years since Diamond provided the Draft POC. Further, the point is taken that it took Diamond over 14 months to respond to AG’s letter dated 17 November 2021.
75. Mr Maynard-Connor KC submits that as it is incumbent on an applicant for pre-action disclosure to demonstrate that the documents sought to be obtained are “*strictly necessary*”, the Court should conclude from Diamond’s tardy behaviour that it is unable to satisfy this test.

### *The Subject Documentation*

76. Mr Maynard-Connor KC submits that Diamond asserts, but without properly corroborating its case, that the documents in respect of which pre-action disclosure is sought are “*strictly necessary*”. Mr Maynard-Connor KC refers, in particular, to what he describes as the generalised comments in paragraphs 12, 27-28, and 31-35 of Dunn 1. The point is made that there is no statement from Oxera (Mr Meaney), who are is said to have “*formulated*” Diamond’s disclosure request, explaining and justifying the need for disclosure in respect of the subject classes of documents in respect of which disclosure is sought. This, it is further suggested, supports TfWM’s case of “*fishing*”.
77. It is therefore submitted that Diamond has failed to justify its application in respect of each of the classes of documents in respect of which disclosure is sought by the Application.

### *Merits*

78. Mr Maynard-Connor KC submits that the present is not a case where the Court can proceed on an assumption that the Fares Foregone Claim is clearly meritorious, and that this is a fact that the Court should take into account on the question of discretion. As to this, reliance is placed on the fact that Mr Lewis is adamant that TfWM's processes are sound, and that there has been no under reimbursement. Reliance is further placed on the fact that Diamond has, itself, had to acknowledge that the Fares Foregone Claim may prove not be a good one in the light of the documentation sought to be obtained by the Application.

### **Conclusion**

79. In the light of the above, TfWM submits that it is not appropriate for an order for pre-action disclosure to be made on the basis that Diamond has failed to meet the jurisdictional threshold, and, in any event, the Court ought not to exercise its discretion in favour of Diamond for a number of reasons. There is nothing to take the case outside "*the usual run*", and the Court should dismiss the Application.

### **Determination**

#### **Introduction**

80. It is necessary to first consider whether Diamond is able to surmount the jurisdictional threshold under CPR 31.16 before considering whether, in the exercise of my discretion, it is appropriate to make an order for pre-action disclosure as sought by the Application, it being necessary to keep separate the questions of jurisdiction and discretion.
81. In considering the merits of the Application, I bear firmly in mind David Steel J's observation in *Pineway Ltd v London Mining Company Ltd & Anor* (supra) at [52] that, in almost every dispute, it could be argued that pre-action disclosure might be useful for achieving a settlement or saving costs, and that to justify an order circumstances must exist that are outside "*the usual run*" – see also *Hutchison 3G UK Ltd v O2 (UK) Ltd* [2008] EWHC 55 (Comm), at [55] and *Trouw UK Ltd v Mitsui & Co (UK) plc* [2006] EWHC 863 (Comm), [2007] at [43].
82. In this context, I further note that *Hollander, Documentary Evidence*, 14<sup>th</sup> Edn, at 1-35 observes that practitioners should almost invariably be advised against pre-action disclosure, and he asks the rhetorical question: if the litigation can be commenced without disclosure, why, asks the court, do you need it? And if the case is not currently strong enough to commence proceedings, then might it not be overly speculative and a fishing expedition?

#### **Jurisdictional Threshold**

83. I am satisfied that the requirements of CPR 31.16(3)(a) to (c) are satisfied on the facts of the present case, noting that TfWM does not seek to suggest to the contrary.
84. As I have identified, the real battleground is in respect of CPR 31.16(3)(d), and whether disclosure before proceedings have started is desirable in order to dispose

fairly of the anticipated proceedings, assist the dispute to be resolved without proceedings, or save costs.

