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5 **IN THE COMPETITION APPEAL TRIBUNAL**

6 **BETWEEN:**

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

8 **1305/7/7/19**

9 **JUSTIN GUTMANN**

10 Proposed Class Representative

11 **– and –**

12 **(1) FIRST MTR SOUTH WESTERN TRAINS LIMITED (“FIRST MTR”)**  
13 **(2) STAGECOACH SOUTH WESTERN TRAINS LIMITED (“STAGECOACH”)**

14 Proposed Defendants

15 **AND BETWEEN**

16 **JUSTIN GUTMANN**

17 Proposed Class Representative

18 **– and –**

19 **LONDON & SOUTH EASTERN RAILWAY LIMITED (“LSER”)**

20 Proposed Defendant

21  
22 **PHILIP MOSER QC, STEFAN KUPPEN and ALEXANDRA LITTLEWOOD** (Instructed  
23 by **Hausfeld & Co LLP** and **Charles Lyndon Ltd**) appeared on behalf of Mr. Gutmann  
24 **TIM WARD QC** and **JAMES BOURKE** (Instructed by **Slaughter and May**) appeared on  
25 behalf of First MTR  
26 **SARAH ABRAM** (Instructed by **Dentons UK and Middle East LLP**) appeared on behalf of  
27 Stagecoach  
28 **PAUL HARRIS QC, ANNALIESE BLACKWOOD and MICHAEL ARMITAGE**  
29 (Instructed by **Freshfield Bruckhaus Deringer**) appeared on behalf of LSER  
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(10.35 am)

**THE PRESIDENT:** Yes, good morning. Ms Abram, is it?

**MS ABRAM:** Good morning, sir.

**THE PRESIDENT:** Mr Moser wants to say something.

**Housekeeping**

**MR MOSER:** I have forewarned Ms Abram, it's just a housekeeping point, sir.

Yesterday we were asked about the agreements. We have looked into what we've been given.

What we appear to have is the original 1995 agreement.

Then, secondly, the 2018 amended version we showed the Tribunal yesterday.

Yesterday, MTR sent us a further set of documents which we understand are about its accession to those agreements.

There's also a set of 2005 and 2015 documents, but we think those only relate to one-day Travelcards.

We are very happy to forward those to the Tribunal as they are, they run to about 350 pages. The Proposed Defendants are happy for us to do so that. What I have said to my learned friends is that if the Tribunal has any questions about what each of these is, then they are going to be -- or their solicitors are going to be best placed to deal with that.

Also, on confidentiality, all parties are happy for these to go in -- within the confidentiality ring -- in that way.

If at some stage any part were to come out of the confidentiality ring, or essentially if you wanted to refer to it, then the Proposed Defendants have suggested that it would be best dealt with by correspondence later because they would need,

1 I think, Transport for London also to consent to that -- it will be a matter for them.

2 **THE PRESIDENT:** Yes, that seems sensible. Thank you.

3 **MR MOSER:** It will be done.

4 **THE PRESIDENT:** Yes, Ms Abram.

5  
6 Submissions by MS ABRAM

7 **MS ABRAM:** Thank you.

8 I will be focusing on two aspects of the case, first the abuse allegation, and, second,  
9 whether the proposed claims should be certified on an opt-out basis.

10 For shorthand, as in my skeleton, I am going to refer to customers who could have  
11 bought boundary fares but instead bought another ticket type as "Eligible  
12 Customers".

13 I will start by summarising my submissions on abuse.

14 First, all of the cases cited by my learned friend Mr Moser on the abuse requirement  
15 concern the imposition of a trading condition by a dominant undertaking on  
16 a counterparty. They have nothing to do with the real issue in this case, which  
17 is whether the dominance concept, the abuse concept, imposes an obligation  
18 on a dominant undertaking to try harder to promote the purchase of cheaper  
19 products by customers that would meet customers' needs. That's my first and  
20 my main point on abuse.

21 Second, there's no support elsewhere in the existing case law in the law for the  
22 proposed claim and there's no reason to think that the law will develop to  
23 encompass the kind of claim that's proposed here.

24 Third, the claim alleges a bundle of distinct types of conduct which have too little in  
25 common, as a matter of law or fact, for collective proceedings to be appropriate.

26 I propose to take my submissions on abuse in four stages.

1 First, I would like if I may just to take you to one case on the test for summary disposal.

2 That is in authorities bundle 2, tab 16.

3 To set the scene, sir, the PCR has emphasised that it's not usually appropriate to  
4 dispose summarily of a claim or a defence that raises an issue of law in an area  
5 where the law is developing. That's true as far as it goes, but the point I want  
6 to show the Tribunal is that it only applies where there's a real prospect of the  
7 law developing in such a way as to enable the claim or the defence to succeed.

8 The case at tab 16 is a Court of Appeal case in Hudson v Treasury, the facts don't  
9 matter too much but just to set the scene, it's a restitutionary claim relating to  
10 pensions rules for former members of the armed services. It came to the Court  
11 of Appeal having been struck out, the claim had been struck out at first instance  
12 and the claimants appealed.

13 All that really matters is the statement of the principles, which are at paragraphs 66 to  
14 67 on page 536.

15 **THE PRESIDENT:** Yes. Just one moment.

16 **(Pause)**

17 Yes. So the question is it was a non-contributory pension scheme, but they are making  
18 a restitutionary claim. That was the response, is that right?

19 **MS ABRAM:** That's right, so the idea was that although there had not been specific  
20 deductions from pay from these armed forces members while they've been  
21 serving members of the armed forces, they ought to have a right to have  
22 a pension because surely their pay would, even if not openly, have taken into  
23 account the fact that there were contributions to a bigger pension scheme.  
24 There had been a change in the law for some members of the armed forces,  
25 not others and these people said, "Well, we want a piece of that pie".

26 The question was: is that covered by the law of restitution or will the law of restitution

1 develop in such a way as to enable it to be covered? It's really just the principle  
2 that I want to take from, as I say, the top of page 536, paragraph 66.  
3 Lord Justice Jonathan Parker had reviewed some earlier authorities and  
4 picking up at the start he said:

5 "As I read these authorities, they do not in any way erode the well-established principle  
6 that claims which are plainly and obviously bad should ... be struck out."

7 Then he refers to another case, and picking up just a line further down he says:

8 "It follows that the proposition that it is not appropriate to strike out a claim in an area  
9 of developing jurisprudence cannot be an absolute one."

10 Then he gives some reasons and I pick up again on the penultimate line of the  
11 paragraph:

12 "If it were otherwise, the court's jurisdiction to strike out hopeless claims would be  
13 unexercisable in any case where the hopeless claim purports to invoke an area  
14 of developing jurisprudence."

15 I obviously lay particular emphasis on that. Then paragraph 67 equally:

16 "In my judgment, therefore, where an application to strike out a claim is resisted on  
17 the ground that, notwithstanding that the claimant may currently have no cause  
18 of action, nevertheless by the time the action comes to trial the relevant area of  
19 jurisprudence may have developed sufficiently to enable the claim to succeed,  
20 the court will require to be satisfied that there is at the very least some real  
21 prospect of that occurring."

22 Of course, Mr Moser says to the Tribunal that his claim falls squarely within the existing  
23 authorities, but I am about to attempt to show you, sir, that it does not fall  
24 squarely within the existing authorities. That then means that the PCR has, by  
25 definition, to rely on the prospect of the law developing in his favour and I say  
26 there's no reason also to think that the law will develop in any relevant respect

1 between now and a trial.

2 That's why I take the Tribunal to Hudson as my starting point.

3 **THE PRESIDENT:** Yes.

4 **MS ABRAM:** Second on abuse, I would like to address the five cases which Mr Moser  
5 took the Tribunal through on the first day of this hearing, although I am going to  
6 avoid taking the Tribunal back through all of them.

7 In my submission, those five cases logically fall into two groups. On the one hand you  
8 have United Brands and on the other hand you have got the other four cases  
9 altogether.

10 I will start with United Brands. My submission really on United Brands is that the  
11 Tribunal isn't going to derive a great deal of assistance from that case.  
12 Mr Moser really relied on it as the starting point for the subsequent case law  
13 rather than as laying down principles that can be directly applied here. For your  
14 note that was transcript Day 1, page 29. I will give you transcript references  
15 where possible, but I am not expecting you to look at the transcript at any point.

16 The reason it is not directly relevant in this case is that the true complaint here is not  
17 about the prices that customers paid actually for any fare really, the real  
18 complaint in this case is about the products that they bought or perhaps the  
19 way in which those products were sold.

20 There is only really an unfair pricing allegation in this case in the sense that the PCR  
21 might say that any price that was charged for a full journey fare was kind of  
22 inevitably unfair in the sense that it is to be inferred that any price for a full  
23 journey fare included an element for the transport in London, which was already  
24 paid for by the Travelcard on the PCR's case.

25 That's why I say that the pure excessive pricing cases, like United Brands, don't really  
26 take one anywhere in this case.

1 Moving on then to the other four cases that were relied on. The kernel of what I am  
2 going to say about them is that in each case the conduct that was found to be  
3 abusive in Deutsche Post and DSD and the conduct that was alleged to be  
4 abusive in Preventx and BVA was a condition imposed by the dominant  
5 undertaking on its counterparties. I will just run through each of the cases  
6 briefly to illustrate why I say that; the only one I intend to take the Tribunal to is  
7 Preventx.

8 Starting with Deutsche Post, Mr Moser emphasised, when taking the Tribunal through  
9 that case, transcript Day 1, page 32, that customers who wanted to post letters  
10 in large quantities from abroad had no choice but to pay the full amount of  
11 internal postage in addition to the terminal dues. The ECJ, consistent with that,  
12 characterised Deutsche Post's abuse as its demands -- that was the word  
13 used -- for the entire internal postage. That is paragraph 61.

14 That's a case where customers who wanted to send large quantities of mail had no  
15 choice but to pay both charges.

16 Second, DSD, Duales System Deutschland.

17 **THE PRESIDENT:** Pausing there, if there were no boundary fares at all, so you have  
18 your Travelcard, you go to the ticket office as an informed consumer and say,  
19 look, I've already paid free travel to this station and they said, "Well, no, you've  
20 got to -- we don't recognise that". Would that be more analogous to Deutsche  
21 Post?

