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Case No: CO/1845/2023;
AC-2023-LON-001563

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22nd December 2023

Before :

THE HON. MRS JUSTICE THORNTON

- -

Between :

The King (on the application of WEST COAST RAILWAY COMPANY LTD)	**Claimant**
- and -	
OFFICE OF RAIL AND ROAD	**Defendant**

- -
- -

Tom Cross and Raphael Hogarth (instructed by **DLA Piper UK LLP**) for the **Claimant**
Hugh Davies KC and Daniel Mansell (instructed by the **Office of Rail and Road**) for the **Defendant**

Hearing dates: 21st – 22nd November 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.00am on 22nd December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HON. MRS JUSTICE THORNTON

Mrs Justice Thornton :

Introduction

1. The Claimant, West Coast Railway Company Limited, is the largest operator of heritage train tours in the United Kingdom. It runs a number of well-known services. These include the Jacobite Steam Train from Fort William, which is known popularly as the "Hogwarts Express", having featured in the Harry Potter films and described as 'the greatest railway journey in the world'. It also operates the "Flying Scotsman" which is considered to be one of the best-known locomotives in the world.

2. The Defendant, the Office of Rail and Road ("the ORR"), is the safety regulator for Britain's railways.

3. The trains operated by the Claimant are predominantly Mark I vehicles which meet the "heritage" appearance required for many heritage train tours. Particular heritage features are hinged doors, known also as 'slam doors', and droplight windows. Hinged doors can be opened by anyone inside the train even when the train is moving. The majority of the doors open outwards and in order to open them, it is necessary to lower the 'droplight' window in the doorframe and reach out of the window to turn the handle. There is no central locking system whereby all doors are locked and unlocked simultaneously by a single individual from a central control point. Instead, the doors on the Claimant's trains are locked by pulling the door shut into a locked position and then engaging a bolt on the inside of the coach. The mechanism is known as secondary door locking.

4. The Railway Safety Regulations 1999 (SI 1999/2244) were made following fatalities and injuries caused by passengers falling from the doors of Mark 1 rolling stock or being hit by the doors when they were opened at platforms. Regulation 5 came into force in January 2005. It prohibits the operation of any rolling stock on the railway if the rolling stock has hinged doors, other than doors which have a means of centrally locking them in a closed position. Regulation 6 provides a discretion to the regulator to issue an exemption from the prohibition.

5. As the safety regulator, the ORR's position is that it does not wish to see heritage train operators go out of business but, as from March 2023, it wants to ensure that heritage trains meet minimum safety standards by introducing minimum engineering safety solutions, namely central door locking. The Claimant contends that its operating procedures for the secondary door locks on the hinged doors of its trains are as safe as a central door locking mechanism. Trained stewards operate the doors, not passengers. There are warning signs in all the carriages and passenger announcements to alert passengers to the risks.

6. The decision under challenge is contained in two letters issued by the ORR on 31 January and 16 March 2023 refusing to issue the Claimant with an exemption from the legislative prohibition on the use of hinged doors without central door locking. The Claimant challenges the decision as unlawful on five grounds:

   i) The ORR misinterpreted the Railway Safety Regulations,

ii) The ORR unlawfully fettered its discretion,

iii) The ORR failed to take relevant considerations into account,

iv) The ORR's decision was a disproportionate interference with the Claimant's right to the protection of property under Article 1, Protocol 1 of the European Convention on Human Rights,

v) The ORR's decision was irrational at common law given its disproportionate and draconian effect.

Legal and policy framework

The Railway Safety Regulations

7. Regulation 5 of the Railway Safety Regulations (SI 1999/2244) provides that:

> "(1) no person shall operate, and no infrastructure controller shall permit the operation of any rolling stock on a railway if the rolling stock has hinged doors for use by passengers for boarding and alighting from the train (other than doors which have a means of centrally locking them in a closed position).
>
> (2) Paragraph (1) shall not apply to rolling stock which at the relevant time is being exclusively operated other than for the carriage of fare paying passengers."

8. Regulation 6 provides:

> "(1) The relevant authority may, by certificate in writing, exempt any person or class of persons, railway, part of a railway or class of railways, train or rolling stock, or class of train or rolling stock from any prohibition imposed by these Regulations and any such exemption may be granted subject to conditions and to a limit of time and may be revoked by a certificate in writing at any time.
>
> (2) Before granting an exemption the relevant authority shall consult such persons as it considers appropriate.
>
> (3) In deciding whether to grant any such exemption the relevant authority shall have regard to –
>
> (a) the conditions, if any which it proposes to attach to the exemption;
>
> (b) any other requirements imposed by or under any enactment which apply to the case;
>
> (c) all other circumstances of the case."

ORR policy and guidance

Railway Safety Regulations 1999: Guide to operation of Mark 1 type and hinged door rolling stock

9. The ORR's policy in relation to the grant of an exemption from the prohibition in Regulation 5 is as follows. The numbering is as set out in the ORR's document and references to CDL are to central door locking:

> "**(ii) criteria for ORR granting an exemption from regulation 5 concerning hinged door rolling stock not currently fitted with Central Door Locking**
>
> 1.1 ORR will consider granting an exemption from regulation 5 where the applicant can demonstrate that there are exceptional circumstances, for example:-
>
> (f) where a robust evidenced case is provided setting out alternative automated door locking or single-action multi-door locking solutions that provide an equivalent level of safety protection to CDL or
>
> (g) where fitment of CDL cannot be completed by the expiry of current exemptions.
>
> 4.5 ORR expects any such application to demonstrate the requirements set out in ORR document (Railway Safety Regulations 1999, Assessment and Guidance Manual for Exemption Applications) are met by either:
>
> (a) Setting out how the means of controlling risks associated with the operation of hinged doors other than the use of CDL as required under regulation 5:
>
> i. are in line with the hierarchy of controls within the Management of Health and Safety at Work Regulations 1999;
>
> ii. provide an alternative engineering solution not relying on individual human action to lock each door, that ensures doors are secondarily locked in position at all times the carriage is in the course of its journey; and
>
> iii. is supported by a quantified risk assessment to demonstrate as a minimum, equivalence to CDL as a means of risk control;
>
> or:

> where fitment of a form of CDL to rolling stock with hinged doors is not achievable by the 31 March 2023 date; that a time bound programme of work is in hand for such fitment.
>
> In such cases a limited period of exemption may be considered to allow the programme to be completed, so long as other methods of secondary door locking are in place and being operated effectively in the meantime."

The Railway Safety Regulations 1999 Assessment and Guidance Manual for Exemption Applications

10. The guidance explains that a risk assessment and details of operational arrangements for the safe carriage of passengers is mandatory for all applications for an exemption under Regulation 6. The operational arrangements should include procedures for training staff who will operate the hinged door rolling stock including ongoing monitoring and competence assessment. The ORR offers and encourages pre-application meetings so applicants can understand the ORR's assessment process. An application will undergo initial screening to assess whether an applicant has provided sufficient justification and reasoning as to why an exemption is required. An application will be put on hold in the event that evidence has not been supplied.

> "7.4 The evidence provided should clearly demonstrate the ability of the applicant to safely manage the operations or section of infrastructure from which they have requested to be exempt from the regulations.
>
> 7.5 Where supporting evidence is provided and additional information or clarity is required, the assessor should contact the applicant directly and obtain this. Once this additional evidence is obtained, it should be uploaded to the Box case.
>
> ……
>
> 7.7 If the case team have any serious concerns about the quality of supporting evidence provided or are not convinced or confident that existing control measures or those to be implemented are suitable measures of risk control, a meeting should be held with the applicant to set out these specific concerns."