85. In short, Diamond's case is that, so far as its own Look-up table is concerned, the disclosure sought will either vindicate its own position, or alternatively that of TfWM, or at least establish the extent to which TfWM's and Diamond's respective Look-up tables are unrepresentative of the typicality of travel of passengers travelling on the buses of Diamond and what adjustments need to be made to those Look-up tables so as to achieve something that is representative of the typicality of travel of passengers travelling on the Diamond's buses, and thereby assist in determining the sum of money required (Revenue Foregone) to put Diamond back into the position of being no better and no worse off.
86. I am satisfied that if Diamond's expectations are realistic, and there is at least a real prospect of achieving one of the outcomes referred to, then the jurisdictional threshold would have been satisfied because, in those circumstances, I consider that it could properly be said that disclosure is "*desirable*" for the purpose of assisting the dispute to be resolved without proceedings, and thereby saving costs, and in disposing fairly of the anticipated proceedings by enabling Diamond to significantly more cogently articulate its case in its Particulars of Claim in the event that it should not prove possible for the dispute to be resolved without proceedings.
87. TfWM's case is, as we have seen, that there are real differences of principle between the parties as to the proper approach to be taken which, realistically, are not going to be resolved or abandoned even if the disclosure sought is provided at this pre-action stage, and so disclosure would be a pointless exercise.
88. I have set out in some detail above, how TfWM's case in respect of these differences in principle is articulated as set out in paragraph 76 and 77 of Mr Lewis's witness statement and AG's letter dated 19 November 2021. There appear, therefrom, to be two key suggested impediments to resolving the matter prior to litigation:
- i) Firstly, that TfWM has appropriately used the DfT Guidelines, and that it would be wrong to contradict the DfT's approach. In so doing, it has used data from the whole Principal Area which, so it is said, leads to greater accuracy than simply looking at Diamond's data because the accuracy of the Look-up table used by TfWM for calculating Average Fair Foregone increases with the amount of data that is included for the purposes of the exercise. Indeed, TfWM maintains that to simply use data relating to Diamond would drastically increase the risk of an inaccurate reimbursement figure in favour of Diamond. On this basis, TfWM is unshakably confident as to the robustness of its own Look-up table so far as it might apply to Diamond, and thus its determination of Diamond's Revenue Foregone figure.
  - ii) Secondly, TfWM's accusation of cherry picking. In essence, as understood, what is said is that whilst Diamond has produced a Look-up table more favourable to itself based on the fact that its passengers are more likely to use cash tickets and less likely to use discounted tickets (weekly or monthly) than the average (as highly represented by National Express), this approach would require other adjustments that would not be favourable to Diamond in arriving at a Revenue Foregone figure, including potentially to the Reimbursement

Factor if not also other elements. On this basis, so it is suggested, the position is more complex than Diamond suggests and unlikely to be resolved by the provision of the data sought.

89. I note that paragraph 76 of Mr Lewis's witness statement refers to Diamond's Average Fair Foregone claim as set out in the Draft POC as being based on an assumption by Diamond that demand from concessionary fare passengers is lower on its services than the average demand from concessionary fare passengers for all bus operators across the Principal Area. AG's letter dated 28 March 2023 makes the same point at paragraph 3(c). I have struggled to identify where, in the Draft POC, reference is made to demand, and as I have said, Mr Connolly explained the matter on the basis the skewing against Diamond that it complains about having been caused by Diamond carrying fewer passengers at discounted fares, and this was how the matter was put in, for example, Backhouse Jones's letter dated 22 April 2021. However, I do not consider that anything ultimately turns on this as it ultimately goes to the same cherry picking point.
90. It is therefore necessary to consider whether TfWM is itself being realistic in suggesting that there are issues of principle between the parties that make it unlikely that the provision of the data sought will assist in resolving the dispute without proceedings, and thereby saving costs. In doing so, it is, as I see it, necessary to bear firmly in mind that the overriding consideration behind the determination of the reimbursement due to Diamond is the imperative of giving effect to the "*no better, no worse off*" principle, if necessary by departing from what would otherwise be the "*standard method*" or standard approach, as recognised by paragraph 17 of the 2000 Act Arrangements, as well as being underpinned by paragraph 4 of the 1986 Regulations and paragraph 6 of the 2011 Regulations, as well as various sections of the DfT Guidelines, including paragraph 1.10 thereof.
91. I can see that, generally speaking, the bigger the data source, the more accurate are likely to be the results of any calculation based thereupon, particularly if the calculation involves the application of averages. However, in the present case, Diamond's specific and identified concern is that the use of an average has produced a skewed result because one particular operator, National Express, forms 90% of the constituency making up the average and has a profile of passengers that does not, according to Diamond, reflect that of Diamond so far as numbers of passengers travelling on discounted fares are concerned. In these circumstances, where the key consideration is, ultimately, the subjective position of Diamond, and ensuring that it is "*no better, no worse off*", the justification for using the larger sample on the basis that it will necessarily be more accurate is, at least, less obvious.
92. In these circumstances, I consider that there is at least a cogent case for preparing a Look-up table simply by reference to Diamond's own figures in seeking to arrive at a more accurate figure for Diamond's Revenue Foregone. However, a potential flaw in Diamond's own figures has been identified given the Cross-Operator Issue. The data that will allow for a consideration of this issue and its input into Diamond's Look-up table is in TfWM's possession or control. I consider that there is at least a real prospect that if Diamond, through its expert, could have access to that data in order to prepare a more robust Diamond only Look-up table, that will serve to test the reliability of TfWM's own Look-up table and thereby assist the parties in resolving their dispute without proceedings and saving costs.

