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Neutral Citation Number: [2001] EWHC Admin 412
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(ADMINISTRATIVE COURT)

CO/1903/2000

Royal Courts of Justice
Strand
London WC2

Tuesday, 5th June 2001

Before:

MR JUSTICE STANLEY BURNTON

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THE QUEEN ON THE APPLICATION OF

LEE MAIR

-v-

CRIMINAL INJURIES COMPENSATION BOARD

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- - - - - - - - - - - - - - -
(Computer-aided Transcript of the Stenograph Notes of
Smith Bernal Reporting Limited
190 Fleet Street, London EC4A 2AG
Telephone No: 0207-421 4040/0207-404 1400
Fax No: 0207-831 8838
Official Shorthand Writers to the Court)
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MR M SEAWARD (instructed by Thompsons, Congress House, Great Russell Street, London WC1B 3LW) appeared on behalf of the Applicant.

MR H KEITH (instructed by the Treasury Solicitor, Queen Anne's Chambers, 28 Broadway, London SW1H 9JS) appeared on behalf of the Respondent.

J U D G M E N T
(As Approved by the Court)

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MR H KEITH (instructed by the Treasury Solicitor, Queen Anne's Chambers, 28 Broadway, London SW1H 9JS) appeared on behalf of the Respondent.

JUDGMENT
(As Approved by the Court)

Tuesday, 6th June 2001

JUDGMENT

1. **MR JUSTICE STANLEY BURNTON:** This is a very tragic case. The claimant was an employee of the railways at the relevant time. On 13th July 1995 a boy called Paul MacDonald, who was aged 12 or 13, was travelling on a train in Sussex without a ticket. The guard or collector required him to alight from the train at Angmering Station. It appears that different guards took then different views about people travelling without tickets. Anyway, he was required to get off the train. There was apparently a suggestion that the boy might have been spoken to before about that kind of conduct.

2. He complied with the request to get off the train. As the train pulled away, he jumped onto steps at the back of a carriage so that he was holding onto the carriage and standing on the steps, from which he slipped and fell on the track. One of the wheels then ran over his arm and it was amputated.

3. The claimant, Lee Mair (I take this account of the facts, I interject to say, from the note of judgment of the Board), bravely gave what help he could. He was understandably shocked and distressed and suffered from post-traumatic stress disorder. He was off work for a period. He subsequently submitted a claim to the Criminal Injuries Compensation Board. That claim was heard ultimately on 29th February last year. The Board consisted of His Honour Sir Jonathan Clarke, who was the Chairman, who sat with Michael Shorrock QC and Ann Curnow QC, a highly qualified Board as appears from their qualifications.

4. The real question before the Board was whether the psychiatric illness, the post-traumatic stress disorder, suffered by the claimant was the consequence of a criminal offence within the meaning and definition of the Criminal Injuries Compensation Scheme. The Scheme itself, which is a published scheme, is set out at pages 15tt and following of bundle A before me.

5. The scope of the scheme is as follows. It permits the Board to entertain applications for ex gratia payments for compensation in cases where there has been personal injury directly attributable (a) to a crime of violence (including arson or poisoning); or (b) to the apprehension or attempted apprehension of an offender or a suspected offender or to the prevention or attempted prevention of an offence or to the giving of help to any constable who is engaged in any such activity; or (c) to an offence of trespass on a railway.

6. Pausing there for a moment, there is an obvious distinction in the kind and the quality between subparagraphs (a), (b) and (c), or rather the offences that are referred to in paragraph 4 of the scheme. The scheme was originally limited to paragraphs (a) and (b), that is to say crimes of violence and apprehension or attempted apprehension of offenders and the like. Following a number of cases in which drivers of trains suffered psychiatric illness as a result of suicides on the railway, paragraph (c) was added. I repeat again, (c) is an offence of trespass on the railway.

7. In this particular case, quite clearly the young boy did not intend to commit any offence of violence. He intended to be violent to no one. Ultimately, of course, he did violence to himself. But he committed no crime of violence, so paragraph (a) was inapplicable. Paragraph (b) similarly was clearly inapplicable. The only paragraph of the Scheme under which the claimant could obtain compensation was (c), an offence of trespass on a railway.

8. That offence is not further defined in this Scheme. There are two relevant offences which have been put before me. One is the offence under section 55 of the British Transport Commission Act 1949; the other is an offence under section 16 of the Railway Regulation Act 1840, both of which do relate to trespassing on railways. Quite what is meant by "railway" in the definitions of those sections I shall come to in due course. But for present purposes, it is sufficient to refer to the fact that paragraph 4(c) of the Scheme does not identify the offence in question. It may be assumed that it was intended to refer to any criminal offence committed by trespass on a railway, of which, as I have said, there are two.