Factual background

11. The consultation that preceded the introduction of the Railway Safety Regulations 1999 explained that there were then approximately 2,300 'Mark 1' vehicles still in passenger service on the main rail network plus others in charter fleets and on heritage railways. The stock mainly dated from between 1959 and 1974. The majority of the vehicles were operated by three companies, Connex South Eastern, Connex South Central, and South West Trains. There had been a number of fatalities, usually between two and four a

year, and a larger number of injuries, resulting from falls from the slam doors of Mark 1 rolling stock, which do not have central locking. In addition, many people were injured every year as a result of being struck by open doors on Mark 1 trains. The benefits of central locking were said to be illustrated by the drop in slam door fatalities from about 18 a year in the early 1990s to about 3 a year following the fitting of central locking to all InterCity trains. The great majority of vehicles without central locking were now Mark 1, and fatalities were therefore unlikely to reduce further until Mark 1 stock was withdrawn or central locking was fitted.

12. Regulation 6 of the Railway Safety Regulations came into force in 2000 followed by Regulation 5 in 2005.

13. In 2012, the Claimant was granted a 10-year exemption from the prohibition in Regulation 5. The exemption would expire on 31 March 2023.

14. Regulation 5 all but removed hinged door rolling stock from the mainline network. Such were the safety improvements on commuter trains brought about by the Regulations that in 2014, the ORR considered that Regulation 5 could be repealed. However, in August 2016 a train passenger died after putting their head out of a droplight window on the Gatwick Express and striking it on a signal gantry. In December 2018, a train passenger on a Great Western Rail High Speed Train died after putting their head out of a droplight window and coming into contact with a lineside tree branch.

15. The two fatal incidents led to the ORR re-evaluating the risks posed by the remaining hinged door rolling stock in operation on the mainline. In 2018, the ORR decided to focus on the hinged doors in use by heritage train companies. It made clear to operators that, from 2023, exemptions from the prohibition in Regulation 5 would only be issued in exceptional circumstances.

16. On 8 April 2019, the ORR published guidance on applications for exemptions from the Regulation 5 prohibition. Relevant extracts are set out above. On 9th May 2019, the ORR wrote to all heritage train operators explaining that the ORR would not be issuing any further exemptions from the prohibition in Regulation 5 after 31 March 2023.

17. In November 2020, the ORR conducted a consultation on revision of guidance on the application of the Railway Safety Regulations 1999 to Mark 1 type and hinged door rolling stock. The position of the ORR was that the 1999 Regulations are not qualified by the 'reasonably practicable' standard in the Health and Safety at Work Act 1974 and central door locking was therefore to be fitted. An exemption would remain if there were alternative and equally effective technical solutions.

18. On 2 October 2020, one of the Claimant's trains was dispatched from York Station with a door open.

19. On 8 April 2021, the Claimant submitted an application for a new certificate exempting the company from the Regulation 5 prohibition. The covering letter acknowledged the regulatory concerns about the continued operation of Mark 1 and Mark 2 stock not fitted with central door locking and emphasised the company's commitment to safety. The letter went on to explain that the company had not had any reportable safety incidents. The application enclosed the company's safety instructions for on-train stewards to

operate the doors which details the actions to be taken before and during a journey and the interactions between the stewards and other personnel on the service. A further document provided a summary of training for stewards operating doors and droplight windows with various hypothetical scenarios of passengers alighting improperly or having their heads outside droplight windows. A further appendix contained an assessment of the impact of any decision not to issue the exemption on the company's right to the peaceful enjoyment of its possessions under Article 1 Protocol 1 of the European Convention on Human Rights.

20. On 22 April 2021, the ORR wrote to the company noting that the application would be reviewed in light of new guidance and stating that further information, including risk assessments and ongoing monitoring and competence assessments for staff was required before it could progress the application. A further letter of 8 November 2021 repeated that the ORR required further evidence to progress its assessment noting "[t]he absence of a proper risk assessment as to why Central Door Locking is disproportionate to the risks identified is required".

21. On 26 July 2021, the ORR published an assessment of the costs of installing central door locking. It obtained the information from three heritage train operators who had fitted central door locking or were in the process of doing so. The maximum cost to retrofit each carriage was £26,250, amounting to £348,440 for a 12 carriage train. The maximum number of trains operated by a single heritage train operator in a day was understood to be four, making a cost of £1,393,920. This was said to be well below the notional economic value of preventing a fatality (VPF), assessed by the Department for Transport on 2019 figures to be £2,017,000.

22. On 30 July 2021, the ORR published guidance setting out its policy that exemptions from the prohibition in Regulation 5 would only be issued in exceptional circumstances (the relevant extract from the policy is set out above).

23. On 21 September 2021, the Claimant sent a letter to the ORR submitting further information and supporting documents for its application for an exemption, including a document titled "passenger train operation and passenger safety" which describes the actions to be taken by the guard for train dispatch, to manage the onboard staff and general passenger safety information. The Claimant explained that the strict approach proposed by the ORR would have a disproportionate impact on its business; it would cost c.£30,000 per vehicle to fit central door locking and that its fleet would require over 130 vehicles to be fitted with central door locking at a conservative estimated cost of at least £3 million.

24. A meeting was arranged between the parties for 12 January 2022.

25. In June 2022 a passenger alighted from one of the Claimant's train doors as it left the station, having overcome the steward attempting to stop him and opening the door himself. He was caught by platform staff as the train was moving.

26. In a letter dated 21 November 2022 from the Claimant's lawyers the financial impacts were now estimated at £7 million, said to arise from direct costs and lost revenue. There were also said to be losses to the wider economy of £50 million. The letter concluded by stating that "the costs are clearly disproportionate in the context of a vanishingly small risk to safety".

27. On 31 January 2023, the ORR issued its first decision letter refusing the application.

28. Following receipt of the first decision letter, on 28 February 2023, the Claimant wrote to the ORR, challenging various points in the first decision letter, enclosing further risk assessment material and requesting reconsideration.

29. On 16 March 2023, the ORR issued its second decision letter refusing the company's application for an exemption.

The decision letters

30. The first decision letter dated 31 January 2023 concludes that the Claimant had provided insufficient information for the ORR to progress its application for an exemption.

> "4.6.3. There is a lack of clarity in the documents provided by the Applicant. In our letter to the Applicant dated 8 November 2021, we requested a risk assessment that set out why CDL fitment is disproportionate to risks identified. To date, we have not received this.
>
> 4.6.4. We note that the Applicant did not use a traditional risk assessment template. The hazard analysis tables in Appendix A identified the potential cause of a hazard, the resulting effect and control measures. Whilst the tables lack expected risk scoring they do manage to communicate whether control measures are 'As Low as Reasonably Practicable' ('ALARP'). However, to give us the understanding of how risks are being controlled as far as reasonably practicable, we would expect to see a full risk assessment which considers all hazards for operating passenger charters, control measures to mitigate any foreseeable risks and suitable quantification of risk.
>
> …….
>
> 4.6.8. In addition, we note that there have been incidents involving the Applicant's operated services directly related to the operation of slam doors and which the fitment of CDL could have been mitigated against. We set out further detail at paragraph 4.6.15 below. Investigations into the incidents would require a review of the risk assessments and control measures in place.
>
> ….
>
> 4.6.14. In addition, Appendix J (Passenger Train Operation and Passenger Safety, Issue 13, 15 January 2020) sets out how passenger services are to be worked. However, this document does not contain how the staff are trained in the operation of hinged door rolling stock. We also require evidence as to how

> the staff are subjected to ongoing monitoring and competence assessments when working such rolling stock.
>
> 4.6.15. Operating instructions should ensure processes are in place to mitigate risks ALARP. We note that the Applicant has had two incidents relating to PTI and train dispatch in recent years, one before the application was made and one since. We consider that the fitment of CDL could have actively prevented these incidents occurring. However, in any event, our expectation when incidents occur is that an investigation would be undertaken.
>
> As part of that investigation, we would expect an operator to, for example:
>
> - review risk assessments to ensure that they are still valid,
> - check existing instructions are workable,
> - issue a bulletin to advise of an incident and a reminder for crews to ensure they dispatch in accordance with process in place.
>
> 4.6.16. If the risk assessment and work instructions need changing, our expectation is that the operator acknowledges this and provides timescales for producing updates, briefing them out, etc. It is not clear from the documentation provided whether these actions were undertaken for the incident that occurred prior to the application being submitted and that risk assessments and existing control measures have been reviewed and updated post incident, thereby providing sufficient assurance that existing arrangements are suitable for controlling risks of operating passenger charters. Certainly we have not received any additional information pertaining to the incident that has occurred since the application was made. Should the Applicant submit a new application, we would expect to see documentation pertaining to the review of risk assessments, etc. for incidents that occurred prior to the application being made and any that have occurred since."