93. As to TfWM's second point regarding cherry picking, I am satisfied that Mr Dunn has made it sufficiently clear in his evidence, including at Dunn 2, paragraph 11, that Diamond recognises that other adjustments may be required, and that this is not something that Diamond would seek to resist. I consider it relevant that Diamond has engaged Oxera (Mr Meaney) as expert, and that it is Oxera that will be processing the relevant data. In accordance with its obligations as an expert, one would expect Oxera to understand the need to make other appropriate adjustments as a result of the data supplied, even if they go against Diamond.
94. I note that it is not suggested by TfWM that, as a result of the preparation by Diamond of its own Look-up table, and the provision by TfWM of the data sought, further specific data will be required in order to arrive at a robust figure for Revenue Foregone. Rather, it is said that the exercise will be inherently less reliable because less data is being used and the DfT Guidelines are being departed from.
95. There are two further issues that I need to deal with at this point:
- i) As I have mentioned, TfWM complains that by the Application, Diamond is impermissibly "*fishing*" for documents. I do not consider this complaint to be justified. Diamond has identified a particular potential lacuna so far as the preparation of a reliable Look-up table of its own is concerned, and has identified what it has been advised by its expert is the data required in order to fill that lacuna. This is not, to my mind, "*fishing*", but a reasonably focused attempt to obtain the data required in order to prepare what it believes will be a reliable Look-up table to compare with TfWM's Look-up table prepared using the standard method.
  - ii) In paragraph 3(d) of their letter dated 28 March 2023, AG suggest that a further objection to a Look-up table prepared specifically for Diamond would be that reliance thereupon by TfWM would be contrary to its obligations as a public body to ensure that all operators are treated equally. However, if the overriding objective of the Arrangements and the legislation and regulations that underpin them is to ensure that no operator should be either better off or worse off, as is the case, then if some different treatment were required to achieve this given the subjective attributes of a particular operator, then I consider that any different treatment must be capable of being justified from a public law perspective. Indeed, the different treatment could be said to be justified in order to ensure that all operators were equally treated by ensuring that they were all neither better off nor worse off through their provision of concessionary services. The argument advanced on behalf of TfWM would be liable to make paragraph 17 of the 2000 Act Arrangements meaningless.
96. In the circumstances, I am satisfied that the provision of the data in question would give rise to at least a real prospect that one or other of Diamond or TfWM will be vindicated in the approach that they are taking with regard to the Look-up tables, or at least assist in establishing the extent to which TfWM's and Diamond's respective Look-up tables are unrepresentative of the typicality of travel of passengers travelling on the buses of Diamond, which, ought, in turn, to assist in narrowing the parties differences as to the Revenue Foregone so as to assist the dispute to be resolved without proceedings and save costs.