22 **MS ABRAM:** May I address head on that point, which you also put to Mr Harris  
23 yesterday. I will take that bit of the case out of order if I may and cover that off  
24 now and then come back to the other cases.

25 I respectfully agree, sir, that there is a factual difference between the very vast majority  
26 of routes on which a boundary fare was available in the sense that it existed,

1 so for most origin/destination pairs there was a boundary fare, and a very small  
2 minority of routes on which no boundary fare existed. In the case of the South  
3 Western Respondents that is for historical reasons due to an anomaly in the  
4 way that the rail regions developed over time.

5 May I take you to the factual position on that, which is --

6 **THE PRESIDENT:** I know it's very small. I wasn't really looking at the impact of that,  
7 I was thinking more conceptually. I mean just suppose -- it's a hypothetical  
8 question -- that on all routes there was no boundary fare, or the vast majority,  
9 not the case, but suppose that was the situation. Would that be then analogous  
10 to Deutsche Post?

11 **MS ABRAM:** We deny that there is an abuse in those cases and if this case were to  
12 go further, then we would be asking the Tribunal to find that there's no abuse  
13 in those circumstances.

14 What I say about it is that, first, I accept that there is a closer analogy between the  
15 Deutsche Post and DSD kind of cases and those facts. We say that there are  
16 reasons why they're different, but we accept that they will require evidence and  
17 a trial to be determined. What I say about it is critical is that pragmatically, the  
18 Tribunal just doesn't actually need to engage with the hypothetical question  
19 that, my Lord, you asked, sir.

20 **THE PRESIDENT:** Can we explore that a bit. Of course, there may be an objective  
21 justification defence, one can see that, but that's not for this stage.

22 If it were the case that one can say, well, that would be an arguable abuse if you didn't  
23 make them available at all, is it such a big leap to say well if they're notionally  
24 available but you don't tell people about them and actually at most of your  
25 outlets you cannot buy them, you have to stand in the queue at the ticket office  
26 to get them. Well, yes, that's, you may say, the method of selling but it's actually

1 restricting the sale of them. Why is that such a great leap from the proposition  
2 that you've accepted is arguable? It may not be right but you accept it's  
3 arguable for summary judgment purposes, that not making them available at all  
4 is arguably an abuse.

5 **MS ABRAM:** There are two differences, one factual difference and one legal  
6 difference.

7 The factual difference is that because the routes on which there were no boundary  
8 fares are such a really tiny corner of the claim, if the Tribunal were to consider  
9 that there's an arguable case of abuse in respect of those situations, there  
10 would be no question that it would be appropriate to certify the claim on that  
11 basis because, assuming that was the only bit of the legal case that was  
12 arguable, the little bit of the claim that is affected by those routes on which there  
13 were no boundary fares at all, is just tiny out of all proportion, vanishingly small,  
14 compared to the class as a whole. It would not just be a sledgehammer to crack  
15 a nut, it would be something much greater to crack something much smaller.

16 That is why it matters factually that they are a really, really small bit of the claim.

17 Secondly, I say that the distinction between the situation where a boundary fare didn't  
18 exist and a situation where it did exist and the PCR says, "Well you should have  
19 done more to go out and get people to buy that fare" is a really fundamental  
20 distinction, according to the authorities, because there is no case in which it has  
21 ever been found that a dominant undertaking has an obligation to go out and  
22 encourage or facilitate at the time, purchase of the cheapest possible product  
23 for a customer.

24 **THE PRESIDENT:** It's not so much encourage, it's make it available for purchase. As  
25 I say, I struggle to see there's such a conceptual difference to saying "well it's  
26 arguable you should have the product", to say "well it's arguable you should

1           have the product and make it available to purchase from the outlets where  
2           customers purchase.”

3   You say that's a fundamental difference in terms of abuse in what a dominant  
4           companies is expected to do.

5   Given that competition law is about substance rather than about form, I mean formally  
6           it clearly is different, I can see that, we can all see that, and there is a bright  
7           line, but in substance, in terms of sort of effect on a market -- if you said yes  
8           you can get a boundary fare but only on the first Tuesday of the month, you can  
9           then buy in advance, but you can't get it when you turn up, you cannot get it  
10          from the vending machine you cannot get it online but it's there, you just have  
11          to go through these particular procedures to get it. I mean that would not really  
12          have been offering boundary fares, would it?

13   **MS ABRAM:** I agree that you proffer a hard case, sir, but that isn't this case.

14   **THE PRESIDENT:** No, I understand that.

15   **MS ABRAM:** That isn't what's -- may I use the facts of DSD to illustrate why I say that  
16          there's such a big difference?

17   **THE PRESIDENT:** Yes.

18   **MS ABRAM:** You will recall that DSD was the packaging case where the ECJ, as it  
19          then was, found that the abuse consisted in requiring all customers who bought  
20          the packaging also to pay for the waste management system, regardless of  
21          whether they were actually going to use the waste management system.

22   Although we say that this case is different in respect of those routes where boundary  
23          fares didn't exist -- and I am not accepting the contrary -- one sees, I accept,  
24          an arguable parallel between the facts of that case and the very few routes  
25          where they didn't exist.

26   But what would be required in order to transform DSD into the case that the PCR

1 argues for in this case, is two further steps that the ECJ didn't take.

2 First, there's nothing in the judgment of the ECJ to say that DSD would also have  
3 committed an abuse unless it made sure that materially all customers who  
4 weren't going to use the waste management bit of the service didn't pay the  
5 waste management bit of the charge. All the ECJ said was, "Look, you have to  
6 unbundle the two charges and offer a packaging-only version".

7 So that is a significant further step.

8 Also a further point is that there's nothing in DSD, for example, or in any of the other  
9 case law, that says that one determines whether or not -- one measures  
10 whether or not there has in fact been an abuse by looking at whether all the  
11 customers in DSD, for instance, had bought the cheapest service that they  
12 needed. That's the PCR's case here. It's that unless materially all eligible  
13 customers buy boundary fares, then hey presto, you've got an abuse. Again,  
14 there is no, authority for that.

15 I say those two steps that are further than Deutsche Post and DSD and so on are  
16 significant distinctions from the previous case law.

17 Could I take you -- before I move on from the case law -- to Preventx. DSD was the  
18 second of the four cases, Preventx is the third.

19 It's at authorities bundle 5, tab 57, the relevant page is 2556. So, as you will recall,  
20 sir, there were three arguably abusive elements of Royal Mail's conduct.

21 Your finding on the first is at paragraph 99. That's your finding as to the requirement  
22 that packages containing the STI testing kits should be labelled "tracked" in  
23 large characters. You will recall that there was evidence that this requirement  
24 would have a deterrent effect on the use of the Preventx service. You found at  
25 the end of paragraph 99, sir:

26 "It seems to me that if the word 'Tracked' may have such a deterrent effect as alleged,

1 an unnecessary insistence that this word is used may well constitute an unfair  
2 term."

3 I emphasise there insistence, of course.

4 The second is at paragraph 101, which addresses the threat by Royal Mail to destroy  
5 the samples that might be returned by free post or to refuse to process those  
6 samples. In the middle of that paragraph, you say there's an arguable abuse  
7 there in the fourth line because it's, in effect, "... a coercive threat to persuade  
8 Preventx to agree".

9 **THE PRESIDENT:** Yes.

10 **MS ABRAM:** Again, I emphasise the word "coercive" there.

11 The third point is at paragraph 102, and that addresses that requirement for Preventx  
12 to migrate to the other means of sending the testing kits, otherwise Royal Mail  
13 would withdraw the licence within three months.

14 Again, you find that the insistence on the right to do that, on the contractual term, is  
15 unarguably an unfair trading condition, is the finding at the end of that  
16 paragraph.

17 What again all of these forms of conduct have in common is that they involve the  
18 imposition by a dominant undertaking of a requirement on its counterparty.

19 The final case in that group is BVA. My Flemish isn't as good as Mr Moser's, so I will  
20 not attempt the name in full but, again, as Mr Moser said, this concerned the  
21 pricing structure that was imposed by the Belgian collecting society for  
22 copyright fees. The complaint was about the alleged inflexibility of the tariff  
23 applied by the collecting society.

24 Actually, this isn't a case where there's a ruling on whether there's an abuse, it was  
25 a preliminary reference and the CJEU said it was for the national court to  
26 decide. The point that I take from the case is that it related to the lawfulness of

1 a tariff imposed by the Belgian collecting society. Again, customers had no  
2 choice about whether to pay the tariff and that was the gravamen of the  
3 complaint that was made.

4 Before I try and tie those cases into this one, could I just add an observation about the  
5 wording of section 18. It's so well known as really not to require study, but it  
6 might be helpful just to go back to it. It's at authorities bundle 1, tab 1.

7 You had an exchange, sir, with Mr Moser at transcript Day 1, page 22, about the limb  
8 of section 18(2)(a) on which Mr Moser relies for this claim. You noted that the  
9 words of that provision refer to imposing unfair trading conditions. You noted  
10 that this case is really about trading arrangements more than trading conditions.

11 I respectfully agree with that and I submit it's of real significance in the light of the case  
12 law that I have just taken the Tribunal through. Of course, I accept that section  
13 18(2), just like Article 102, doesn't exhaustively enumerate all the different types  
14 of abusive dominance that there can ever be, it doesn't. But it is significant that  
15 it refers to imposing and trading conditions because, as the facts of Preventx  
16 show, whether or not a dominant undertaking imposes a trading condition is  
17 entirely within the control of the dominant undertaking. It's clearly something  
18 that Royal Mail or Deutsche Post can desist from doing, the customer doesn't  
19 have any choice.

20 The reason why I respectfully would say that Deutsche Post and DSD and the other  
21 cases are a very long way from this one is that that is a great distance from  
22 a positive duty to put in place selling arrangements to encourage customers to  
23 buy the cheapest product that meets their needs.

24 I am not intending to parse the language of the abuse in the terms that Mr Moser puts  
25 it or doesn't put it, I am not seeking to make a clever point about "encourage"  
26 versus "facilitate" or "promote", I think we are all talking about the same thing.