31. The letter explained that, despite the inadequacy of the information provided, the ORR had nonetheless gone onto make a decision based on the information presented to date, as the Claimant had indicated the information would not be provided. On the substantive decision, the ORR concluded that an exemption from Regulation 5 would not be granted:

> "4.3.9 there has been a requirement to fit CDL in accordance with Regulation 5 since 1 January 2005. …..we have been clear about our expectations to industry about compliance with this Regulation via the fitment of CDL and the issuing of exemptions since 2018. Both the Assessment Manual and the Application

Guidance reiterate our expectation that CDL will be fitted, or an alternative engineering solution provided by operators. To date, the Applicant has provided neither.

4.3.10. We recognise that the cost of fitting CDL to vehicles would likely be a significant outlay for the Applicant especially in the current economic climate, with the rising cost of living and absence of revenue during the Covid pandemic. However, even though operators have had a significant period to fit CDL since the Regulations came into force, we are not requiring operators or owners to cease using vehicles until CDL is fitted. Instead, we have requested that operators provide timebound plans for how they will fit CDL for our consideration, which include any financial, engineering, etc. limitations which means fitment might take longer. Other operators or owners of vehicles that travel on the mainline are in the process of, or have, fitted CDL. Where fitment is not complete, plans for completion have been submitted to us for our consideration. We remain open to considering the need for exemptions whilst fitment takes place but, noting the contents of our Impact Assessment, to ensure that staff and the public can expect comparable levels of safety regardless of the operator of the train service we expect costs provided by applicants to be used as a means of setting out how long it may take for CDL to be fitted. Cost of fitment is not sufficient reason for CDL not to be fitted at all. As such, we would expect the Applicant to provide a clear breakdown of the costs as part of its programme to fit CDL to vehicles, ensuring that it is clear whether figures provided relate to those stored or stopped from operational traffic.

4.3.11. As set out in section 2 above, the Applicant operates at speeds of up to 100mph on the mainline throughout Great Britain, interacting with different operators and stopping at various stations. We do not agree with the Applicant's assertions set out in DLA's letter of 21 November 2022 that the impacts of fitting CDL are clearly disproportionate in the context of a "vanishingly small risk to safety". We consider that familiarity with slam door stock, including with passengers travelling on the Applicant's services, is decreasing, because it has been phased out by the franchised operators. This increasing lack of familiarity could in turn result in an increased risk of a door being opened when it is not safe, for example, when the train is in motion or where the train exceeds platform length.

4.3.12. We note the information provided at Appendix E. It appears that most incidents relate to Mark 3 coaches which have door handles but which also have CDL fitted. We do not consider that this information of itself supports a case that CDL should not be fitted. Instead, our expectation is that this type of information should be used by other operators (including the

> Applicant) to better identify risks and mitigations so to reduce the likelihood of these incidents occurring elsewhere.
>
> 4.3.13. The clear and objective sufficiency of the Applicant's current approach to maintaining safety in connection with using historic rolling stock, and in the context of the safety record of the historic charter service sector, does not refer to incidents of doors open in traffic and dispatch irregularities at stations involving services operated by the Applicant (see paragraph 4.6.15 below for further details). We consider that having rolling stock fitted with CDL would reduce the risk of such incidents occurring because if CDL is fitted then doors can only be opened by a competent person as it needs to be energised from the Guards panel.
>
> 4.3.14. We would also expect operators to adopt the control measures that the Applicant has cited even where CDL has been fitted."

32. By letter dated 16 March 2023 the ORR issued a review of its earlier decision following a request to do so by the Claimant but concluded that its decision of 31 January 2023 remained unchanged and an exemption would not be issued. The letter repeats the earlier position that the application was incomplete, noting in relation to further information provided in relation to the incident at Reading that, where such incidents occur, "we would expect to see documentation pertaining to the review of risk assessments, etc." No information had been provided to indicate that the risk assessment and procedures for operating charter services had been reviewed.

33. The letter goes onto explain that the purpose of the impact assessment undertaken by ORR in July 2021 was to present cost information for the fitting of central door locking systems that had been, or were being, implemented by charter operators with trains with hinged doors, at that time. The intention was that the information provided would allow other operators, including the Claimant, to compare the cost of fitment of central door locking for their operations against the benefit of mitigating a fatality. The letter continues:

> "3.12. The Applicant is correct in that no attempt was made in the Impact Assessment to analyse the risk of a fatality as a result of the Applicant's operations, that was not its purpose. That was analysis that the Applicant should have undertaken to support their position that their existing controls offered equivalence in risk mitigation to fitment of CDL.
>
> 3.13. We have used the HSE document 'Reducing Risks Protecting People-(R2P2)' in our review. We have been proportionate in our approach and considered in our assessment the specific characteristics of the Applicant's operations, the risks associated and the robustness of the risk controls in place. Following the guidance in R2P2, at section 19, we have not taken into account the ability of the Applicant to afford fitment of CDL, as this is "not a legitimate factor in the assessment of

costs" to mitigate risk. We reiterate the position in our Decision Letter at paragraph 4.3.10 that "[c]ost of fitment is not sufficient reason for CDL not to be fitted at all".

3.14. In our Assessment Manual we set out at paragraph 5.3 "a risk assessment is mandatory for all applications". …

3.15. Inspectors have assessed the risk assessments provided….. Their conclusions are that, in relation to the risk of a door opening in traffic, there is not a suitable and sufficient assessment of the hazard, associated risk, mitigation in place, and remaining risk following mitigation. Therefore, equivalence to CDL is not demonstrated**.** The reasons for this view are:

3.15.1. The risk assessment provided uses a 5x5 methodology for the assessment of risk and is typically referred to as a qualitative risk assessment. This method is based on scenarios, subjectivity, and knowledge. This method of assessing risk, whilst quick and easy to implement, has significant limitations. It is this methodology that the Applicant has used to conclude that a likely chance of a lost time injury occurring is low risk. We do not consider that this is a suitable and sufficient assessment of risk. Important amongst those limitations is the analysis of likelihood and severity and in this instance, for each scenario, the Applicant has reduced the severity of harm once mitigations are applied. We consider that the severity of harm is unlikely to reduce with the mitigations identified, only the likelihood.

3.15.2. Consistent with our conclusion at paragraph 4.6.4 of the Decision Letter where we explain that "…we would expect to see a full risk assessment which considers all hazards for operating passenger charters, control measures to mitigate any foreseeable risks and suitable quantification of risk", we require a Quantified Risk Assessment ('QRA') from the Applicant so that we can understand whether the control measures the Applicant is relying on to mitigate the risk of doors open in traffic are equivalent to the risk control provided by CDL. QRA is based on data, objectivity, and measurements. It is more detailed and reliable than qualitative risk assessment, but also more complex and time-consuming. Industry accepted tools such as fatality and weighted injuries ('FWI') have not been used to quantify the likelihood of a fatality occurring and therefore the Applicant is unable to demonstrate a suitable and sufficient analysis of risk and equivalence in risk control of the measures it has in place compared to fitment of CDL.

