**IN THE COMPETITION APPEAL TRIBUNAL**

**BETWEEN:**

**Case No.:1304/7/7/19**

**1305/7/7/19**

**JUSTIN GUTMANN**

Proposed Class Representative

**– and –**

**(1) FIRST MTR SOUTH WESTERN TRAINS LIMITED ("FIRST MTR")**
**(2) STAGECOACH SOUTH WESTERN TRAINS LIMITED ("STAGECOACH")**

Proposed Defendants

**AND BETWEEN**

**JUSTIN GUTMANN**

Proposed Class Representative

**– and –**

**LONDON & SOUTH EASTERN RAILWAY LIMITED ("LSER")**

Proposed Defendant

**PHILIP MOSER QC**, **STEFAN KUPPEN** and **ALEXANDRA LITTLEWOOD** (Instructed by **Hausfeld & Co LLP** and **Charles Lyndon Ltd**) appeared on behalf of Mr. Gutmann
**TIM WARD QC** and **JAMES BOURKE** (Instructed by **Slaughter and May**) appeared on behalf of First MTR
**SARAH ABRAM** (Instructed by **Dentons UK and Middle East LLP**) appeared on behalf of Stagecoach
**PAUL HARRIS QC**, **ANNALIESE BLACKWOOD** and **MICHAEL ARMITAGE** (Instructed by **Freshfield Bruckhaus Deringer**) appeared on behalf of LSER

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**Tuesday 9 March 2021**

**(10.35 am)**

**THE CLERK:** Case 1304 and 1305, Justin Gutmann and First MTR South Western Trains Ltd & another and London & South Eastern Railway Limited.

**THE PRESIDENT:** Good morning, everyone. Although this case is being heard remotely, it is of course a full Tribunal hearing in just the same way as if everyone was present in the courtroom in Salisbury Square House, where two of the three members of the Tribunal are now sitting.

An official transcript will be prepared in the usual way, and an official recording is being made of the proceedings, but I have to start with a warning that any unauthorised recording, whether visual or audio, of the proceedings is strictly prohibited and is punishable as a contempt of court.

It is being live streamed, as you know, and we will take breaks mid-morning and mid-afternoon of 10 to 15 minutes, in everyone's interests.

There is, I think, a limited amount of confidential material in the bundles. I don't know if it will be necessary at any time for any counsel, or indeed the Tribunal, to refer to it. Where that can be done by just directing us to the passage, so it's not read out, that is obviously preferable. If one needs to actually talk about confidential matters, then if you alert us to that, the live stream will be turned off and, as I understand it, everyone who is joining through the Teams platform is within the confidentiality ring. If that's not the case, please let me know at some point.

If, finally, you lose connection at any time, or can't hear what's happening, please send a message and we will pause the proceedings until that can be restored.

I think that is everything from me, other than to advise you that when we do have a break, you may wish to mute your microphone, otherwise any remarks you

make about the Tribunal will get onto the transcript!

Mr Moser, I know that there are applications by the Proposed Defendants for summary judgment, reverse summary judgment, as it were, and striking out, but I think the primary application is of course yours and it's right, and I think agreed, that you should begin.

**Submissions by MR MOSER**

**MR MOSER:** Yes, I am grateful. I appear with Mr Kuppen and Ms Littlewood on behalf of Mr Justin Gutmann, the Proposed Class Representative, who is watching on live stream.

My learned friends Mr Ward QC and Mr Bourke appear for First MTR.

Ms Abram appears for Stagecoach.

Mr Harris QC, Ms Blackwood and Mr Armitage for LSER.

It's been agreed at least at the bar that I shall address all of the applications insofar as it is sensible for me to do so in opening and, likewise, collectively my learned friends are going to address their own and my application in their response. There is the opportunity for both parties to come back at the end and so one can pick up some matters that are more sensibly done in reply then. We will see how we go.

There is the timetable that's been suggested and approved by the CAT. On the provisional timetable I have today, my learned friends have tomorrow and then Mr Holt would be on Day 3, with the afternoon as a spare.

I hope to finish more or less within a day. There is a certain chance that I might need to go into tomorrow morning. Either way, I submit that we are going to have plenty of time within the four days so I hope that should not be a problem.

**THE PRESIDENT:** Yes. I mean if you go into tomorrow, or indeed if the three

respondents go into Thursday morning, I don't think that's a problem. We are certainly not envisaging Mr Holt -- it would be quite wrong if he were to be giving evidence for a whole day, it is not a question of cross-examining as in trial.

**MR MOSER:** Quite. So quite a lot of the third day is likely to be a buffer for the openings.

The order of my submissions today is that, first, I will give a brief introduction to the facts of the case, and the abuse.

Secondly, I am going to show the Tribunal the relevant statutory framework and the rules, quite briefly because the CAT is familiar with them.

Third, I am going to deal with the case law in two parts.

First, the case law on strike out and summary judgment.

The second part will be the UK and Canadian Supreme Court cases on collective actions, in the UK that is essentially Merricks.

Then, fifth, in the as it were substantive part of my submissions, I will address the cause of action, the expert report and the issues raised by the Proposed Defendants in their skeleton arguments. From a strike out summary judgment perspective.

Finally, in the fifth part -- fifth or sixth, sorry -- I will make my submissions on certification, so on the CPO itself.

By then, the ground on that should be relatively well trodden so I hope not to repeat lots of things at the end when I come to the CPO.

**THE PRESIDENT:** Yes.

**MR MOSER:** This claim is brought on behalf of millions of London train passengers in relation to an abuse that is widespread, systematic and ongoing.

The abuse in question is charging customers twice for a portion of their railway journey.

On one estimate of the damages, the aggregate damages for South West are around £60 million and for South East around £38 million. That is money that we say the customers were charged in the claim period and broadly also a value that the PDs, the Proposed Defendants, will also have received twice, once from the customer and once via the Transport for London payment arrangements for Travelcard journeys.

Before I continue, I will just say I might refer to the defendants as "Proposed Defendants", "PDs" or sometimes as "TOCs", train operating companies. I will try to stick to at least no more than two of those.

At the heart of this case is the system whereby London travellers have a Travelcard that allows them to travel around the Underground, but also the railways within the London zones. That is explained probably most easily in Mr Holt's first statement. That is at core bundle, tab 5, it starts at page 79. At page 88 we see at 1.4.1:

"The harm suffered by an individual passenger in relation to a rail journey within the scope of this claim is the difference between what the passenger paid for a relevant rail journey, and the cheaper boundary fare that a passenger should have purchased instead, given the passenger held a Travelcard providing the right to travel for at least part of their journey."

That is expanded on at paragraphs 3.2.1 and following at page 95 of the report:

"... the claim relates to all persons who, at any date on or after 1 October 2015 purchased or paid for, for themselves and/or another person, a rail fare which was not a boundary fare, where:

"... the person for whom the fare was purchased held a Travelcard valid for travel within the TfL travel zone; and.

"... the rail fare was for travel in whole or in part on SWF or SEF's networks from

a station within the zone to a destination beyond the outer boundary of the applicable TfL travel zones ..."

The terms are defined below in 3.2.3 and following. Travel zone is the TfL network divided into nine zones.

Travelcards are the tickets you buy for different time periods. We see over the page there are a number of different Travelcards, anytime, off peak, 7day, group day and for different time periods.

There's an explanation of the zone boundary at 3.2.9. There is a line that defines the boundary between the nine zones and the edge of the London zones. There may be a station on the boundary but there may not. So Putney lies at the boundary but Clapham Junction for instance does not, so the boundary kicks in somewhere between two stations.

A boundary fare is a fare that gives the right to travel on the national rail service either from a zone boundary to a given destination station or from a given origin station to a zone boundary. For example it could be from boundary 2 to Reading.

The full journey fare is pretty self-explanatory, it's explained at 3.2.11.

Conditions leading to the claim:

"... when individual rail passengers purchase rail fares for journeys between two points ... spanning a boundary ... where they would have saved money by purchasing a cheaper boundary fare."

The three conditions are (1) purchase a rail fare that spans a zone boundary, (2) holding a valid Travelcard and (3) not being sold a boundary fare.

The type of journey that we are looking at are the journeys going out of London. We are not looking at the boundary fares going into London, and that's purely for simplicity. It's likelier that people who travel out of London are holders of

Travelcards because they are likely to be resident in London rather than people who reside out of London, who are more likely to --

**THE PRESIDENT:** Yes.

**MR MOSER:** There is at this stage almost no disclosure. There is one item of actual figures around boundary fares that has been disclosed that we have so far been given by the other side about the incidents of the sale of boundary fares.

In trying to cross-refer the figures in the evidence, I realised yesterday it would be easier to make a table. It came rather late I'm afraid but I hope that --

**THE PRESIDENT:** Yes, we have it and I assume the representatives of the first defendants have it.

It's the one-page table like this (indicated).

**MR MOSER:** It just saves people's --

**THE PRESIDENT:** No, that's very helpful.

**MR MOSER:** This is the one, headed "South Western, South Eastern". What we see in the first line of the South Western table is the boundary fares actually sold as disclosed. So this is real facts.

They are found in bundle 8 --

**THE PRESIDENT:** Do we need to look at them? Because we have this table. I assume, therefore, on South Western the 2015/2016 figure and part of this 2016/2017 figure, that would be Stagecoach?

**MR MOSER:** That's right. We have amalgamated those.

**THE PRESIDENT:** Yes.

**MR MOSER:** The boundary fares sold are going to be an underestimate in relation to our class, because the boundary fares sold include boundary fares into London as well as boundary fares out of London. But I am just going to leave that there because we don't know at the moment what the respective figures are. I just

comment that these are conservative figures, therefore, as far as our relevant journeys are concerned.

The relevant journeys are the in-scope journeys -- again no need to turn it up, the figures are in Holt 1, table 6.27. Those are the relevant journeys across a boundary out of London --

**THE PRESIDENT:** Can you just help me -- I'm sure it's explained by Mr Holt -- are those pretty accurate figures, the in-scope journey figures, they are very precise here, that are derived from publicly available information?

**MR MOSER:** They are derived from publicly available information, they are an estimate.

**THE PRESIDENT:** They are an estimate. Okay, we can turn up Mr Holt to see how he has done it, yes.

**MR HOLMES:** Is there any reason why the estimate for 2015/2016 is so different to the others?

**THE PRESIDENT:** It only starts in October, I suppose.

**MR MOSER:** That's right.

**MR HOLMES:** It's a part year, thank you.

**MR MOSER:** Part year, because that's when the claim period starts for limitation purposes.

**THE PRESIDENT:** Yes.

**MR MOSER:** We see that for all the relevant journeys, the proportion of in-scope journeys with boundary fares is exceedingly small, if one can say that, it's very small.

1.5 per cent, 1.4 per cent --

**THE PRESIDENT:** Yes.

**MR MOSER:** If one then assumes the number of journeys made by Travelcard

holders -- that's the second half of the table -- because this is all journeys -- there is an assumption made by Mr Holt, and again this is at this stage purely an estimate -- as to what percentage of passengers were holding Travelcards.

Then one gets to the lowest line, the proportion of Travelcard journeys made with boundary fares of being somewhere between 8.4 and 11.2 per cent, on average 9.2.

The headline of this is that over 90 per cent of Travelcard holders did not avail themselves of boundary fares on relevant journeys.

That's our class. It's the ones who didn't.

The same then for South Eastern, except for South Eastern the situation is even more stark, because overall South Eastern sold less than 1 per cent of boundary fares and the incidence of Travelcard holders availing themselves of boundary fares is somewhere between 6.6 and 4.8 per cent.

So well over 90 per cent, around about 94/95 per cent, who didn't.

That's all I planned to derive from that table.

**THE PRESIDENT:** You say, presumably, that even if the assumed Travelcard holder percentage is slightly lower, one can juggle the figures a bit, but still it would show that the overwhelming majority didn't buy boundary fares?

**MR MOSER:** Yes. And these are the best figures we have at this stage. So these are the figures I propose to work with. In various places Mr Holt says if anything his assumptions are conservative.

We see, for instance, when it comes to the percentage, this very percentage of how many people actually bought Travelcards, Mr Holt, before disclosure, made a much more conservative assumption of 2.4 per cent of overall tickets, rather than the 0.7 per cent and so on. We see in his report, just as an example -- I will

not turn it up now -- that line "Proportion of in-scope journeys with boundary fares", the third line in each table, Mr Holt's more generous assumption to the other side was it would be 2.4 per cent. So we do say his assumptions are conservative.

Whichever way you cut it, even allowing for a margin of discretion on the figures, we say there's an overwhelmingly strong indication of the abuse. It's simply implausible that over 90 per cent of relevant customers would willingly pay more. That is, as I say, the 90 per cent odd is our class.

Just to make that good, the amended claim form is at core bundle 1, tab 2 --

**THE PRESIDENT:** We have two of them, of course. Are you going to work off -- I know that the paragraphing is the same but probably, just for page numbers and so on, it would be helpful if we have one as the main one we are going to work off. Shall we take the first one in tab 1?

**MR MOSER:** Yes.

**THE PRESIDENT:** The class definition, I think, it's the same paragraph, paragraph 88, isn't it?

**MR MOSER:** That's right, page 19:

"All persons who, at any point during the period between 1 October 2015 and the date of final judgment or earlier settlement ... (the 'Relevant Period') purchased or paid for, for themselves and/or another person, a rail fare which was not a boundary fare, where.

"a. The person for whom the fare was purchased held a Travelcard valid for travel within one or several ... fare zones ... and.

"b. The rail fare was for travel in whole or in part on the services of the Proposed Defendants from a station within (but not on the outer boundary of) those zones to a destination beyond the outer boundary ... (including fares for return

journeys)."

**THE PRESIDENT:** While you are on the definition, either now or at some other time, looking at the next paragraph, we would welcome your submissions as to what you suggest should be the date of domicile for non-UK potential class members.

**MR MOSER:** Yes.

**THE PRESIDENT:** The other thing at some point, if you could address, as I understand it the class definition will include persons who purchased a point-to-point fare. They didn't buy a boundary fare, but they purchased a point-to-point fare and how that fits in with the way that aggregate damages have been calculated.

That seems to be the critical question, is the calculation of the aggregate damages, because if they suffered no loss, they will not get paid on distribution, presumably.

**MR MOSER:** That's right, sir. Yes. I'll come back to that.

**THE PRESIDENT:** If you can come back to that at some point.

**MR MOSER:** There's our class definition. Just to give a feel for the problem, a suggestion of the facts on the ground, the Proposed Class Representative commissioned a survey from Decidedly and I would ask the Tribunal to have a look -- it is not in the core bundle, it's in hearing bundle 1 at tab 3. Bearing in mind this is a survey that's been done relatively recently.

**THE PRESIDENT:** Yes. What's the date? Was it December?

**MR MOSER:** 2018.

**THE PRESIDENT:** 2018 ... and it was done? The report is dated late December; when was it actually carried out.

**MR MOSER:** Between 8 and 17 December 2018.

Because one asks oneself how is it possible that over 90 per cent of people are happy

to pay more? First of all, it's helpful, I think, to look at page 184, which is where we see what they did and what date. We see, for instance, at point 4, mystery shopping at ticket counters with a range of conversation starting points.

**THE PRESIDENT:** Yes.

**MR MOSER:** Then also, next bullet point, ticket machine purchasing options as well as virtual ticket offices --

**MR HOLMES:** Sorry, what page in the report is this, in the report itself?

**MR MOSER:** 7.

The four questions are at report page 9, page 186 of the bundle.

Scenario 1 question -- this is the going up to ticket counters questions:

"Can I please buy a ticket for tomorrow?"

Scenario 2:

"I have a Travelcard, can I buy a ticket to that destination for today/tomorrow?"

Scenario 3:

"What is your cheapest ticket to that destination?"

Scenario 4:

"I would like to buy a boundary or extension ticket."

Then we see, at page 11 of the report, 188 of the bundle, they also explore the following non-station purchasing channels, so not going up to the window, the TOCs' own and third parties' websites, mobile applications and telephone-assisted sales.

The first type of mystery shopping is summarised at page 14, page 191 of the bundle, in-station mystery shopping. The key finding in the blue bit that emerged is when shoppers do not mention Travelcards, counter clerks will predominantly offer the full ticket price to a destination outside London. If Travelcards, boundary tickets are mentioned, that clerks on both networks are mostly aware

of the option and are likely to support customers in acquiring the appropriate ticket unless they get defensive.

Then we have the percentages.

89.4 per cent where you don't mention Travelcards on South West lead to a price without further enquiry about Travelcards, on South Western.

On South Eastern, 83.5.

Even where Travelcards are initially mentioned, 71 or 58 per cent respectively only lead to an incorporation of Travelcards into ticket price. So even when specifically mentioned, 28 or 41 per cent respectively do not incorporate a reduction.

These are of course limited factual findings, but they are an indication, as I say. If we look at the mystery shopping scenario, starting at page 16 of the survey, 193.

Scenario 1: I want a ticket. Only 3 out of 141 instances was a Travelcard mentioned unprompted, so in 2 per cent of cases. In 83 per cent of occasions, clerks confirmed it was the cheapest option. I know the other side will say there were various ways in which that could be cheaper, but we say it is simply implausible -- impossible really -- that in 83 per cent of occasions it would be cheaper without a boundary fare.

194, this is the, "I have a Travelcard and I want a ticket", and we see that in 20 out of 113 instances, a price was quoted without enquiry about a Travelcard, 87.1 per cent were offered the full Travelcard discount, but you had to ask for it specifically.

Even if you asked for it specifically, there was a residue of cases where it was not done.

**THE PRESIDENT:** Sorry to interrupt you, is this South Western or is this both?

**MR MOSER:** This is all South Western.

**THE PRESIDENT:** This is for South Western. Then they go on to South Eastern separately, yes.

**MR MOSER:** In the next section, yes.

In the third scenario, "What is the cheapest ticket?" Over the page, still in South Western. More than 8 out of 10 enquiries result in clerks directly quoting a price without asking about Travelcards.

Even when prompted, there is still about a quarter who say it will not make a difference.

Page 196, "I want a boundary fare", so that's perhaps the clearest indication of an informed, highly informed, consumer. 12 out of 36 enquiries clerks quote a price directly, with five of these leading to a statement that a Travelcard makes no difference to the price.

We are not saying that the survey reaches a conclusion on whether that's right or wrong, but that's the situation on the ground when you ask for a boundary fare.