97. I am therefore satisfied that the jurisdictional threshold under CPR 31.16(d)(ii) and (iii) is satisfied.
98. On this basis and given the disjunctive formulation of CPR 31.16(3)(d), it is not strictly necessary, as I see it, for Diamond to also have to show that disclosure is desirable in order to dispose fairly of the anticipated proceedings. It is in respect of this limb of CPR 31.16(d) (CPR 31.16(3)(d)(i)) that the question of the Draft POC arises, and the question as to whether, having served the Draft POC, Diamond is in a position to commence proceedings. However, it may become relevant to the question of discretion.
99. *First Gulf Bank v Wachovia Bank* (supra) at [23]-[27], referred to by Mr Maynard-Connor KC, certainly provides authority for the proposition that an ability to commence proceedings may negate an ability to satisfy the jurisdictional threshold under CPR 31.6(3)(d)(i), and may also be relevant on the question of discretion, and provide a reason for refusing relief. However, in reply, Mr Connolly referred to a number of cases in which an ability to commence proceedings was found not to provide a reason for refusing relief. Thus:
- i) In *Hands v Morrison Construction Services Ltd* (supra) at [31], Mr Michael Briggs QC (as he then was) said:
- “The desideratum in rule 31.16(3)(d)(i), that is the fair disposal of the proceedings, is addressed to the question whether early disclosure, rather than disclosure at the usual time, will add fairness. That may be achieved not merely to give an opportunity to plead an otherwise unpleadable case but where it enables the Statement of Case to be better focused so avoiding the cost, delay and disruption which may otherwise be caused by amendment after normal disclosure, for example, leading to further consequential amendments and a yet further round of disclosure.”
- ii) In *Hays Specialist Recruitment (Holdings) Ltd v Ions* (supra) at [44], David Richards J (as he then was) considered that the applicant could, for the most part, plead a case only in the most general terms, and that disclosure should enable there to be fully pleaded particulars of claim from the start. He thus concluded that there was a real prospect that disclosure would therefore assist in the fair disposal of the anticipated proceedings.
100. Whilst Diamond did provide the Draft POC to TfWM as early as April 2021, it is fair to say that the pleading in respect of the Fares Foregone Claim is in somewhat general terms, and whilst relying upon the figures derived from Diamond’s Look-up table, does so knowing that such figures are subject to the objection referred to above concerning the Cross-Operator Issue. There is, as I see it, given my findings in respect of what might be hoped to be achieved from the receipt of the data in question, at least a real prospect that the provision of the requested data will enable Diamond to plead its case in its Particulars of Claim on the basis of figures that it understands and believes to be reliable.
101. Further, there is at least a real prospect that disclosure will better enable Diamond to decide whether there is merit in commencing proceedings in the first place, dependent



upon what the data relating to journeys taken by Diamond passengers on buses operated by other operators for the same journey reveals. *Hollander*, (supra) at 1-35 posed the rhetorical question referred to in paragraph 82 above. However, in the present case, there are cogent reasons why Diamond would not want to commence proceedings without seeking to close the lacuna in its Look-up table, and rather than embarking on an overly speculative and fishing expedition, Diamond is, as I see it, making a focused request for data with a view to closing that lacuna.

102. In short, therefore, I am well satisfied that Diamond has satisfied the Jurisdictional Threshold.

### **Discretion**

#### *Desirability*

103. I share the concern expressed by a number of other judges in the cases that I have referred to as to the difficulty of separating out the jurisdictional threshold, and matters going there to, from discretionary considerations as to whether an order for pre-action disclosure ought to be made – see e.g. *First Gulf Bank v Wachovia* at [23].
104. However, so far as the matters referred to in paragraphs 84 to 100 above give rise to discretionary considerations, I consider that they are discretionary considerations that point in favour of ordering pre-action disclosure, rather than refusing it.

#### *Dispute Resolution Procedure*

105. I consider that the present dispute between the parties does fall within the scope of Schedule 7 2000 Act Arrangements, being a dispute of the kind referred to in paragraph 27(a) of the 2000 Act Arrangements.
106. Mr Connolly, on behalf of Diamond, submits that, as a matter of true construction, Schedule 7 to the 2000 Act Arrangements is permissive and not mandatory. He submits that the high point of any mandatory provision is paragraph 1 which mandates a meeting, but that, thereafter, if settlement is not reached at that meeting, there is no mandate on either party to agree to or submit to expert determination given the reference to the fact that either party “*may propose*”. To this extent, Mr Connolly submits that the wording in the present case is not dissimilar to that in *Halifax Financial Services Limited v Intuitive Systems Limited* unreported 21 December 1998.
107. I do not agree that Schedule 7 to the 2000 Act Arrangements is merely permissive. Under paragraph 2 thereof, if the dispute is not resolved as a result of the meeting provided for by paragraph 1, then, as I see it, either party has the option of proposing to the other in writing that the dispute be referred to an independent expert, and if the parties are then unable to agree on an independent expert, or the independent expert or unwilling to act, then either party has the option of applying to the President of the Law Society to appoint an independent expert - see paragraphs 2 and 3. Paragraph 4 then provides that if any matter is so referred to the independent expert for determination, then the independent expert shall determine the matter. The effect of this is, as I see it, that either party has the option to force the appointment of an independent expert, appointed, if necessary, by the President of the Law Society. If an expert is so appointed, then the expert is required to determine the matter.