3.15.3. There is a statement stating the costs are disproportionate, but there is no evidence that the Applicant has sought specialist advice on the cost of fitting CDL to their

fleet of trains. Whilst no calculation has been provided to support this statement, and notwithstanding our position at paragraph 3.15.1 above, an accurate assessment of the cost of fitment by the Applicant would help us to determine what would be a reasonable timescale for fitment of CDL by the Applicant.

3.15.4. There is no evidence of consideration of the hierarchy of risk control (principles of prevention, Management of Health and Safety at Work Regulations 1999- MHSWR). The control measures identified rely on the lowest means of control within this hierarchy, giving instructions to employees.

3.15.5. We reiterate our conclusions in the Decision Letter at paragraph 4.6.14 that the document "Passenger Train Operation and Passenger Safety, Issue 13, dated January 2020" provided in September 2021, "does not contain information on how the staff are trained in the operation of hinged door rolling stock" and we "require evidence as to how the staff are subjected to ongoing monitoring and competence assessments when working such rolling stock". With significant reliance on operational control measures, the Applicant has given no consideration given to human failure, such as distraction or coercion of Stewards - the latter occurring at Reading on 18 June 2022. The risk assessment gives a minimum Steward of one per coach, with the responsibility for four sets of doors, meaning their attention is divided between all four and the likelihood of distraction increased.

3.15.6. The presence of the British Transport Police should not be listed as a control measure as the Applicant cannot guarantee their presence or attendance.

3.16. As set out at paragraph 2.2 of this letter, we have considered the requirements of the Assessment Manual and Application Guidance. This is demonstrable via our assessment of the Applicant's application where we have considered the specific characteristics of the Applicant's operations, the risks associated with those operations and the robustness of existing risk controls so as to determine whether or not to grant an exemption from the Regulation 5 requirement. As part of this assessment, we have also assessed the evidence provided by the Applicant to establish whether there is equivalent or better risk mitigation, through its existing risk control arrangements compared with CDL.

3.17. We have determined that the Applicant has not demonstrated equivalence, or better, in risk control and therefore

> has not provided cogent justification and reasoning why it should not progress with fitment of CDL.
>
> …….
>
> 3.21. In summary, and as detailed in the Decision Letter at paragraph 4.6.15, we consider that the incidents at both York and Reading indicate that having CDL fitted to vehicles would have mitigated against the risk of these occurring.
>
> 3.22. The York incident would have been mitigated because the door being open would have stopped the interlocking. The Guard would then have needed to establish why this was and in turn, have secured the open door. Until this occurred, the station duties and train dispatch process would not be complete.
>
> 3.23. The incident at Reading, whilst not an emergency situation, did have an impact on the safe dispatch of the train. We acknowledge that the Steward was put in a difficult situation (as detailed in footnote 11 of our Decision Letter), but they did not act in accordance with their training, by releasing the secondary door lock and opening the doors whilst the train was in motion. If CDL was fitted to the vehicles, it would have been the Guard that would have needed to energise CDL, rather than the Steward, to allow a door to be opened and one or more passengers to disembark."

Events postdating the decision

34. After its second decision letter, the ORR conducted an unannounced and anonymous inspection of the Jacobite train on 9 June 2023 following a report by a whistle-blower about the operation of train doors on the service. The inspection identified issues with the implementation of the Claimant's safety system and breach of the conditions of the exemption to Regulation 5 pursuant to which the train operated.

35. On 14 June 2023, the ORR served a prohibition notice on the Claimant. After discussions, the ORR was satisfied with the Claimant's proposed response to the notice. On 15 June 2023 services recommenced. The ORR undertook a second unannounced inspection on 14 July 2023 which resulted in the service being suspended on 15 July 2023 and the withdrawal of the exemption on 19 July 2023. The Claimant undertook a review of the matters identified from the June and July inspections and took various measures including amending work instructions, updating protocols for briefing stewards, replacing warning labels on the train doors, training personnel and increased monitoring by leadership. After inspection on 8 August 2023, the ORR was satisfied that the changes proposed by the Claimant were sufficient to address the safety concerns raised by its June and July inspections.

36. There was a dispute between the parties about the relevance of these events given they post-dated the decision. In written submissions the ORR relied on the June and July inspections to corroborate its assessment that secondary door locking is dependent on

human action and is quantitively less safe than central door locking. In oral submissions, it was said on behalf of the ORR that it was not necessary for the ORR to rely on events post-dating its decision to justify its decision making. The Claimant disputed the legal relevance of events that occurred after the decisions challenged. For the reasons set out below the Court has not found it necessary to consider the events or the legal or factual issues said to arise from them.

Discussion

Introduction - the role of the Court in judicial review

37. Underlying the present claim is a disagreement between the Claimant and the ORR as to whether the Claimant's arrangements for operating the secondary door locking system on its hinged doors provides an equivalent level of safety to a central door locking system. The Claimant considers that continuing with existing 'high quality' control measures is sufficient. The measures include ensuring that stewards operate the doors, not passengers; that stewards and staff are suitably trained in the procedures; there are warning signs about safety throughout the coaches along with passenger announcements; and consistent application of door maintenance and schedule checks. The company also points to the risk of retrofitted central door locking. The ORR disagrees with the Claimant. It is of the view that the Claimant is unable to demonstrate that its controls of the risks from secondary door locking make it as safe as central door locking.

38. It is apparent that the disagreement is deep seated and wide ranging. The Court was provided with approximately 1000 pages of witness evidence and exhibits including contracts, consultation documents/responses, power-point slides, impact and risk assessments, regulatory codes of practice and guidance. The technical and factual matters raised in the witness evidence included: whether central door locking improves mitigation of risks as compared to secondary door locking; the impracticability of fitting central door locking; whether the Claimant's risk assessment was a quantified or qualitative risk assessment; the types of hazard a quantified risk assessment is suitable for assessing; the ORR's alleged 'fixation' on regulating droplight windows; the work and system that would have to be implemented into the Claimant's heritage trains and the alleged absence of suitable data on the part of the ORR to support its position.

39. In this context it is appropriate to restate the basic proposition that judicial review is not an appeal. It is not the function of the court in a judicial review claim to assess the merits of the decision for which judicial review is sought. The basic constitutional theory on which the jurisdiction rests confines the court to determining whether the decision was a lawful exercise of the relevant public function.

40. Moreover, the scope of judicial review is acutely sensitive to the regulatory context (R (Mott) v Environment Agency [2018] UKSC 10). Regulations 5 and 6 of the Railway Safety Regulations 1999 were introduced in response to a number of fatalities from train doors. By way of Regulation 5, the Secretary of State (and ultimately Parliament) has imposed a prohibition on the use of hinged doors on rolling stock except where they are operated by central door locking. By Regulation 6, the Secretary of State (and ultimately Parliament) entrusted the ORR to decide on exemptions from the general prohibition on a case by case basis.

41. The dispute underlying the claim relates to technical matters to do with the safety of the locking systems for train doors. The Courts have recognised the need for judicial restraint where the issue under scrutiny falls within the particular specialism or expertise of the defendant public authority. Where a decision is highly dependent upon the assessment of complex technical matters by those who are expert in such matters and/or who are assigned to the task of assessment (ultimately by Parliament) the margin of appreciation will be substantial (R (Mott) v Environment Agency [2016] EWCA Civ 564 at §63 and §75).