The same in South Eastern --

**THE PRESIDENT:** Yes, I don't think you need take us -- I mean, you have explained how it works and we can look at the detail --

**MR MOSER:** Yes, indeed.

**THE PRESIDENT:** -- rather than taking up time with that.

**MR MOSER:** At page 25, that's page 202 of the bundle, is the other main way of purchasing, which is from ticket vending machines at the stations. The headline here is:

"Boundary fares are not at all available on South Eastern."

**THE PRESIDENT:** This is?

**MR MOSER:** Page 202, page 25. We have South Western on the left of the page and South Eastern on the right. On the right of that page, we see the first bullet

point, boundary tickets are not available at South Eastern ticket machines.

**THE PRESIDENT:** Is that only at St Pancras, Bickley and Waterloo?

**MR MOSER:** No, that's universal.

**THE PRESIDENT:** Sorry?

**MR MOSER:** No, it's everywhere.

**THE PRESIDENT:** I am looking at what is said for South Eastern, "Clerk at St Pancras explained we don’t have a boundary option but other stations might provide the option ..."

I mean, that's a factual question, whether South Eastern had boundary fares on its TVMs.

**MR MOSER:** Yes.

**THE PRESIDENT:** So we don't even need the survey for that ...

**MR MOSER:** We don't need the survey. Mr Backway in his evidence confirms that South Eastern does not have the boundary tickets available on their TVMs, their ticket vending machines.

**THE PRESIDENT:** Right, yes.

**MR MOSER:** Mr Backway says amongst other things that it's simply impractical. It can't be completely impractical, however, because South Western -- to their partial credit -- do have them available on their TVMs, but according to the survey, on the left-hand side, it's difficult to find the right option price on the home screen, no fewer than two steps are involved to access boundary tickets.

It's a virtual parallel to what happens at the ticket window. You will find them if you know exactly what you are looking for and where to look.

So there we are. I won't trouble the Tribunal at this stage with all the anecdotal evidence that follows at page 204 or page 27 for South Eastern and South Western. It's broadly either not mentioned, when they're mentioned sometimes

they're told they make no difference, the clerks are sometimes surprised, sometimes they get upset at being made to sell a boundary ticket and so on.

The most common conversational flow in summary is that it is up to the consumer to raise Travelcard, and even then that doesn't always lead to a boundary fare. You really have to say, "I want a boundary fare" and even then you are sometimes told it's not suitable.

On page 212 we have the websites. Nowadays, a number of people buy their tickets from websites. Boundary tickets appear not to be accessible on websites. Whether they are TOCs' or third parties', and the CAT will hear a bit about these third parties. There are, as Mr Backway I think explains, about 5 per cent of sales through third parties such as Trainline, who are commission agents, effectively. They sell the same tickets for the same journey. It's another route to market for the TOCs.

We see here that there's a similar booking process across all websites, no mention of Travelcard -- that's the third bullet point -- no option of boundary when booking your ticket.

Over the page, page 36, or 213, boundary tickets cannot be purchased on mobiles, which is what a number of people do now, especially younger travellers.

214 is the telephone channel. As a sort of consumer-type comment, the South West staff seem more customer centric than South East, so there is a slight reflection in all of this where South Western -- who of course sell slightly fewer boundary fares relatively speaking -- are a bit more aware of boundary tickets.

South Western, they are available over the phone, but similar issues -- this is the left-hand side of 214 -- that most staff seem to believe the Travelcard will not reduce the price, direct quote 11 times, "Even if you start with Travelcard", so even then 3 out of 14 didn't quote a price directly.

At south Eastern ticket purchase is not available over the phone, great resistance to Travelcards making any difference, then transferred to Trainline.

Over the page at 215/38, these are third parties.

Trainline, no staff awareness on boundary tickets, price is difficult to understand, staff not able clearly to offer a boundary zone ticket.

Train Genius, boundary tickets not available at all.

Then, finally, the virtual ticket office -- that's at page 216 -- on South Western, there's a call centre, all the scenarios were tested in the same way, so this is as though you were at the window, staff awareness, again, low. Not sure how to do a boundary ticket. Across nine enquiries there was a price quoted about half the time, asked about Travelcard only twice, didn't know how to perform the ticket purchase once and couldn't complete the transaction.

**THE PRESIDENT:** Sorry, excuse my ignorance, what's the difference between the virtual ticket office of South Western and the telephone enquiry with South Western?

**MR MOSER:** It's a very good question. I am not entirely sure. My understanding is that one is a call centre, which specialises in the sale of tickets, and the other one is simply the line for South Western. But if --

**THE PRESIDENT:** Maybe in due course that can be clarified, because normally if there's a telephone service you go through to the call centre. Maybe Mr Ward might be able to help me at some point.

**MR MOSER:** Mr Kuppen tells me what it is. Apparently, it's a physical phone at the station. If you don't have the window, you have a phone instead and you pick it up and it goes to the call centre, rather than just calling in from anywhere, or from home.

**THE PRESIDENT:** I see.

**MR MOSER:** South Eastern doesn't do them.

**THE PRESIDENT:** Yes.

**MR MOSER:** That's not specifically a boundary fare criticism.

That gives us a flavour, sir, of the nature of the problem and how it --

**THE PRESIDENT:** Yes.

**MR MOSER:** That the selling arrangements that we are dealing with lead to the unfair price of a double charge.

A lot of this is to do with transparency. As the TOCs remind us in their skeleton arguments, there are 1,000 tickets and 55 million fares on the system. The consumer is very largely, or wholly, dependent on being quoted the cheapest price in a system of complexity where using the term "Byzantine" might be unfair to the ancient Byzantines.

Indeed, the TOCs themselves are committed to transparency.

If I can ask -- we can put away now bundle 1 -- if I can ask the Tribunal, please, to turn back to the core bundle -- forgive me, we are going to go to authorities bundle 6 instead.

If I can ask the Tribunal to turn to authorities bundle 6, at the back of that bundle is a divider D, which is the other materials tab, and behind divider D is tab 1, and then -- sorry, tab 2, page 3261.

It's a document from the Office of Rail Regulation headed "Fares and ticketing information and complexity".

Within it, at page 3263, page 19 of the document, is a comment around ticket vending machines. Just above the first hole punch, the third bullet point:

"Better information about ticket choices. The additional information file has been created by the rail settlement plan to ensure that ticket vending machines can provide expanded details of validity, restrictions and other relevant options

when customers are choosing tickets."

Then the last bullet point of that section before the second hole punch:

"Better choice of tickets. In some cases popular tickets have not previously been offered on TVMs if they do not commence from the station at which the TVM is located. Boundary zone fares are the most requested category Souther are piloting the provision of these tickets on their machines."

We see that South Western have since introduced them, although we say not in a transparent way, South Eastern are yet to get there.

At tab 4 --

**THE PRESIDENT:** Do they say anything about this under "Websites"? I am not sure we have the complete document.

**MR MOSER:** Not other than the general comments. If it helps, I am sure we can get the rest of the document.

**THE PRESIDENT:** Yes, if it's not relevant then we don't need it.

**MR MOSER:** In relation to all of them -- the whole document is about addressing passengers' concerns about a lack of transparency and the complexity of tickets. Every channel -- perhaps we will see that we do get the rest of the document -- is addressed through that lens, making general validity clear, redesigning for improved clarity and improving access to information about products.

The only mention of boundary zone fares is on the TVMs.

**THE PRESIDENT:** This was in June 2012?

**MR MOSER:** Yes.

**THE PRESIDENT:** But in 2018, it's still the case that South Eastern did not offer boundary fares on its TVMs?

**MR MOSER:** Correct.

**THE PRESIDENT:** Yes.

**MR MOSER:** We then have, at tab 4, an extract, again, from the rail industry's own code of practice on retail information for rail tickets and services, of March 2015. It's really just principle 1 over the page at 3269 --

**THE PRESIDENT:** Just to be clear, this is code of practice produced by ...

**MR MOSER:** By the TOCs themselves, in their capacity as the rail industry body. Principle 1 on page 3269:

"Retailers should provide passengers with the information they need to make informed decisions."

**THE PRESIDENT:** Yes.

**MR MOSER:** The last document I want to touch on in this bit is at tab 8, which --

**THE PRESIDENT:** Just one moment. **(Pause)**

Yes.

**MR MOSER:** Tab 8 is national conditions of travel, national rail conditions of travel. It's explained at page 3280, internal page 5, part B, introduction:

"When you buy a ticket to travel on scheduled train services on the national rail network you enter into a binding contract with each of the TOCs whose trains your ticket allows you to use. The conditions set out the rights and obligations of passengers and the train companies ... [they are listed in appendix A] ..."

Over the page, the conditions, 3281, include 2.1:

"Buying your ticket. We want you to make a well-informed choice when buying your ticket and to feel confident that you have purchased the most appropriate and best value ticket for your journey."

At 4, we see, unsurprisingly, 4.3, over the page, 3282:

"You may only buy your ticket from a TOC or a licensed retailer otherwise it will not be valid."

At page 3288, it's a detail, but just touching on 14, "Using a combination of tickets":

"Unless shown below, you may use a combination of two or more tickets to make a journey provided that the train services you use call at the stations where you change from one ticket to another."

That is relevant, sir, because of some of the situations described, where it was thought, or in previous iterations of the selling arrangements, it was necessary, if you wanted to avail yourself of a point-to-point ticket from the boundary outside the zone to alight at the station and purchase a further ticket.

We have seen the Decidedly report, there is sometimes mention of, "You would have to get out", so there is that. That is not the situation that we say ought to prevail in boundary fare combinations, and, as we understand it, that's not now the TOCs' case either, but there is sometimes confusion in relation to point-to-point fares from the boundary and whether they can be purchased anywhere or not.

**THE PRESIDENT:** Yes.

**MR MOSER:** That's my relatively high-level introduction to the facts. What I propose to do next is to go through the statutes and the law. To the extent that the CAT finds it of assistance, I would like to start with the very familiar, the Competition Act and the rules.

They are in authorities bundle 1, and at tab 1 is the Competition Act. Page 7 is the cause of action that we seek to claim under, section 18(2) -- well section 18(1) is about the abuse of a dominant position.

**THE PRESIDENT:** Yes.

**MR MOSER:** Section 18(2), it's (2)(a), it's:

"Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions."

**THE PRESIDENT:** Yes.

**MR MOSER:** Really, we say both. There are at least indirectly -- disclosure will show the extent of directly -- unfair purchase prices, and there are also generally unfair trading conditions. Unfair selling arrangements is the other name of that.

**THE PRESIDENT:** It's unfair selling prices, I think, here.

**MR MOSER:** I'm sorry, unfair selling prices or other unfair trading condition.

Then, 47 --

**THE PRESIDENT:** You mean trading arrangements, it's not quite the same, necessarily, as trading conditions. But of course this is not an exhaustive category or --

**MR MOSER:** It's not an exhaustive category. We are dealing with consumer --

**THE PRESIDENT:** Yes, trading conditions, I think is rather a narrower concept isn't it of the terms and conditions of the contract.

**MR MOSER:** It is, sir. As we plead, the categories are not closed.

**THE PRESIDENT:** That's, I'm sure, common ground.

**MR MOSER:** We then have, at 47A, the chapter 2 prohibition, under which we claim -- that's at page 9.

10, collective proceedings are at 47B, the Tribunal is very familiar with this. Of course we are here today principally because of 47B(4) to seek a collective proceedings --

**THE PRESIDENT:** Yes.

**MR MOSER:** -- which may be made only if --

**THE PRESIDENT:** Yes.

**MR MOSER:** Yes.

(6) the same similar or related issues of fact or law.

(7) authorisation of Mr Gutmann.

(5) the class must be described as eligible for inclusion.

(c) opt in or opt out. We seek opt out.

**THE PRESIDENT:** Yes.

**MR MOSER:** Importantly, we seek aggregate damages pursuant to 47C over the page:

"... in collective proceedings without undertaking an assessment of the amount of damages ..."

**THE PRESIDENT:** Yes.

**MR MOSER:** "... recoverable in respect of the claim of each represented person."

In the Merricks sense.

**THE PRESIDENT:** Yes.

**MR MOSER:** The CAT's own rules are more familiar to the CAT than to me, I will just touch on them. The relevant part is really at page 20 of this bundle, tab 3, 73(2).

Aggregate award of damages:

"... award of damages made ... in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of each represented person."

That's the counterpart to what we have just seen.

Common issues are also well known.

Just at the end of this very brief touching on the rules, 79, at page 25, of course the certification conditions, an identifiable class of persons, common issues, suitable to be brought.

Whether suitable, there are the 79(2) points:

"... the Tribunal shall take into account all matters it thinks fit, including ..."

(a) to (g), they are the multifactorial approach. You don't have to tick every box, obviously the more the better, and some are a strong indication for certification.

In determining opt in or opt out, that's where the strength of the claims can come in

under (3), and whether it's practicable.

79(4) is the basis for my learned friend's strike out, and that refers back to rule 41(1) and 43(1).

**THE PRESIDENT:** Yes, which are the strike out rules, yes.

**MR MOSER:** The strike out rules and they are at pages 18 and 19. I will come back to them when I look at the authorities in a moment.

It's useful perhaps to note what is not in dispute at this collective procedure application hearing.

At least for today's purposes, the market definition of the provision of passenger rail services on point-to-point journeys is not in dispute.

Dominance is almost not in dispute -- I will explain. Self-evidently the TOCs hold either 100 per cent or a very high percentage of the market on their own flows. Only LSER has raised a substitute ability issue in its defence. It's referred to right at the end of LSER's skeleton argument. I will respond to that if it's developed at all in oral submission. But, subject to that, nothing on dominance.

There was a pleading point on effect on trade, but there is now no dispute between the parties as to effect on trade, so we have the market dominance effect on trade.

We also have no objection to Justin Gutmann being suitable as the class representative.

There was one theoretical reservation, you will recall from the CMC, depending on the outcome of the appeal in the Trucks case.

**THE PRESIDENT:** Yes, on the damages-based agreement point, and that's gone.

**MR MOSER:** That's gone, last Friday. That need no longer concern us.

We are left with class definition and suitability for bringing collective proceedings, specifically an opt out claim for aggregate damages.

We have our expert methodology and at the moment there is no expert report from the other side, so that's where we stand.

**THE PRESIDENT:** We would not expect an expert's report from the other side at this stage.

**MR MOSER:** No. Well certainly not after Merricks.

Sir, what I propose to do next is to finish on the law, in relation to the case law, first the case law on strike out and then the case law on collective proceedings.

The case law on strike out, it suffices to go to two authorities. We can put away authorities bundle 1 for now -- though it will come out again in two cases' time -- and go to authorities bundle 5. Authorities bundle 5, tab 52 is another Trucks case, Wolseley v Fiat.

We need not I think trouble ourselves too much with the facts, which are well known. At page 2334 of the bundle, paragraph 14 of the CAT's judgment, we see the strike out provisions I just referred to generally before, rules 41(1) and 43(1). The CAT may give strike out or summary judgment if (a) the claimant has no real prospect of succeeding on a claim or issue and (b) there is no other compelling reason why the case or issue should be disposed of at a substantive hearing.

15 it is common ground in that case that these powers are here to be exercised on the same basis as would apply under the corresponding rules of the CPR in the High Court. We respectfully submit that that is right.

There is no material difference between the test for striking out and for summary judgment. Again we agree.

16, the approach to be adopted was set out by Mr Justice Lewison in EasyAir and it is first whether the claimant has a realistic as opposed to a fanciful prospect of success.

I may sometimes summarise this concept by the phrase "non-fanciful".

A realistic claim is one that carries some degree of conviction, more than merely argument, ED&F Man, no mini trial, doesn't mean you have to take at face value without analysis everything the claimant says, there may be no real substance or factual assertions. However, in reaching its conclusion the court must take into account not only the evidence actually placed before it but also the evidence that can also reasonably be expected to be available for trial, Royal Brompton Hospital.

We have emphasised this in our skeleton argument because it's of course particularly acute in this sort of application where we are at a relatively early stage we have had literally one item of disclosure and all of the information sits with the Proposed Defendants. So when the Proposed Defendants in their skeleton argument say, "They cannot just hope that something might turn up", this isn't a case where we are hoping that something might turn up. This is a case where there will clearly be a great deal of relevant disclosure and data that we simply haven't received yet.

6 starts a few lines down:

"The court should hesitate about making a final decision without a trial even where there is no obvious conflict of fact where reasonable grounds exist for believing a full investigation would add to or alter the evidence available at trial and so affect the outcome at case ... on the other hand it is not uncommon for there to be a short point of law or construction."

We say if ever there was a case where you can't say there's simply a short point of law or construction, where the court has before it all of the evidence necessary, then this is such a case.

So that's Wolseley and the President's judgment. We have summarised that in our

skeleton argument at paragraphs 13, 14 and 15.

Summary disposal is not appropriate --

**THE PRESIDENT:** Yes, and the other case is?

**MR MOSER:** The other case is best illustrated by Kyrgyz Mobil, and that is the case where there is a question of law in a developing area. That is in authorities bundle 3, tab 28. The facts need not concern us -- although they are quite sensational, about a *coup d'etat* in Kyrgyzstan -- the relevant point is at page 1212 of the bundle at 84, this is a case on service out, but it is a very similar test.

What the Privy Council says is, 84:

"The general rule is that it is not normally appropriate in a summary procedure (such as an application to strike out or for summary judgment) to decide a controversial question of law in a developing area, particularly because it is desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts ... Lonrho v Fayed ... Dyson v Att-Gen ... summary procedure 'ought not to be applied to an action involving serious investigation of ancient law [not quite us] and questions of general importance ... X ... 'Where the law is not settled but is in a state of development ... it is normally inappropriate to decide novel questions on hypothetical facts ..."

I suppose we say two things. Although we say that this is a common or garden application of the law on unfair pricing, we do also say that it is an application of unfair selling arrangements to a consumer situation. To that extent that is a developing area, as we shall see when we come to, sir, your judgment in Preventx, which I am going to come to in two or three judgments' time.

This is, for that reason alone, would not be a case suitable for strike out or summary

judgment. But that we don't need that only reason, we have all of the others as well.

Having mentioned the abuse, I want briefly to touch on our abuse cases before I come to class certification. I would like to start --

**THE PRESIDENT:** I think the point, Mr Moser, you have just been making by reference to Kyrgyz Mobil was made specifically with regard to competition law and some earlier cases, in Intel v Via and then I think picked up in SEL-Imperial, I do not think we need to turn them up.

**MR MOSER:** Indeed you are right, sir. There is no reason why it should be any different in competition law cases.

I think in our skeleton we also cite Farah v British Airways.

I have taken those two cases, they are not the only ones.