1 **MR HOLMES:** You may be coming to this in a moment, but can I connect with what  
2 you were just saying in relation to these three cases to what you said about  
3 Hudson a moment ago. In effect, in these cases you are saying that they  
4 concern the imposition of unfair trading terms on a counterparty as opposed to  
5 a positive obligation to make the customers aware of things. When you spoke  
6 about Hudson I think you were saying that the point there was that the fact that  
7 something was novel might be a reason not to strike it out, unless there was  
8 a sense that the law might be developing in that direction. I am paraphrasing  
9 what was said in that judgment.

10 Are you going to say anything about whether the law or presumably in your case, you  
11 think the law is not developing in that area, because we have seen and our  
12 attention has been drawn to things which are pushing in that direction. For  
13 example, our attention was drawn I think to the fares and ticketing, a document  
14 of the ORR, which talks about the need for greater transparency and so forth.

15 Are there not things that are suggesting the law might move in that direction?

16 **MS ABRAM:** Thank you, sir. I would make two points about this.

17 The first is that if you look at the hard law, so the cases, there is no indication  
18 whatsoever of any relevant development in this field. Deutsche Post was  
19 a case decided nearly 25 years ago. BVA was a case decided a few months  
20 ago. They're very much of a piece. I don't think Mr Moser is suggesting that  
21 there's some kind of trajectory of inevitable expansion of this bit of the abuse  
22 concept.

23 I would say that, on the cases, there's no indication that the law is developing.

24 You refer, sir, to consumer-facing documents that indicate that it's good practice to  
25 help consumers out by getting them to buy the best product for them, and  
26 I emphasise the word "consumer" there, because what the Tribunal is inevitably

1 concerned with in this case is whether there's an arguable case of abuse of  
2 dominance. The fact that it may be good for consumers to buy boundary fares  
3 when they're eligible for them and they happen to be the cheapest fare is  
4 absolutely not to be equated with it being abusive not to ensure that materially  
5 all customers buy boundary fares in those circumstances.

6 I put the point in my skeleton, and I press it again that it's very important that  
7 Parliament having legislated for there to be opt-out collective proceedings  
8 within the scope of competition law, the scope of Chapter 1 and Chapter 2, that  
9 Parliament defined the limits of that procedure and it should be kept within its  
10 proper bounds.

11 The truth is that this isn't an abuse case at all, it's a consumer protection case. It's  
12 very important that the abuse concept shouldn't be expanded kind of by the  
13 back door to encompass what are really consumer protection concepts. I would  
14 respectfully submit that the documents that you mentioned, sir, just underline  
15 that point.

16 **MR HOLMES:** Thank you. That's helpful.

17 **MS ABRAM:** I am grateful.

18 Having been through the cases, I would like to make a couple of points about the way  
19 that the case is put by the PCR. This is the third area of my submissions on  
20 abuse.

21 I will approach it by reference to the different strands of the abuse case that's argued  
22 against us, and I will start if I may with the best endeavours limb or the best  
23 efforts, the promotion of sales limb, because that's obviously the true heart of  
24 the case against us.

25 Mr Moser said that he's not alleging a positive duty to ensure that materially all  
26 customers buy boundary fares. But my learned friend also says that if the TOCs

1 had taken sufficient steps to make customers aware of boundary fares, it would,  
2 in his words, follow axiomatically that materially all customers would buy those  
3 fares because they just wouldn't choose to pay twice. (Transcript Day 1,  
4 page 99).

5 We have said in writing and we maintain the point that this really is trying to have your  
6 cake and eat it, because if the PCR's position is that you will be able to tell  
7 whether the TOCs are abusing their dominant positions by looking at whether  
8 material numbers of eligible customers don't buy boundary fares, then in  
9 substance there's just no difference from saying there's a duty to bring about  
10 that result.

11 I have set out in writing in my skeleton why there's no real prospect of that kind of duty  
12 existing. It brings one back to the consumer protection point that Mr Holmes  
13 raised and the idea that competition law isn't a general law of fair dealing, as  
14 you put it in Preventx, sir.

15 Then one moves on from the result that the PCR says we are obliged to achieve to  
16 the scope of the duty as it's described by the PCR. There are two reasons why  
17 the cases on which Mr Moser relies don't meet this situation.

18 The first is the point about the imposition of trading conditions being the focus of the  
19 cases, and that not being this case.

20 I have given the example of DSD and how this case would go substantially further than  
21 the findings in DSD. Because it's such a critical part of the case, it might be  
22 helpful to think about it in terms of the various analogies that have been  
23 deployed over the last few days. Perhaps we could start with Mr Moser's  
24 version of my cornflakes analogy.

25 So, Mr Moser said (transcript Day 1, page 103) he said this is like a case in which  
26 a customer has bought a voucher for a 250g box of cornflakes from

1 a supermarket's partner business and the supermarket refuses to honour it.

2 So, it says, "No, you, customer, can only buy a 500g box".

3 With respect, I say that is not a fair analogy for routes on which a boundary fare  
4 existed, because no one is saying no you cannot buy a 250g box of cornflakes,  
5 or a boundary fare.

6 It goes to the distinction that I am seeking to draw in response to the President's  
7 questions, to say a fairer analogy for those routes would be: imagine  
8 a dominant supermarket selling a product which it's aware that some customers  
9 can get more cheaply with the benefit of a voucher issued by another party, in  
10 a magazine for instance. It couldn't seriously be said to be an abuse if the  
11 supermarket cashier failed to ask each customer whether they had a voucher  
12 before selling them the product at full price. That's a fairer version of the  
13 analogy by reference to the man in the ticket window in a train station, for  
14 instance.

15 Strikingly, that is actually very similar to Mr Moser's chocolate analogy from yesterday  
16 (transcript Day 2, page 10). You will recall that that was the shop keeper who  
17 had the cheaper bar of chocolate hidden underneath the counter. Mr Moser  
18 proffered the analogy, but he didn't actually analyse it in terms of how it fits with  
19 the authorities.

20 I just want to put to one side the rhetoric of hiding products behind the counter,  
21 because that's not --

22 Let's say, for instance, that the supermarket has a dedicated bargain area where there  
23 are cheaper chocolate bars, but the customer takes the chocolate bar from the  
24 main confectionary aisle where they are available at full price.

25 I say that you cannot seriously argue in those circumstances that if the supermarket  
26 is dominant it has committed an abuse of dominance if the cashier does not

1 point customers who come with a full-price bar of chocolate to the chocolate  
2 bars that might be in the bargain area.

3 The second point I make on why the earlier cases are different from this one is that  
4 there's no support in the law on dominance for the existence of an obligation to  
5 kind of do more or try harder or take steps towards a goal. The cases that are  
6 cited are actually really good examples of the fact that an abuse is identified by  
7 reference to specific conduct, not by a generalised obligation to do more.

8 If you take Deutsche Post as an example of that, the abuse was charging the full  
9 internal postage without deducting the terminal dues.

10 The PCR's approach to this, you can see it at paragraph 33 of his skeleton on page 14.

11 **PROFESSOR MASON:** Ms Abram, could I quickly interject just before you move on  
12 from the supermarket analogy, and, again, it may be me over-interpreting the  
13 analogies that are employed in this.

14 One could argue that a related analogy is a supermarket that sells cheaper chocolate  
15 bars in an aisle that is behind a door that's closed and customers would only  
16 then find out about it if they asked directly: what's behind that closed door? In  
17 your analogy, the consumer could find out because if they walked around the  
18 supermarket they would potentially find the aisle with the cheaper chocolate  
19 bars, but in this one it's much more difficult for they themselves to discover,  
20 they are more reliant on being informed about it.

21 Is that not part of what, to use your analogy, is being argued by the other side?

22 **MS ABRAM:** I would say two things about that.

23 First, I would say that the facts are different because it's not actually suggested that  
24 boundary fares are secret in any sense. It's suggested that they are not  
25 available on all sales routes so they are not in every aisle of the supermarket,  
26 they are not in the bit before you get to the till where the supermarket might put

1 things that they are particularly wanting to sell that week, but they are not hidden  
2 away behind a locked door. So, with respect, I would say that's not a fair  
3 analogy and it's not actually the case that's put against us.

4 The second thing I would say is that even if the supermarket did pursue that policy,  
5 there's absolutely nothing in the law of abuse to say that it would be dominant  
6 for the supermarket -- that the supermarket has any kind of duty to say to its  
7 customers, "Look, I know where you can get a good deal ..."

8 **THE PRESIDENT:** Sorry to interrupt you, I think you misspoke, when you said  
9 "nothing to say it would be dominant", you meant "would be abusive".

10 **MS ABRAM:** Would be abusive, yes, I did misspeak, yes, I'm sorry.

11 There's absolutely nothing on the law on abuse to say that it would be abusive for the  
12 cashier at the supermarket not to say, "Look, I'll tell you what the best deal that  
13 you can get in the supermarket is today". So, I say it's not on point.

14 Also, that even if it was on point then it would be a step beyond the current case law.

15 **PROFESSOR MASON:** Okay, thank you.

16 **MS ABRAM:** I am grateful.

17 I was about to start on the lack of particularisation and the question of whether the  
18 PCR's job is to tell us what the abuse consists of.

19 The way that that's approached by the PCR is at paragraph 33 of their skeleton, on  
20 page 14.

21 **THE PRESIDENT:** This is Mr Moser's --

22 **MS ABRAM:** Mr Moser's skeleton.

23 **THE PRESIDENT:** Mr Moser's skeleton, and his juniors', yes ...

24 **MS ABRAM:** If I just ask you to remind yourself of that.

25 **(Pause)**

26 **THE PRESIDENT:** Yes.

1 **MS ABRAM:** Mr Moser explained this again yesterday (transcript Day 2, pages 29 to  
2 30). I submit that there are two different points here and that the PCR is  
3 perhaps hiding a bad point behind a good point. There are two questions.

4 There is, first, the question of what the PCR's case is that the TOCs should have been  
5 doing all along in respect of the sale of boundary fares.

6 Then, second, there's the question of whether, if there is an abuse, the TOCs might  
7 need, in the short or medium term to take additional steps which might not have  
8 been needed in the counterfactual to bring customer awareness of boundary  
9 fares back to where the PCR says it should be.