42. It should also be emphasised that it is not typically the role of the Court in judicial review to determine technical or factual disputes:

> "In general, a court hearing a judicial review claim does not resolve disputes about primary fact. Typically, the court focuses on the procedure adopted before the decision was made; whether the decision-maker was entitled to conclude the information before him was sufficient; and whether the decision-maker identified and answered what in law were the right questions, approached and structured his task in a logically acceptable way, gave adequate and intelligible reasons and reached a decision that was open to him on the evidence." (R (F) v Surrey County Council [2023] EWHC 980 (Admin), Chamberlain J at §46).

Ground 1 (Misinterpretation of the Regulations)

43. On behalf of the Claimant, it was said that the ORR's decision making was based on a mistaken view that the Railway Safety Regulations 1999 imposed a time limit for compliance and required all operators of hinged door rolling stock to fit central door locking by a certain time. Alternatively, it was said that the ORR was using its power in Regulation 6 to phase out or remove the operation of hinged door rolling stock even where the locks are not operated by passengers so that the risk, which was the policy intention of the Regulations to address, does not arise. Further, the ORR was using the regulatory prohibition to, in effect, regulate droplight windows, which was not permissible.

44. It was common ground that when exercising a discretionary power conferred by legislation a public authority must use its discretion to promote the policy and objects of the legislation and not use its discretion so as to thwart or run counter to the policy and objective of the legislation (Padfield v MAFF [1968] AC 998). Lord Reid explained how the policy and objects of an Act are to be determined at 1030:

> "Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court."
>
> (Underlining is the Court's emphasis).

45. Accordingly, the policy and object of an Act must be determined by construing the Act itself. In submissions the Claimant placed particular emphasis on a 2014 consultation by the ORR, long after the Regulations were adopted, in which the ORR explained that

the policy intention behind Regulation 5 was to reduce the risks of hinged doors on the heavily used commuter services in the South East. Regulation 5 prohibits hinged doors for use by passengers for boarding and alighting from the train on any rolling stock unless the doors are operated by central door locking. The Court does not accept the submission that the prohibition does not apply where the doors are operated by stewards such that the doors are not thereby 'used' by passengers. The wording of Regulation 5 makes clear that the prohibition applies if rolling stock has hinged doors for use by passengers for boarding and alighting. It is not disputed that passengers use the doors on the Claimant's trains to get in and out of the train, albeit it is said, that the doors are opened for them by stewards.

46. There is no evidence before the Court indicating that the ORR mistakenly considered that the Regulations imposed a time limit for compliance with Regulation 5. The evidence demonstrates the ORR regulating in accordance with evolving safety standards. The Railway Safety Regulations were introduced in response to fatalities on commuter lines caused by the hinged doors. The Court was told that the prohibition all but removed hinged door rolling stock from the mainline network. Such were the safety improvements on commuter trains brought about by the Regulations that in 2014, as the Claimant has highlighted, the ORR suggested that Regulation 5 could be repealed. However, two fatal incidents in 2016 and 2018 caused the ORR to re-evaluate the risks posed by the remaining hinged door rolling stock in operation on the mainline. The exercise of discretion by the ORR to extend the prohibition beyond commuter trains to heritage train operators cannot be said to be contrary to the policy and objects of the Regulation in light of the prohibition on hinged doors for all rolling stock, unless they have central locking. The ORR is eminently well placed to make those evolving evaluations, which are consistent with the discretion afforded to it by Regulation 6 (Mott v Environment Agency). One of the implications of the Claimant's submissions on this ground is to treat the ORR's role as set in stone as at the date of adoption of the Regulations and to prohibit regulation according to developments in safety. The fact that the risk has been significantly reduced as the heavily used commuter train services have been replaced by rolling stock with central door locking cannot rationally mean, as the Claimant appeared to suggest, that other trains should escape the safety improvements because they were not the original driver for the Regulations. There was no evidence before the Court to demonstrate that the ORR was using the regulatory prohibition to impermissibly regulate droplight windows. As Counsel for the ORR made clear in oral submissions, the ORR well understands that Regulation 5 does not extend to droplight windows. It is simply that there is an additional safety benefit from central door locking in that there is less need to lean out of droplight windows.

47. Ground 1 fails.

Ground 2 (Fettering of discretion)

48. On behalf of the Claimant, it was said that, whilst the ORR was entitled to have a policy on its approach to exemptions under Regulation 6, the ORR treated the policy as automatically determining the outcome of the Claimant's application. That was said to be unsurprising. It was submitted that, for years, and without basing its position on any empirical evidence of the relative safety merits of secondary door locking (as operated by the Claimant) versus central door locking, the ORR had consistently indicated that it was unprepared to grant any exemptions beyond March 2023 where an applicant's

proposed locking system was secondary door locking. The decision under challenge is a continuation of that position.

49. It was common ground that when exercising a statutory discretion, a public authority is entitled to have a policy in relation to the exercise of that discretion. Further, the discretion can be "so precise that it could well be called a rule" providing the public authority does not "shut its ears" to an application (British Oxygen Co Ltd v Board of Trade [1971] AC 610 at 625).

50. The ORR's policy gives a strong steer that central door locking will be required but it nonetheless makes clear that ORR will consider granting an exemption from Regulation 5 where an applicant can "demonstrate that there are exceptional circumstances". Two examples of exceptional circumstances are given but they are not said to be exhaustive. It is 'expected' that any deviation from the policy "provide an equivalent level of safety protection to central door locking" but the requirement is not mandatory. It is noteworthy in this regard that, in 2020, the Claimant commenced pre-action correspondence with the ORR about a challenge to the lawfulness of the policy but did not proceed with the challenge.

51. Moreover, it is readily apparent from the decision letters that the ORR did not shut its ears to the application, despite the Claimant not having provided the necessary information to process the application:

> "3.16. ….we have considered the specific characteristics of the Applicant's operations, the risks associated with those operations and the robustness of existing risk controls so as to determine whether or not to grant an exemption from the Regulation 5 requirement. As part of this assessment, we have also assessed the evidence provided by the Applicant to establish whether there is equivalent or better risk mitigation, through its existing risk control arrangements compared with CDL." (Second decision letter dated 16 March 2023.)

52. Ground 2 fails.

Ground 4 (Article 1 Protocol 1 of the European Convention on Human Rights)

53. In oral submissions, ground 4 was advanced on behalf of the Claimant prior to ground 3 so the Court's judgment follows the same structure.

Legal framework

54. A public authority must not act in a way which is incompatible with Article 1 of the First Protocol to the European Convention on Human Rights (s.6(1), Human Rights Act 1998).

55. Article 1 Protocol 1 of the European Convention of Human Rights (A1P1) provides that:

> "(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his

> possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> (2) The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

56. A1P1 is, in substance, a guarantee of the right to property. For present purposes it lays down the general principle of the peaceful enjoyment of property but recognises that the use of property may need to be controlled in the public interest (AXA General Insurance Ltd v HM Advocate [2012] 1 AC 868 at §21). An assessment of whether there has been a violation of A1P1 involves consideration of whether there has been an interference, including the nature of the interference. If an interference is established, then it must be shown that the interference complies with the principle of lawfulness and pursues a legitimate aim by means that are reasonably proportionate to the aim sought to be achieved. This final question focusses upon whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights, i.e. the proportionality of the decision (AXA at §108).

57. In Bank Mellat v Her Majesty's Treasury [2014] AC 700, Lord Sumption explained the role of the Court in assessing the requirement for proportionality. The Court should conduct "an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them" (§20). In oral submissions on behalf of the Claimant emphasis was placed on Lord Reed's expansion of Lord Sumption's fourth criterion, which Lord Reed phrased as whether, balancing the severity of the measure's effects on the rights of the person to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter (§74).