Consequently, it is, as I see it, open to either party, under the terms of Schedule 7, to require a dispute falling within the scope of paragraph 27 of the 2000 Act arrangements to be determined by an independent expert.

108. Diamond did, going back to 2018, initiate the DRP under Schedule 7 and the parties got to the point of seeking to appoint an independent expert, only for that independent expert to decline to act, and the matter seemingly not taken any further at that point. Notwithstanding the passage of time, it would, as I see it, still be open to TfWM to apply to the President of the Law Society to appoint an independent expert, who would then be required to determine the matter.
109. However, Mr Connolly makes the further point that Schedule 7 does not mandate any rules for determining the dispute in issue, save that it is to be done on a basis that is “*fair and reasonable*”. There are thus no provisions for disclosure or evidence (lay or expert) or for submissions, and these matters would thus require agreement between the parties. The furthest that Schedule 7 goes is that paragraph 4(c) requires TfWM and Diamond to ensure that the independent expert has full access to all books, information and records in their possession or in the possession of their auditors and accountants “*that are relevant to the dispute and his determination thereon*”. This does not, in terms, provide for disclosure as between the parties. The present DRP is in contrast to the expert determination machinery in *Taylor Wimpey UK Ltd v Harron Homes Ltd* (supra), where Fraser J considered the existence thereof to be a determinative discretionary factor against ordering pre-action disclosure. In the present case, the absence of rules for determining the dispute within an expert determination would, as Mr Connolly points out, weigh heavily against a stay if sought by TfWM after Diamond had commenced proceedings – see *Cott UK Limited v FE Barber Limited* [1997] 3 All ER 540 at 548J to 550A, per HHJ Hegarty QC. Further, *Total E&P Soudan SA v Edmonds and Ors* [2007] EWCA Civ 50 at [28] and [29] provides Court of Appeal authority that on applications of the present kind the Court ought not to give great weight to stay arguments save where it is shown beyond doubt that any claim would be stayed, which is not the present case.
110. In the present case, TfWM has offered limited disclosure in the context of a determination by an independent expert, and I must take into account that that might provide one way for Diamond to obtain the required data, leading to a resolution of the dispute without the requirement for disclosure. However, I do not consider that this ought to weigh significantly in the balance against ordering disclosure as a matter of discretion in that:
  - i) TfWM has said that it would provide “*safe*” disclosure, but this has not been explained, and it is TfWM’s case that disclosure as sought by Diamond would be unsafe because of confidentiality issues whatever safeguards were put in place.
  - ii) More fundamentally, there is still the point that Schedule 7 does not mandate any rules for an independent expert’s determination of the dispute.
111. In conclusion so far as the DRP is concerned, whilst I recognise that the existence of the DRP is a factor that the Court must take into account, I do not, on the present facts, consider that it has the determinative consequences that it did in *Taylor Wimpey UK Ltd v Harron Homes Ltd* (supra), as indeed I understand Mr Maynard-Connor KC

to accept, and indeed I do not consider that it weights significantly in the balance against ordering pre-action disclosure and my exercise of discretion in that respect.

*Confidentiality*

112. TfWM quite rightly expresses legitimate potential concerns at least about providing confidential information relating to other operators to Diamond. However, I am satisfied that TfWM's concerns are overstated in the light of the considerations identified by Mr Connolly as referred to in paragraph 46 et seq above.
113. I have considerable doubts as to whether, in fact, there is the scope for Diamond to obtain the collateral benefit suggested for the reasons given in Dunn 2, paragraph 17 (v). However, even if that is not right:
  - i) Firstly, I agree that there is something of an inconsistency about TfWM expressing concern about confidentiality in the present context, yet being prepared, apparently, to provide relevant data for the purposes of an expert determination;
  - ii) Secondly, there is no need for Diamond, itself, to have access to the data. All that is required is that Mr Meaney/Oxera, and possibly also Mr Latchford/Phinancial and Diamond's lawyers, have access to the data so that what is hoped to be a robust Look-up table can be produced, and a Revenue Forgone figure arrived at therefrom. It would be quite usual in a situation such as this for a "*confidentiality club*" to be established which ought to safeguard against TfWM's concerns.
114. Mr Maynard-Connor KC raises a concern as to whether, in these circumstances, Diamond could sign off on Particulars of Claim that relied upon the data to be provided. However, I do not consider that there is a real issue here on the basis that the case would be based upon the figures derived from the data as reported upon by Diamond's expert and advisors rather than the raw data behind it, and in particular the confidential aspects of that data.
115. In the circumstances, I am not persuaded that questions of confidentiality mitigate against granting the pre-action disclosure sought, or that this is a factor that ought to weigh in the balance against making an order for pre-action disclosure.