10 Mr Moser says, "I cannot possibly state any case on the second question, I would  
11 need to have evidence to know what the TOCs would now need to do". I quite  
12 accept that the PCR doesn't need to answer that question at this stage, but  
13 what that doesn't excuse the PCR from doing is having a case about what the  
14 abuse actually consisted of.

15 So, what the PCR is saying that the TOCs were required to do, have always been  
16 required to do and should still be doing on their case.

17 The PCR just hasn't explained what it is said that we should have been doing all along.  
18 I say that that means that the PCR hasn't met its obligation to plead its claim in  
19 terms that can be understood.

20 **MR HOLMES:** Can I ask, is this not quite a common problem in abuse? For example,  
21 in a case where there's a refusal to supply or a refusal to supply a licence on  
22 FRAND terms or not at all, the authority or the complainant will allege:

23 "The abuse consists of not providing me with a licence or only giving me a licence at  
24 a royalty of 100 per cent which is outrageous and abusive ..."

25 Is it not frequently the case that the abuse doesn't consist of not providing me with  
26 a licence at a royalty of 5.7 per cent, or whatever it may be, even when cases

1 are determined the non-abusive conduct is often not clear, indeed it's one of  
2 the problems of crafting remedies.

3 **MS ABRAM:** In fact FRAND cases are a really good example of why it is the PCR's  
4 obligation to set out what it says should have happened because, as you will  
5 know, sir, the way that a FRAND case works is that the parties have  
6 negotiations and the patent holder will ask for 50p per mobile phone and the  
7 implementer, alleged implementer will offer 1p per mobile phone and the  
8 implementer's case will be your 50p offer isn't FRAND, it's abusive because the  
9 true FRAND rate is 1p or okay even if I should have offered more than 1p, that  
10 there isn't a FRAND rate above 5p. That absolutely is part of making a FRAND  
11 case.

12 The only way that a court can determine a FRAND case, or any abuse case, is to know  
13 what the wrongful conduct is said to consist of and what the delta, in  
14 econometric terms, is between the parties.

15 **MR HOLMES:** Thank you.

16 **MS ABRAM:** The leading case on how this translates into a claimant's obligations at  
17 the pleading stage is another case decided by the President, sir, Sel-Imperial,  
18 I will not take you back to it because it's too well known to require going back  
19 to, but I cited the relevant bit of it at paragraph 54 of my skeleton on page 15.

20 We particularly emphasise of course the underlined sentence there:

21 "A Defendant faced with such a claim [that is a competition claim] is entitled to know  
22 what specific conduct or agreement is complained of and how that is alleged to  
23 violate the law ..."

24 We say that the allegation that the TOCs were obliged to take reasonable steps, or  
25 some equivalent, to sell boundary fares is just too vague to meet that standard.

26 The point that I wish particularly to underline is that it shouldn't be assumed

1 from the vagueness of the PCR's case that within that case there is concealed  
2 some identifiable and legally recognisable allegation of abuse. It's for the PCR  
3 to identify what the arguable allegation of abuse is. If I'm right that just doing  
4 more or trying harder isn't legally recognisable, then what's done isn't good  
5 enough and it shouldn't be assumed that there is some kernel of arguable case  
6 with some arguable merit somewhere hidden away within that greater whole.

7 That's what I wanted to say about the best endeavours element of the claim. I would  
8 like now just to address the three more specific types of conduct that are  
9 wrapped up in the claim as well, caught up, because of the expansiveness of  
10 the class definition, including all eligible customers.

11 These really matter because they add to what the eligible customers in those three  
12 categories would have to prove at a trial of any of this case and what they need  
13 to establish in order to show that there's any arguable claim at this stage.

14 For example, if you're an eligible customer who bought an advance fare, they have to  
15 show that there's an obligation on TOCs to create advance fares. It's not  
16 enough just to show there was a general best endeavours obligation, you have  
17 to have the advance fare creation obligation as well, particularly because  
18 advance fares for example, as we know, are often cheaper than boundary fares,  
19 so absent that allegation there is no claim.

20 I have already covered in response to your question at the outset, sir, the first of the  
21 three categories, which is the creation of boundary fares for certain routes  
22 where they don't exist.

23 All I would add to that, just by way of signposting, is that the factual position, including  
24 references to the underlying materials, is all set out at paragraph 13 of my  
25 skeleton on page 4. That shows just how marginal and vanishingly small these  
26 situations are.

1 The second point of the three is the suggested obligation to create new boundary fare  
2 ticket types. That's the idea that a TOC committed an abuse unless it created  
3 a boundary fare for every single ticket type. The example often given is  
4 advance fares.

5 You asked Mr Harris yesterday, sir, what the difference is between a situation where  
6 there's no boundary fare at all for a particular route and this aspect of the case  
7 where there may be no advance boundary fare, for instance.

8 As I say, we deny that either is an abuse, but I submit further that the argument that  
9 the TOCs were obliged to create new products in order to be able to provide  
10 further discounts on a fare that was already discounted, is particularly lacking  
11 in merit. The idea that it was an abuse not to create a double-discounted  
12 product.

13 I have addressed the facts on this point at paragraph 38 of my skeleton, which is on  
14 page 11, and again I have set all the references for the evidence out in there.

15 The fundamental factual point here is that train tickets aren't priced per mile travelled,  
16 there's no direct correlation between how far you go and how much you pay.  
17 It's obvious really, but different rail fares are created for a whole range of  
18 reasons, and their purpose is to incentivise various different types of consumer  
19 or customer behaviour.

20 For example, if you have an advance fare, that gives the passenger the benefit of  
21 a discounted price, in return for that, the TOC gets certainty about a spread of  
22 passenger numbers across its services.

23 On that, my submission, against that factual background, is that it's perfectly proper  
24 for a TOC to decide what value to attribute to incentivising travel on a particular  
25 service, for example by means of reducing the ticket price. In some cases that  
26 will result in a full advance journey fare costing less than a boundary fare for

1 the same train journey, but there's nothing objectionable about that because  
2 the advance fare is created to incentivise particular behaviour. That just has  
3 nothing to do with boundary fares, it's about incentivising travel on a particular  
4 train, for example, or trains at a particular time of day.

5 If there's a boundary fare available for that route, the customer can't complain, "Well,  
6 I got a bigger discount from a different ticket type", that was intended to  
7 incentivise completely different behaviour, that had nothing to do with the  
8 reason why boundary fares are offered.

9 Any contrary argument is essentially an argument that competition law is about telling  
10 dominant undertakings what products they have to create and how they should  
11 be priced and how deep discounts ought to be.

12 I suppose the final stage on advance fares and ticket types for which there weren't any  
13 boundary fares, is to map the points onto the cases on unfair trading conditions.

14 On those, if a customer can buy a non-boundary fare type more cheaply than  
15 a boundary fare, it just doesn't make sense to talk about that in terms of  
16 imposing an unfair trading condition, for example, an unfair selling  
17 arrangement, because the customer is benefiting from buying the fare that's  
18 intended to incentivise the different behaviour. So, there's nothing that the  
19 customer can complain about in those circumstances.

20 What Mr Moser says about that is -- perhaps appreciating the difficulty of the  
21 point -- well if it wasn't abusive not to create advance boundary fares, then  
22 these fare types can just be excluded from the class. (Day 1 transcript  
23 page 91).

24 That does not answer the point if there's no arguable basis for the claim to begin with,  
25 and that's what we are here to determine today.

26 That's the second of the three specific categories of argument that are wrapped up

1 within the claim.

2 The third specific area which I need to address, the final one, is sales of non-boundary  
3 fares to eligible customers by third parties. Just to be clear, these cover  
4 a number of different types of third parties. There are other TOCs, there's TfL  
5 and there are the third-party ticket sellers like Trainline.

6 Between them, they are non-negligible, they sell over one-third of relevant tickets.

7 I will not take the Tribunal to it, but Mr Holt gives a figure of 37 per cent in total  
8 for those groups of sales. That's, for your note, Holt 1, paragraph 5.6.4, which  
9 is core, tab 5, page 140.

10 In my skeleton argument at paragraph 41, I did focus on a particular type of third-party  
11 arrangement. I just want to be clear that the particular third-party investor  
12 licence that I mentioned there isn't the only arrangement through which third  
13 parties sold tickets, either on behalf of TOCs generally or any individual TOC.  
14 I am also not making any submission about whether the third parties or any of  
15 them were the agents of the TOCs under national law or under competition law.  
16 Instead, I am making what I hope are two hard-edged legal points about third-  
17 party sales.

18 The first of those is directed at the PCR's submission on this point, which focused on  
19 whether the TOCs could have taken further steps in respect of third-party  
20 boundary fare sales. So, whether it would have been open to the TOCs to do  
21 more than they did in respect of third-party boundary fare sales.

22 I say there's a logically prior question. Before you ever get to whether the TOCs could  
23 have done more in respect of third-party sales, there's the question of whether  
24 they were obliged, arguably obliged for current purposes, under the abuse  
25 concept to ensure that the third parties made boundary fares available.

26 It's important to remember here that the third parties themselves aren't actually alleged

1 to have acted unlawfully in any respect. This isn't, for instance, the classic civil  
2 law case where you're talking about attribution of liability for a tort committed  
3 by an agent up to the principal, for instance. There's no allegation of unlawful  
4 behaviour on the part of the third-party sellers.

5 It's a much more fundamental question. The question is what is the TOCs' duty in  
6 respect of the promotion of the sale of boundary fares by third-party agents?

7 It's a further step, again, beyond the kind of generic best endeavours allegation.

8 Because even if the TOCs had some positive duty in respect of their own sales, which

9 I say they unarguably don't, it would be another extension to say they also have

10 a duty to promote sales by third parties of boundary fares.

11 The point that I am making goes to a prior point in the analysis to that that was

12 addressed by Mr Moser.

13 The second point that I would like to make about the third-party sales is just to mention

14 that in the reply, as I flagged in my skeleton -- I think Mr Moser described it as

15 a Greek gift in his oral submissions -- the PCR identified this alternative way of

16 putting the third-party sales point, describing them as something that appeared

17 to be an umbrella basis of sales. This argument is that if the TOCs had done

18 more to sell boundary fares themselves, that would have had the practical

19 effect, in the words of the PCR, of giving third-party retailers every incentive to

20 make them available too. Mr Moser said yes that has a limited parallel with an

21 umbrella claim, but it's not an umbrella claim.