Submissions

58. On behalf of the Claimant, it was said that the ORR's decision was a serious interference with the Claimant's business amounting to, or close to, a deprivation of property, rather than simply an interference. The effect of the decision will be to destroy the business or to require the Claimant to spend approximately £7 million to fit central locking, which is approximately seven times the company's average annual net profit, thereby wiping out the company's profits for the best part of a decade. If the business does not survive there will be £50 million in lost economic value to the wider community. The ORR has 'wholly failed' to establish a justification for the interference. The ORR has previously granted the Claimant an exemption from the

prohibition on the basis that its secondary door locking system is safe and has granted the Claimant a safety certificate. Accordingly, the ORR's position cannot be that the Claimant's system is unsafe but only that central door locking is safer, yet the ORR has never assessed the comparative safety of secondary door locking and central door locking far less the particular way in which the secondary door locking system is operated on the Claimant's trains. In contrast, the Claimant has undertaken a comparative safety assessment which concludes that secondary door locking is as safe as central door locking. The ORR did not make clear in its decision letter that it required a quantified risk assessment and it was unreasonable for the ORR to criticise the Claimant's risk assessment on this basis. The Defendant's case on justification which rests centrally on its unreasonable requirement for a quantified risk assessment collapses and is unsustainable. There are risks to using central door locking. Even if the ORR could establish a materially greater safety risk to using secondary door locking, it would still be necessary to consider the safety benefits of central door locking as against the undisputed financial impact on the Claimant. Whilst the ORR has gathered together general costs figures based on the indicative costs to other operators of fitting central door locking it has not considered the financial impact on the Claimant.

An interference, prescribed by law, in pursuit of a legitimate aim

59. There was no dispute that the ORR's decision constituted an interference with the Claimant's possessions, prescribed by law (Regulation 6 of the Railway Safety Regulations), in pursuance of a legitimate aim – the safety of passengers.

60. On behalf of the Claimant, it was suggested that the interference was more akin to a deprivation of property than a control on use because the Claimant will go out of business unless it expends considerable sums of money. This characterisation of the impacts on the Claimant is explored further below but in Mott v Environment Agency the Court classified a measure which eliminated at least 95% of the benefit of the right in question as a control on use, albeit closer to deprivation than mere control (§32 and §36). In any event, the importance of classification should not be exaggerated. The test is, in substance, the same however the interference is classified (AXA at §108).

The proportionality of the interference

61. There was no dispute that the safety of train passengers and the prevention of death or serious injury was a sufficiently important objective to justify a limitation on the right to peaceful enjoyment of property under A1P1. There was also no dispute that the ORR's decision to refuse the Claimant an exemption from the prohibition on the use of hinged doors without central door locking was rationally connected to passenger safety. The submissions on behalf of the Claimant focussed on whether a fair balance had been struck between the rights of the Claimant and the interests of the community (iv).

62. On behalf of the Claimant, it was submitted that the Court was entitled to closely scrutinise the ORR's decision making because the ORR had not addressed its mind to the human rights implications of its decision. In this regard, it was common ground that the Court's scrutiny is bound to be closer where a decision-maker is not conscious of, or does not address its mind at all to the existence of values or interests which are relevant under the Convention. Where however a public authority has carefully weighed the various competing considerations and concluded that interference with a Convention right is justified, a court will attribute due weight to that conclusion in

deciding whether the action in question was proportionate and lawful. But what matters in any case is the practical outcome, not the quality of the decision-making process that led to it (Belfast City Council v Miss Behavin' Ltd [2007] 1 WLR 1420, Lord Mance at §§46-47).

63. In the present case, contrary to the submission on behalf of the Claimant it is apparent that the ORR had in mind the proportionality of its decision to refuse an exemption.

64. In its application letter of 8 April 2021, the Claimant made clear that the removal of the exemption would interfere with its possessions and was disproportionate to the safety concerns that were already mitigated and said that the ORR should consider less intrusive measures. In its first decision letter, the ORR noted the Claimant's analysis of A1P1 before stating at 4.3.11 "We do not agree with the Applicant's assertions ……that the impacts of fitting central door locking are clearly disproportionate in the context of a "vanishingly small risk to safety". The letter went on to state that "There is a lack of clarity in the documents provided by the Applicant. In our letter to the Applicant dated 8 November 2021, we requested a risk assessment that set out why central door locking fitment is disproportionate to risks identified. To date, we have not received this." In the second decision letter the following was said: "3.13. We have used the HSE document 'Reducing Risks Protecting People- (R2P2)' 4 in our review. We have been proportionate in our approach and considered in our assessment the specific characteristics of the Applicant's operations, the risks associated and the robustness of the risk controls in place." The underlining in the quotes above reflects the Court's emphasis. In addition, as considered further below, the ORR decided to inform itself about the costs of retrofitting central door locking by obtaining information from heritage train operators who had installed, or were in the process of, retrofitting central door locking.

65. The Claimant's contention that the ORR had "wholly failed" to justify the interference falls to be assessed in the context of the primary basis for the ORR's refusal of the Claimant's application. The ORR repeatedly explained to the Claimant that it had not provided sufficient information to demonstrate the safety of its proposed method of operating its secondary door locking system. In particular, it had not demonstrated, to its satisfaction, whether the control measures relied on to mitigate the risk of doors opening were equivalent to the control of the risk as provided for by central door locking. It is apparent that the regulatory regime places the burden on a train operator to satisfy the regulator in this regard. Paragraph 7 of the ORR's application guidance states that the burden is on an applicant to satisfy the regulator, with appropriate evidence, that the applicant can safely manage the operations in relation to which they have requested an exemption from in Regulation 5. The guidance explains that the evidence provided should clearly demonstrate the ability of the applicant to safely manage the operations or section of infrastructure from which they have requested to be exempt from the Regulations (7.4). The supporting evidence to be provided by the applicant includes a mandatory risk assessment, a Safety Management System (SMS) or operational safety plan setting out health and safety control measures to be implemented, details of the location, operators, and duration of the requested exemption, and operational arrangements for the safe carriage of passengers in hinged door rolling stock. The operational arrangements should include procedures for both the operation of the slam door rolling stock and the training of the operating staff, which is to include ongoing monitoring and competence assessment. An application will be

put on hold where evidence is not supplied (6.4). Counsel for the ORR explained to the Court that the rationale for the regulatory approach is that the regulated party has the information, safety data and knowledge of its own operations that the regulator will not have.

The general interest - the safety case

66. Regulation 5 of the Railway Safety Regulations 1999 prohibits the use of hinged doors for passengers unless the doors have central locking. The Regulations were introduced following a history of fatalities and/or serious injury to passengers from hinged doors and secondary door locking.

67. The Claimant operates on national rail infrastructure managed by Network Rail. It operates on routes with varying line speeds of up to 125 mph and on lines fitted with overhead line equipment and, in some areas, a third live rail carrying an electric current. The Claimant's trains run at speeds of up to 100 mph. Passing traffic can run at higher speeds. Its trains operate in conjunction with a mix of traffic, including passenger, freight, express and local stopping services, both at stations and during journeys.

68. Hinged doors can be opened by anyone inside the train even when the train is moving. The ORR considers that the risk of hinged doors is increasing over time as passengers, particularly the younger generation, become less familiar with them, as central door locking becomes the norm on commuter trains. Whilst the Claimant expressed scepticism about this proposition it produced no evidence base to refute the opinion expressed by a specialist safety regulator and which accords with common sense.