9. On the day the matter came for oral hearing before the Board, matters did not go as efficiently and in as well-informed a manner as might have been hoped for. It appears that, at least when matters began, counsel who acted for the claimant did not have a copy of the relevant legislation. The relevant legislation does impose conditions on the definition of an offence, which are by no means obvious, and it would have been very important to the Board's consideration of this matter.

10. The matter was argued on the basis that the reference to a "railway" in paragraph 4(c) included a train, a carriage; that the attempt to reboard the train on the day in question by the boy in question was a trespass on the train and therefore there was a relevant offence. It was not argued before the Board that at any time the unfortunate young man, Paul MacDonald, had become a trespasser on the station platform or that he had become a trespasser on the airspace above the railway line immediately between the platform and the train.

11. It is now sought to argue those matters. Before considering that matter, however, I should continue with the narrative of events. Understandably, as I am, the Board was very sympathetic to the application before them. Clearly there are analogies between the situation of this case and the situation of a driver who finds himself bearing down upon a person intent on committing suicide and with the shock caused to the railway employees in both cases. I think it is accepted that the Board did what it could to investigate such possibilities as there were for establishing that the post-traumatic stress disorder suffered by the claimant was indeed directly attributable to an offence of trespass on the railway.

12. For that purpose, during the course of the day there was an adjournment so that counsel who appeared for the claimant could further consider the position and put any authorities he could find before the Board. In the end the Board came to the conclusion that an offence of trespass on a railway meant trespass on land and that a criminal offence had to be discovered and that there was none. I will come in a moment to discuss the relevant sections.

13. The Board gave their decision and gave their reasons for it. Before the end of the day, however, counsel for the claimant returned to his chambers, I believe, and as a result of discussions with one or more other barristers, he submitted, with the note of the reasons given by the Board for their decision, a note asking for the opportunity of inviting the Board to consider further certain matters which were set out in the note. He referred to a colleague in chambers having been informed of a decision of the Board in a case called Wood, who was a train driver whose train had struck the head of a man who had leant forward from the platform. That man was lawfully on the platform at the time. The question of whether the man was trespassing was argued, and section 16 of the 1840 Act and section 55 of the 1949 Act was said to apply. In that case the Board had accepted that the man had trespassed on the railway in dangerous proximity to the line by placing his head across the airspace above the lines, and compensation was awarded. There was a reference to various cases, and in paragraph 4 the note stated:

> "It is therefore further submitted that in the instant case the boy must have trespassed the line when he jumped onto the steps at the back of a carriage (the agreed facts). There must have been a moment when he trespassed the airspace above the line. To find otherwise would have the result of depriving applicants of claims where for instance, people in a bid to commit suicide jump and become entangled with the train without ever having touched the line (a circumstance which apparently happens)."

14. He continued:

> "I am aware that I am making further submissions and that there is no direct authority to invite the Board to review a decision but I would ask the Board to consider the matter further if they feel the above assists."

15. The Board did not feel, it would seem, that it was right to hear further submissions. I have a witness statement of His Honour Sir Jonathan Clarke, who was Chairman that day, who says this in paragraph 11:

> "I believe that later in the day [and he is referring to the day of the hearing], probably during that afternoon, we were given a message that counsel wished to address us further. The message was, roughly, to the effect that after we had refused the appeal he had returned to chambers and discussed the matter with a fellow member of chambers who suggested that in a previous case another Board had taken a different view of trespass. Might he therefore argue the case further? We took the view that we had made our decision. We had done so on the facts of this case. We had done so after full consideration of the possible arguments including those not fully advanced by counsel and that we were functus. We therefore declined to reopen our decision."

16. Pausing there for the moment, there is a reference there to "a message that counsel wished to address us further", which does not refer explicitly to the written note, from

which it might appear that something had arrived with the Board second-hand, so to speak. But since the note enclosed the note of the decision of the Board, the reasons of the Board, and that those reasons clearly did reach the Board because they were signed by the Chairman, and we have a copy of the document as signed by him, the inference I draw is that the message was received as a note. It may be that by the time this witness statement was made the Chairman no longer had a copy of the note and his recollection was not entirely accurate, but I proceed on the basis he did have that note.