22 Since the umbrella point is not pursued, then I don't want to take up a lot of time on it.

23 What I would say is that if the argument is other than the TOCs have

24 a hard-edged legal duty to ensure that their third-party retailers sell boundary

25 fares, so if it's an indirect causation point in the style of the Kone case for

26 instance, then that would call for a completely different approach to the

1 quantification of loss, to causation and loss, in respect of purchasers from third-  
2 party sales.

3 Mr Holt -- it's not a criticism -- treats third-party sales as just the same as sales by the  
4 TOCs themselves. Of course, if there is an umbrella basis for the case, then  
5 you have to have a whole further stage of looking at causation, at what the third  
6 parties would have done if the TOCs had the duty to promote sales themselves,  
7 whether the third parties would have responded in the way that's claimed for,  
8 what effect that would have had, how many customers would then have bought  
9 boundary fares in those circumstances.

10 Again, in my submission that's something that can't just be fudged by the PCR, it needs  
11 to be tackled head on what the basis for the claim is.

12 That's the end of my third submission on abuse.

13 The fourth aspect of my submissions on abuse relates to the common issues  
14 requirement for certification. That's going to be addressed by Mr Ward, so all  
15 I want to do is just tie in what I have said about abuse to common issues and  
16 then make one point that's specific to Stagecoach.

17 This point is considered, at paragraph 55(b) of the PCR's skeleton on page 23. What  
18 the PCR says there is, look, liability is a common issue because in each case  
19 the conduct complained of is the fact that a ticket other than a boundary fare  
20 was sold to an eligible customer. The point is expressed in terms of compelling  
21 customers to pay twice, but of course we don't accept that characterisation. But  
22 the idea is that every customer in the class bought a ticket other than  
23 a boundary fare.

24 That approach confuses the experience that class members had, the fact that they  
25 bought a ticket other than a boundary fare, with whether they suffered the same  
26 legal wrong or any wrong at all. Just because they have all bought the same

1 fare it doesn't mean that they all have a cause of action. Still less does it mean  
2 that they all have the same cause of action.

3 The same is true in relation to the facts that each class member would need to  
4 establish to succeed in their claim. Again, that's really a point for Mr Ward, so  
5 what I want to do is just make the Stagecoach-specific point, which relates to  
6 the Decidedly study.

7 The importance of the Decidedly study is that, as you have heard, sir, that was the  
8 only evidence relied on by the PCR in respect of the way in which boundary  
9 fares were sold by TOCs.

10 Mr Moser showed you that the Decidedly study is dated December 2018 and that it's  
11 based on mystery shopper enquiries carried out earlier in the same month, so  
12 it's December 2018 work. Of course, Stagecoach hasn't operated the South  
13 Western franchise since 2017, so what is the evidence relied on against  
14 Stagecoach in respect of the way in which non-boundary fares were sold by my  
15 clients?

16 The answer is that it's common ground that the only evidence that's relied on against  
17 Stagecoach now is an inference from the number of boundary fares that we  
18 sold before the franchise was transferred. The submission on that is from  
19 Mr Moser is transcript Day 2, page 10.

20 We don't accept that that is a sufficient basis for the claim all by itself. We say that  
21 that strays into the dangerous territory of hoping that something further will turn  
22 up in disclosure and that it's just not as good enough a basis for the claim.  
23 That's a key distinction between the claim against Stagecoach and the claim  
24 against the other TOCs.

25 That's everything I wanted to say about abuse.

26 **THE PRESIDENT:** Sorry to interrupt, can you just help me with -- I think it may be in

1 your client's evidence, Stagecoach ... Stagecoach, did you offer boundary fares  
2 for sale for online purchase?

3 **MS ABRAM:** On Stagecoach's own online sales platform, I would need to check that.  
4 I will take instructions and come back to you on that, if I may.

5 **THE PRESIDENT:** Yes.

6 Secondly, on ticket vending machines, your ticket vending machines and your stations,  
7 did you offer boundary fares?

8 **MS ABRAM:** Yes. On that I do know the answer and it's that we are in the same  
9 position as First MTR, who were our successor of course, as opposed to LSER,  
10 so yes, we did.

11 **THE PRESIDENT:** Yes.

12 **MS ABRAM:** That's what I wanted to say about abuse. I now have to cover opt in  
13 versus opt out. I probably have another 15 or 20 minutes, which I have  
14 discussed with Mr Ward and is fine, we are well within time. I don't know  
15 whether it would be more convenient to have the break now or afterwards?

16 **THE PRESIDENT:** I think perhaps if it's 15/20 minutes, let's take a break now and  
17 come back at just after 11.50.

18 Thank you.

19 **(11.41 am)**

20 **(A short break)**

21 **(11.52 am)**

22 **THE PRESIDENT:** Yes, Ms Abram, can I just ask you following on from my questions  
23 before we took a short break, were Stagecoach, because you were dealing with  
24 Stagecoach-specific issues, were boundary fares for travel on Stagecoach  
25 journeys available from Trainline in 2016/2017 until, I think, August you lost the  
26 franchise?

1 **MS ABRAM:** That's it, yes, they were available from Trainline. I will need if I may to  
2 come back to you a little later on the online question, if that's all right.

3 **THE PRESIDENT:** Yes.

4 **MS ABRAM:** Thank you. I was about to move on from abuse to address two points  
5 going to whether the claim should be certified on an opt-out basis specifically.

6 The first of those goes to the strength of the claims. That is the argument that even if  
7 these claims get over the summary disposal threshold, they are not strong  
8 enough for certification as an opt-out claim.

9 This point wasn't addressed by Mr Moser orally, which isn't a criticism, but I do need  
10 to address it because in the amended reply at paragraph 115 -- I am not asking  
11 you to go to it now -- it says that the threshold for certification as an opt-out  
12 claim is no higher than the summary disposal threshold.

13 So, if the claim meets the summary disposal threshold then it meets the threshold for  
14 certification as an opt-out claim. That's wrong, with respect, and I just want to  
15 show the Tribunal why it's wrong.

16 The starting point is rule 79(3)(a), so that's in authorities bundle 1, tab A3, page 25.

17 Of course, this is very familiar. 79(3)(a):

18 "In determining whether collective proceedings should be opt-in or opt-out ... the  
19 Tribunal may take into account all matters it thinks fit, including ... (a) the  
20 strength of the claims ..."

21 In order for that rule to have any effect, it must by definition require something more  
22 than merely getting over the summary judgment or strike out threshold.

23 That was clearly the view that the Supreme Court took in Merricks as well. If I may  
24 just show you two paragraphs of Merricks to explain why that's clearly the case.

25 That's in authorities bundle 5, tab 59.

26 The relevant page is 2596.

1 This is Lord Briggs's judgment, and we all know this judgment almost off by heart by  
2 now, but of course as we all know paragraph 59 says subject to two exceptions  
3 the certification process doesn't involve a Merricks test. The two exceptions  
4 are, first, summary disposal applications and, second, addressed at  
5 paragraph 60, considering the strength of the claim as between opt-out and  
6 opt-in proceedings.

7 That's the first three lines of paragraph 60.

8 The Supreme Court must have thought that that second exception added something  
9 to the first exception, the summary disposal point, because otherwise there  
10 would have just been one exception, and this wouldn't have been part of it.

11 **THE PRESIDENT:** As I understand it, Lord Briggs is saying: it's not relevant to  
12 whether you certify for collective proceedings, but it's relevant to, if you are  
13 going to certify, the choice between opt in and opt out. Is that right?

14 **MS ABRAM:** Well, in my submission that can't be the beginning and the end of the  
15 analysis, because using this case as an example, the PCR says that they are  
16 only going for certification on an opt-out basis, they don't want certification on  
17 an opt-in basis so it can't be that just by saying we don't want certification on  
18 an opt-in basis you can somehow bring the Merricks threshold for opt-out  
19 proceedings further down so that the Tribunal has to say, "If you had offered us  
20 the choice between opt out and opt in we would have said it's not strong enough  
21 for opt out, so because you are not offering us the choice we have to certify  
22 because it gets over the threshold".

23 That cannot be the answer.

24 **MR HOLMES:** You took us to paragraph 60, which refers, as the President says, to  
25 the choice between opt in and opt out, but a bit further on down that paragraph  
26 Lord Briggs refers to:

1 "... factors relevant to whether the claims are suitable to be brought in collective  
2 proceedings do not include a review of the merits."

3 Isn't that saying, as the President suggested, that it's relevant to the choice between  
4 opt in and opt out and that only?

5 **MS ABRAM:** In my submission, that sentence has to be read subject to paragraph 59,  
6 which says that there's the provision for summary disposal, which of course as  
7 we all know is also in issue in this case. It's not the case that there's absolutely  
8 no consideration of the merits at all in certification per se. It's that there's  
9 a summary disposal threshold and then there's the question of whether it's good  
10 enough for opt out.

11 As I say, it can't be the case that you can just, by saying, "I don't want opt-in  
12 certification", somehow bring the merits threshold further down, that would not  
13 be rational.

14 **THE PRESIDENT:** What you say is that if you were asking for opt out only, then the  
15 strength of the claim comes in. If there was a real alternative of opt in, then it  
16 will only be relevant to which of those two alternatives is appropriate. Is that  
17 essentially your submission?

18 **MS ABRAM:** Yes, yes. In a case where there isn't the alternative of opt in, either  
19 because that isn't pursued or because for other reasons the Tribunal does not  
20 consider that appropriate then that can't magically take away the force of this  
21 part of the rules, is what I say about that.

22 To make the submission on the point, as the Tribunal knows, in the guide at  
23 paragraph 6.39, the example is given of a follow-on claim as a claim that will  
24 generally have sufficiently immediately perceptible strength to satisfy the  
25 opt-out merit threshold for certification.

26 **THE PRESIDENT:** That is quoted, isn't it, by Lord Briggs at paragraph 29 of his

1 judgment?

2 **MS ABRAM:** It is. I am not seeking to disagree with that part of the CAT guide, I was  
3 using that as a starting point for my submissions, sir, I was not seeking to  
4 undermine ...

5 **THE PRESIDENT:** The way it's put in the CAT guide supports your submission --

6 **MS ABRAM:** Yes.