**THE PRESIDENT:** No, they are summarising it, yes.

**MR MOSER:** For the sake of economy.

**THE PRESIDENT:** Yes.

**MR MOSER:** Sir, the abuse. Bundle A1 is United Brands.

**THE PRESIDENT:** At some point, Mr Moser, we should take a short break. You can think what is a sensible --

**MR MOSER:** This is as good a moment as any, sir, I am about to deal with five cases on abuse and then deal with the class certification cases, which ought to take me to the end of the morning.

**THE PRESIDENT:** Would it be sensible to break before abuse and then hear those five cases together?

**MR MOSER:** Sir, yes.

**THE PRESIDENT:** We will just take a short break until 11.50, so not quite ten minutes I think should do, thank you. We shall metaphorically rise.

**(11.42 am)**

**(A short break)**

**(11.51 am)**

**THE PRESIDENT:** I am told we are now live.

Yes, Mr Moser, abuse.

**MR MOSER:** Abuse.

United Brands. Authorities bundle 1, section B, tab 6, page 137 and following. It needs no introduction, it's the case about the bananas. I am really just touching on it so that it makes it into your note because it's where we start.

The relevant section on unfair prices is what we have mentioned in our skeleton argument, that starts at page 227 of the bundle, paragraph 235 of the report. and it talks about unfair prices, which the Commission in that case talked about being excessive in relation to the economic value of the product supplied. Obviously this is heavily analogous, because the situation was different in relation to those banana prices.

The relevant part we cite is at page 229 of the bundle, page 301 of the report, between the two hole punches, 248, the imposition by an undertaking in a dominant position directly or indirectly of unfair purchaser selling prices is an abuse, to which exception can be taken under article 86, which we know is of course the same as our --

**THE PRESIDENT:** Yes.

**MR MOSER:** 249:

"Advisable therefore to ascertain whether the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition."

We say that this is such an instance. If you imagine, sir, that instead of one ticket counter there had been two ticket counters next to each other, and it's the second ticket counter would be from a rival TOC that provided exactly the same journey and the second ticket counter had a big sign that said "Travelcard holders travel cheaper", and maybe at the beginning of the queue there was an arrow that said, "If you hold a Travelcard go to our ticket window for your travel card cheaper price".

It's implausible that anyone other than someone not entirely in their right mind would have paid more in such circumstances.

So in this case, at 250, charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be such an abuse. Again, we have perhaps in my submission the most straightforward example of a price that has no relation to the economic value, because the product has already been paid for once.

So that's all I wanted to say about United Brands.

Further on in this bundle, we have the case of Deutsche Post, and that's at tab 12, starting at page 444. The case is again I think reasonably well known, at 447 of the bundle is the judgment. It's a case about remail, it's delivery of post from abroad using remail.

What happened there, as explained at paragraph 3 of the judgment, postal services are obliged to forward and deliver international letter post items passed to them by postal services of other contracting states under a thing called the Universal Postal Convention, when they are addressed to persons resident in the first state.

The states are entitled to charge something called terminal dues -- we see that at 450, paragraph 7. Terminal dues are the dues which one postal administration

collects from another for the delivery of its international mail.

A problem arose in relation to the terminal dues in that they weren't sufficient any more to cover the costs in the country to which the mail was being sent, because of a problem in relation to what in those days was called developing countries.

Terminal dues don't cover the costs, so what happened was that the Deutsche Post decided to claim full-price postage at its internal rate. We see that at 20, on page 454, that Deutsche Post claimed, namely 1DM per letter in respect of all the letters delivered in Germany from someone else and they sought payment from those people. Citicorp or CKG refused to pay and brought a case in Frankfurt.

What had happened there was that the Netherlands post had already paid the terminal dues -- we see that in paragraph 19 -- so a little bit like Transport for London already paying the boundary dues to the TOCs. Then Deutsche Post claimed the full price again from its customer.

At page 460, 37, we see that this is a dominance case, Deutsche Post had exclusive rights in that case, and settled case law that an undertaking having such a monopoly holds a dominant position within the meaning of article 86.

We get to the meat of things at paragraphs 56 and following, where it is said by the first hole punch of 465:

"It is not necessary in order for a body such as Deutsche Post to fulfil the obligations flowing from the Convention that postage be charged at the full internal rate."

57, it is to be remembered that they have a dominant position.

58:

"The exercise by such a body of the right to demand the full amount where the costs relating to that are not offset by the terminal dues paid by those services may be regarded as an abuse of the dominant position within the meaning of article

86."

We see at 59, that the senders in that case had no choice but to pay the full amount of internal postage.

As the court has stated, at 60, in relation to a refusal to sell, a different abuse, such action would be inconsistent with --

**THE PRESIDENT:** Yes.

**MR MOSER:** 61, by the second hole punch:

"On the other hand, the exercise of such a right is contrary to article 90, read with article 86, insofar as the result is such a body may demand the entire internal postage applicable without deducting the terminal dues."

So our analogy, not strained I submit, of boundary fares, part already paid, terminal dues already paid, you can't then charge the customer the full price.

**THE PRESIDENT:** The terminal dues here would be received by Deutsche Post, wouldn't they?

**MR MOSER:** Yes.

**THE PRESIDENT:** You said it's an analogy because payment for the Travelcard would have in part been passed over to the TOC; is that right?

**MR MOSER:** Yes, there's a formula under the agreement between the TOCs and Transport for London whereby the TOCs are paid according to that formula for any boundary fares, for the notional cost for accommodating the non-boundary portion.

**THE PRESIDENT:** You have seen that agreement, have you? Because you have said there's been very limited disclosure --

**MR MOSER:** We have.

**THE PRESIDENT:** -- but you have the agreements?

**MR MOSER:** The only other bit of disclosure is that agreement.

**THE PRESIDENT:** I haven't looked at that agreement, and perhaps I don't need to, but I don't know if the formula and the way that is assessed is relevant to any of this.

**MR MOSER:** We say we hope it is going to be relevant in part, although it seems now that it's not as helpful as we initially thought, and probably a survey is going to be a reasonable estimation in this case.

**THE PRESIDENT:** Yes, but I don't know what he's done under that agreement to -- how it is that the parties to it have agreed what is the appropriate payment to be made to the TOCs. There must be certain assumptions underlying that.

**MR MOSER:** There are, sir. It may help if at some stage perhaps we can even get a common position.

**THE PRESIDENT:** I see that Mr Holt says somewhere he doesn't find it particularly helpful.

**MR MOSER:** That's right, yes.

**THE PRESIDENT:** One would have thought it might be useful, but apparently not.

**MR MOSER:** In my respectful submission it is not going to be useful and we haven't even included the agreement in the bundle.

**THE PRESIDENT:** Right, okay.

**MR MOSER:** Although of course it could always be added.

I suspect it is common ground that there is a way of working it out between TfL and the TOCs which involves a payment of a sum for essentially the same part of the same journeys.

As it turns out, it doesn't look as though that's going to be particularly of assistance in the calculation of damages. What it does mean is that, in a not dissimilar way to the terminal dues, there's another payment that the TOCs receive, which is related to the same journey.

As I say, I think that's common ground, if it isn't we will no doubt hear about it.

That's the analogy with Deutsche Post.

Then at bundle 3, authorities bundle 3, at tab 24, we have a similar sort of case called Duales System Deutschland, or DSD.

What happened there was that there was a system whereby manufacturers were obliged to take back, free of charge, used sales packaging. There was a company called DSD which operated that exemption system, and we see that at paragraph 7 of this judgment. It was approved by the lender for that purpose.

Paragraph 8, the relationship between DSD and the manufacturers and distributors which participated in the system was governed by an agreement which covers the use of the *Der Grüne Punkt* logo, which was a sort of green sticker or mark that was affixed on the packaging.

At 12 we see that under this agreement, users of the logo paid DSD a fee for all packaging carrying that logo. The fee was determined on the basis of weight and volume. The analogous thing about this case is that they had to pay the same fee whether or not they chose to avail themselves of another such system or tried to do it themselves.

They complained of a distortion of competition, alleged abuse of a dominant position and the Commission sent a statement of objections followed by a decision, which was then appealed against.

At paragraph 29, DSD had a dominant position not disputed --

**THE PRESIDENT:** Yes.

**MR MOSER:** Over the page, the abuse is based on the fact the fee is tied not to the actual use of that system but it's calculated on the basis of the number of packages bearing the logo and so on.

At 32, the Commission stated:

"First, by making the licence fee dependent solely on the use of the ... logo, DSD imposes unreasonable prices and unfair commercial terms on undertakings which do not use its service or ... use it in respect of only some of their packaging."

Again, sir, the Tribunal will see where this is going. If I can cut to the findings of the court at 1099, paragraphs 141 following, second paragraph of article 82, now we have moved to that nomenclature:

"... abuse of a dominant position may [include] ... directly or indirectly ... unfair prices or ... unfair trading conditions."

At 143:

"In requiring payment of a fee for all packaging bearing the [*Der Grüne Punkt*] logo ... even where customers ... show that they do not use the ... system ... must be considered to constitute an abuse of a dominant position within the meaning of the provision and the case law referred to above."

Again, we rely on this case as an analogy.

**THE PRESIDENT:** I mean, it's slightly different, isn't it, because there they are being charged for a service they are not using at all.

**MR MOSER:** Quite right.

**THE PRESIDENT:** Your analogy is to say that they are paying for that portion of the journey for which they have already paid, so it's a different situation, isn't it?

**MR MOSER:** It's a bit different because it involves, as it were, a payment to a third party, so they have, one supposes, already paid either through their own investment or using a third-party supplier for the same service.

We are a fortiori of DSD, because DSD may have collected the money once, including for things that were not used, but they didn't collect it twice. As happened in Deutsche Post and as happens in our case.

Anyway, that's it for completeness, DSD.

Then we have the case of Preventx, at authorities bundle 5, tab 57. Preventx before my Lord, Mr Justice Roth, page 2538, concerned the basis on which the defendant was willing to offer carry out a return service for patient samples for the testing of sexually transmitted infections, testing kits. The facts need not concern us particularly.

It's a slightly different legal context, we see that at page 2551 at paragraph 64. It's an interim injunctions case involving the American Cyanamid test, which is not dissimilar but I have to point out in fairness, it is a slightly lower bar than strike out, so that's the question of whether there's any real prospect of succeeding.

But it is not dissimilar to the non-fanciful test. The strike out test, of course, is: it has to be more than merely arguable.

Again, it's a section 18 CA case, so exactly like ours, legally, in that way.

It's relevantly dealt with -- we see that at 73, where, sir, you dealt with Mr O'Donoghue's submissions, the instances of abuse are not exhaustive:

"The statutory examples, and those developed by subsequent case law, are ways in which the basic wrong can be committed, but at all times an eye must be kept on the basic wrong itself."

The particulars in that case alleged four forms of abuse, including the imposition of unfair trading conditions. In his oral submissions Mr O'Donoghue focused on (a) and (b), limitation of markets and the imposition of unfair trading terms.

At 79, there was a reliance in that case on the music cases, SABAM, the copyright payments cases, and the Commission decisions in amongst other things DSD, which we have just looked at. Both BRT v SABAM and GEMA concerned copyright collecting societies.

We see at 80 there's an analogous sort of argument:

"... the fact that an undertaking entrusted with the exploitation of copyrights ... occupying a dominant position ... imposes ... obligations which are not absolutely necessary for the ascertainment of its object and thus encroach unfairly upon the freedom ... to exercise his copyright can constitute an abuse."

That's the point about necessity. We will see later also actually used.

At 82, just before the second hole punch, in GEMA:

"... the decisive factor is whether they exceed the limits absolutely necessary for the effective protection (indispensability test) and whether they limit individual copyright holders' freedom ..."

Of the charge.

At 84, we have just looked at DSD, I concede it's explained much better there than I managed. In the last sentence, but that's the summary:

"... the licence fee [was] charged ... solely on the extent of use of the ... dot and not ... the ... service."

Not only obstructive but also exploitive and there's an interesting extract from the Commission and reference at 113 of the Commission decision. Imposing unfair prices and commercial terms on undertakings.

It's in that context then that there is a discussion, at 2555. At 95, as regards section 18(2) and unfair trading conditions there is force in Mr Woolfe's submissions, et cetera, four lines down:

"Competition law is not a general law of fair dealing."

Of course we have seen that in I think Ms Abram's skeleton argument, but that passage goes on, sir, it goes on:

"However, despite over half a century of EU jurisprudence, there have been very few cases considering the meaning of 'unfair trading conditions', the recent German Facebook decision indicates the potential breadth of this provision. Moreover,

the authorities on excessive pricing, and the United brands ... show it is not necessary to show a distortion of competition to establish that that form of exploitative abuse. If that is the position for the 'unfair prices' ... it is not evident ... a different approach would apply to 'unfair trading conditions' ..."

Sir, we have had our exchange about unfair trading conditions, unfair selling practices, whatever, I say it's analogous.

**THE PRESIDENT:** Yes.

**MR MOSER:** At 96, we have Sir Andrew Morritt --

**THE PRESIDENT:** Yes, that's the case I had in mind.

**MR MOSER:** Intel Corp v Via Technologies, so here it is:

"Where a contention of abuse of a dominant position was raised ... the Court of Appeal allowed the appeal against the grant of summary judgment where the court below had held there was no arguable case of abuse. Sir Andrew Morritt (with whose judgment Mummery and Tuckey LJJ agreed) observed:

"where it can be seen that the jurisprudence of the European Court of Justice is in the course of development it is dangerous to assume that it is beyond argument with real prospect of success that the existing case law will not be extended or modified so as to encompass the defence being advanced."

Then there's a reference to American Cyanamid and the test.

At 100, sir, you mention:

"... the statutory reference to 'unfair trading conditions' is broad enough in my view to apply to the unfair reliance on a contractual term in certain circumstances."

And then explain why that is relevant in relation to the facts.

We say, in a not dissimilar way, the law on this form of abuse is clearly in the course of being developed. The law on collective actions is by definition in the course of being developed, in the sense that if this is certified this week, or shortly after,

it will be the first to be successfully certified in this country under the new jurisdiction as explained in Merricks.

**THE PRESIDENT:** The development here is that the law of substantive abuse, that's what you are addressing.

**MR MOSER:** Indeed.

**THE PRESIDENT:** That's the critical one --

**MR MOSER:** Yes, that's the critical one.

**THE PRESIDENT:** -- it's not the law on collective proceedings, yes, okay.

**MR MOSER:** That's the critical -- although we will also hear from, I expect, my learned friends an attack on our arguments in relation to certification.

**THE PRESIDENT:** Oh, yes.

**MR MOSER:** But here for present purposes, unfair selling remains, absolutely.

Then the last case really just to note is the BVA case. It's at tab 58 of this bundle, the Belgische Vereniging van Auteurs, it's a SABAM case, copyright type case. We see from the headnote at H3, which will suffice, that the remuneration for the use of the repertoire at music festivals is determined on the basis of something called tariff 211, which applied certain standard criteria.

The claimants contested the validity of the tariff, which they considered unfair on the ground it does not correspond to the economic value of the service provided by SABAM.

I bring this case really because it provides a sort of coda to the SABAM cases as discussed in Preventx. Again it's the most recent -- it's a 2021 report -- expression of the court's approval of this sort of reasoning.

We see at H6, the court held:

"Article 102 as it now is must be interpreted as meaning that the imposition on a scale on organisers does not constitute an abuse, whereby ..."

They then set out how the royalties are calculated, four lines down --

**THE PRESIDENT:** Just a second, one moment. **(Pause)**

You were at which paragraph, sorry?

**MR MOSER:** H6. Page 2561. As I say, essentially they say it's all right if, and then they explain how royalties are calculated on the basis of the tariff.

Then four lines down:

"Provided that having regard to all the relevant circumstances the royalties actually imposed by the management company are not excessive in view of the nature and extent, in particular the nature and extent of the use of the works, the economic value ..."

It's an instance of actual use, and we see that sufficiently at paragraph 50, at page 2570 of the judgment:

"As the court has already had occasion to point out, the royalty applied must take account of the quantity of musical works protected which is actually used."

Then it makes reference to, amongst other things, DSD. So obviously, we say useful to know that is still good law.

**THE PRESIDENT:** 25 November 2020 is the date of the judgment, is it? On page 2560?

**MR MOSER:** I am sure --

**THE PRESIDENT:** I am just reading, that's the date of the judgment, not of the AG opinion, it's the date of the judgment, is it?

**MR MOSER:** That's the date of the judgment.

**THE PRESIDENT:** Yes, thank you.

**MR MOSER:** I have not checked whether there even was an AG opinion.

**THE PRESIDENT:** Well it says Advocate General Pitruzzella, that's why.

**MR MOSER:** That's right. Very often now you have the Advocate General allocated

and they decide to proceed without an opinion anyway.

**THE PRESIDENT:** I see, yes.

**MR MOSER:** That brings me to the cases on class certification. That's all I plan to say about abuse for now.

Indeed, I don't plan to revisit my submissions on abuse, having, I submit, sufficiently made them now in the course of going through the cases.

The class certification, I would like to start with the Canadian case law, because it's chronologically correct, which is the case law found persuasive by the Supreme Court, and indeed by the CAT, because it has similar -- not identical -- provisions to the UK and it was found by the Supreme Court to pursue the same statutory purpose of providing effective access to justice for claimants for whom the pursuit of individual claims would be impracticable or disproportionate.

The first case is not actually a Supreme Court case, but it's the case of Robertson at authorities bundle 5. Within it, there is a tab called C and behind C, it's tab 2. It's an Ontario case, it's first in time. It was a case, as we see by the summary, by the second hole punch on page 2640, a class proceedings on behalf of a class of authors who had submitted articles for publication in written form who had not sold the right for publication in electronic form. In particular Ms Robertson objected to the fact that she had submitted her article in writing and then it appeared online and she asserted that the defendants had breached her copyright in that way.

In her statement of claim, she stated -- this is over the page, 2641, by the first hole punch:

"... class members were creators or owners of the copyrighted works that did not sell the right to copy or disseminate their works in electronic medium."

She moved for certification of the action as a class proceedings pursuant to the Class Proceedings Act 1992.

The relevant class definition, which is all I want really to go to in relation to this case, is at 2653. In which Sharpe J, at the second full paragraph, the one starting:

"I agree with Winkler, J in Bywater and with Newberg Class Actions that the class should be defined in objective terms and that circular definitions referencing the merits of the claim or subjective characteristics ought to be avoided, such definitions make it difficult to identify who is a member of the class until the merits have been determined. Definitions based on merits violate the statutory policy that merits are not to be decided at the certification stage. Proposed definition of the class excludes those who have surrendered their rights, in my view to insist upon the further limitations on the class definition urged by the defendants [there were various limitations] to restrict membership to those who have a valid claim would contravene the policy I have just mentioned."