*Delay*

116. There has been significant delay on Diamond's part in advancing its case. Particularly marked is the 14 month delay in Backhouse Jones responding to AG's letter dated 17 November 2021. TfWM quite legitimately asks as to whether the disclosure of the documents sought can properly be said to be "*strictly necessary*" if Diamond has been so tardy in seeking to obtain them.
117. However, it is, in my judgment, necessary to have regard to the fact that Covid intervened during the course of the present dispute with what I would have thought would have been significant consequences for the bus transport industry. Further, Diamond, and its holding company, Rotala Plc, have more recently been involved in an appeal concerning the Arrangements, as well as significant litigation regarding bus

routes in Manchester. It has been explained, albeit not wholly satisfactorily, that this has been a distraction.

118. In the circumstances, I do not read Diamond's delays in progressing matters as being a recognition that disclosure is not "*strictly necessary*" for the purposes for which it is being sought, which have, I consider, been clearly explained in Diamond's evidence and in the course of submissions.
119. Consequently, I do not consider that the delay is a significant discretionary factor that ought to weigh against granting the relief that is sought.

### *The Subject Documents*

120. TfWM maintains that Diamond has failed properly to justify its application in respect of each of the classes of documents sought, and this is said to be a serious failing having regard to the fact that it is incumbent upon Diamond to demonstrate that the data/documents sought is/are "*strictly necessary*".
121. I regard it as unfortunate that there is no evidence from Mr Meaney explaining, as expert, the classes of documents in respect of which disclosure is sought. However, Mr Dunn has provided a fairly cogent explanation in Dunn 1, paragraphs 31 and 32, with regard to what is sought. TfWM clearly understands what is sought, in that Mr Lewis, in paragraph 47 of his witness statement, acknowledges that TfWM would be able to provide the data within a reasonable period of time. Further, TfWM does not, as I read Mr Lewis's witness statement, seek to suggest that the data sought goes beyond what is reasonably required in order to address the Cross-Operator Issue.
122. Further, as I read sub-paragraphs 1(a) to (d) of Diamond's draft Order setting out the "*classes of documents*" in respect of which disclosure is sought, it does not identify separate classes of documents in the usual sense. Rather, as I read it, paragraph 1(c) sets out the data required, and the other sub-paragraphs set out the parameters and scope thereof.
123. If TfWM were able to suggest, which it has not to date done, more limited parameters and scope to the data to be provided that still enables the Cross-Operator issue to be addressed and a more robust Look-up table to be prepared, then the Court could always give consideration to an Order of more limited scope, or differently expressed, when it comes to finalise the terms of the Order.
124. However, I am not presently persuaded that the draft Order is too widely drawn, or that Diamond has failed to justify its entitlement to the same as "*strictly necessary*" for the purposes for which it seeks pre-action disclosure as explained in Dunn 1, paragraph 31 et seq.
125. Consequently, I do not consider that there is the failing of the kind contended by TfWM that ought to weigh in the balance against granting the pre-action disclosure sought.