17. As I have already indicated, the Board determined that they were unable to award compensation in this case because there had not been committed an offence of trespass on the railway. In these proceedings judicial review is sought of that decision of the Board, effectively on two bases. The first is that the Board erred in law in determining that there had been no criminal offence committed by the young boy, Paul MacDonald. That, of course, depends in part and certainly principally on the construction of the two statutory provisions to which I have been referred. But it is also contended that, in the light of the note, the Board should have reconsidered their decision, considered whether it was right to allow further submissions, and if the Board thought it appropriate, to have ordered a further hearing to hear those further submissions.

18. It appears from the Chairman's witness statement that they decided that having made their decision, they were functus, that is to say they had no power or authority to deal with the case any further. I have to say that my initial reaction to that was to somewhat surprised, having regard to the fact that, as far as I could see, their decision had not been reduced in writing, otherwise than by recording of the oral reasons given. There had been no formal written decision made at the time, and it is not easy to see why a Board which is not subject to written procedural provisions cannot reconsider its decision, certainly until such time as it has been formally recorded, if it thinks it right to do so. Of course, it may be that having regard to various matters, including the extent to which argument has been put before them, questions of delay that may be involved, questions of cost, questions of the impact on other applicants for compensation, the Board may feel it wrong to permit further submissions even in a case where there is real prospect of their making a difference.

19. As I read the decision of the Board, they did not weigh out the advantages or disadvantages, rights and wrongs of reopening their decision. They determined that they had no power to reopen their decision. It has been conceded on behalf of the Board that, in fact, they did have such power. That accords with my initial reaction, certainly in the case where the application is made as soon after their decision as this was. And I do not find the decision of the Court of Appeal in the case of Akewushola v Secretary of State for the Home Department [2000] 1 WLR 2295 to which I have been referred as authority against that proposition. In that case the Court of Appeal was dealing with the power of a statutory tribunal, which is normally bound by rules of procedure having the force of law by statute or delegated statutory rules of procedure, to set aside a decision it has already made.

20. It follows that the decision made by the Tribunal not to accept any further

submissions is one which could be set aside and would be set aside as having been made under a misapprehension of the powers of the Board, and I would certainly do so if I came to the conclusion that there was good point in doing so because the Board could properly come to a decision to award compensation in this case.

21. The crucial question in this case is in fact whether or not, as a matter of law on the facts found, and as to the facts there is no dispute, Paul MacDonald committed a criminal offence. If he did, then the claimant is entitled to compensation. One would regret finding one's self in a position in which the Board, because of some defect in the original procedure before it, was unable to award him that compensation. If there was no criminal offence, then there is no point in the remitting of the matter to the Board for their reconsideration.

22. I therefore turn to two statutory provisions with which I have been concerned. The first I shall deal with is section 16 of the 1840 Act, which is as follows, insofar as relevant:

> "If any person shall wilfully obstruct or impede any officer or agent of any railway company in the execution of his duty upon any railway, or upon or in any of the stations or other works or premises connected therewith, or if any person shall wilfully trespass upon any railway, or any of the stations or other works or premises connected therewith, and shall refuse to quit the same upon request to him made by any officer or agent of the said company, every such person so offending, and all others aiding or assisting therein, shall...",

23. and then there are the provisions for punishment. But the important provision is that any such person shall have committed an offence.

24. It can be seen that there are two parts of that particular statutory provision. The first part is concerned with a person who wilfully obstructs or impedes any officer or agent of a railway company in the execution of his duties. It is not suggested that that provision applied in this case. The second part is concerned with wilfull trespass on a railway, and the words are "or if any person shall trespass upon any railway, or any of the stations or any works or premises connected therewith, and shall refuse to quit the same upon request to him made by any officer or agent of the said company".

25. Pausing there for a moment, the words clearly refer to premises or land or works, works in the sense of an electrical substation. They do not refer to a train as such, and it is not suggested that they do. That is the first point. The second point is that the provision requires a refusal on the part of the offender to quit the same upon a request. If there is no request and a refusal to comply with the request, there is no offence committed under that part of this statute.

26. Here there was a request made to Paul MacDonald, according to the facts found. There was a request to leave the train. That of course involved his going onto the platform. There is no evidence, and I think it is not suggested, that there was any express request on him to leave the platform. In my judgment, therefore, he did not

commit any offence by being on the platform, nor did his attempt to jump on the train involve a refusal to quit the platform, or any other premises or works of the railway, following a request.

27. I do not have to consider whether, if this section applied to the train as such, there would have been an offence committed. But there was no request other than the request to quit the train. In those circumstances, it is clear to me that no offence was committed under section 16 of the 1840 Act.