There are definitions and discussion of other cases:

"I disagree with the defendants. In that case, there was a serious question whether harm from a landfill site [we are about to go to that I think] was widespread, it was in that context that O'Leary J held that evidence may be required to show that all members of the class likely have a cause of action. In my view O'Leary J did not hold that it would be appropriate to define the class in terms coincident with the merits of the claim."

We will see shortly where O'Leary J's judgment in Hollick went, in the Supreme Court.

**THE PRESIDENT:** Yes, I just wanted to look at what is the class definition here, which I think is back on 2651 ... is it?

**MR MOSER:** Sir, yes. Class proposed by the plaintiffs --

**THE PRESIDENT:** Except ...

**MR MOSER:** I will not read it out.

**THE PRESIDENT:** No, let me just read it through for a moment. **(Pause)**

I suppose the paragraph on 2652 ... argued the proposed definition fails to define an identifiable class and so on ...

**MR MOSER:** So large and diverse it would be impossible to determine who are members. Fatally flawed because it likely includes some individuals who in the end will not succeed.

**THE PRESIDENT:** Yes, must be rejected ...

**MR MOSER:** Yes. That is the takeaway point from Robertson which it will be the thread, sir, that I will seek to draw through all of my submissions, or citation of authority, because of course what's being said against me, one of the things being said against me in this case, is well your class is over-inclusive, it includes people who will not have suffered loss. We say that is (a) inevitable and (b) perfectly permissible under the correct approach, which is akin to the Canadian approach.

It is also said against me that it is necessary to identify individual losses. That is also something the individual issues of entitlement to compensation that I say is not necessary under the correct approach, and indeed under Merricks.

That's where I'm going, broadly.

**THE PRESIDENT:** Yes, I understand.

**MR MOSER:** That was Robertson.

The next case in the bundle is Webb v K-Mart Canada, I submit it is sufficiently quoted in Hollick, I am not going to go through it on its own.

Indeed, the next case, which is Western Canadian Shopping, which I submit is sufficiently quoted in Pro-Sys, but those cases are there, they are all relevant and in our skeleton argument.

The next case I propose to go through in any detail is Hollick, which is behind tab 5. This is the case that we have just seen mentioned back in 1999, in Robertson, when the certification had failed at first instance in front of O'Leary J. What's happened since 1999 is that it's also failed in the appeal court and it's now reached the Supreme Court and Chief Justice McLachlin and her colleagues.

This is a case, we see at 2717, of the appellant complaining of noise and physical pollution of a landfill owned and operated by the respondent city of Toronto, he sought certification under the CPA to represent about 30,000 people who live in the vicinity of the landfill.

The divisional court overturned the certification order -- I have skipped a bit -- on the grounds that the appellant had not stated an identifiable class and had not satisfied the commonality requirement. For fear of giving away the ending, as you probably know, sir, the certification is going to fail again because it really is a very diverse class.

But, what matters in Hollick is the journey because the Chief Justice is said to have produced a seminal statement of the law. It's useful to look at 2728 first, the legislative history of the CPA. 2728, the first full paragraph in the left-hand column:

"The legislative history of the Class Proceedings Act makes clear that the Act should be construed generously, before the CPA class actions were prosecuted under another route."

We see at the end, the next main paragraph, the last sentence:

"The Class Proceedings Act ... was adopted to ensure that the courts had a procedural tool sufficiently refined to allow them to deal efficiently, and on a principled rather than ad hoc basis, with the increasingly complicated cases of the modern era.

"The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. As I discussed at some length in Western Canadian Shopping Centres (at paras. 27-29), class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public."

There's reference there to effectively what the EU would call the "travaux preparatoires" of the legislation.

Last sentence:

"In my view, it is essential ... that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.

"It is particularly important to keep this principle in mind at the certification stage."

There's a recommendation that wasn't adopted:

"Instead it adopted a test that merely requires that the statement of claim 'disclos[e] a cause of action' ... thus the certification stage is decidedly not meant to be a test of the merits of the action."

Then well known that certification stage focuses on the form of the action, and so on.

At page 2732, first full paragraph:

"The respondent is of course correct to state that implicit in the 'identifiable class'

requirement is the requirement that there be some rational relationship between the class and common issues."

The next paragraph:

"The requirement is not an onerous one. The representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not unnecessarily broad - that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue."

There are some examples.

We of course say that our class definition fits that exactly.

Then what's been called the seminal statement is at page 2734, this is just after the first paragraph where the Chief Justice refers to a certain minimum evidentiary basis being required for certification. As she says, it's not a onerous requirement.

Then continues:

"I agree that the representative of the asserted class must show some basis in fact to support the certification order. As the court in Taub held, that is not to say ... there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. However, the Report ... clearly contemplates that the class representative will have to establish an evidentiary basis for certification ..."

There's then the reference at the bottom:

That latter requirement is of course governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is 'plain and obvious' ..."

So there's an echo of what the Supreme Court would later say in Merricks. Other than

a strike out.

There is then the finding that in the end, for your note, at pages 2738 and 2739, certification fails because she was not persuaded that the class action would be preferable and there was an alternative remedy, something called a small claims trial.

That's what happened in Hollick. I will just touch on the last authority in this bundle, if I may, which is the Saskatchewan case of Sorotski. It's a case about tractors that ran on tracks rather than wheels and the tracks cracked and frayed and Mr Sorotski wanted to bring a class action.

There's a useful reference at 2759, is there an identifiable class? Paragraph 41, the reference back to what we have just seen in Hollick, and the Chief Justice. Over the page at 43/44, the claim describes the class, 43:

"As Canadian purchasers of case ... track model whatever, tractors having tracks that developed severe cracks, fraying and shredding, it was held to be not circular. Counsel for case nonetheless suggested that class identification was deficient, because in cases ... the cracking shredding and fraying was essentially cosmetic and the plaintiff would need to prove some sort of loss. In my view this objection confuses the issue of whether the class is identifiable with the issue of whether any particular class member would ultimately be in a position to establish an entitlement to damages. This is significant because the Act does not require a class to be identified in such a way that every class member will by definition be entitled to damages if the common issues are resolved against the defendant."

That's a reference to Western Canadian at paragraph 39, which as I say I have not specifically gone to, but that is another important case, it's essentially what it says.

We then have really two more Canadian authorities I want to take you to specifically. They are in bundle 6 of the authorities. There is the case of Sun-Rype which I will not go to specifically --

**THE PRESIDENT:** Just one moment. **(Pause)**

**MR MOSER:** That case of Sun-Rype is at 12 --

**THE PRESIDENT:** This is the sixth volume of authorities and you are at tab 12?

**MR MOSER:** That's right.

I am at tab 12 to tell you that I am not going to take you there specifically, because it's simply a quote in Pro-Sys, which is at tab 13, sorry.

Pro-Sys is another Supreme Court case, again McLachlin CJ, and others including Rothstein J.

**THE PRESIDENT:** This is Pro-Sys v Microsoft, yes.

**MR MOSER:** This is Pro-Sys v Microsoft. Well known. This is the case that was particularly persuasive for I think everybody in Merricks.

The facts are very well known, class action against Microsoft, unlawful conduct for overcharging for the Intel Inside operating systems.

The proposed class is made up of ultimate consumers known as indirect purchasers, so we have the whole pass-on complexity.

I will skip the headnote, partly because I am presuming a certain amount of familiarity with the issues.

**THE PRESIDENT:** Yes.

**MR MOSER:** The court analyses the question of double or multiple recovery, starting at page 2985 of this bundle, and makes reference to Illinois Brick and overlapping recovery.

There is the finding at 2987, at 39:

"As for the risk of double recovery where actions by direct and indirect purchasers are

pending at the same time, it will be open to the defendant to bring evidence of this risk before the trial judge and ask the trial judge to modify any award of damages accordingly ..."

Reference to a case called --

**THE PRESIDENT:** This section of the judgment, Mr Moser, is all on the question of whether indirect purchasers should be allowed to sue in Canada.

**MR MOSER:** It is.

**THE PRESIDENT:** So I am not sure that's relevant, is it, to class certification, that was obviously a very important question of law.

**MR MOSER:** I cited that well-known bit because it's another illustration of how you deal with, in that case, double recovery. We of course are going to say that some of the issues that are not real issues are going to be easily dealt with by way of adjusting the estimation.

I will move on and I will come to certification, which starts at 2996. I would just like to touch on Illinois Brick, because it contains something that's useful more widely. We haven't looked at it specifically, but the quotation is at 2989.

**THE PRESIDENT:** Yes.

**MR MOSER:** That's where Brennan J in Illinois Brick, dissenting, says, and the quotation is in the middle of the page left-hand column:

"Admittedly, there have been many cases in which the plaintiff will be unable to prove the overcharge was passed on."

**THE PRESIDENT:** This is the dissenting judgment of Justice Brennan. Yes.

**MR MOSER:** That's right:

"In others, the portion of the overcharge passed on may be only approximately determinable. But again, this problem hardly distinguishes this case from other antitrust cases. Reasoned estimation is required in all antitrust cases, but 'while

the damages [in such cases] may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate'."

It's that bit, which I submit there has been generally adopted as correct, that I just wanted to touch on, reasoned estimation.

**THE PRESIDENT:** I think we have that in UK law from the Supreme Court in the -- well, Merricks is in the context of collective procedure, but we have it in Sainsbury's v Mastercard, so I think that's not a problem.

Let's look at certification.

**MR MOSER:** Certification starts at 2996, 61. It's after he has answered --

**THE PRESIDENT:** Yes.

**MR MOSER:** He has answered pass-on, 61 last few lines, (1) cause of action (2) common issues (3) preferable procedure.

He cites the law. He talks about the cause of action from 63 following. For the reasons of the facts in that case, having already made his earlier findings, the conclusion at 71 is that it wasn't plain and obvious that the cause of action would be unsuccessful.

So there was a cause of action sufficient.

We see the adoption of the Hollick standard starting at 3010, 98, "... Microsoft's argument that the claims should nevertheless be rejected ... that the claims of the class members raise common issues ... class action is the preferable procedure ..."

Standard of proof, 99, "... seminal decision in Hollick ... some basis in fact ..." And a repeat of Hollick at 100:

"The Hollick standard of proof asks not whether there is some basis in fact for the

claim itself, but rather whether there is some basis in fact which establishes each of the individual certification requirements. McLachlin CJ did, however, note in Hollick ... evidence has a role to play ..."

And there's the repetition of that, some basis in fact.

At 102, disagreement with Microsoft's submissions:

Had McLachlin CJ intended ... the standard of proof to meet the certification requirements was ... 'balance of probabilities', that is what she would have stated ... nothing obscure ... the Hollick standard has never been judicially interpreted to require evidence on a balance of probabilities. Further, Microsoft's reliance on US law is novel and departs from the Hollick standard [so no adoption of US law]. The 'some basis in fact' standard does not require [resolution of] ...conflicting facts and evidence at the certification stage ... 'the court is ill-equipped ...'"

Again over the page, 105, there's a final note:

"... Canadian courts have resisted the US approach of engaging in a robust analysis of the merits ..."

Then at 106, commonality:

"... commonality ... has been described as '[t]he central notion of a class proceeding' ..."

Then again Western Canadian Shopping:

"... this court addressed ... commonality ... '[t]he underlying question is whether allowing the suit to proceed ... will avoid duplication of fact finding or legal analysis ...'"

That McLachlin CJ's instructions are (1):

"... commonality ... should be approached purposively.

"(2) an issue will be 'common' only where its resolution is necessary to the resolution

of each class member's claim.

"(3) it is not essential that the class members be identically situated vis a vis the opposing party.

"(4) it [is] not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues."

(5):

"Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent."

**THE PRESIDENT:** Can I just interrupt you to ask. Common issues, is that in the Canadian context that's being discussed here, or the commonality requirement, is that a statutorily defined term to this -- yes, because it looks like it from paragraph 98 that you read.

Two of the remaining certification requirements of the claims of the class members raise common issues. I just wonder if there's a definition of "common issues". We have a definition of what common issues means, which you have taken us to, it doesn't necessarily define in the same way in the Canadian legislation. That's what I'm just looking for.

**MR MOSER:** It may not. At 136 --

**THE PRESIDENT:** I see, it's 107; if you look at 107, it's just before where you were reading:

"Section 1 of the CPA defines 'common issues' as ' ... common but not necessarily identical issues of fact ... common but not necessarily identical issues of law that arise from ..."

Yes, so we have that definition. That's what I was looking for, thank you.

**MR MOSER:** I am grateful.

**THE PRESIDENT:** Slightly different, slightly narrower in a sense than perhaps the definition.

**MR MOSER:** It is narrower -- the Quebec CCP has laid down conditions that are closer to ours, so it's Quebec, the definition is identical, similar or related.

**THE PRESIDENT:** Yes, that is very much like ours, isn't it.

**MR MOSER:** We will see that in a moment in Vivendi.

**THE PRESIDENT:** What province is this case from?

**MR MOSER:** This is from British Columbia.

**THE PRESIDENT:** Yes.

I interrupted you, Mr Moser, you were taking us through paragraph 108.

**MR MOSER:** Yes.

At 109, there's the argument by Microsoft that there are multiple separate incidences of wrongdoing over 24 years, in 19 different products, various co-conspirators and countless licences. So there is not unlike the present case, an argument -- there are many, many different stories for consumers.

We are in fact considerably more homogeneous and we don't have a pass-on issue in our case.

Nonetheless, at 110, it's held there would appear to be a number of common issues that are identifiable.

At 112:

"The differences cited by Microsoft are, in my view [says Rothstein J], insufficient to defeat a finding of commonality. Dutton confirms that even a significant level of difference among the class members does not preclude a finding of commonality in any event, as McLachlin CJ stated, '[i]f material differences

emerge, the court can deal with them when the time comes'."

There is then a discussion at 115 of the role of the expert methodology. The role of the expert methodology is to establish the overcharge was passed on in that case.

Over the page, about halfway down the paragraph:

"It is not necessary at the certification stage that the methodology establish the actual loss to the class, as long as the plaintiff has demonstrated that there is a methodology capable of doing so."

Then at paragraph 118:

"In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement ... [it] must offer a realistic prospect of establishing loss on a class-wide basis [I will come back to the class-wide basis in Godfrey] so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate ... it is common to the class (ie that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.

And:

"To hold the methodology to the robust or rigorous standard ... for instance to require the plaintiff to demonstrate actual harm, would be inappropriate at the certification stage."

The last bit of this is in relation to the idea of establishing proof to the loss of the class as a whole. We will see that at paragraph 130. This is a bit where I am going to say that our UK law is in fact wider than Canadian law:

"Aggregate damages provisions used to establish proof ... loss as a whole."

There's the reasoning of the British Columbia Court of Appeal in Infineon cited:

"Certification of an aggregate monetary award as a common issue in claim for disgorgement of the benefits of the wrongful conduct without an antecedent liability finding. Rather, the aggregate assessment would establish concurrently, both that the defendant benefited from its wrongful conduct and the extent of the benefit."

Rothstein, J says:

"With respect, I do not agree. The aggregate damages provision ... relate to remedy and are procedural. They cannot be used to establish liability."

That is something that is said against us, of course, by the TOCs.

Now, sir, I am going to say, in my submissions, that we don't need the aggregate damages to do all that work in this case, to establish liability. But we will say that UK law in fact goes further than this, when we look at Merricks, because of what -- in fact, both Lord Briggs for the majority and the minority say about the aggregate damages provisions of the competition impact.

Anyway, we say that we have ample evidence of liability and causation, even on the disclosure we have had so far. Further, we have in fact a more puissant measure in the Competition Act than even in Pro-Sys.

Just briefly before the luncheon adjournment, I wonder whether I would be able to finish Canadian. I was perhaps a little --

**THE PRESIDENT:** Yes, go on.

**MR MOSER:** I will try to finish with Canada.

**THE PRESIDENT:** Yes.

**MR MOSER:** Supreme Court in Vivendi is behind 15. Vivendi is the one that deals with the Quebec law, and the Quebec law is as we see at page 3073, the one of -- paragraph 2 of the judgment: identical, similar or related. So that's the one

most closely approximating to us.

In Vivendi, there's a citation at 41, again of Dutton and what Chief Justice McLachlin said.

We have looked at the underlying question allowing the suit to proceed and so forth and so on.

There's an interesting comment at page 3086, by the first hole punch:

"It is quite possible the determination of common issues does not lead to the complete resolution of the case, that it results instead in small trials at the stage of the individual settlement of the claims."

At 50, on page 3088:

"Recourse of the members raise identical, similar or related questions of law or fact. Two observations are in order. First, this paragraph provides that a class action can be authorised only if the questions are common. Nowhere has the legislature stated that there must be common answers."

Which is another point that we have made in our skeleton.

At 53, on page 3089:

"Although the expression 'common issues' is frequently used by Quebec judges and authors, its content is not exactly the same as that of the expression 'identical, similar or related questions of law or fact'. It would be difficult to argue that a question that is merely related or similar could always meet the common issue requirement of the common law provinces. The test that applies in Quebec law therefore seems to be less stringent. Because the differences in the wording of the applicable legislation, the case law on class actions, is not determinative by the application of the criterion ... concerned."

I think the President was ahead of the judges on that point.

At 58, there's a reference to these requirements being flexible. As a result, even

where circumstances vary from one group member to another, a class action can be authorised if some of the questions are common.

Again, 59, the conclusion that common questions do not have to lead to common answers.

**THE PRESIDENT:** Yes, just a minute. **(Pause)**

And the rest of 58, I suppose: the Applicant must show an aspect of the case lends itself to a collective decision once a decision has been reached on that aspect ... partly ... resolved a not insignificant portion of the dispute. Yes.

**MR MOSER:** Yes, indeed. Unless that question would play only an insignificant role, et cetera, it's not necessarily a question to make a complete resolution of the case possible.

Of course we say we are considerably a fortiori of that in our case, where we say all of the issues -- all the issues that matter are common issues and will lead to a complete resolution of the case.

Then finally for Canada -- I am mindful of the time, sir. Do you want me to deal with it --

**THE PRESIDENT:** This is your last Canadian case, is it?

**MR MOSER:** It is.

**THE PRESIDENT:** I think why don't you do that. This won't be more than ten minutes, will it?

**MR MOSER:** It will not.

**THE PRESIDENT:** No.

**MR MOSER:** So that is at the end of bundle A6, authorities bundle 6, behind the tab called E, E1. It's the only addition to the bundle in this matter since the bundles were first delivered. To the authorities, anyway.