7 **THE PRESIDENT:** -- and I don't think Lord Briggs is suggesting, when he quotes it at  
8 paragraph 29 of his judgment, that there's anything wrong with it.

9 **MS ABRAM:** No. It's cited with approbation by the Supreme Court, I respectfully  
10 agree, sir.

11 **THE PRESIDENT:** Whether it's approbation or at least without any sense that it needs  
12 qualification.

13 **MS ABRAM:** Without disapproval.

14 **THE PRESIDENT:** Yes, without disapproval, yes, there are other bits that clearly do  
15 need reconsideration. Yes, that does seem to me to tie in with what you are  
16 saying.

17 **MS ABRAM:** I am grateful.

18 If one uses the follow-on claim as a yardstick, and of course I am not suggesting that  
19 those are the only circumstances you could ever have an opt-out claim but just  
20 to measure this standalone claim against that example, this is a claim that does  
21 not fit into any established category of the law on abuse, where the PCR has  
22 not identified the specific conduct that's said to be abusive and where, as I say,  
23 the case law relied on is irrelevant to almost all of the claim.

24 I say it's just not strong enough to be certified on an opt-out basis, even if it gets over  
25 the summary judgment threshold which we say it doesn't.

26 That was my penultimate point.

1 My final point is on the cost benefit issue. May I take you first on cost benefit to answer  
2 directly the questions that you asked yesterday, sir, about the Litigation Funding  
3 Agreement.

4 **THE PRESIDENT:** Can we put Merricks away?

5 **MS ABRAM:** You can put Merricks away. You can put all the authorities away in fact,  
6 sir.

7 I need now the Litigation Funding Agreement which is in the supplementary bundle,  
8 bundle 11, tab 16. This submission is directed to the costs of the present  
9 proceedings, or the proceedings that are in prospect.

10 **THE PRESIDENT:** Parts of this are confidential.

11 **MS ABRAM:** This is a non-confidential bundle, sir, so everything that you can see is  
12 fair game, everything you can see is not confidential.

13 **THE PRESIDENT:** Right, I am just looking at it. That's why things are blanked out in  
14 part of the document.

15 **MS ABRAM:** It is, yes. But the only relevant bits are non-confidential, so that won't  
16 cause us any difficulties as a process.

17 **THE PRESIDENT:** I understand.

18 **MS ABRAM:** Of course, when we are looking at the costs of the proceedings, they  
19 are in various categories, there is the respondents' costs, Tribunal time, public  
20 expense and for present purposes I am just looking at the PCR's costs.

21 By way of background, to give the context, you were taken yesterday, sir, to the  
22 litigation costs budgets. You will recollect that the PCR's cost budget to trial  
23 was £11 million, including CFA uplifts.

24 You asked about the funder's return under the litigation funding agreement, either  
25 under a settlement or after judgment.

26 The clause that addresses that in this document is clause 10, which starts at page 239

1 of the bundle.

2 Clause 10.1 addresses what happens if the funder is seeking payment of its fee under  
3 CAT rule 94(4)(b), so that's following a collective settlement. You will see to  
4 start with under 10.1, from the words above the table, that the funder's fee will  
5 be the higher, the greater, of a fixed fee or a percentage of the proceeds. The  
6 proceeds are essentially the damages, for current purposes.

7 **THE PRESIDENT:** Yes.

8 **MS ABRAM:** The top line of the table shows that the funder's fee depends on the  
9 funder's outlay, which is a defined term, and it's essentially the costs of funding  
10 the action. It's important to remember for the purpose of understanding this  
11 table, as you will recall from the exchange with Mr Moser yesterday, the  
12 funder's obligation under this agreement is to fund up to £6 million worth of  
13 costs. Just for your note, that's clause 4.1.5 of this agreement.

14 It's also important to know that, under clause 5.11, that figure can be increased by  
15 agreement.

16 Given that figure, I would submit that line 3 of the table in clause 10.1 is the relevant  
17 one. That says that if the funder's outlay, which is X, is more than £4 million,  
18 the fixed fee is £15 million and the percentage is a quarter of the proceedings.

19 The equivalent fees are higher in the context of an application for a rule 93(4) payment  
20 out of undistributed damages. You can see that from clause 10.2. So, over the  
21 page on page 240, the Tribunal sees from clause 10.2.1 that it applies if the  
22 Tribunal approves the payment to the PCR under rule 93(4).

23 Line 3 of that table shows that where X is over £4 million, so outlay is over £4 million,  
24 the funder's fee is the larger of £21 million or 34.5 percent of the proceeds, so  
25 the damages awarded again.

26 There's then an equation that we don't need to bother with to determine what happens

1 if payment is partly under one head and partly under the other.

2 The final bit of the agreement that I do want to take you to is clause 10.4, to complete  
3 the picture. That's on page 241. This addresses what happens if the funder  
4 agrees to increase the action costs, so its contribution to the costs of the  
5 litigation, to above the £6 million limit.

6 The keywords there are under clause 10.4.5, at the bottom of page 241. You see  
7 there that the percentage funder's fee increases by 1 per cent for every  
8 £100,000 increase in the costs limit.

9 Of course I am not attacking the lawfulness of the agreement, and I also -- to get my  
10 retaliation in first -- accept the point that will doubtless be made against me that  
11 payments under either rule 93(4) from undistributed damages or payments in  
12 the collective settlement context under rule 94(4) would be subject to the control  
13 of the Tribunal. I do take that point, but nonetheless the kind of black letter  
14 agreement that's been struck does raise the spectre of proceedings in which  
15 the funders have a great deal to gain and potentially very much more than the  
16 class that they represent.

17 **THE PRESIDENT:** Yes.

18 **MS ABRAM:** May I just conclude, just before I let Mr Ward have his say at last, with  
19 one final submission on costs versus benefits.

20 The PCR's position is, look, neither opt-in proceedings nor individual claims are  
21 practical alternatives in this case because too few class members will  
22 participate. We say, in itself, that really reflects an implicit acceptance that very  
23 few people are going to take up their share of the award.

24 In any type of claim, whether it was individual or opt in or opt out, at some point every  
25 eligible customer who wants to get some money out of the claim would need to  
26 show that they have suffered the relevant loss. In an individual claim you would

1 put in evidence, in an opt-in claim you would produce evidence when you opt  
2 in. In an opt-out claim it's at the time of take up. So, all types of proceedings  
3 have materially the same obstacles in their way in that respect.

4 The only question is the stage of the proceedings at which that obstacle arises. The  
5 difference is that opt-out proceedings have this additional disadvantage that  
6 a judgment risks potentially the very large majority of any damages award being  
7 left unclaimed by class members, in circumstances where the main beneficiary  
8 would be the funder.

9 As to the PCR's point, well, actually the real choice is between opt-out proceedings  
10 and nothing. In my submission when the Tribunal is weighing up that question,  
11 whether the proceedings are suitable for certification as opt-out proceedings,  
12 you have to consider how different for the class members opt-out proceedings  
13 and nothing really might be. Because if the reality is that the class members  
14 just aren't going to take up their share of the award, although in dollar terms the  
15 suggested benefits might be large, the practical benefits are almost entirely ...  
16 "illusory" is unfair but "unrealistic/unreal" is the submission that I would make.

17 In my submission you need a real-world approach to weighing up the costs and the  
18 benefits of the proceedings.

19 That's all I wanted to say, sir, unless there's anything else I can assist you with.

20 **THE PRESIDENT:** I will just pause.

21 We will just withdraw for a moment because we cannot all confer.

22 **(12.10 pm)**

23 **(A short break)**

24 **(12.13 pm)**

25 **THE PRESIDENT:** Thank you, Ms Abram, we've nothing to ask you.

26 **MS ABRAM:** I am very grateful.

1 **THE PRESIDENT:** Mr Ward.

2

3 Submissions by MR WARD

4 **MR WARD:** Thank you, sir, I appear with Mr Bourke for First MTR. As you will have  
5 noted the Applicant alleges that my client is liable from August 2017 when it  
6 began operating the South Western franchise.

7 Under the division of labour between the respondents, my task is to address the  
8 Tribunal on the conditions for certification. Of course I am not going to repeat  
9 what you have already heard, which extensively overlaps with that, but I am not  
10 dealing with a matter of strike out, even though my clients do have a strike out  
11 application.

12 Under certification, Mr Moser bears the burden of persuading the Tribunal he has met  
13 the conditions.

14 What I propose to do is address the conditions principally through the lens of suitability  
15 and make some particular points of emphasis from the perspective of First  
16 MTR, and answer a number of Mr Moser's points.

17 I want to start with commonality.

18 As the Tribunal will be aware, rule 79(2)(a) asks whether collective proceedings are  
19 an appropriate means for the fair and efficient resolution of the common issues.  
20 For the reasons that have been developed at length by Mr Harris, it is our  
21 submission that it is not possible to try the supposed common issues of breach,  
22 causation and quantum fairly or efficiently because of the myriad of individual  
23 factual questions that they arise.

24 Mr Moser's strategy has been to emphasise that the common issues need not be  
25 identical, but he is quite clear there will be no trial at all of any individual issues.

26 I want to show you briefly, please, what the CAT guide says here about the approach

1 to common issues, commonality, which is strongly redolent of the Canadian  
2 case law you have already seen.

3 It's in the authorities bundle under tab 4, and I would like to go, please, to page 46 of  
4 the bundle numbering.

5 We see, under the head "The claims must raise common issues", the core notion of  
6 collective proceedings is that they group together similar claims which raise  
7 common issues. Then, in the last three lines:

8 "It is important the claim form identifies the common issues which it is contended can  
9 suitably be determined on a collective basis."

10 "Suitably", of course, means "fairly and efficiently". The next paragraph is also very  
11 important because, just as in Canada, it makes clear that it's not necessary that  
12 all of the issues should in fact be common:

13 "Although the claims must raise common issues to satisfy the criteria for approval, the  
14 final resolution of the claims will often require the assessment of individual  
15 issues. The existence of such individual issues is not fatal to an application for  
16 a CPO. For example, the determination of liability for an infringement may raise  
17 common issues of fact and law which justify a CPO, while causation and the  
18 quantification of any damages may not be common to the class. In such  
19 circumstances, the Tribunal may decide to approve collective proceedings in  
20 relation to only part of the claims ... Once a judgment in those proceedings on  
21 the common issues is given, if an aggregate award of damages is inappropriate  
22 the claims will continue thereafter on an individual basis."