28. The claim form in this case originally conceded that there was no offence committed under section 16, but I gave leave this morning for the claimant to withdraw that concession and to argue the point. As a result of that I gave leave for the claim form to be amended, and I have only just seen the amendment. The amended paragraph 5 now reads as follows:

> "For the avoidance of doubt, it is still contended that an offence was committed contrary to section 16. Paul MacDonald could have been prosecuted under section 16 despite the fact that there was no evidence that he had refused to quit the railway upon specific request made after he had trespassed the railway. He was asked to alight the train because he was travelling without a ticket, but he did not trespass in so doing because he plainly had permission to use the platform for the purpose of quitting the train."

29. Pausing there there for a moment, all that is common ground of course.

> "No further request was made for him to leave."

30. Again that is common ground. The amended sentence is:

> "The guard's request that the boy should leave the train at Angmering Station contained an implicit request also that he should leave the track and the platform. The offence did not require proof of a further request specifically to quit the track and the platform."

31. I have in a sense already in this judgment given an indication that I do not accept that there was an implicit request to leave the track and the platform. One just pauses there for a moment. It seems to me that if the boy had done nothing after leaving the train but stay on the platform, whether for half an hour or an hour, he would not have committed an offence under section 16. Whether there was an implicit request in the circumstances no doubt is a question of mixed fact and law, but on the material I have seen, the only request that was made was to leave the train. As I say, having regard to the fact that I am dealing with a criminal statute here which should be construed, to the extent there is any ambiguity, narrowly, I would not regard anything other than a request which made it obvious that the person requested had to leave the platform as being a sufficient request to come under this section.

32. There is a further point which arises in connection with section 16, and that is of

course that the question of Paul MacDonald being a trespasser on the platform was not raised before the Tribunal and was not raised in the note which went to the Tribunal following the hearing.

33. It has been suggested on behalf of the claimant that a matter which has not been raised may be the subject of judicial review if there has been an error of law on the part of a subordinate tribunal. This is a proposition which has to be considered with some care. This court is a court of review and not a Court of Appeal. It is, in general, not for this court to make decisions involving adjudicating on the facts which were before the tribunal; nor in general is it the case that a decision by a tribunal, including the Criminal Compensation Board, can be reviewed on the basis of matters which were not put before the Board and not argued before them. Review in general involves finding some error of law on the part of the tribunal or some error in procedure.

34. This was a matter which was not put before them in any way, and I refer of course to the allegation that there was a trespass on the platform. It was not put before them during the original hearing and was not put before them during the application for a rehearing. I take the view that on the facts as found, there could be no offence under section 16. Therefore, it would be inappropriate for the matter to go back before the Tribunal, having regard to the two matters I have just mentioned, namely the matter was not argued before them nor was it suggested to them during the first argument or the second argument, and also having regard to my conclusion as to the meaning of section 16.

35. So I come now to section 55. Like the Board, at first sight I thought that section 55 offered the claimant the best hope for a finding in his favour. Section 55 is headed "For better prevention of trespass on railways, etc.", and is as follows:

> "Any person, who shall trespass upon any of the lines of railway or sidings or in any tunnel or upon any railway embankment cutting or similar work now or hereafter belonging or leased to or worked by any of the Boards or who shall trespass upon any other lands of any of the Boards in dangerous proximity to any such lines of railway or other works or to any electrical apparatus used for or in connection with the working of the railway shall on summary conviction be liable to a penalty..."

36. Subsection (3), which is important, is as follows:

> "No person shall be subject to any penalty under this section unless it shall be proved to the satisfaction of the court before which complaint is laid that public warning has been given to persons not to trespass upon the railway by notice clearly exhibited and that such notice has been affixed at the station on the railway nearest to the place where such offence is alleged to have been committed and such notice shall be renewed as often as the same shall be obliterated or destroyed and no penalty shall be recoverable unless such notice is so placed and renewed."

37. So far as the claimant is concerned, there are really two difficulties as far as section 55 is concerned. Let me deal with the minor one first. It is a precondition of criminality under section 55 that there should be an appropriate notice. It seems that no suggestion of the existence of any notice was made to the Board. The question simply was not raised. Equally, it is right to say it was not considered by the Board. It seems that there was no evidence that there was any relevant notice, and no one raised the question whether any relevant notice was necessary. When I read the reasons given for the decision of the Board and the witness statement of the Chairman, the impression I have is that no one got as far as subsection (3). The case was lost on subsection (1).