**THE PRESIDENT:** Yes.

**MR MOSER:** It's the Supreme Court of Canada. It's 2019. At page 3320, it's certification of the class proceedings for -- against defendants who manufacture optical disc drives and ODD products, who are alleged to have conspired to fix prices for six years.

I would like to jump in, at 3383, certifying loss as a common issue:

"91. Godfrey sought to certify several loss-related questions, common issues, principally whether the class members suffered economic loss. It was stated broadly enough that they could be taken as asking whether all class members suffered economic loss or whether any class members suffered economic loss. Because they could be taken two different ways, they might follow in the common issues ... be answered in different ways."

At 92, how the certifications are certified. Second sentence:

"The question of whether any class member suffered loss, or whether all class members suffered loss, fulfil the requirements of a common question ... he erred and argues that Microsoft requires, for loss to be certified as a common issue, that a plaintiff's expert methodology be capable, either of showing loss to each and every class member or of distinguishing between those class members who suffered loss and those who did not."

That's exactly what is being said against us in this case.

Godfrey's response is at 93. 94:

"The appropriate standard for certifying loss as a common issue at the certification stage is a question of law to be reviewed on appeal for correctness. If I conclude the certification judge identified the correct standard ... may not be disturbed, absent a palpable error."

So that's the appeal task. What we see following, 95 and following, is a discussion of the methodology of the expert.

At 101, it is concluded that, in that case, Dr Reutter didn't resile from an opinion that all class members would be impacted, but we are not so interested in that. But we are more interested in 102, at 3389:

"In any event, were Dr Reutter's methodology incapable of showing loss to every class member, as I explained below, it is not necessary, in order to support certifying loss as a common question, that a plaintiff's expert's methodology established that each and every class member suffered a loss. Nor is it necessary to identify those class members who suffered no loss so as to distinguish them from those who did. In order for loss-related questions to be certified as common issues, a plaintiff's expert methodology need only be sufficiently credible or plausible to establish loss reach the requisite purchaser level."

There is then a citation from Microsoft at 104, Western Canadian Shopping again. Vivendi is cited at 105, the common success requirement should be applied flexible. It does not note that success for one class member must mean success for all. But rather, that success for one class member must not mean failure for another.

So it would be, even on the worst-case scenario, that some class members in our case did not suffer loss, then it doesn't mean that success for one means failure for another. Just some would be successful and some not.

Citation from Microsoft. Then 107 is an important bit:

"While there may be some room for debate arising from the references to class-wide basis in the above passages, in my view the court was employing the term class-wide basis synonymously with indirect purchaser [the facts of that case of course] ... Microsoft therefore directs that for a court to certify loss-related questions as common issues in a price fixing class proceeding, it must be satisfied that the plaintiff has shown a plausible methodology to establish that

loss reached one or more purchasers. That is, claimants at the purchaser level. For indirect purchases, this would involve demonstrating that direct purchasers passed on the overcharge."

There's comment at 108:

"Showing loss reached the level satisfies the criteria for certifying a common issue."

At 109:

"When thinking about a proposed common question, whether proposed common question would advance the litigation, it is the perspective of the litigation not the plaintiff that matters. The common issues trial has the potential to either determine liability or terminate litigation. Either scenario advances the litigation towards resolution. Here, if it cannot be shown that the loss was suffered by any purchasers, then none have a cause of action. The action to all would fail."

Well of course, on any view, it can't be said that we haven't got a reasonable -- more than non-fanciful case that there was loss suffered by some purchasers, but we say the vast majority.

**THE PRESIDENT:** But this is going to, as I understand it, the passage you have read -- we have not got to section 4 of the judgment -- to what can happen in Canada, as I understand it, that they can have a common issues trial. So, for example, you could have a trial on: Was the alleged conduct of the defendants, Proposed Defendants, an abuse and a breach of section ... the chapter 2 prohibition under section 18?

That might be a common question. They say it isn't, but you may say it is. But then the collective proceedings go so far, and at that point you then revert to having individual trials by all the class members, if that's feasible.

So I think that's what they are looking at in terms of a common issue, and hence the reference "advancing litigation" and a common issues trial, as referred to in

paragraph 109.

The court then goes on to look at aggregate damages --

**MR MOSER:** Yes.

**THE PRESIDENT:** -- in section 4 of the judgment.

**MR MOSER:** On aggregate damages, the court goes on to find that it does not agree with the use of the aggregate damages provisions, other than to distribute damages to class members. So it doesn't agree with a procedural advantage argument that you can order aggregate damages where it would be impractical to identify the members of the class.

So that's the situation that we have also seen in the previous authority, that we saw in Vivendi. We of course say that our law goes further. But I do not rely on this authority purely to say, "Well, that's what you do in a pass-on case where you then break up into a number of different claims at the end".

When I say that you have to establish a class-wide loss in the Godfrey sense, the class-wide loss includes cases where not every member of the class has suffered loss. Because if it's said against me that you can't establish a class-wide loss, I say, "Oh, I can", because all I have to establish, at least for that stage, is I have to establish that there is a class-wide loss in the sense that the loss reaches the class, even if not every member of that class will in the end be shown to have suffered a loss.

So that's my submission. I intend to make that good after lunch by turning to Merricks and our law, which as I see is, in fact, in my submission, more permissive on the aggregate damages provision than Canadian law.

**THE PRESIDENT:** Yes. Shall we say we will resume at 2.10.

**MR MOSER:** I am grateful.

**(1.09 pm)**

**(The luncheon adjournment)**

**(2.13 pm)**

**THE PRESIDENT:** Yes, Mr Moser. We are back on stream.

**MR MOSER:** Sir, thank you. Before I come to Merricks -- which is going to be the last authority that I am going to go to -- it may be convenient if I answer the two questions that the President put to me this morning.

The first one was in relation to the domicile date. The domicile date that we had in the timetable, which I don't think we need to turn up, but which for your note, sirs, is in hearing bundle 1, tab 13, page 423.

The domicile date we had was December 2019, on the basis that that would be one month after the assumed CPO date, which was November 2019.

Accordingly, the domicile date that we are suggesting is one month after the CAT has certified the collective procedure in this case. Which would be --

**THE PRESIDENT:** Yes.

**MR MOSER:** The second question --

**THE PRESIDENT:** The logic of that, just so I understand it, of doing it, is that those are people who are in the UK now, although they may not have been when they took the journeys?

**MR MOSER:** They may not have been when they took the journeys but, as ever, it's a proxy, and do you err on the side of excluding people where there's a risk that a minority might be included who were not here, or a majority might be excluded who were here?

We submit that's going to be -- because it's an ongoing infringement, at least to some extent ongoing, that's an appropriate date.

**THE PRESIDENT:** Yes.

**MR MOSER:** In relation to the second question, they didn't buy boundary fares, but

they purchased a point-to-point fare, how does that fit in with the way the aggregate damages have been calculated.

Perhaps first to clarify, I think it's tolerably clear but First MTR make this point in their skeleton, when we are talking about point-to-point fares in this context then we mean a very specific kind of point-to-point fare, which is the one from the station closest to the outer boundary, sometimes to the outside, not point-to-point fares generally, which of course are very well --

**THE PRESIDENT:** Yes.

**MR MOSER:** The short answer is that once we have disclosure then Mr Holt's damages calculation will be based not on his current estimate of total journeys made and their distribution across the ticket types, which is what he currently refers to in his report, but on data based on actual tickets sold during the relevant period.

That's what is recorded in a database called LENNON.

The damages calculation will then be in essence the sum of all the individual damages calculated for each actual ticket sold that fits within the definition of an in-scope journey.

If that ticket was bought as a point-to-point fare from a near boundary station, then that is what would form the basis for the damages calculation for that type of journey. The price of that ticket is then compared to the boundary fare and the loss is the difference.

In those cases, if one accepts that that is a relevant category and that it's within the final definition, in those cases presumably it would be relatively low, the PDs allege zero in some cases, but that would be a matter for evidence. That's how that will be adjusted, so that would not be the full boundary fare reduction, but if somebody has tried to do the best they can by --

**THE PRESIDENT:** I mean, would one -- it's not clear to me one would know -- that you would know that a ticket, so many tickets, have been bought as between the station at the edge of zone 5 and wherever it is, any station right outside the zones, but I don't know how one would know that that was a ticket that was bought for use with a Travelcard, you wouldn't know.

**MR MOSER:** You would have to make a reasonable estimation, sir.

**THE PRESIDENT:** I don't understand, you just know that so many -- it's something we might ask Mr Holt to explain, because I don't think that's something he has discussed. How one would estimate that, on what basis one could make that estimation.

**MR MOSER:** Indeed. What we have I think said somewhere, it may even be in our skeleton or the reply, how often such -- what we say is how often such fares were used for journeys will be apparent when you compare the number of tickets sold for travel from a near boundary station against the footfall of these stations.

If they are aligned, then it seems unlikely that there is any real incidence of such behaviour. If there's a noticeable discrepancy between the tickets actually bought and people who use the station, then you can estimate the incidence of the use of point-to-point fares in that way.

**THE PRESIDENT:** The reason I asked about point to point, it seems to me that doesn't come within your basic concept of abuse, namely people who have paid twice. Because they haven't paid twice. They might have bought a slightly more expensive point to point, possibly, than the boundary fare, although there's some evidence that the price of boundary fares is fixed to equate to the point-to-point fare, giving point to point the special meaning that you rightly indicated. But they are not people who have paid twice, they are just people

who have paid, perhaps, a bit more than they might have done, or perhaps not. The alternative is to say that the class members should not include people within that special point to point category.

**MR MOSER:** Indeed, sir, as we will see, the answer to many of these things is that the class can be adjusted.

**THE PRESIDENT:** Yes, well I am just testing as to whether, given that -- I am not even sure whether it comes within your basic concept of abuse. Someone who's bought a point-to-point fare.

**MR MOSER:** Taking it in stages, they come within the definition because they will be Travelcard holders who have had an outward journey across the boundary zones and they haven't bought a boundary fare, because they have bought a point to point.

If such individuals exist at all in any than the most de minimis of ways, which is a matter for evidence, then it is right to say that they will not have been double charged. They will have been overcharged.

**THE PRESIDENT:** Well they may have been.

**MR MOSER:** They may have been. There's an allegation that in fact it's a difference of zero. That's not going to be resolvable at this stage of the --

**THE PRESIDENT:** An overcharge is not just paying a little more than you might have done, it's not excessive pricing in itself, it has to be unfair pricing and it's generally a significant excess.

I am not quite sure -- you said you have left abuse, but the way you explained abuse, how those individuals, there may be few, there may be more than few, actually are the victims, if that's the right word, of an abuse.

**MR MOSER:** It seems to us that they are likely to be a very small category.

**THE PRESIDENT:** Yes.

**MR MOSER:** Hence I say in the end there can be an adjustment made.

**THE PRESIDENT:** I mean, if they have not had an abuse, it would be more appropriate simply to exclude them from the class.

**MR MOSER:** Sir, we'll obviously consider that. The best I think I can do today on that point is that I can say: over the period, and in relation to the numbers, if this is really a common form of behaviour amongst the consumers which they are driven to by the unavailability of boundary fares then collectively the loss might be very great.

Either the whole category is non-existent or de minimis, or, if it is significant, then one way of viewing it, holistically, would be to say it may be significant.

I obviously take your point, sir, that these are then not part of my egregious double charging allegation.

**THE PRESIDENT:** Well there is no double charging and I am not quite sure what the abuse is. Unless it's significantly more than the boundary fare. You have had a chance to look at that, because you know what the boundary fares are and you know what the point-to-point fares are. I don't see much suggesting that it is.

Perhaps we will park that and come back to it and you can reflect on it.

Can I give you one other thing to reflect on, which is a small legal point. At the back of my mind is some recollection that where you have a continuing breach, which assumes it is what you say it is, in other words that continues beyond the date of the issue of the claim, and on your case of course every time one of these tickets is purchased that's an abuse. So it's a continuing tort, like nuisance sometimes.

You can only claim for loss up to the date of the issue of the claim form, and normally you deal with the fact that there's further loss after the issue of the claim form

by doing what you originally sought to do, quite reasonably, which is to seek a declaration and get your loss up to the claim form, and then you go to the defendants and say, "Well, look, we've got our declaration, pay us for the subsequent loss", and if they don't, you start another action and get summary judgment.

You can't get a declaration because of this restriction in the CAT's jurisdiction, so you are asking for the loss to continue up to judgment, effectively.

Are you entitled to do that? I am not sure of the answer to that, quite genuinely, and it may be that between you all you will come up with what the position is.

As it happens, as we all know, this past year has seen an absolutely momentous drop in the volume of rail traffic, for obvious reasons, so that it may be that the loss in 2020 is pretty insignificant, because people just weren't travelling, although at the moment I think your case started in about some time in 2019, April, is it, or February 2019?

So there is probably another year of the same order of annual loss before the coronavirus crisis hit everyone.

At some point, perhaps you can just see if you can find anything on that.

But that's, in a sense, a diversion from the main issues.

Thank you for that. You want us to look at Merricks?

**MR MOSER:** I do, sir. Where do we find it?

**THE PRESIDENT:** Do you want to go to the Supreme Court or --

**MR MOSER:** I would suggest we go straight to the Supreme Court.

**THE PRESIDENT:** Yes.

**MR MOSER:** If anyone wants me to take them to any other aspect, I'm happy to look --

**THE PRESIDENT:** I think it's in authorities bundle 5.

**MR MOSER:** It is, tab 59.

This was the case of the unlawful pass-on in relation to --

**THE PRESIDENT:** Yes, I think we've all -- obviously I'm familiar with it but I think my two colleagues on the Tribunal have also read it in preparation for this hearing.

**MR MOSER:** I think we have probably all read it, sir.

**THE PRESIDENT:** I am sure counsel has read it, I would be horrified if you haven't, but I am just saying that normally the fact that I'm familiar with it doesn't necessarily mean those sitting with me are and you might need to take it more slowly, but in this case, as it's so central, you can assume that we have read it and take us to the relevant bit.

**MR MOSER:** Indeed. I would be particularly surprised if Mr Harris had not read it. And of course he was wonderfully successful, quite rightly so.

Sir, the general remarks of Lord Briggs on behalf of the majority are in the introductory section on page 2577. They do generally echo, unsurprisingly, the things I read from the Supreme Court in Canada.

We can see between E and F:

"The prospect that the rights of consumers can be vindicated in that way also serves to act as a disincentive ..."

At G, "The claims need not be identical ..."

Same, similar or related, there we are.

**THE PRESIDENT:** Yes.

**MR MOSER:** "... damages provides just compensation for the loss suffered by the claimant class as a whole, but the amount need not be computed by reference to an assessment of the amount of damages recoverable by each member of the class individually."

**THE PRESIDENT:** Yes.

**MR MOSER:** We have the familiar discussion of same, similar or related. There's

a description of the proceedings, which I propose to skip over.

There is the reference, at 19 and following, page 2581 following, to the significant Canadian jurisprudence, about similar although not identical statutory schemes, and reference to the Act. And promoting fairness by enabling consumers and businesses who have suffered loss due to anticompetitive behaviour to obtain redress. That's at page 33B.

We have the statutory purpose. At 26, on page 2584 Mr Harris will no doubt want me to point out that the Supreme Court said that of course rules 41 and 43 provide the CAT with the power to strike out. That's no news to the Tribunal.

There's reference to the guidance at paragraph 29, the CAT guidance, force of a practice direction, strength of the claims ... will be more immediately perceptible in a opt out, does not require the Tribunal to conduct a full Merricks assessment, that was of course more of an issue in that case.

There was then the discussion of the compensatory principle and where matters had gone in the Court of Appeal, in particular, 36, Pro-Sys being treated and the discussion of Pro-Sys and the Canadian jurisprudence, which I have already taken you to today.

There's the Rothstein J Pro-Sys citation at page 4 1, F to G.

Again, the some basis in fact test, the some basis in fact test we are told at 41 is not an onerous one, we have seen that in various places.

42, Lord Briggs regards the Canadian jurisprudence as persuasive:

"... not only because of the greater experience of their courts ... but also because of the substantial similarity of purpose underlying both their legislation and ours."

There's an analysis at 45 following:

The rules are:

"... designed to provide access to justice for that purpose where the ordinary forms of

individual civil claim have proved inadequate for the purpose."

Last sentence:

"It follows that it should not lightly be assumed that the collective process imposes restrictions upon claimants as a class which the law and rules of procedure for individual claims would not impose."

There is then a discussion of that case, which was a follow-on claim.

At 47:

"Where in ordinary civil proceedings a claimant establishes an entitlement to trial in that sense [that's a triable issue], the court does not then deprive the claimant of a trial merely because of forensic difficulties in quantifying damages, once there is a sufficient basis to demonstrate a triable issue whether some more than nominal loss has been suffered. Once that hurdle is passed, the claimant is entitled to have the court quantify their loss, almost ex debito justitiae. There are cases where the court has to do the best it can upon the basis of exiguous evidence. There are cases, such as general damages for pain and suffering ..."

Where general tariffs have been developed. Then, of course, there is the reference to McGregor on Damages and the famous example of Chaplin v Hicks which is where Vaughan Williams LJ said the jury in those days must do the best they can.

**THE PRESIDENT:** I don't think any of this is controversial. If we go straight to 51.

**MR MOSER:** Yes. Indeed, well 50 is assisted by expert -- you make use of the best evidence available.

**THE PRESIDENT:** Evidence available, quite broad assumptions.

**MR MOSER:** Indeed.

51 is broad axe, broad brush and Watson Laidlaw, Mr Justice Popplewell:

"The 'broad axe' metaphor appears to originate in Scotland in the 19th century. The

more creative painting metaphor of a 'broad brush' is sometimes used. In either event the sense is clear. The court will not allow an unreasonable insistence on precision to defeat the justice of compensating a claimant for infringement of his rights."

There's reference then to the Commission guide.

At 53:

"... the twin reasons of vindicating the claimant and exacting appropriate payment from defendant reflect the wrong done."

Again, doing the best, 54, one can on the available evidence. It's not in any way watered down in collective proceedings:

"Nor that the gatekeeping function of the CAT at the certification stage should be an occasion when a case which has not failed the strike out or summary judgment tests should nonetheless not go to trial because of difficulties in the quantification of damages."

Then there is in relation to the certification at 56 the suitability is said to be in a relative sense, ie suitable to be collective rather than individual.