23 Then if we could look, please, just at the very final paragraph of this topic, which is on  
24 page 47, just before the next subheading.

25 **MR HOLMES:** Sorry, which paragraph of the guide are you on, please?

26 **MR WARD:** I was just reading from page 46 of the bundle numbering, which is the

1 second paragraph under the heading "The claims must raise common issues".

2 **THE PRESIDENT:** So that's under 6.37 --

3 **MR WARD:** Yes.

4 **THE PRESIDENT:** -- the second indent, "The claims must raise common issues".

5 **MR WARD:** Exactly so, sir.

6 Then I was going to go to the next page, which is the second paragraph, or the first

7 full paragraph, again just above the subheading, where it says:

8 "Where only certain issues in the claims constitute common issues, there is no

9 requirement that those must predominate over the remaining individual issues

10 in order for it to be suitable for the part of the claims covering the common

11 issues to be brought in collective proceedings. However, the common issues

12 must be significant such that resolution of those issues will significantly advance

13 the claims of the members of the class."

14 That is exactly the approach in a number of the Canadian cases. I will not take time

15 with them, but just to give you two references if you would like to see that.

16 In Pro-Sys, which is authorities bundle 6, tab 13, at paragraph 112, the judgment

17 envisages the court dealing with divergences that may arise.

18 Then a case that's been mentioned often but not shown to you, which is Dutton v

19 Western Shopping, which is quoted with approval in Pro-Sys, authorities

20 bundle 5, tab C4, paragraphs 42, 50 and 54.

21 What these cases show is that there can be judicial determination of those individual

22 downstream issues and it's not necessary that all issues should in fact be

23 common.

24 It is just the Applicant's choice to bring the case on the basis that all of the issues in

25 this case are common, because they do not wish there to be any determination

26 of any individual issues.

1 Mr Moser, in his opening observations, said it would be both case ending and  
2 jurisdiction ending if there was a requirement to consider individual  
3 circumstances in this case. (Day 1 transcript, page 79, lines 19 and 20).

4 In our respectful submission that is an entirely misconceived complaint. The collective  
5 action procedure is there for claims which have genuine commonality, whether  
6 in part or all. The parts that do have such commonality can be tried collectively.

7 What makes this claim so unsuitable is it seeks to airbrush out all of those necessary  
8 individual items and it is not jurisdiction ending to say, "A claim based on  
9 100 million ticket transactions is too disparate to satisfy that requirement". That  
10 is very far indeed from the kind of claims in Pro-Sys and others to do with  
11 whether they are competition follow-on claims, whether they are product liability  
12 claims. What's needed in all cases is that there is enough commonality in the  
13 common issues that they can be adjudicated on a common basis fairly.

14 A major strand in Mr Moser's argument to defeat this proposition relies on the  
15 Supreme Court's judgment in Merricks. I would like to go back to that very  
16 briefly. It's authorities bundle 5, tab 59. Mr Moser's argument was that this  
17 somehow swept away the need to consider any individual issues arising in  
18 respect of liability. We disagree and we respectfully adopt the points made by  
19 Mr Harris about this yesterday. The majority do not hold that this is the effect  
20 of section 47C(2), that provision is only concerned with a calculation of  
21 aggregate damages.

22 Mr Moser's argument draws upon the obiter observations of the minority. I would like  
23 to address those, even though my primary point is, just as Mr Harris: they do  
24 not state the law.

25 The key passage, of course, is paragraph 97, which is at page 2606 of the bundle  
26 numbering. You will recall Mr Harris took you to this yesterday. Lord Sales and

1 Leggatt say, picking it up in the third line:

2 "Section 47C(2) is phrased in broad terms and is properly read as dispensing with the  
3 requirement to undertake 'an assessment of the amount of damages  
4 recoverable in respect of the claim of each represented person' for all purposes  
5 antecedent to an award of damages, including proof of liability as well as the  
6 quantification of loss. Such an interpretation better accords both with the  
7 language used and with the statutory objective of facilitating the recovery of  
8 loss caused to consumers ..."

9 Certainly, the majority did not use language of this kind. But I want to look at this  
10 dictum through the lens of suitability.

11 As Mr Harris said yesterday, and he knows better than I, that Merricks itself was  
12 concerned only with the question of assessment of loss. It was a follow-on  
13 claim, a live issue was about the adequacy of economic modelling.

14 There was no live issue, as far as I understand it, in Merricks of the kind of factual  
15 breach and causation issues that are at stake here. In other words, what  
16 happened on Waterloo station when the ticket was bought or not bought?

17 In our submission, if -- if -- this paragraph 97 is to be taken at its highest and these  
18 kind of fundamental building blocks of liability do not have to be proved  
19 individually, then a collective claim would have to be suitable for determination  
20 in this way.

21 In other words, the degree of commonality in those issues would have to be strong  
22 enough that there was no need to address individual issues.

23 One thinks, for example, about overcharge in a follow-on claim that might be accepted  
24 by all parties to be uniform.

25 Because otherwise, if this is taken to mean an unfair or inefficient way of dealing with  
26 these issues, it would violate rule 79(2).

1 In my respectful submission, there are good indicators in this dissenting judgment that  
2 this is how their Lordships saw the point as well. Might I ask you, please, to  
3 turn on in the judgment to page 2611 of our bundle numbering, where we look  
4 at what their Lordships said about suitability. This is of course where Mr Moser  
5 does want to cherry pick. He doesn't like the dissent on suitability, but he does  
6 like the bit that we have just seen. However, I will show you that they are in  
7 fact inextricably linked.

8 We can see in paragraph 120 Lords Sales and Leggatt say:

9 "In determining whether the claim sought to be combined ... are suitable ... one of the  
10 matters specifically identified ... is 'whether the claims are suitable for an award  
11 of aggregate damages'."

12 Then if I can just ask you to skim on to just above letter D:

13 "Such an award dispenses not only with the legal requirement to calculate damages  
14 on an individual basis, but also with the legal requirement ... to prove individual  
15 loss ..."

16 So, they are restating the contentious proposition from paragraph 97.

17 Then at 121:

18 "In our view, 'suitable' has a similar meaning in considering whether the claims are  
19 suitable for an aggregate award of damages to its meaning in considering the  
20 more general question of whether the claims are suitable to be brought in  
21 collective proceedings. In determining whether a class of claims is suitable for  
22 an aggregate award of damages, the focus is on whether the claims are  
23 suitable to be grouped together as a unit for the purpose of proving and  
24 assessing loss, justly and at proportionate cost."

25 That is precisely my submission, that if Lord Sales and Leggatt's dictum is to be taken  
26 at face value, then the claims must be suitable for a process where liability will

1           only be decided on this basis.

2   The same thought resonates in paragraph 123 of the judgment.

3   Of course -- of course -- the majority did not follow Lord Sales and Leggatt's approach  
4           to suitability. However, precisely the same point that I rely upon could be made  
5           through the lens of the majority view of suitability.

6   Even if suitability is relative, it is still essential that if there is a unified determination of  
7           liability, that liability itself must be a truly common issue and not dependent on  
8           the facts of individual cases.

9   If necessary, we would say this dissent is wrongly decided. But in our respectful  
10          submission, firstly, it's not the law and, secondly, it can in fact be read so as to  
11          dovetail with the requirement of suitability that does not eliminate the rights of  
12          defendants to test the facts of individual cases.

13   I was just going to move on from there and talk about the way individual issues arise  
14          in this case. Mr Harris addressed you at length on that, I am not going to repeat  
15          it. I am going to focus on a few small points and one slightly larger point.

16   It is important to keep in mind that the claim on the South Western franchise is  
17          100 million in-scope journeys. We get that from Mr Holt's report at CB4,  
18          page 173, table 6.3.3.

19   Of course, the claim dates back to October 2015, albeit against my client only from  
20          August 2017. We heard yesterday that Mr Moser plans to seek damages all  
21          the way to judgment. We reserve our position on that, but if that claim is made  
22          there will need to be evidence governing the entirety of the period. At that point,  
23          by the time there's a trial it's likely to be an eight-year period. The current year,  
24          and perhaps years to come, may look very different to what has happened in  
25          the past.

26   So, the vast amount of factual evidence that will be required --

1 **THE PRESIDENT:** The current year claim is likely to be vastly smaller, isn't it?

2 **MR WARD:** Indeed, and the whole question of travel patterns have obviously been  
3 turned on their head and nobody of course can know when, if ever, they will  
4 revert to normal.

5 **THE PRESIDENT:** When you say you reserve your position, is that on the point that  
6 I raised, about --

7 **MR WARD:** Yes.

8 **THE PRESIDENT:** You don't have an answer to it that helps me?

9 **MR WARD:** No, not in the time available, sir. We saw the passage in McGregor, we  
10 pay great respect to McGregor, like no doubt all practitioners do, but we cannot  
11 be taken to make a formal concession that that is certainly available in the  
12 Tribunal without giving the matter full consideration.

13 **THE PRESIDENT:** I am not sure the Tribunal is really, in this respect, different from  
14 the court because he doesn't rely on anything now in the rules other than the  
15 overriding objective really, which we have the equivalent.

16 **MR WARD:** Quite so, sir.

17 **THE PRESIDENT:** It's very odd that there's no clear authority on this.

18 **MR WARD:** It is, and I am sure you can understand, sir, that my clients would like the  
19 opportunity to think carefully before making a concession in open court on such  
20 an important point.

21 **THE PRESIDENT:** No, I understand that.

22 **MR WARD:** I just want to make a few really short points on the facts from the First  
23 MTR perspective. Then I am going to talk about point-to-point fares, which are  
24 particularly important for First MTR.

25 The first concerns ticket machines. You already have the point, I think, that boundary  
26 fares are available through most of my client's ticket machines. The reference

1 for that is Mr Cameron's witness statement, paragraph 55, which is core  
2 bundle, tab 6, page 328.

3 I want to just make one minor clarification here in respect to something Mr Harris said  
4 yesterday, which was correct for his client but not quite right for mine.