38. Again, it has been argued on behalf of the claimant that the proceedings before the Board not being adversarial, the Board might have been satisfied from their general knowledge that there was an appropriate notice, or at least should have raised the question. It does seem to me that it was the duty of those acting on behalf of the claimant, if they were to make a case under section 55, to bring evidence, which need not be very specific evidence (it need not be in photograph form; it could simply be oral evidence), of any relevant notice on which they relied.

39. The question of notice, and I think I am right in saying, was similarly not referred to in the note that went to the Board following the hearing, and that is perhaps a matter I might have taken into account if I had reached a different conclusion on the meaning of subsection (1).

40. Again, I must say it is regrettable that when this matter was presented to the Board, the various requirements of the two offences which were under consideration were not properly analysed and the proper material necessary to establish any alleged offence put before the Board in clear terms.

41. The major question that has been argued on section 55 is whether it applies to the platform in a train station at all. The relevant words are, of course:

> "Any person, who shall trespass upon any of the lines of railway or sidings or in any tunnel or upon any railway embankment cutting or similar work now or hereafter belonging or leased to or worked by any of the Boards or who shall trespass upon any other lands of the Boards..."

42. Pausing there for a moment, the only words there which it is said could include the station and the platform of the station are "any other lands". I do have to say that it is an odd way to refer to the most obvious place where one finds passengers, particularly since those words would normally be used to refer to land on which there has not been any construction. One would not normally refer to a railway station or railway platform under that generic head.

43. I have to say I do construe the words "any other lands" to some extent by reference to the words which precede them. As I say, when I read the generality of those first four lines as I have encountered in the text in front of me of the 1949 Act, it is not obvious

that the platform of the station is intended to be included in the words "any other lands".

44. One should not stop there. One should continue to read the words "in dangerous proximity to any such lines of railway or other works."

45. A platform as a whole, one would have thought, is not in dangerous proximity to a line of railway. If it were, it could not be used as such. Of course, one can go, even when on the platform, very close to the line. But it seems to me that in a criminal statute, some clarity of division between the areas in which a criminal offence is committed and the areas in which no criminal offence is committed is necessary. To say of the platform that one part is subject to a criminal offence and another part not is something which concerns me, although I do not find that decisive.

46. The words "in dangerous proximity" do not refer to a particular time. It is the lands in general wich must be in dangerous proximity to such line of railway or other works. One cannot say that they are in dangerous proximity because a person is jumping or seeking to jump onto a train. One must look at the location of the lands in question and decide whether those lands are in dangerous proximity to any lines of railway or other works or any electrical apparatus used for and in connection with the working of the railway and so on.

47. Reading that paragraph as a whole, I would find it odd if those words did include the platform of a station. What confirms to me that it was not intended for section 55 to do so is the wording of subsection (3). Subsection (3) requires there to be a public warning given to persons not to trespass upon a railway, and that notice has to be clearly exhibited at the station on the railway nearest to the place where such offence is alleged to have been committed.

48. Manifestly, if the notice has to be affixed at the station on the railway nearest to the place where such offence is committed, that place cannot itself be or is not expected to be the station itself. It is a place other than the station. To some extent the reference to the content of the public warning also is consistent with the interpretation I have arrived at. The public warning has to be a public warning not to trespass upon the railway. Now, that is exactly the sort of notice one would expect to see along the railway line, say in a cutting, but not in a station, because in general persons are admitted by the railway company onto the station and onto the station platform. The notice, as I read the section, is expected to be and intended to be an unqualified notice warning those who might otherwise trespass not to do so. As I say, it seems to me it is referring to a situation where the location in question is one to which the public are not normally admitted.

49. If one puts section 55 and section 16 together, one does arrive at a certain degree of consistency. Section 55 is dealing with places on the railway to which the public are not normally admitted. In those cases an offence is committed by someone who trespasses, provided there has been a warning placed at the nearest station. There is no requirement on the person who is accused of an offence of his having been told to leave; he should not be there in the first place. On the other hand, in the case of

section 16, which does apply to stations (and I note incidentally that stations are referred to expressly and specifically), a person does not commit a criminal offence unless he is told to leave and refuses to do so.

50. One must remember that one is dealing here with criminal statutes which generally are to be interpreted narrowly so far as the criminality is concerned, notwithstanding the fact that in this particular case, if one could, one would come to the conclusion that a criminal offence was committed by Paul MacDonald.