*Merits*

126. I do not consider that the points taken by TfWM in respect of the merits are good ones.
127. I agree that this is not a case where the Court can proceed on an assumption that the Fares Foregone Claim is clearly meritorious. However, Diamond has, in my judgment, advanced what might fairly be considered to be cogent reasons as to why a Revenue Foregone figure based upon statistics relating to all bus operators in the Principal Area might well be skewed against Diamond because of the predominance of National Express (90%) in the constituency from which the relevant averages are arrived at. Further, Diamond has demonstrated that any such skewing might well serve to mean that the fundamental “*no better, no worse*” objectives are not achieved by TfWM’s Revenue Foregone figures. Consequently, there may well, as I see it, be merit in Diamond’s claim.
128. However, in no way inconsistent with the above, Diamond recognises that its own analysis may be undermined by data relating to the Cross-Operator issue. If there is a real prospect, as I consider that there is, of the data sought by the Application addressing the impact of the Cross-Operator issue on Diamond’s Look-up table, then there is, as I see it, merit in there being disclosure thereof at this stage even though it might serve to undermine the merits of Diamond’s case because there is a real prospect, in that scenario, of it assisting the dispute to be resolved without proceedings, and/or saving costs.
129. In the circumstances, I do not consider that considerations as to the merits of the Fares Foregone Claim undermine the case for pre-action disclosure. Indeed, I consider these considerations provide compelling reason for ordering pre-action disclosure so that the merits of the Fares Foregone Claim can be tested with the benefit of data that Diamond does not presently have access to.
130. There is, I consider, a real prospect that this will serve to assist in resolving the dispute without proceedings, and in saving costs, and that even if it does not, that there is a real prospect that it will assist Diamond in formulating a more focused claim once it has been put on an equal footing with TfWM in respect of the relevant data and thus assist in disposing fairly of the anticipated proceedings.
131. I can see some analogies with certain types of medical negligence claim where orders for pre-action disclosure are by no means uncommon, where there is documentation in the possession of the hospital or medical practitioner that provides the key to the merits and the formulation of the claim.

**Overall conclusion**

132. I am satisfied that the jurisdictional threshold under CPR 31.16(3) has been satisfied by Diamond. Further, I do not consider that there are any discretionary considerations that weigh determinatively against ordering the pre-action disclosure sought in the present case. To the contrary, my “*big picture view*” is that I consider that discretionary considerations in the round, and in particular those considered in paragraphs 125 to 128 above, weigh significantly in favour of granting the relief sought by the Application.

133. The jurisdiction under CPR 31.16 may be unusual, but it is not exceptional – see *Carillion* at [66(vi)]. I consider that the present case can properly be described as outside “*the usual run*” because Diamond has been able to identify a particular purpose for the data in respect of which disclosure is sought, and that there is a real prospect at least of that data, when used for the purpose of producing a revised Look-up table for Diamond, assisting the dispute to be resolved without proceedings and saving costs, and failing that assisting in the fair disposal of the proceedings that Diamond anticipates.
134. I am presently satisfied that the terms of the draft Order produced by Diamond are sufficiently focused to enable me to be able properly to conclude that the data to be provided pursuant thereto will provide Diamond with no more than that which is “*strictly necessary*”. However, as indicated, I would be prepared to hear submissions from TfWM as to the scope of data to be provided, so long as it does not undermine the objective for which the data is sought.
135. Further, I would be prepared to hear further submissions from the parties as to the terms of the confidentiality undertakings to be given, and as to who those undertakings ought to be given by.
136. No attendance will be required at the hand down of this judgment. I will adjourn all consequential matters, including as to the form of order, any application for permission to appeal, and costs to a short consequentials hearing to be listed as soon as possible. I will extend the period for lodging an appellant’s notice with the Court of Appeal to 21 days after the consequentials hearing.

**APPENDIX**

**SCHEDULE 7 – 2000 ACT ARRANGEMENT**

- “1. In the event of any dispute, formally notified to the Authority in writing, in connection with any matter arising from this agreement which cannot be resolved by agreement between the parties representatives within 20 working days of the notification, senior representatives of the parties shall, within 20 working days of a further written request from either party to the other, meet in good faith to attempt to resolve the dispute.
2. If the dispute is not resolved as a result of such meeting, either the Authority or the Operator may propose to the other in writing that the dispute referred to an independent expert (“Independent Expert”).
3. If the parties are unable to agree on an Independent Expert, or if the Independent Expert agreed upon is unable or unwilling to act then any party may apply to the President of the Law Society to appoint an Independent Expert.
4. If any matter is referred to the Independent Expert for determination in accordance with paragraph 3 above, then
  - (a) the Independent Expert shall determine the matter, subject to the remaining provisions of this paragraph 4, on a basis that is fair and reasonable in all respects as between the Operator and the Authority and that takes into account all relevant factors and circumstances;
  - (b) the Independent Expert shall act as an expert and not as an arbitrator and its determination of the dispute shall be final and binding on the parties (save in the case of manifest error;
  - (c) the Authority and the Operator shall ensure that the Independent Expert has full access to all books, information and records in their possession or in the possession of their auditors and accountants that are relevant to the dispute and to his determination thereon; and
  - (d) the Independent Expert’s fees shall be borne equally by the parties unless they shall decide that one party has acted unreasonably (in which case their fees shall be borne as they shall direct).”