69. The Claimant contends that the use of 'stewards' (who can be volunteers) on its trains to operate the train doors is safe. However, the ORR does not consider the risk assessment produced to be suitable or sufficient to demonstrate that the Claimant's operations provide an equivalent level of safety as central door locking. The ORR's concerns about the information provided focussed on the quality of the risk assessment provided by the Claimant and on the absence of data about the ongoing monitoring and appraisal of the competence of on-train stewards who operate the train doors. In the first decision letter it said that there was "a lack of clarity in the documents provided". The ORR had requested a risk assessment that set out why central door locking fitment is disproportionate to risks identified which it had not received. It was said that the Claimant had not used a traditional risk assessment template and "we would expect to see a full risk assessment which considers all hazards for operating passenger charters, control measures to mitigate any foreseeable risks and suitable quantification of risk". It was further said that there was no information on how the staff are trained in the operation of hinged door rolling stock, in particular how staff are subjected to ongoing monitoring and competence assessment. The second decision letter explained that:

> "Inspectors have assessed the risk assessments provided. Their conclusions are that, in relation to the risk of a door opening in traffic, there is not a suitable and sufficient assessment of the hazard, associated risk, mitigation in place, and remaining risk following mitigation. Therefore, equivalence to CDL is not demonstrated."

70. The ORR criticised the Claimant's qualitative risk assessment for not making use of 'industry accepted' tools such as fatality and weighted injuries to quantify the likelihood of a fatality occurring. It also criticized the approach taken of reducing the severity of the harm once mitigation was in place on the basis that the severity of harm is unlikely to reduce with the mitigations identified, only the likelihood. The Claimant was said not to have provided "information on how the staff are trained in the operation of hinged door rolling stock" and the ORR required "evidence as to how the staff are subjected to ongoing monitoring and competence assessments when working such rolling stock".

71. In turn, the Claimant objected to the ORR's stipulation that the risk assessment should be quantitative not qualitative. However, this is an area where the Court ought to afford the ORR a margin of appreciation. In AXA, Lord Reid said at §131 that the concept of the margin of appreciation requires the courts to recognise that, in certain circumstances, and to a certain extent, other public authorities are better placed to determine how those interests should be balanced. Although the courts must decide whether, in their judgment, the requirement of proportionality is satisfied, there is at the same time nothing in the Convention, or in the domestic legislation giving effect to Convention rights, which requires the courts to substitute their own views for those of other public authorities on all matters of policy, judgment and discretion:

> "Judicial recognition and assertion of the human rights defined in the Convention is not a substitute for the processes of democratic government but a complement to them. … a national court ……will give weight to the decisions of a representative legislature and a democratic government within the discretionary area of judgment accorded to those bodies. The intensity of review involved in deciding whether the test of proportionality is met will depend on the particular circumstances."

72. In the present case, the Railway Safety Regulations entrust the ORR to assess the suitability of exemptions from the legislative prohibition. The ORR is a specialist safety regulator with the accompanying expertise, knowledge and experience.

73. To the extent the Court needs to form its own view on matters, it must follow as a matter of common sense, that a system which involves all doors being locked and unlocked simultaneously by a single individual from a central control point, is as a general rule, safer than a system dependent on no more than an assumption by the guard that the stewards have locked the doors. With central door locking there are external lights on each carriage door to indicate whether all the doors are locked. In contrast there is no external light to demonstrate to the guard that the doors are locked with a secondary door locking system. Moreover, there have been two safety incidents on the Claimant's trains which indicate the risks of human error. In October 2020 a train left York station with a door open. In June 2022 a passenger overpowered a steward to open the door whilst the train was moving. It was only luck that prevented a serious injury or worse in both incidents. The ORR's first decision letter noted that there was no evidence of any investigation into the incidents or reflections on lessons learnt. The ORR's concerns about the Claimant's use of stewards accord with the established hierarchy of risk control set out in Schedule 1 to the Management of Health and Safety at Work Regulations 1999/3242. It is a system which helps to identify and implement the most effective measures to prevent or reduce the hazards and risks. The hierarchy consists of

levels of control from the most effective to the least effective. The hierarchy should be applied in a systematic way starting from the top and working down. The lower levels of control should only be used as a last resort or as a temporary measure until a higher level of control can be implemented. Fitting central door locking would involve "adapting to technical progress" (fifth in the hierarchy). The Claimant's method of giving instructions to employees (stewards) is the lowest level of control.

74. It was said on behalf of the Claimant that the ORR had not made clear that it required a quantitative risk assessment. The ORR disputed the factual accuracy of the submission. In any event however, the submission cannot materially assist the Claimant in the context of a regulatory system where the onus is on an applicant to satisfy the regulator about the safety case for a deviation from the usual policy, and clear legislative preference, for central door locking.

75. Accordingly, on the information available to the ORR at the time it took its decision, the Court is of the view that the general interest lay firmly in favour of refusing the Claimant's application for an exemption.

Impacts on the Claimant

76. The Claimant initially estimated the costs of retrofitting central door locking at £3 million, which was based on an approximate cost of £30,000 per carriage to fit central door locking. As the parties accepted, the latter figure is broadly in line with the ORR's assessment of a maximum cost per carriage of £26,250. The Claimant's cost estimate later rose to £7 million, which was said to be direct costs and lost revenue. No supporting evidence was provided. The ORR disputed the estimate. The increase in estimate appears to relate to loss of revenue but the ORR has indicated that it is prepared to allow a transition period for the installation of central door locking and has done so for other operators. The Court was told that other operators have done the work in January and February, out of season, so as to reduce the impact on revenue. The Claimant's Jacobite train only operates in the summer months, which would enable the work to be done in the winter months without loss of revenue. "Since the burden of proof is usually on the person who asserts a fact to be true, if that burden is not discharged, the court will proceed on the basis that the fact has not been proved" (R (Talpada) v SSHD [2018] EWCA Civ 84, Hallett LJ at §2). Accordingly, the Court proceeds on the basis the £7 million estimate has not been proved.

77. The Claimant's initial estimate of £3 million was based on an approximate cost of £30,000 per carriage to fit central door locking. The Claimant's application for an exemption indicates that it expects to run between 1 – 5 services a day. Thus, the costs would range, on the Claimant's estimate, from £360,000 - £1,800,000 to operate the requisite number of daily services. The ORR's upper estimate was £1,393,920 to fit out 4 trains for daily use, based on information from Network Rail that it was not aware of a heritage train operator running more than 4 services a day.

78. The Department for Transport has produced a well-established notional economic value of avoiding a fatality, referred to as the value per fatality figure (VPF). On 2019 figures, the value is £2,017,000. Accordingly, the cost of fitting central door locking to the trains required for use by the Claimant in any one day falls well below the VPF. On the ORR's figures an operator could fit a further 21 carriages with central door locking capability for back-up or replacement carriage purposes and still fall below the 2019

VPF. A charter operator would need to install central door locking on up to 77 carriages before the question of exceeding the 'value of preventing a fatality' becomes a meaningful consideration.

79. The ORR did not take into account the ability of the Applicant to afford fitment of central door locking, as this is "not a legitimate factor in the assessment of costs" to mitigate risk. The Court agrees with the ORR that safety requirements obviously cannot vary according to the ability of an operator to pay for them. The Court also accepts the submission on behalf of the Claimant that affordability is relevant to the impacts on it and therefore potentially relevant for the human rights balancing exercise. The Claimant emphasised to the ORR the impacts of Covid on its operations. However, the ORR's first decision letter indicates a willingness to take account of finances in the timetable for fitting CDL:

> "4.3.10. We recognise that the cost of fitting CDL to vehicles would likely be a significant outlay for the Applicant especially in the current economic climate, with the rising cost of living and absence of revenue during the Covid pandemic. However, even though operators have had a significant period to fit CDL since the Regulations came into force, we are not requiring operators or owners to cease using vehicles until CDL is fitted. Instead, we have requested that operators provide timebound plans for how they will fit CDL for our consideration, which include any financial, engineering, etc. limitations which means fitment might take longer…"

80. Further, the Claimant is the largest heritage train operator in the UK and the Court was told that almost all other heritage train operators have accepted the requirement to fit central door locking and have done so, or will do so. In this regard, the ORR produced a witness statement from the managing director of Locomotive Services, another heritage train operator, explaining that Locomotive Services Group started retrofitting central door locking in 2017 and did so over a period of 6 years in agreement with the ORR who were flexible about the timetable for installation. The statement explains that the company is adversely affected by the Claimant's refusal to install central door locking. Fitting central door locking has been a major expense and a constituent part of the fares charged for tours. The Claimant has been able to operate at a lower cost base putting it at a significant competitive advantage.