51. What is also said in the present case is that there was a momentary trespass of lands when the unfortunate young man, Paul MacDonald, jumped on the train because there must have been a moment when he was above the line and had no business to be above the line. I shall assume that he was for a moment above the line, but it seems to me that section 55 is not dealing with and is not intended to deal with that situation. One must be astute in the interpretation of a criminal offence not to introduce notions, which may be appropriate in civil law, that trespass includes trespass in the air above a space.

52. I do not say that in every case of trespass on railways it is necessary for there to be contact with the land, but it seems to me that when a person goes or seeks to go, as he did in this case, from a platform to a train, he cannot be said to have committed an offence of trespass on the railway line. If he had crossed the railway line in the sense of going over the line when there was no train there, the position might have been different. I do not need to deal with that. But it seems to me that section 55 does not apply to a person who is seeking to go from the platform onto the train.

53. In those circumstances, regrettably I have come to the conclusion that there is no criminal offence upon the reading of paragraph 4(c) of the Scheme committed by Paul MacDonald in the present case. That is a conclusion I have come to reluctantly in this particular case. I have said in a number of points in this judgment that criminal offences and statutes creating them are to be narrowly construed. I have been conscious of the fact that if I were to arrive at a wide construction of section 55, or even section 16, that would have the effect of making conduct criminal which in my judgment Parliament did not intend to make criminal. If there is a remedy in a case such as the present, it is by way of amendment to the Scheme rather than by way of broadening the application of section 55 and section 16 of the statutes in question beyond the ambit which Parliament intended them to cover.

54. In those circumstances, it seems to me that it is unnecessary for me to consider the question of the reconsideration by the Board of this case having regard to the interpretation I have arrived at of sections 55 and 16. Regrettably, this is a case in which Mr Mair did not have a right to compensation under the Scheme as presently formulated. The offence which was committed was not an offence of trespass on a railway. If an offence was committed at all, the offence was an attempt to travel on a railway without a ticket.

55. I should perhaps add that the words "offence of trespass on a railway" do not obviously cover the case if a boy tries to jump on a train in circumstances such as this.

I appreciate that is little comfort to Mr Mair. As I say, I would have found for him if I could, but regrettably, I have come to the conclusion that I cannot.

56. **MR SEAWARD:** Thank you, my Lord. I think I will leave it to my learned friend to make the next application.

57. **MR KEITH:** Indeed. The application I make is for the Criminal Injuries Compensation Board to have its costs. I do not know whether my learned friend is in receipt of a Legal Services Commission notification.

58. **MR SEAWARD:** No.

59. **MR JUSTICE STANLEY BURNTON:** This is private?

60. **MR SEAWARD:** Private, yes.

61. **MR KEITH:** Indeed. Then I make an application for costs.

62. **MR SEAWARD:** My Lord, I do seek to resist the application for costs on two grounds: firstly, the reasons; and secondly, the failure to reconsider. Of the three issues that made the substance of this challenge, the claimant was justified in seeking to challenge the absence of reasons because the reasons were inexplicable without the statement of His Honour Judge Clarke. Insofar as the reconsideration is concerned, your Lordship has explained that had a different construction been properly applicable to sections 55 and 16, then your Lordship would have taken a different view on the refusal to reconsider, having regard to the error considering the Board was functus.

63. Bearing those two considerations in mind, I ask your Lordship to limit the costs exposure of the claimant in this matter.

64. **MR JUSTICE STANLEY BURNTON:** Do we have a statement, a schedule of costs?

65. **MR KEITH:** I do not believe the Board has served a schedule of costs for the purposes of summary assessment, but we have received part of the claimant's costs, but again probably not sufficient for summary assessment. My Lord can make an order in principle as to how much the costs should be paid and then we --

66. **MR JUSTICE STANLEY BURNTON:** I prefer summary assessment because the costs of a detailed assessment simply add to the costs of the --

67. **MR KEITH:** Yes. The difficulty is I do not know in fact what costs are at issue in this case. Certainly, we have been provided with some details of counsel's costs for the claimant.

68. **MR JUSTICE STANLEY BURNTON:** It is your costs you want, not his.

69. **MR KEITH:** Will your Lordship give me one moment.

70. I regret to say we do not have a summary of costs.

71. **MR JUSTICE STANLEY BURNTON:** Why not?