Then at 57:

"The same analysis leads to the same conclusion about the meaning of 'suitable for an award of aggregate damages' under rule 79(2)(f). The pursuit of a multitude of individually assessed claims for damages, which is all that is possible in individual claims under the ordinary civil procedure, is both burdensome for the court and usually disproportionate for the parties. Individually assessed damages may also be pursued in collective proceedings, but the alternative aggregate basis radically dissolves those disadvantages, both for the court and for ... the parties. In general, although there may be exceptions, defendants are only interested in the quantification of their overall (ie aggregate) liability.

For the claimants the choice between individual or aggregate assessment will usually be a question of proportionality."

There is the reference to another basic feature of the law and procedure for determination of civil claims, the compensatory principle.

At C, really the ratio on this point:

"Where aggregate damages are to be awarded, section 47C of the Act removes the ordinary requirement for the separate assessment of each claimant's loss in the plainest terms. Nothing in the provisions of the Act or the Rules in relation to the distribution of a collective award among the class puts it back again."

I pause there just to say that that means that when looking at aggregate damages under the Act, the majority plainly is not looking only at distribution, it is looking at the logically prior causative questions.

**THE PRESIDENT:** Sorry, I didn't quite follow what you have just said. They are obviously looking at aggregate damages and saying well you don't have to know what each individual suffered to calculate aggregate damages, and you can estimate and you can do it on the best evidence available and you can use the broad axe or broad brush.

They are saying all that. I am not sure what else it is that you are suggesting is being said.

**MR MOSER:** What I am suggesting is that, for instance, you are looking not only at distribution but also at quantification of damages. In relation to the aggregation.

**THE PRESIDENT:** Yes.

**MR MOSER:** You are not just looking at the back end of things.

**THE PRESIDENT:** You are looking at the quantification of the aggregate sum --

**MR MOSER:** Yes.

**THE PRESIDENT:** -- and you don't, to do that, have to look at what each individual

might have suffered. But you still have to quantify the aggregate sum --

**MR MOSER:** Oh, yes, absolutely.

**THE PRESIDENT:** -- in a way that's fair, but you do it with recognising the imprecision of the exercise and with assumptions and estimates.

**MR MOSER:** Exactly. That's exactly what I am saying, sir.

We are doing it with, in this case, the expert advice of Mr Holt, he will apply his estimates and he will assess based on his methodology.

We are then told, in relation to distribution, all that has to be done is it has to be fair and reasonable.

Strike out is to be dealt with separately.

There's then, over the page at 2597, I think the next relevant point, at H, is what I mentioned earlier this morning, the multifactorial balancing exercise in relation to certification.

At A, common issue question, B, the suitability of the claimants for aggregate damages isn't a hurdle, it's a factor to be weighed in the balance and so forth.

There's no requirement, they agreed, that all significant issues should be common issues.

Then, again, his Lordship returns to the quantification of damages and the Tribunal is doing what it can with the available evidence, at paragraph 72 and following.

In that case it was said that the data was incomplete, difficult to interpret, it was very burdensome and expensive.

At 73 the majority found:

"The fact that data is likely to turn out to be incomplete and difficult to interpret ...burdensome and expensive processes of disclosure are not good reasons for a court or Tribunal refusing a trial ..."

At 74:

"The incompleteness of data and the difficulties of interpreting what survives are frequent problems with which the courts and Tribunals wrestle on a daily basis."

This harks back to what his Lordship said earlier, about the court not throwing up its hands.

**THE PRESIDENT:** Yes.

**MR MOSER:** Then over the page at 76, the compensatory principle is not essential in distribution. Having dealt with not just distribution but the prior stages, at 76 Lord Briggs addresses distribution directly in the compensatory principle, there is:

"... no requirement to assess individual loss in an aggregate damages case and nothing ... puts it back ... the CAT took the opposite view ..."

Obviously they disagreed. At 77:

"A central purpose of the power to award aggregate damages in collective proceedings is to avoid the need for individual assessment of loss."

Of course, we rely on that in this case, which indeed was stood behind Merricks, not least for that very reason.

**THE PRESIDENT:** Can I just ask you to read on, 77.

**MR MOSER:** "While there may be many cases in which some approximation towards individual loss may be achieved by a proposed distribution method, there will be some where the mechanics will be likely to be so difficult and disproportionate, eg because of the modest amounts likely to be recovered by individuals in a large class, that some other method may be more reasonable, fair and therefore more just. For that purpose the statutory scheme provides scope for members within the class to be heard about the proposed distribution method. In many cases the selection of the fairest method will ... be left until the size of the class and the amount of the aggregate damages are known."

**THE PRESIDENT:** Yes.

**MR MOSER:** There's then the reference to prematurity. In some cases -- that's at 80 -- suitability will be better addressed when the whole proposed scheme, including distribution proposals, are looked at in the round.

One can look at the distribution proposals at the certification stage, even though one does not have to. Nothing here militated against certification.

**THE PRESIDENT:** Yes, that's of course a distinction with the present case, where I think all the Proposed Defendants say the proposed distribution method does militate against certification.

**MR MOSER:** Yes, but --

**THE PRESIDENT:** You will come on to that in due course.

**MR MOSER:** I will come on to that in due course and what we say in brief is that it is -- well it has two --

**THE PRESIDENT:** Why don't you come back to it. I do not want to take you out of order, I just want to flag that because that is a separate topic.

Let's complete Merricks.

**MR MOSER:** Let's it complete Merricks, because I have reached the end of Lord Briggs, apart from the disposition, and in relation to the death of Lord Kerr.

Lords Sales and Leggatt of course disagreed. We do say, and I think I have said it already this morning, that there is a part of Lord Sales and Leggatt's opinion that is not dissenting, and that's the parts where they agree.

If we look at page 2603 at the top, between A and B:

"We agree with Lord Briggs JSC and the Court of Appeal that the CAT's second reason was unsound."

That's the bit about aggregate damages.

**MR HOLMES:** Sorry, which paragraph are you on?

**MR MOSER:** I am on paragraph 83, but at the top of page 53 of the report, 2603.

**THE PRESIDENT:** This is the distribution point?

**MR MOSER:** The distribution point, yes.

**THE PRESIDENT:** Yes. Distribution doesn't have to reflect individual loss.

**MR MOSER:** Yes.

Then there is a reference to the CAT's second reason -- that's distribution of aggregate damages.

There is a section on aggregate damages in the dissenting opinions. That's starting at paragraph 93. Talking about the second major innovation in terms of UK law effected by 47C(2).

What Lords Sales and Leggatt say, 95:

"A provision for aggregate damages may, however, go further and serve an additional purpose. It may also permit liability to be established on a class-wide basis without the need for individual members of the class to prove that they have suffered loss, even though this would otherwise be an essential element of their claim."

Over the page, 57:

"An aggregate damages provision may dispense with this requirement by permitting liability towards all the members of a class to be established by proof that the class as a whole has suffered loss without the need to show that any individual member of the class has done so."

There is then the reference to how this is limited in Canada, and I pre-advertised this point when I was looking at Pro-Sys this morning, but at 97 their Lordships say:

"The UK legislation is not limited in this way. Section 47C(2) of the Act contains no wording comparable to that of section 29(1)(b) of the British Columbia [CPA] ... Section 47C(2) is phrased in broad terms and is properly read as dispensing

with the requirement to undertake 'an assessment of the amount of damages recoverable in respect of the claim of each represented person' for all purposes antecedent to an award of damages, including proof of liability as well as the quantification of loss. Such an interpretation better accords both with the language used and with the statutory objective of facilitating the recovery of loss caused to consumers by anti-competitive behaviour."

It's my submission that this is not an instance where Lord Sales and Leggatt were in conflict with Lord Briggs and the majority.

**THE PRESIDENT:** No, I see that.

**MR MOSER:** Of course I rely on the fact that the UK legislation is broader in that way than in Canada.

One can see the good sense, if I may put it that way, in a case such as the present one. That where you have a class of many millions of members, each of whom has suffered a relatively small loss, it would entirely scupper the well-known purpose of the legislation if despite the course of action and the strength of case and the obvious abuse, one were then obliged, first to identify the individual causation and loss for each of the 2.5, or however many it is, million class members, and then to distinguish, on an individual basis, between the class members who did and didn't suffer loss. It would simply be yet another unmanageable hurdle for the millions of consumers in cases of this kind.

Putting it in headline terms, I will come back to this when discussing my learned friend's skeleton argument, but in headline terms I repeat where I have reached in relation to this case.

There's no need, first, to have a class of only injured members, I get that from all of the Canadian cases.

As far as causation is concerned -- bear in mind that our primary submission is that

causation in this case is so stark that it's overwhelmingly likely that we will establish breach and causation in relation to the small number of boundary fares actually sold.

In any event, the individual taking of evidence is not necessary or appropriate. We submit that must be right.

First because all the points in this case are capable of being argued out at the level of the expert evidence, the reasonable estimations of damages, at trial.

Secondly, because it would be wholly disproportionate and really a case-ending point, a jurisdiction-ending point, for any consumer claim of this kind. One need only imagine if -- I think it's Mr Harris who makes the point in his skeleton argument about disclosure and cross-examination, but with great respect, Mr Harris cannot get disclosure from and cross-examine 2.5 million people for the next X years in front of the Tribunal and ask each one their own causation story, "You say you visited your auntie Ethel in Brighton on the evening of 16 December 2016?"

The witness says, "Oh, yes, I did".

"That was your auntie Ethel's bridge night, wasn't it?"

**THE PRESIDENT:** We have the point.

**MR MOSER:** Yes, forgive me, but it's in truth impossible and it goes against the thrust of the purpose of the interpretation of the statute adopted by the Supreme Court.

It's the opposite of the thrust of Merricks. It puts one in mind of the famous remark by Judge Posner in Carnegie where he said:

"The realistic alternative to a class action is not 17 million individual suits but zero individual suits, as only a lunatic or a fanatic sues for $30".

That maps entirely onto our situation.

**THE PRESIDENT:** Yes.

**MR MOSER:** To be clear, the TOCs are of course not prevented from adducing any evidence they wish at trial to argue that this or that is an unreasonable assumption, or an unsuitable head of loss, and indeed the President may already have, depending on where we land on that, hit on exactly an example of that kind of point in saying well this business of point-to-point fares, there is a problem here.

That's going to be based on real evidence, it's going to be based on real evidence as to what a point-to-point fare at the boundary is worth, and if I am wrong then point-to-point fares at the boundary are simply not going to be a part of this because, on any view, the difference is not going to amount to an abuse.

**THE PRESIDENT:** Yes.

**MR MOSER:** Those sorts of points can be made about each and every one of the things that the other side want to make against us, the points the other side wants to make against us.

There's no right in this case to individual evidence, because there's no need for individual evidence to prevent over-recovery.

The rights of the defence are not in peril, because in the end it's only going to be for journeys that are in scope for which there will be damages.

The TOCs' own liability is no greater or lesser by knowing exactly which of the individuals in the class suffered how much. That's the point that's also made in the authorities, that that is all dealt with then at the stage of distribution. But by then, the defendants really no longer have any legitimate concerns, because their damages have been assessed on the basis of the -- sir, as you put it to me, the methodology and the estimation and the assessments based on all of the evidence.

That's where I submit we have landed at the end of all of these authorities, including Merricks.

Sir, for the moment I propose to leave that there and turn to our methodology -- if the CAT wants me to go through our methodology -- and then the TOCs' skeleton arguments.

**THE PRESIDENT:** Yes.

**MR MOSER:** I am grateful.

**THE PRESIDENT:** When you say methodology, is that, as it were, the --

**MR MOSER:** The expert report.

**THE PRESIDENT:** The expert report, yes. So you have done cause of action?

**MR MOSER:** That's right. I have done cause of action. I have mapped out where I want to get to with our reasonable assessment methodology.

Now I would like to just go at a reasonably high level through the expert report, unless and until you tell me that I am telling you things that you have already read sufficiently.

Mr Holt of AlixPartners has produced two reports, his original report supporting the claim form, which is at core bundle 5, and then the second report at 6.

The first expert's report, which starts at page 79, has an executive summary starting at 85. We see that that starts with "Market definition" and "Dominance". We need not go there.

At 1.4, which starts at page 88, we have the methodology, some of which I have already read to you this morning. That's the methodology for estimating aggregate damages, which is then set out in greater detail for your note at section 6. It broadly has four steps.

The first step, at 1.4.4, seeks to estimate the total number of tickets sold during the period, originating within the travel zone and terminating beyond the outer

boundary.

Table 1.3 shows us that in summary we are looking at about 100 million journeys on South Western and 67 million on South Eastern.

Mr Holt has to estimate this, and also the distribution of these tickets across different ticket types, peak, off-peak, single, return from a number of sources and make a number of assumptions for present purposes. He tells us that, at the end he will not have to estimate because he says the actual data -- as I think I mentioned earlier -- exists in the hands of the TOCs in the form of the LENNON database, that's "LENNON" as in John.

Then there's step 2. 1.4.7, that seeks to estimate for each of the journeys identified in step 1 what saving would have resulted from a boundary fare. At its most basic, it's obvious. You compare the price of the one with the full journey fare, for instance, and so if one seeks an example, there is an example given at page 163 of this bundle, how that works.

In table 6.16, the savings from Clapham Junction to Wraysbury, which is just outside the zone, near Windsor Castle. You would find that a boundary fare from the edge of zone 4 -- so that's the middle column, "boundary zone 4" at the top. Going down the left-hand column, "anytime day return" is five lines down, and one sees where they meet that that would result in a saving of £5, where a boundary fare would be £5 cheaper than a full journey fare. At the moment these calculations -- well, always, I think, these calculations are made on the basis of the atoc fares data that covers all the fares that exist, 55 million fares and 1,000 tickets.

Mr Holt then calculates an average -- this is now going back into 1.4 at the beginning -- and he uses a weighting of all of the individual savings is calculated by how often the relevant tickets are sold. We see at table 1.4 on page 90 the

weighted average boundary fare saving per journey 2015 to 2019 is £5.09 for South Western and £4.84 for South Eastern.

In most cases, that's the extent of it.

In some cases, there are a couple of assumptions that need to be made. In about 27 per cent of the cases for South Western and 12 per cent for South Eastern the boundary fares do not exist in the database. In those cases Mr Holt has estimated the price of the missing boundary fares. Of course it's going to be, we say, a matter for trial as to whether -- as part of the abuse and therefore a counterfactual, the TOCs would have to provide for boundary fares in those cases.

Then, in a small number of cases, Mr Holt has identified boundary fares were actually more expensive. That is in 0.9 per cent of fares for South Eastern and 0.1 per cent for South Western. We see that, by the way, at page 160 -- I am sorry to be jumping about a bit, but that's where this is explained.

At page 160 --

**MR HOLMES:** Sorry, again, which paragraph, please?

**MR MOSER:** Paragraph 6.2.48. A summary of boundary fare saving methodology. We see (a) deals with this issue of negative savings, a lovely term.

At the top of page 161, Mr Holt tells us there are 2,800 negative boundary zone savings, in order boundary zones not cheaper, that's 0.9 per cent of the total and 434 for South West, 0.1 per cent of the total.

So he could make an adjustment, of course that won't make a significant difference. Then there's the argument about non-existent fares I have just mentioned.

To demonstrate how this adjustment is then catered for.

**THE PRESIDENT:** Just pausing for a moment, the non-existent fares, unlike the negative savings, is more significant, isn't it?

**MR MOSER:** Yes.

**THE PRESIDENT:** As I understand it, 27.1 per cent of South West and 11.6 of South Eastern.

**MR MOSER:** That's right. That's where we say that they ought to be existent.

**THE PRESIDENT:** Yes.

**MR MOSER:** If we turn over the page to 163, this is a table which shows how the raw price differences that we looked at earlier, between Clapham and Wraysbury have been worked out. Over the page at 165, the same table I've already shown you, but now the same table with the adjustments for non-existent and negative savings. We see -- it so happens not to make a difference on the particular journey, but the blue shading is the missing boundary fares, the negative savings is the pink shading, it's adjusted for and weighted and we will see that on this particular route a Travelcard holder travelling could on average have saved £2.07 using a boundary fare.

So that's step two. If we go back to page 90 --

**PROFESSOR MASON:** Mr Moser, could I just interject with one question there, since you have raised it. Those boundary fares that are missing in the analysis that you have just described, are they missing only in the atoc database and likely to be found under further disclosure or they're missing?

**MR MOSER:** No, they're missing in the sense that they don't exist.

**PROFESSOR MASON:** Very good, thank you.

**THE PRESIDENT:** In other words there were no boundary fares for those types of ticket?

**PROFESSOR MASON:** That was my understanding, but I just wanted to confirm that with you.

**MR MOSER:** That's very helpful, thank you.

Just to complete the steps, so at step 3 then, just going back to page 90, step 3 --

**THE PRESIDENT:** Before you do that, I thought that the advance fares, you say where there wasn't a boundary fare available, you say there should have been?

**MR MOSER:** Yes.

**THE PRESIDENT:** But in the table 6.18 at page 165, which you have taken us to, there isn't a saving for advance tickets. That's not been factored in, has it?

**MR MOSER:** No, it has not.

**THE PRESIDENT:** I am now unclear what's being done about advance fares and how Mr Holt is treating that.

**MR MOSER:** On this particular route there is no advance fare at all.

**THE PRESIDENT:** I see, there's no advance fare anyway?

**MR MOSER:** That's right. It's well spotted, sir, but it's in a sense therefore not perhaps the most fantastic example of all non-existent --

**THE PRESIDENT:** Yes, I see, and we can see that from table 6.15, I understand, on page 162. Yes. There is no advance fare, yes, I understand. But if there had been, as it were, then Mr Holt would have estimated the boundary fare saving and put it in?

**MR MOSER:** Yes. He says confidently he can do that, and indeed we have seen him do that in circumstances where they exist.

That's steps 1 and 2, which are however not even the most contentious part of this. The most contentious part really is, I sense, step 3, which is, if we look back at paragraph 1.4.10, the estimate of how many journeys are made by Travelcard holders. As the TOCs have stressed, this is not data that's actually recorded. Mr Holt has therefore had to estimate it. Mr Holt chose to do that by looking at the pattern of outward journeys made from the big London rail termini, so passengers arriving by train and then travelling on to somewhere, and

specifically how many of these onward journeys were made by Tube and bus. He's multiplied that with information about how many Tube and bus journeys are made using Travelcards to get an idea of how many arriving rail passengers likely have Travelcards.

**THE PRESIDENT:** Is it just arriving or arriving and departing?

**MR MOSER:** Well, it's arriving because they depart by bus and --

**THE PRESIDENT:** I thought he'd done it on the basis of that survey, the 2011 survey, in large part, which was both incoming and outgoing. It surveyed passengers at London stations. We will come to it no doubt.