81. In witness evidence, a representative of the Claimant explained that the company has 101,429 passenger journeys on the Jacobite line which generates £4.7 million in fare income and £5.7 million in turnover per annum. The average return ticket is £46.58 and the average profit is £1 million per annum. It is apparent that a modest rise in fares, in circumstances where the Court was told that the Claimant has a monopoly and a relatively price-insensitive customer demographic, ought to enable the Claimant to meet the cost of fitting central door locking in a phased manner. A £10 increase in the fare for the Jacobite service would generate approximately an additional £1million per annum in revenue with no additional overheads. The ORR has explained to the Court that it is not averse to a transition timetable for fitting CDL because it does not want to end the heritage train services.

The balancing exercise

82. Turning to the balancing exercise. The legislative prohibition on hinged train doors without central door locking came into force following a series of passenger fatalities and serious injuries. The Claimant contends that its method of operating its secondary door locking doors is safe but there have been several safety incidents on its trains which indicate otherwise and the Claimant has not produced evidence of an investigation into the incidents or reflections on lessons learnt, to the satisfaction of the specialist safety regulator. In addition, the ORR does not consider the risk assessment produced to be suitable or sufficient to demonstrate that the Claimant's operations provide an equivalent level of safety as central door locking. As a specialist safety regulator, the ORR is entitled to a margin of appreciation in this regard. There is no less restrictive measure available. As matters currently stand, the general interest falls clearly in favour of the installation of central door locking.

83. It was common ground that in considering proportionality in an A1P1 case, it is necessary to consider whether the effect on the particular claimant was excessive and disproportionate (R (Mott) v Environment Agency [2018] UKSC 10 [2018] 1 WLR 1022, Lord Carnwath at §32). In concluding that the impact on Mr Mott of the restrictions on the fishing licence was excessive and disproportionate, the Court emphasised the case was exceptional on its facts because of the severity and disproportion as compared with others of the impact on Mr Mott (§37).

84. The same cannot be said in the present case. The legislative prohibition came into force over 18 years ago. The ORR has made clear its policy on exemptions to the charter heritage sector since 2019. Other smaller heritage train operators have invested in central door locking and have passed the cost onto customers. From their perspective the Claimant has gained an unfair competitive advantage in refusing to fit central door locking. The cost of retrofitting central door locking on the train services run daily by the Claimant falls comfortably below the notional economic value of preventing a fatality. The ORR has made clear that it is willing to allow a transition period for the retrofitting of central door locking as it has done with other operators, which would enable central door locking to be fitted out of season thereby avoiding loss of revenue. As other operators have done, the cost of retrofitting can be passed onto passengers by way of a modest price increase.

85. Balancing the considerations summarised above the Court has reached the view that the restrictions imposed on the use of the Claimant's property are justifiable and the ORR's decision was not incompatible with A1P1 of the European Convention on Human Rights.

86. The Court has reached its view on the basis of the material before the regulator and has not found it necessary to consider events post-dating the decision.

87. Ground 4 fails.

Ground 3 (Failure to take account of relevant considerations)

88. On behalf of the Claimant, it is said that the ORR disregarded material considerations in breach of (i) its common law duty to take all mandatory relevant considerations into account, and (ii) its statutory duty, under Regulation 6(3)(c) of the Railway Safety Regulations, to consider "all the circumstances of the case". In particular, it is said that the ORR failed to consider circumstances mitigating the risks of secondary door locking

on the Claimant's trains, including its passenger profile and the pre-scheduled nature of its charter operations, which had been specifically drawn to its attention in application materials. The ORR failed to consider factors limiting the safety benefit of central door locking, including the risk of human failure in the operation of central door locking, and the Claimant's assessment of an additional risk of passengers being trapped in the event of accident or fire. The ORR did not consider the impact on the Claimant and third parties. It expressly disregarded the cost of fitting central door locking which (given its prohibitive size) was an obviously relevant circumstance of the case. It also disregarded the public benefits to the wider community and economy which would be lost to the extent that the Claimant could no longer operate. On a conservative estimate, the Jacobite alone contributes £19.3 million per annum to the Scottish economy, in addition to ticket revenue of £4.72 million.

89. The ground must be seen in the context, explained above, of the onus on an applicant for an exemption to justify a deviation from the clear legislative preference for central door locking and the ORR's accompanying policy that exemptions will only be granted in exceptional circumstances.

90. The Claimant's application failed, primarily, because the ORR was not satisfied with the information provided, in particular the risk assessment, the absence of any evidence of ongoing monitoring and assessment of the competence of the staff operating the SLD and any apparent investigation into and reflection on the previous safety incidents. Having chosen not to provide the evidence that a regulator has made clear it requires, it is not open to the Claimant to criticise the regulator for failing to consider the information that the Claimant chose instead to put forward. In the circumstances, the factors cannot be said to be so obviously material that it was unlawful to fail to take them into account.

91. In any event the costs of fitting central door locking were expressly referred into the decision letter. The other points now said by the Claimant to have been disregarded by the regulator were all made by the Claimant in its application or in subsequent correspondence. Representatives of the Claimant and the ORR met to discuss the application. It is plain therefore that the ORR would have been aware of the considerations. On analysis, the ground collapses into a reasons challenge. A public authority's reasons for its decision must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues". They should refer to the main issues in dispute, but need not necessarily deal with every material consideration (South Buckinghamshire DC v Porter [2004] UKHL 33, Lord Brown at §36). The absence of references in the decision letters must be viewed in the context of ORR's primary position that the application could not be progressed as the Claimant had not provided sufficient information.

92. Ground 3 fails.

Ground 5 (Irrationality)

93. It was common ground that a public authority must not exercise a discretion irrationally, including because of oppressiveness or disproportionality in the effects of its exercise (R (Khatun) v London Borough of Newham [2005] QB 37, Laws LJ at §41).

94. In Bank Mellat, Lord Sumption observed that "the requirements of rationality and proportionality, as applied to decisions engaging the human rights of applicants inevitably overlap" (§20). By reason of the factual analysis set out above addressing the proportionality of the ORR's decision the Court is not persuaded that the ORR's decision can be said to be, in any way, irrational. There is a legislative prohibition on hinged doors operating without central door locking. The specialist safety regulator was not satisfied that the Claimant had demonstrated its method of operations provided an equivalent level of safety. There is an evidential basis for the ORR's concerns, not least because there have been several safety incidents on the Claimant's trains. The Courts have recognised the need for judicial restraint where the issue under scrutiny falls within the particular specialism or expertise of the defendant public authority (R (Mott) v Environment Agency). Where a decision is highly dependent upon the assessment of complex technical matters by those who are expert in such matters and/or who are assigned to the task of assessment (ultimately by Parliament) the margin of appreciation will be substantial (R (Mott) v Environment Agency [2016] EWCA Civ 564, Beatson LJ at §75). The ORR's decision fell comfortably within its discretion.

95. The Court has reached its view on the basis of the material before the regulator and has not found it necessary to consider events post-dating the decision.

96. Ground 5 fails.

Conclusion

97. For the reasons set out above the claim fails.