72. **MR SEAWARD:** My Lord, while my learned friend agonises on that, there are two issues. Firstly, in my discussions with counsel who appeared below, it was made clear to me that it was actively encouraged by one of the Board members to make this challenge. I have not told your Lordship because it has not been relevant. But clearly this is an area of law which causes some concern. It caused concern to the Board, and it is of benefit to the Board members and those who administer the Scheme, and indeed to claimants, to know where they stand on this issue because it is not an issue where there is much clarity, or was not before your Lordship's judgment.

73. **MR JUSTICE STANLEY BURNTON:** While you are on your feet, as I was reading out the statute, the statute as I have it refers to "the Board". Has it been amended to cover Railtrack, et cetera?

74. **MR SEAWARD:** No, it has not, my Lord. What has happened is that in Stone's, we see there has been a statutory instrument: by virtue of the Railways Act 1993 (Consequential Modifications) (No 2 Order of 1999), Article 3, references in the 1949 Act to any of the Boards and to any wholly-owned subsidiary of the Boards shall include references to any successor of the British Railways Board.

75. **MR JUSTICE STANLEY BURNTON:** And that is Railtrack?

76. **MR SEAWARD:** That is Railtrack. And it goes on to say, but not a subsidiary of such a successor, unless it is itself such a successor. So they are not allowed to delegate it any further, essentially.

77. **MR KEITH:** Doing the best we can, in order to avoid the invidious position of having to waste money doing a detailed assessment, my application for costs is for the sum of £3,500. Can I say that that is a reasonable sum, and I do not wish to go too far into the details, but part only of the claim of the costs submitted for the other side amounts to some £7,000, and that is for appearances and counsel's work.

78. Can I say in relation to the points of principle, the reasons were irrelevant of course, or the deficiency in reasons were irrelevant, because they were cured by the later statement, and of course they were irrelevant to the substantive position on the law. Secondly, the application for the reconsideration of the Board was brought about by the clear failure of the claimant to raise the points properly the first time round.

79. **MR JUSTICE STANLEY BURNTON:** I am conscious of that. What do you say about the amount? I am not going to require you to deal with this on the basis of the say so of counsel.

80. **MR SEAWARD:** My Lord, I do not -- I have to think on my feet and rapidly.

81. **MR JUSTICE STANLEY BURNTON:** Do you want to take a --

82. **MR SEAWARD:** Can I just take a moment to consult with my instructing solicitor. I am grateful.

83. **MR JUSTICE STANLEY BURNTON:** While that is being done, you have no objection to that amendment?

84. **MR KEITH:** My Lord, no.

85. **MR JUSTICE STANLEY BURNTON:** Then I will make an order for that amendment.

86. **MR SEAWARD:** My Lord, I do not object to the amount my learned friend has put forward. I do not know whether it bears any relation to the real costs incurred on the other side, and that we have not received a statement, but I am prepared to waive all those objections and accept that that is a reasonable amount for summary assessment purposes.

87. **MR JUSTICE STANLEY BURNTON:** It is not very much for this sort of case.

88. **MR SEAWARD:** What I would ask your Lordship is, having regard to -- bearing in mind also of course that we have lost, I would ask your Lordship to reflect in the costs order the fact that we were justified in two of our points of challenge and to order that we pay only a proportion of that summary assessment of the costs.

89. **MR JUSTICE STANLEY BURNTON:** What proportion?

90. **MR SEAWARD:** Bearing in mind that we bear the greater share of the responsibility having made the challenge --

91. **MR JUSTICE STANLEY BURNTON:** And also what happened below. Frankly, the proceedings were not as they should have been below.

92. **MR SEAWARD:** Indeed, my Lord. But also bearing in mind we would not have known about the reasons without making the challenge, 67 per cent my Lord.

93. **MR JUSTICE STANLEY BURNTON:** 67?

94. **MR SEAWARD:** Yes, two-thirds.

95. **MR JUSTICE STANLEY BURNTON:** Do you want to say anything about that?

96. **MR KEITH:** I am not going to barter with the court.

97. **MR JUSTICE STANLEY BURNTON:** No, no, but it is a question of proportion.

98. **MR KEITH:** I have already made my submissions in relation to the irrelevancy of the reasons and the irrelevancy of the reconsideration argument. These substantive points brought down every other argument, and they were not good points in your Lordship's judgment.

99. **MR JUSTICE STANLEY BURNTON:** Thank you very much.

100. **MR KEITH:** I may say I realise that one of the points was not even raised in the claim form but then subsequently had to be revised.

101. **MR SEAWARD:** My Lord, in that regard, I do not think that caused any additional costs. I hope that is not going to be a relevant factor.