**MR MOSER:** We will come to it. At least this bit, as I understand it -- perhaps we can ask him -- it's the arriving rail passengers.

If we look at table 1.5, that shows the results estimated percentage of Travelcard holders on that basis.

That's where the percentage in the table that I handed up first thing this morning --

**THE PRESIDENT:** Sorry, if you stop for a moment. Looking at 1.4.10, the second sentence:

"A boundary fare would only be valid on a journey where the passenger holds a valid Travelcard covering the part of the journey from the origin station to the boundary zone ..."

I don't understand the bit in brackets that follows.

**MR MOSER:** The bit in brackets, I believe, refers to the journeys that are actually excluded in our claim, which is the incoming passengers. But it does include, and that is part of our claim, return fares.

**THE PRESIDENT:** I see, yes, from boundary zone to ... yes, that's the incoming, is it? Yes.

**MR MOSER:** Yes, that's the incoming.

**THE PRESIDENT:** Yes, thank you.

**MR MOSER:** Then there's the summary at table 1.5. The percentages may be familiar from this morning's table. They are estimates of Travelcard in-scope journeys. The decline over the years is because of the result of the increase in adoption of Pay As You Go and contactless more generally.

Then this gives you a reduced number of journey per tickets compared to table 1.3. So you get the relevant journeys for the case.

The potential defendants, Proposed Defendants, of course say, "Oh, this is a terrible proxy, the data is old, some of the termini are operated by other TOCs ..."

The answer for present purposes, indeed I may not need to come back to it, because the answer for this hearing is this is simply a working estimate so as to put a value on these claims.

The overlap will in due course be able to be refined, and this is where Mr Holt's survey comes in, and that is asking rail travellers on outbound London journeys whether they have a Travelcard, and that's explained in Mr Holt's second report. Given that that is at the centre of the TOCs criticisms of Mr Holt, I will turn to that in a moment.

Then for completeness, just to finish this off as quickly as is decent, step 4 is entirely straightforward, subtracting the very small -- this is at 1.4.12 -- number of boundary fares actually sold from the estimated value of the claim.

At table 1.6 there is an estimate of customer harm, that's at page 90. So an estimate of the damages. Total for South Western being 56.9 million and for South Eastern 36.24 million.

We see a comment in 1.4.14 that further to the claim by residents, I estimate a further 2.8 for South Western and 1.7 for South Eastern could be claimed by non-UK residents. They would have to opt in.

The estimate of class members is complicated, or complex at any rate, because the methodology is based on journey times, numbers of journeys. That's explained at 1.5. There's a central estimate for a claim per person, which is -- sorry, there's a range of estimates which is fairly broad, but, again, nothing hinges on these numbers because, as Mr Holt explains, loss is the sum of the losses calculated individually for every ticket sold, and that is something that we will know once we have disclosure.

**THE PRESIDENT:** What you are saying, if I can try and summarise my understanding, is that whether the number of class members is overstated or understated isn't going to affect the aggregate damages on Mr Holt's methodology --

**MR MOSER:** That's right.

**THE PRESIDENT:** -- because it's not calculated in that way. All it will do is affect the calculation of what is the average recovery per class member. Because obviously if there are more members, the average goes down.

Is that right?

**MR MOSER:** That's right.

**THE PRESIDENT:** The calculation of the journeys and the Travelcards, therefore, is also neutral as to whether they are residents or non-residents.

This is just the number of in-scope journeys by people who held Travelcards, is that right, as well?

**MR MOSER:** That's right, sir.

**THE PRESIDENT:** Yes.

**MR MOSER:** That's also part of our answer in relation to overcompensation and so forth. Which is that in aggregate terms there's not going to be overcompensation because we are looking at the numbers of journeys, not at

an uncertain number of class members.

As far as individual --

**PROFESSOR MASON:** Mr Moser, forgive me, sorry, I meant to ask a question a few seconds earlier but my camera stopped working, so if I could just ask a question on the last comment that you made, just for clarification.

I understand that there is independence between the estimate of customer harm and the estimate of the number of class members.

I think you expressed -- the transcript will tell us later -- that you said the uncertainty about the number of class members doesn't affect the customer harm.

Uncertainty has been presented about the number of class members in the form of three scenarios. I just wonder if you could comment briefly on whether such a presentation would be appropriate for the customer harm calculations.

**MR MOSER:** In relation to high, central and low, is the scenario.

**PROFESSOR MASON:** Or some such framing of the uncertainty inherent in the calculation.

**MR MOSER:** I submit not. That the uncertainty about the number of class members arises simply because we have no firm estimate of how many tickets on average were bought by the same person. That has no effect on the damages calculation.

**PROFESSOR MASON:** That I understand. But in calculating the damage, there is a degree of uncertainty in arriving at that calculation. I wondered whether any thought had been given as to how to express that uncertainty.

**MR MOSER:** If I may, I will take -- that's a very helpful thought. If I may, I will take that thought away and come back on it -- as now seems inevitable, I will have to go into tomorrow morning, and I hope that by then I might have a suitable answer.

If for some reason the answer is so sophisticated that I am not qualified to give it, then no doubt Mr Holt will deal with it.

**PROFESSOR MASON:** Indeed, thank you.

**MR MOSER:** I am grateful.

That's really all I planned to say about Mr Holt's first expert report.

Mr Holt's second expert report is at tab 6. That is a responsive report and addresses some of the TOCs' criticisms in relation to, really, two issues. The calculation of savings for individual tickets and the estimate of Travelcard holding patterns, that is what share of potential relevant journeys were made by Travelcard holders.

The first point, the calculation of savings for individual tickets, concerns specific examples, of which the TOCs have given a number, where it is said that allegedly a boundary fare would not have been the best fare. Or where it is said we have calculated the price of a missing boundary fare incorrectly.

In very short summary, we -- this is not Mr Holt but we -- disagree with most of the points made. But in any event, to the extent that any of these arguments prevailed at trial, Mr Holt explains, in his second report, that they could all be adjusted for in his methodology.

For example, if the TOCs are successful in arguing that it was not abusive for them to offer advance boundary fares at all, then purchasers of advance fares can simply be excluded entirely from the class, from the class definition for the loss calculation.

And a regular advance fare can be compared to a regular boundary fare, resulting either in no loss or reduced loss. These adjustments could be made. This is not our primary case but that is what Mr Holt explains if we are wrong in his second report.

Similarly, if the TOCs are successful in arguing well a boundary fare would have to be priced like this, again that's not something where they need individual evidence. Then Mr Holt can determine the price of a missing boundary fare on the basis of any alternative price that they have managed to persuade the court at trial is the appropriate price.

The second, and perhaps more substantial, criticism is the estimate. The damages calculation, which is not known precisely, who needs to be estimated, as is quite standard in competition law cases, and when I say just generally, this is not one of the most complex calculations of competition law damages one has ever seen, or the Tribunal will ever have seen. It's not a question of econometric evidence constructing a scenario within which damages are suffered. We are looking at the differences in ticket prices.

The TOCs say that our damages calculation is itself an impediment to certification, so great in fact that it means we don't even have a cause of action.

As explained earlier, or as submitted earlier, by relation to Merricks, we say that clearly can't be the case, you don't just throw up your hands, all of that. You do the best you can with the evidence that is available for the calculation of damages.

Mr Holt's response to the TOCs criticisms, comes in two parts.

First, Mr Holt -- if I can take you to page 239, this is at 3.1.7, where Mr Holt explains that the quality of a proxy, which is what this is, we have got a proxy, the quality of a proxy needs to be evaluated in two dimensions, with bias being the real concern.

The other dimension is imprecision.

Much of the TOCs criticisms in Mr Holt's evidence here, he says in fact goes to precision. Not to bias. He explains that in his own words, which I am not going to seek to copy.

He engages with the various criticisms levelled against his calculations, then in some detail at 3.2, 3.3 and 3.4.

Again, I am not going to read it out, but I know the CAT has had the benefit of pre-reading, and Mr Holt concludes firmly at 3.4.2 at page 247 that the methodology he proposed in his first report, in his view remains a reasonable one even in the light of the criticisms, and he explains why he thinks his proxy holds good.

This goes back to the discussion in relation to Merricks as to what is needed by way of an estimation and assessment of aggregate damages.

We say this amply satisfies that, it certainly amply satisfies it for the purposes of it being a non-fanciful arguable case, but in fact we say this is the correct way of assessing a consumer case of this type.

**THE PRESIDENT:** Essentially you say there is no data for what one can crudely describe as the overlap, that's to say the number of in-scope journeys made by passengers holding Travelcards, data will indeed probably never become available. It's clear from all the evidence that nobody has the data. So one either, if there is this abuse, gives up and says well it's just all too difficult, we can't work anything out, or, relying on Merricks, one does the best that one can, which has to be by proxies, and Mr Holt has come up with a plausible method for doing it, of course it results in an estimate and it relies on certain assumptions, but that's the only way you can do it and it's not so weak, shaky and lacking in robustness that it should be thrown out?

**MR MOSER:** Exactly.

**THE PRESIDENT:** On the contrary, you would say it's a very good method of doing it, no doubt.

**MR MOSER:** A very good method, it's a survey, and we see in the case law that

surveys is a perfectly respectable way of doing these things --

**THE PRESIDENT:** The survey comes on top, at the moment he's doing it without the survey and then he goes on to talk about the refinement through a survey.

**MR MOSER:** That is true, that is his second point. So first, sir, you are quite right, with respect, the methodology he proposes he says is sound.

**THE PRESIDENT:** Yes.

**MR MOSER:** That chimes with the broad brush or whatever it is. What does one do? Does one simply throw up one's hands? No, that's not the approach of the UK courts. If we look at a case like Chaplin v Hicks, the one thing that was clear in Chaplin v Hicks actually, talking of proxy, is that Ms Chaplin was never going to recover the estimated loss that she eventually recovered, because it was a beauty contest and she would either have won or she would have lost, and the prize I think was £100. We don't know what would have happened. There was a loss of a chance estimate and I can't remember now what the recovery was, but it was somewhere between zero and 100.

So it is with proxy assessments. One makes a reasonable estimation, as Mr Holt explains, often erring on the side of caution to prevent over-recovery.

That is his first point.

His second point, as you rightly correct me, is he explains in more detail, in section 3.6 of his second report, starting at page 251, how the estimate can in any event in due course be refined by relying on a customer survey. So the customer survey isn't everything, it's a refinement and that's about actual Travelcard holding patterns.

He explains the survey, including what he would be likely to ask, at 253, 3.6.7 to 3.6.10. He explains how the results would need to be interpreted at page 254. Mr Holt also points out, at 3.6.2, earlier, as I have already said, it's not at all unusual to

rely on customer surveys:

"Customer surveys are commonly used to understand customers' behaviour and preferences. It is important to note at the outset that surveys are widely used in the rail industry, and more generally to inform the assessment of competition issues. For example, the National Rail Passenger Survey ..."

**THE PRESIDENT:** One of the unfortunate facts of this case, having been delayed for reasons we all know, is that we are now in a somewhat different world, and one can only do a survey, obviously, once rail passenger travel picks up again, and it may be that the method of purchasing that people use has rather changed as a result of the experience of the last 12 months or so. There's no escape from that.

**MR MOSER:** It's already changed, it's already changed, because people now tap in and tap out with contactless payments. So what does that mean for my class? Well, it means that it will most likely significantly underestimate Travelcard holdings, given the gradual decline. That's unfortunate. Mr Holt explains how he will try to make up for it, but it's not, whatever happens, going to be a matter of prejudice to the TOCs. If anything, it will prejudice the claimants. Who, incidentally, ought not to be prejudiced by the passage of time that is none of their fault.

We make that point in relation to the criticism in the skeleton arguments that says well this is all going to be old, times have changed and so on. Well, yes, times have changed, it doesn't mean you can't make a reasonable estimation of what the holding would have been in 2017/2018, for instance.

That's the expert evidence, sir.

What I propose to do, I think ... may I just check ...

**THE PRESIDENT:** Would that be a good moment to take our short break?

**MR MOSER:** It would.

**THE PRESIDENT:** Yes. We will come back at 3.40.

**(3.29 pm)**

**(A short break)**

**(3.41 pm)**

**THE PRESIDENT:** Yes, Mr Moser.

**MR MOSER:** Sir. May I, just at the outset, enquire at what time the Tribunal intends to rise?

**THE PRESIDENT:** We haven't set a time but I think we would, unless we are under a great concern that we are running behind, we would not want to sit beyond 4.30.

**MR MOSER:** I assumed as much. What I am estimating is that within the next 45 minutes, I will deal with the points on the TOCs' skeleton arguments, and possibly also my rather brief comments on their witness evidence. That leave relatively little by way of my -- essentially closing my opening on strike out, probably tomorrow morning, and then making my relatively short remarks on the certification also tomorrow morning.

I say that because really I have made most of my points in going along already. So I am not going to reintroduce all of the points every time about Merricks and so forth. That's my fond hope, let's see how it goes.

What I propose to do next in my menu of things is to deal with the PDs' skeletons and our response. I will not do a page turn but I will refer to points made in the skeleton, usually with a reference to a paragraph in one of them, and our headline responses.

Sir, there is a certain mismatch between the case as I have been setting it out today and the case that my learned friends purport to be responding to in their

skeleton arguments. As I have sought to emphasise today, our case on abuse is very simple. The TOCs abused their dominant position by charging customers a second time for a part of the service they provide to their customers for which those customers had already paid, and for which the TOCs had already received revenue.

And that the TOCs were aware of this and were happy to all intents and purposes to do nothing about it, so it seems, to put it at its lowest. We will see what the disclosure says.

We say that's just not compatible with the special responsibility of such companies that enjoy a certain degree of strength on the market.

**THE PRESIDENT:** When you say charging a second time, and that's one of the issues that emerges, of course, from the defendants, both their responses and then the skeletons, that's where they talk about strict liability. You are not actually saying that if -- to take your example, that where you have the two competing ticket counters, and one that says if you have a Travelcard come here because you can save, and the other one doesn't, and somebody decides, well, the queue in this one is shorter, I don't mind paying extra, or paying the full fare and does so, that would not be an abuse.

As you explained it, I think, at the CMC, it's making the opportunity to buy a boundary fare available and making reasonable efforts to inform the customer of the choice. That's what you say --

**MR MOSER:** That is --

**THE PRESIDENT:** -- as I understand it.

**MR MOSER:** That is right.

**THE PRESIDENT:** It's not quite as simple as, therefore, the Deutsche Post example, and of course that's what the defendants say about that.

**MR MOSER:** Yes, we also have the Preventx argument, and that is where, whether you want to call it sufficiently available or the fare selling --

**THE PRESIDENT:** Yes.

**MR MOSER:** -- comes in. It's a not only but also, and you are quite right to pull me up on that. I hope I introduced it in both ways. I suggested it was the two limbs of section 18(2). You quite rightly pulled me up on that and said it's not quite that, the categories are not closed. It's very similar to the second limb of 18(2).

**MR HOLMES:** Would it be fair to describe your case as the obligation to make boundary fares sufficiently -- customers sufficiently aware of them and to make them sufficiently available? That's how I'm understanding the two elements of your argument.

**MR MOSER:** Yes, in essence. We have made that as the bedrock of our fairness point, and in so doing we have of course suggested a number of ways in which they could have done that.

That's not to be misunderstood as perhaps some of the TOCs might have misunderstood us, by saying that there is some sort of duty to advertise or fiduciary duty, quasi fiduciary duty, to ensure that people are never double charged.

It's putting in place a fair selling system, which is more than just an argument about a general duty for fair dealing, but an actual obligation if you are a dominant undertaking.

Exactly, sir, as you have described it to me, that's how we put it.

We say that, and we say it is not the same as my learned friend Mr Ward says, as a quasi fiduciary duty towards customers to make sure a customer buys the cheapest product that would meet their needs. It's not a strict liability obligation, which the other side say we suggested and then abandoned -- they say that

quite a lot. Then they also say, in a similar way, that we made two allegations and it's collapsed into one.

I submit, with respect, nothing has collapsed and nothing has been abandoned. It is exactly as Mr Holmes has set out. It's not a mere marketing obligation, and that's my learned friend, Ms Abram, at paragraph 58 of her skeleton argument. It's a legal obligation not to have an unfair selling system that leads people to be double charged. That is the charge, as it were, that we make.

I have made my submissions on the case law that supports our abuse claim in both its limbs. There's at least an indirect imposition of an unfair price and/or an unfair selling system by not making sufficiently available -- perhaps in fact in fairness to Ms Abram, if I can put it that way, she comes closest when she says that the TOCs are being accused of an abuse unless they bring about a situation in which materially all eligible customers buy boundary fares. That's at paragraphs 4.1 and 29 of her skeleton.

With respect, even that misunderstands our case because we are not saying that the TOCs are obliged to bring about a certain outcome. What we're saying is that what we are seeing, the real-world facts, are not compatible with the special responsibilities of the dominant undertaking.

The vast majority of eligible customers are being double charged and the TOCs are aware of it.

Yes, we are also saying that the realistic counterfactual will see materially all, to use her words, eligible customers purchase a boundary fee but that's a function of the fact that we say it's implausible to assume any other outcome once the abuse, the inaction, is removed.

We say that's what will follow axiomatically once the boundary fares are no longer kept under wraps. We have our real-world example of off-peak fares, which

everybody knows about, and which therefore are universally available.

We can argue about what exactly would happen in the counterfactual, but that would be a matter for trial. It will be for the TOCs to argue and prove at trial the right counterfactual does not involve materially all eligible customers purchasing boundary fares.

They have tried to make this argument in a number of ways on the evidence, with things like "kids for a quid" or "two together railcard", there were a number of avenues where it would be cheaper.

But, sir, I do emphasise none of these, even collectively, are enough to explain the reality of 90 plus per cent, or 95 plus per cent, of all relevant customers being double charged. The reality is a monopoly standing by while customers are paying twice, in the sense in which I know the Tribunal understands I say that.

Again, it's not a new category of consumer protection obligation being imported into competition law, as Stagecoach complain at paragraph 23. What we claim on meets the threshold of exploitive conduct under competition law, and it's only because of the absence of competition that the TOCs are able to get away with it. That was, sir, my example of the two windows.

Stagecoach at paragraph 20 of their skeleton argument say the single alleged abuse consists in double charging.

I have made those points in exchanges a moment ago. (A) it's not singular, but also, with respect, that's actually yet another mischaracterisation of our case. The product is always the same. What Ms Abram says is we are saying it's abusive to sell a customer a more expensive product when a cheaper one would meet their needs.