102. **MR JUSTICE STANLEY BURNTON:** As a matter of principle, the Board is entitled to its costs, which have been assessed, and I think assessed conservatively, in the sum of £3,500. It is right to say that on some of the issues, at least in principle, the claimant won. But I think I should bear in mind that, to a significant extent, these proceedings were occasioned by -- certainly the request for reconsideration was occasioned by -- what, on the material before me, seems to me to be failures in the presentation of the case before the Board. When I weigh those two things together, I come back to the conclusion that it is right to make an order for payment of that sum of £3,500.

103. **MR SEAWARD:** My Lord, now there only remains to consider the question of any permission for leave to appeal. Now, I must ask for permission for leave to appeal.

104. **MR JUSTICE STANLEY BURNTON:** Yes, of course.

105. **MR SEAWARD:** That is with some hesitation, because your Lordship has addressed a difficult area in detail. But may I indicate those areas that seem to me to be possibly vulnerable on appeal.

106. **MR JUSTICE STANLEY BURNTON:** Arguable, I think is the word.

107. **MR SEAWARD:** Arguable.

108. **MR JUSTICE STANLEY BURNTON:** It is the construction of the statute, is it not?

109. **MR SEAWARD:** The first one is, yes, whether the -- yes, they are both construction of statute -- they are all construction of statute points, under section 16 and 55.

110. But under section 16 one of the questions your Lordship asked rhetorically was whether a passenger would have committed the offence of wilfull trespassing if he was on the platform, having been asked to alight from a train, he then loitered on the platform for half an hour. And of course if he then crosses the railway line, if he wilfully trespasses, then yes. Not if he just stays in the same part of the platform, but yes if he wilfully trespasses.

111. So, my Lord, that, I think, is something which is arguable upon appeal. The other points are points of statutory construction, which, for example, under --

112. **MR JUSTICE STANLEY BURNTON:** I think we have just argued the points.

113. **MR SEAWARD:** I do not have to go over them again, but clearly it is not

straightforward.

114. **MR JUSTICE STANLEY BURNTON:** Let me ask Mr Keith what he says.

115. **MR KEITH:** Your Lordship's judgment is, in my respectful submission, clear and unambiguous on two points of statutory construction, and additionally, of course, on the point of discretion as to whether or not these are matters which should have gone back to the Board.

116. If my learned friend wishes to proceed any further, he will have to take his chances in front of the Court of Appeal and seek their leave.

117. **MR SEAWARD:** May I just add, my Lord, a factor, and that is that this decision of your Lordship will affect a great many applicants under the Scheme. It is not only of interest and importance to the Board itself but also to a great number of applicants. As indicated in the case of Webb, there are a considerable number of these cases every year, so it is a matter of some considerable importance.

118. **MR JUSTICE STANLEY BURNTON:** Is Mr Mair supported by his union in this?

119. **MR SEAWARD:** I think he is, yes.

120. **MR JUSTICE STANLEY BURNTON:** I feel rather happy about the costs order then.

121. **MR SEAWARD:** Yes, indeed, my Lord.

122. **MR KEITH:** My Lord, I am instructed that in the Board's opinion, no more than a handful, and those behind me do not know of any other cases at present.

123. **MR SEAWARD:** I am happy to stand corrected by better knowledge. Mine is extracted from the case of Webb, which actually gave figures.

124. **MR JUSTICE STANLEY BURNTON:** My conclusions on the statute were clear. In my judgment this is not a case for leave to appeal because my conclusions as to the construction of the statute were clear, quite apart from the complication of the procedural history of the present case.

125. In my judgment the claimant should take my judgment to the Court of Appeal. If it is arguably wrong, they will say so and give leave. That should not involve too much in the way of delay or any additional costs, or should not involve any additional costs really or very little.

126. **MR SEAWARD:** Thank you, your Lordship, for your Lordship's patience. Thank you.

127. **MR JUSTICE STANLEY BURNTON:** Thank you very much.

128. **MR SEAWARD:** In the end, my Lord, just by way of clarification, in case an

application goes to the Court of Appeal, did the photographs find their way into the bundle, or were they just looked at de bene esse?

129. **MR JUSTICE STANLEY BURNTON:** I think they were looked at de bene esse.

130. **MR SEAWARD:** Indeed.

131. **MR JUSTICE STANLEY BURNTON:** But if you do get leave to go before the Court of Appeal, I think they will take a similar view, the photographs not having been before the Board. There will be an order that you have permission to amend , obviously. I do not think there is any other homework to do.

132. **MR KEITH:** My Lord, no, thank you.