No, that's not, with respect, what we are saying. What we say is in what to charge for the same product, which is the journey, do you take into account that the

customer has already prepaid, via another system, for part of the product? Analogies are always tricky, Stagecoach favours a cornflakes analogy. A more apt comparison in this case, I submit, would be for instance a traveller booking accommodation on Expedia, on a bed and breakfast basis -- Expedia, it's a booking website. And the hotel then proceeds to charge the customer again for breakfast, despite having received a portion of its payment, which was intended to go towards breakfast, via Expedia. And it does so either negligently -- there doesn't have to be intent, of course -- or it does so in the hope that the customer may not be aware that they've already paid for breakfast. And when challenged, may claim, as Mr Ward claims, "I have got no fiduciary duty to ask you whether you want to pay for the same breakfast again". The point is that if the hotel is a dominant undertaking, then there is a duty.

**PROFESSOR MASON:** Mr Moser, I do not want to press your bed and breakfast analogy too far but let me just test going back to an earlier discussion that we had. Let's suppose instead that somebody books just the night's accommodation on Expedia, comes down for breakfast in the morning, pays a price for breakfast which, in combination with the night's accommodation, could have been gotten more cheaply on Expedia as a bed and breakfast deal; where does that stand, in your view, in terms of abuse?

**MR MOSER:** Well, since the customer hasn't already paid, I hope it's not too evasive of me to say that it doesn't map on to the situation of the class membership. Because all of my class members have already paid for breakfast, as it were. They have all already got a Travelcard. So perhaps -- that, as you say ... maybe one does not want to push the analogy too far. That's my immediate reaction. Speaking purely in the abstract, there would then be a question of, I suppose, the -- how shall I put it? The significance of an overcharge. But it would be

being a different kind of an abuse scenario, but that's, I think, the best I can do by way of an answer. Because I respectfully don't think -- it's the same analogy, but it's not my customer.

**THE PRESIDENT:** You say he is not then paying again for something he's already paid for, albeit he has taken a more expensive option?

**MR MOSER:** That's right. And there is indeed no -- as my learned friend says, there's no established line of saying, "If you're selling a customer something more expensive when the cheaper one would meet their need, then you have necessarily broken competition law". You could probably construct some examples of that in the right circumstances. But that's where I started my bed and breakfast business, because I said that's precisely what we're not saying.

So if the customer comes and doesn't already have a Travelcard, well then -- what we are not saying is we are not saying to the TOCs that, "Every single person who turns up at your counter has to be told 'you should really get yourself a Travelcard if you haven't got one'". That's not what we are saying. We are talking about people who have already paid for a Travelcard, who come up -- and maybe they even say, "I have a Travelcard", depending on the evidence, and they are charged, again, for the portion of the journey that's inside the zone.

Perhaps a more apt way of looking at it, is, if one takes my learned friend's analogy of the own-brand cornflakes -- paragraph 37 of her skeleton argument -- and she says: well, what you are saying is own-brand cornflakes should be available in 500g as well as 750g boxes, that's the analogy that's been made against me. There, perhaps, the more apt analogy would be that you have a supermarket that goes into partnership with another party, the equivalent of TfL --

I think Ms Abram may have just fallen out of the hearing.

**THE PRESIDENT:** Yes. Shall we pause a moment, especially as you are talking about her cornflakes.

**MR MOSER:** Exactly.

**MR HOLMES:** I hope it wasn't a knockout blow.

**MR MOSER:** So devastating was the argument.

**(Pause to wait for Ms Abram to reconnect)**

**THE PRESIDENT:** Mr Moser, can you just give me the paragraph reference to Ms Abram's skeleton argument again?

**MR MOSER:** It's paragraph 37.

**MR WARD:** Ms Abram has just messaged me to say she is trying to rejoin.

**THE PRESIDENT:** Thank you, we will just wait.

**(Pause)**

**THE PRESIDENT:** Ms Abram, you have rejoined us, have you?

**MS ABRAM:** I have. I'm very sorry about that, sir.

**THE PRESIDENT:** These things happen. I think we can get the live stream resumed. Yes.

As soon as we realised, thanks to Mr Ward, pretty quickly that you had dropped off, we just paused. So you haven't missed anything.

**MS ABRAM:** I am very grateful.

**THE PRESIDENT:** Mr Moser?

**MR MOSER:** I was addressing Ms Abram's skeleton argument, and specifically at paragraph 37 where two points are made.

The first is about price control in relation to Flynn, and I will come back to that.

The second one is that it is not the function of competition law to dictate to undertakings what products to create or how those products should be priced relative to one another.

The example is you don't require dominant supermarkets to produce an own-brand product in small as well as large pack sizes. That's the cornflakes analogy.

My point, very simply, was going to be that a more apt analogy may be that of a supermarket which, through partnership with another party, so the TfL of the scenario, sells vouchers for 250g own-brand cornflake boxes and then you go into the dominant supermarket and the dominant supermarket says to customers, "Well I'm sorry, you cannot have them; they're only available in 500g boxes". So no value would be given to your voucher.

Again, all of these analogies are so-so. We reject that analogy. And for the same reason, we say that this isn't a question of price control or telling anyone what products they should have, this is in relation to a product that already exists.

On the regulator -- as a matter of fact, it's obvious that the regulator didn't act on this, even though there's at least one report that mentions that boundary tickets were something that consumers were looking for and couldn't find.

So there's no alternative scenario where, "Oo, price regulation is best left to sector regulators", and it's not price regulation, it's double charging for something you have already got.

So it's not really the function of the regulator in setting the prices. We are not attacking -- to be quite clear, we are not attacking the pricing of boundary fares. We are accepting whatever the price is of boundary fares, indeed we base our claim on it.

Then we have -- I have already mentioned it, it was at paragraph 23 of this skeleton argument -- the notion that competition law is not a general law of fair dealing. Well I dealt with that when I was taking you through Preventx and I have made a point. Of course, the passage in Preventx goes on, and it talks about the breadth of the unfair trading head of abuse, relatively under-explored in the

case law, and in this case summed up by us in that phrase "making sufficiently available".

**THE PRESIDENT:** Yes, I think we've got that.

**MR MOSER:** They do criticise us also for not going into greater detail as to what "sufficiently available" actually means. There's quite a lot made, for instance by Stagecoach in paragraphs 52, 54 of the skeleton argument. I would like to say just a few words about that.

The first is it's not actually, in my submission, for us to precisely identify what the counterfactual world would look like, absent abuse, at this stage. It's not for us to tell the TOCs how to avoid giving rise to the effects we complain about. And there may well be a difference between what's required in the short term, to get customers to a right level of awareness, and what's ultimately required.

The true counterfactual is a hypothetical counterfactual in which the boundary fares are as well known as, for instance, off-peak tickets. And would have been for some time, including the entirety of the claim period.

So that's the real counterfactual. The counterfactual isn't about getting consumers up to speed from the real world and exactly what level of advertising would be required.

If the tickets had been appropriately available and known at all times, indeed not much active effort might be required at all to avoid customers being double charged.

Now, we have suggested of course a number of ways in which they could have remedied the abuse, for instance after 2012, posters and so on. We are open to other ways in which they say this could have been done. But that's not a valid criticism, in my respectful submission.

There is a different kind of criticism coming from LSER. My learned friend Mr Harris, in his skeleton argument -- without turning it up -- but at paragraph 24 of his

skeleton argument he criticises the class definition. He criticises it for not taking account of the fact that information may have been available on some sales channels to some customers, and he says this creates a mismatch between the abuse and the class definition, which is of course all persons who held a Travelcard and took a relevant journey.

He doesn't do it in such detail but he says, "You've got the ticket windows, and that's different from the TVMs", and so on.

We say a number of things about that. One point I would make is that, if the fact that boundary fares were more available on one sales channel than another had made a real difference, then the evidence, the existing evidence, on the number of boundary fares sold, less than one in ten, could only be explained by assuming that those channels, like ticket windows, were used generally by customers who were happy to pay the price.

That's, we say, a nonsensical assumption, with respect, and cannot be right.

There is also this point on mismatch. Even if the Tribunal were to find at trial the correct counterfactual was one in which it cannot be assumed that all customers able to do so would in fact buy a boundary fare, then a discount can be applied to the aggregate damages to account for this imperfection. And then there ceases to be any mismatch.

So even if I'm wrong on any of these points, there would not be a mismatch between abuse of methodology on any such point on which the Tribunal agrees with Mr Harris.

Then --

**THE PRESIDENT:** That's on the basis -- sorry to interrupt you -- that it's just a question then of causation, that it might not have caused everyone not to. Is that right?

**MR MOSER:** Well that's right. On causation, we say, first of all, that we will be able to establish causation sufficiently for all of the class members, in what I have called the Godfrey sense, whether accurately or otherwise -- but I think, sir, you know what I mean by that -- that causation would be sufficiently established on the evidence of this extreme mismatch of the low number of boundary fares sold, which is where I started this morning with the table.

In any event, if one takes the correct Merricks approach, sir, we say that the issues of causation and quantum, on an aggregate damages basis, will be sufficiently established by way of the methodology described, and by way of the Tribunal doing the best it can, making the relevant finding as to what caused the significant under-incidence, the significant lack of sales of boundary fares.

At that point, that's where we say that the TOCs' complaint about individual issues -- that's for instance Mr Ward's skeleton at paragraph 25 -- that the fact that he says it's necessary to determine the fair resolution of these claims to determine individual issues; that simply falls away.

The resolution will be fair towards the PDs, the TOCs, in that any damages will account for no more than the effects of the abuse. So the difference between the real world and the counterfactual. Any remaining issues after that are matters for the class inter se, and that shouldn't concern the PDs. That's what the Supreme Court said in Merricks at paragraph 80 of Lord Briggs.

So that's our point in relation to the argument on causation.

**THE PRESIDENT:** The point I was putting to you is your causation assumes, as you said, no one would willingly, as you put it, pay twice if they had been given the opportunity to pay otherwise.

What I was saying was, even if it's thought: well, there might be a small proportion who -- possibly for some of the reasons that were set out -- might not be

concerned about that, that could be done by discounting, or something, from the aggregate sum. That would then avoid overburdening the defendants by making them pay more than compensatory damages.

**MR MOSER:** That's right, sir.

**THE PRESIDENT:** At least that's the way I understood it. Is that right?

**MR MOSER:** That's right. There's one prior point to that. Where I start is that I say, if it's found that these suggestions are so implausible, or so rare, then they can be discounted completely by analogy with the de minimis doctrine. Even if they are not discounted as de minimis, then, sir, what you have just put to me is, with respect, absolutely right.

We say that chimes entirely with the Supreme Court in Merricks specifically confirming that no individual assessment is required in a claim for aggregate damages under section 47C.

All of that, in the context of this strike out application, sir, all of that -- it's just worth saying once in a while, there must be at least a non-fanciful case, in an EasyAir sense, to that effect.

At one stage, LSER, the way that it's put, is that there must have been "many" transactions which didn't result in a loss. But that would involve them demonstrating that, in a significant portion of the 90-plus per cent of transactions where a Travelcard holder didn't hold a boundary fare, it wasn't because they didn't know about boundary fares, it wasn't because they couldn't reasonably get hold of one; it was instead because they chose to pay twice or make a mistake.

That's why I say my first line on this is that that is so implausible as to be discounted by analogy with the de minimis doctrine. And that's before we come to any of the other points.

So that's what we say on causation. There is then the issue of third-party retailers, and I have already addressed them to some extent this morning.

According to Mr Backway -- for your note, it's in the first Backway witness statement at paragraph 32 at tab 15 of the core bundle, page 485 -- there's a focus on whether third-party sales, which relate to 5 per cent, according to that statement, can be legally attributed to the TOCs.

Now, my headline point on this, in the context of a strike out application, again, is I must have at least a non-fanciful case that these third-party sellers are agents.

LSER says that it has evidence, in Mr Backway, that third-party retailers' decisions cannot be attributed to the TOCs, and LSER says that's uncontested. That's at paragraph 57 of my learned friend Mr Harris' skeleton.

With respect, it's not uncontested. The evidence is contradicted, partly by the terms of the agreement, which we've described in our reply at paragraphs 35 to 41, partly by what Mr Holt says, and by the real-world relationship between the TOCs and the third-party retailers.

The third-party retailers, so-called, they are simply a conduit through which -- and, as I say, the TOCs have another route to market. They sell the same product, which is the journey. Indeed, they are creating a contract between the TOC and the customer. It's got nothing to do with them in their own name. They are pure agents. The TOCs' influence over third-party retailers is a question of fact, which insofar as it's relevant at all will require witness evidence in due course. You have that at paragraph 40 of our reply.

I agree with my learned friend Ms Abram, at paragraph 42 of her skeleton argument, when she says this isn't a question that needs to be decided now. Except I put it and say it's a question that can't be decided now and is properly for trial.

Even LSER agrees that a TOC is an agent for the "general purpose" of selling rail

tickets. It then seeks to distinguish that from decisions in relation to the precise manner of sale, whether they are also offering boundary fares, and no basis for that distinction has been put.

What we know is that these third-party sellers generally just don't sell boundary fares at all. What we say is, of course, if boundary fares were a standard fare, popular and widely-available, then of course the conduit pipe, online conduit pipe, of the agents would sell it. They are commission agents, they exist on commission. If there's a popular product, they would sell it or they would lose out.

"Aha", says Ms Abram, "that's then an umbrella claim", at paragraph 47 of her skeleton argument. Mr Harris echoes that at 57.

But, sir, I am not going to go there. Ms Abram offers a number of Greek gifts, if I may put it that way, to me, and one of them is, "Oo, isn't this really a claim a bit like Microsoft and the ordering of the search results", which --

**THE PRESIDENT:** "Google", I think you mean.

**MR MOSER:** Google, so sorry. And the ordering of the search results, which it isn't. And also, "Oo, isn't this really an umbrella claim", but I am not going to bite, as it were.

The customers who buy the tickets through third-party retailers are still the customers of these TOCs, they travel on the TOCs services, the TOCs receive the remuneration. The fact that the retailer receives a commission along the way, which is their role under the agreement, doesn't change that. The product is in all cases the transport and nothing else.

There's a limited parallel, I can see that, with umbrella claims, in the sense that the effect of the TOCs making boundary fares sufficiently available would be to force the third parties to make them available too, in the way I have just

explained. My learned friend Ms Abram is right to that extent.

**THE PRESIDENT:** Well, there will presumably be a contract between each TOC and the third party governing the way in which they sell, what they can sell, and could specify -- for example, it could require them to ask the customer, "Do you hold a Travelcard", as part of the contractual obligation, couldn't it?

**MR MOSER:** The contractual obligation is covered by the -- excuse me a second.

**THE PRESIDENT:** Sure.

**(Pause)**

**MR MOSER:** The contractual obligation is covered by a thing called the RDG, which is the Rail Delivery Group, and that is the TOCs collectively, including these three, at least when they are holding a franchise.

They are the ones -- but, yes, one of the points that we make is that these powerful players in the game, if they put their mind to it, would be able to say, we are going to have to get our third-party agents to offer these boundary fares.

I submit that there's certainly at least a triable question as a matter of fact whether that isn't something that they could do. I would go so far as to submit it's not credible that the dominant players in the market -- who control all of this, it's their tickets, their trains, their everything, that the Commission agents are just a mere speck on the sort of vast picture of the TOCs' operations.

**MR HOLMES:** Can I ask a question. You took us this morning to the ORR report and said that it was mentioned somewhere that the boundary fares were the most frequently demanded fares by customers. If that is the case, why don't these third-parties who are on commission, why are they not incentivised to make customers aware and make them available?

**MR MOSER:** It's difficult for me to speak for the third-party agents.

There are two points to make.

The first is that when there is that mention that of all the other fares, the most frequently mentioned is boundary fares, that is plainly a relative quality, because we do not know what other fares, if any, are mentioned. One suspects very few out of the rather non-transparent list of 55 million fares.

Insofar as there's been a mention, it's been about boundary fares, but that of course we rely on. There is not, from our Decidedly research, any obvious evidence that the third-party tickets agents are particularly aware of boundary fares, or a clamour for them, because of course, and this is the whole gravamen of our case, speaking widely rather than relatively in relation to those in the know who are looking for these things on the TVMs. Speaking generally, the evidence I submit is overwhelming that boundary fares are not known, that they are obscure. We have that one reference that I have taken you to, and I took you to it partly to demonstrate that it's the only reference anywhere in the documentation to a boundary fare.

**THE PRESIDENT:** Mr Moser, when you said they are paid by the third-parties on commission, is that a percentage of their sales? That sort of commission?

**MR MOSER:** That's right. So that's the other --

**THE PRESIDENT:** Aren't they then actually disincentivised to sell the boundary fare --

**MR MOSER:** Exactly.

**THE PRESIDENT:** -- because they make more money by selling the full fare?

**MR MOSER:** Sir, you are of course as usual ahead of me.

My second point to Mr Holmes was, as I am sure Mr Holmes, you yourself expected me to say, that if you are working on commission you will want -- this is where I was going to say, I don't wish to put words in the mouth of the third-parties who are not here, but if I am a third-party commission agent I want to sell a full fare I do not want to sell a boundary fare in relation to something where I, as

the Commission agent, I don't get the nice payment from TfL in relation to kilometres travelled or whatever it is for that -- I just lose out.

**MR HOLMES:** In that context, I think it's helpful, that since you took us to that extract from the ORR report, we've now been helpfully given the whole report. So we can see the context in which --

**MR MOSER:** I was going to say, at the end of today that a full version of the ORR report --

**MR HOLMES:** We now have it. Thank you to whoever sent it to us. (Indicated)

**MR MOSER:** I am grateful, I have also just received it. So there it is.

I note we are almost at 4.30. I might have a little bit more than just five minutes. Holistically the rest of my submissions are not going to be more than an hour. I wonder whether this is an appropriate moment to pause, sir, and regroup tomorrow morning?

**THE PRESIDENT:** Yes. If it's no inconvenience to anyone, let's start at 10.15 tomorrow morning, just to build in a little extra time.

**MR MOSER:** Thank you.

**THE PRESIDENT:** We will then adjourn now, until 10.15 tomorrow.

Thank you.

**MR MOSER:** Thank you very much.

**(4.29 pm)**

**(The hearing adjourned until 10.15 am on**

**Wednesday 10 March 2021)**

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**Key to punctuation used in transcript**

| | |
|---|---|
| -- | Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking |
| … | Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence. |
| - xx xx xx - | A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption. |
| - | Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there? |