5 He mentioned that a Travelcard holder has to hold a Travelcard prior to the purchase  
6 of a boundary fare, and that's yesterday's transcript, page 103. In our client's  
7 position, the position is slightly more nuanced, because of course if you buy  
8 one from the ticket machine you don't have to show the ticket machine that you  
9 already have a Travelcard.

10 If you buy it from a ticket office, you will be asked. You can find that in Mr Cameron's  
11 witness statement at 55B, page 333.

12 You also asked about virtual ticket office, what is a virtual ticket office? The answer  
13 Mr Moser gave was broadly correct. It's a machine which you can find on South  
14 Western stations, for example, that allows a customer to talk face to face with  
15 a call centre.

16 There were times in Mr Moser's submissions that it sounded as if he was tempted to  
17 argue there was an obligation to proactively prompt people to buy boundary  
18 fares, and he talked about separate windows and big arrows, but I take it that  
19 was just for illustration.

20 But when he was discussing the Decidedly report for example, he complained that one  
21 of its findings, based on its very limited sample, was that passengers had to ask  
22 for a boundary fare. Sometimes it was asked without the passenger prompting  
23 the clerk, even without them telling them they had a Travelcard, but sometimes  
24 it had to be prompted.

25 This complaint really does need to be put into context. Mr Cameron's evidence is  
26 there are 30 core types of fares out of a total of 1,000 products, that's

1 paragraph 21 of Mr Cameron.

2 It's just not realistic to imagine that all of these can be put up in bright lights, with or  
3 without arrows, in separate windows. Obviously marketing decisions have to  
4 be made to make messaging and systems manageable for consumers.

5 Here I would like to show you something that Decidedly say, another of Decidedly's  
6 criticisms. It's in tab 3 of the claimant bundle, not the core bundle -- I am using  
7 the South West version, but I suspect the South East one is exactly the same.  
8 It's under tab 3, page --

9 **THE PRESIDENT:** Sorry, when you say tab 3 of the claimant bundle, we have them  
10 numbered -- is it bundle 3?

11 **MR WARD:** I hope so.

12 **THE PRESIDENT:** 3A or B?

13 **MR WARD:** Sorry, sir, it's not 3 at all, it's tab 3. It's bundle 1, which is not the core  
14 bundle, but numbered bundle 1. Tab 3 is the Decidedly report. If I could ask  
15 you to turn to page 202 of the pagination.

16 **MR HOLMES:** Which page of the report, please?

17 **MR WARD:** Page 25.

18 **MR HOLMES:** Thank you.

19 **MR WARD:** You will see this is talking about ticket machines. On the left, in the  
20 middle of the page, South Western Railway. The second bullet point is  
21 a complaint, which in my respectful submission just lacks any reality. It says:  
22 "No less than two steps are involved to access boundary tickets."

23 Well, with respect, there are 30 core types and 1,000 products, they cannot all be, as  
24 it were, on the front page, or rather like in Google terms, the top search pick.  
25 In my respectful submission it's not surprising that this product, which -- whilst  
26 it may be the focus here today -- is not in truth the focus of the railway system,

1 might not be put up in bright lights.

2 Putting that aside, I want to come on to a specific issue in terms of ticket types which  
3 has been ventilated but not in my respectful submission exhausted, which is  
4 point-to-point fares.

5 **THE PRESIDENT:** Can we put the report away?

6 **MR WARD:** Yes, please do. Thank you very much, sir.

7 We are going to want Mr Cameron again in a moment, if you still have that.

8 **THE PRESIDENT:** He is in the core bundle.

9 **MR WARD:** He is indeed.

10 Point-to-point fares, suppose a passenger standing on Waterloo station wants to travel  
11 to Guildford. If they have a zone 1 to 2 Travelcard, they only need a ticket from  
12 Clapham Junction. Clapham to Guildford, not Waterloo to Guildford.

13 In fact, that's something they may not even think about, and if they don't, Mr Moser will  
14 still say they have a claim. But let's suppose that they do think about this and  
15 that it occurs to them they have this Travelcard and it might save them some  
16 money, £4.09, or whatever the figure is that Mr Holt has.

17 Let's also suppose they have never heard of boundary fares, because the complaint  
18 is they are not made sufficiently available. But if that was right, there was, and  
19 is indeed, an obvious solution, which is to buy a so-called point-to-point fare,  
20 which is a fare from Clapham to Guildford.

21 Mr Moser called this a very specific kind of point-to-point fare (Day 1, page 64, lines 5  
22 to 6), but it's really foreign appreciate point-to-point fares are not some other  
23 exotic category of fares or niche product like boundary fare, they are just fares  
24 from A to B.

25 **THE PRESIDENT:** I think, to be fair, all he meant was the expression "point to point"  
26 is often used to mean origin to destination and here it's not, we are talking about

1 a supplementary purchase, just as a matter of language.

2 I don't think he was suggesting ... it's a different category in that sense.

3 **MR WARD:** I am glad that is understood, because this is important. I want to show  
4 you what Mr Cameron says about this, if I may. For that, we go back to the  
5 core bundle, his witness statement is under tab 8 and I would like to start at  
6 paragraph 31, which is on page 318 of the bundle numbering.

7 What Mr Cameron says is:

8 "A boundary fare is a permanent fare that covers a journey from/to the edge of the  
9 boundary ... [skimming down about six lines] The price of a boundary fare is  
10 updated using the same formula as applied to the equivalent point-to-point  
11 fare."

12 He uses the example of Surbiton to Southampton, like my Clapham to Guildford. Then  
13 at 32:

14 "'Point-to-point' is used in the industry, and in this witness statement, to describe  
15 a journey between two physical stations. There is at least one point-to-point  
16 fare available for every origin and destination, between two physical stations ...  
17 Point-to-point fares are generally available through all sales channels ..."

18 Well of course they are because it just means fares:

19 "... meaning a customer could purchase a point-to-point fare from Clapham ... to  
20 Southampton from a TVM in Richmond."

21 There's a footnote that says that's generally the case but not absolutely all ticket  
22 machines is that true for.

23 In the next paragraph, as I know you know he says, I have done a comparison for  
24 zones 4 and 6, which is where he said is the majority of boundary fares sold by  
25 First come from, and he's found the boundary fare is within 10p for the vast  
26 majority of cases and sometimes the point-to-point fare is as much as £2

1 cheaper.

2 Then, just to finish this piece of his evidence, a very important point at paragraph 51,  
3 please, which is 326 of the bundle numbering, and this is a point that has been  
4 mentioned a couple of times. If I could just ask you to look at the end of  
5 paragraph 51:

6 "Where a passenger holds a valid point-to-point fare (or boundary fare) in combination  
7 with a Travelcard, the train does not need to call at the last station in the  
8 relevant TfL ... zone."

9 In other words, you could get a non-stop train from Waterloo to Guildford in the happy  
10 event that such a thing existed, it does not need to call at Clapham.

11 **THE PRESIDENT:** Yes, the footnote --

12 **MR WARD:** The footnote is very important, it was changed in 2016, and you can find  
13 that date in fact in Mr Joyce's witness statement for Stagecoach, which is under  
14 tab 12 at page 418. Of course, that means that for the purpose of my client's  
15 claim -- I am sorry to do my learned friends down slightly with this point -- this  
16 rule has been in place for the entire period. If you wanted to see the most  
17 up-to-date rules which express this, they are in authorities bundle 6 under tab  
18 D8. The critical paragraph is 14.2, which Mr Moser didn't read out. I can do it  
19 now if it's helpful or it's there for your note. To make sense of it, one needs to  
20 trace through to the definitions section.

21 **THE PRESIDENT:** I think we understand.

22 **MR WARD:** Thank you very much, sir.

23 One of the ways that this has been dealt with is by the Applicant complaining that, as  
24 it was put in the reply, point-to-point fares are only marginally less obscure than  
25 boundary fares themselves. That's in the reply at paragraph 88.

26 In our respectful submission, this does miss the point, as I have already said, these

1 just are fares, and indeed when they first drafted their claim form they described  
2 them as "universally available". That's in the claim form, paragraph 37a.

3 That, in my respectful submission, is much closer to the truth.

4 Why does any of this matter? It does matter. The first question which is actually  
5 surprisingly difficult to answer is whether any of these point-to-point fare  
6 purchases are within the claim. I confess, we have heard Mr Moser say that  
7 they are, but we hesitate, at least, to just accept that logic without applying  
8 some scrutiny to it.

9 It's probably useful to turn up again the class definition, even though I know how  
10 familiar it must be at this stage. In the core bundle, of course, the claim form is  
11 under tab 1 and the class definition is at paragraph 88, page 19.

12 The proposed class is of course essentially, to put it colloquially, people with  
13 overlapping tickets is what it really amounts to.

14 If we take the first paragraph it is:

15 "All persons who ... purchased ... a rail fare which is not a boundary fare ..."

16 That could include for example my ticket from Clapham to Guildford, where the person  
17 who purchased it held a Travelcard and b, "the rail fare was for travel in whole  
18 or in part on the services of the ... defendants from a station within (but not on  
19 the outer boundary) those zones to a destination beyond the outer boundary of  
20 those zones ..."

21 In other words, you could buy your Clapham to Guildford ticket and you are in if you  
22 also had a Travelcard for part of that journey, is how I read that, putting it in  
23 simple terms.

24 This is where matters get a little bit more complicated.

25 **THE PRESIDENT:** Just pausing there, the rail fare is what we've been calling the  
26 point-to-point ticket.

1 **MR WARD:** I think so, that's how I read this.

2 **THE PRESIDENT:** That's the only rail fare that's been purchased, so it has to be.

3 **MR WARD:** Yes.

4 **THE PRESIDENT:** From a station but isn't the point to point on the outer boundary,  
5 isn't that --

6 **MR WARD:** Sir, that's exactly what I am about to come to because this is where it  
7 gets a little bit more confusing because some stations sit on a zone boundary  
8 and some sit within a zone. If you have the willingness to look at a very tiny  
9 map I can actually show you this or I can just explain it.

10 Clapham Junction, my example, is the last station in zone 2 towards Guildford, but not  
11 actually on the boundary. Because where a station sits on the boundary it's  
12 effectively in two zones, so a station on the boundary of zone 2 and 3 is in both  
13 zones. Putney is in fact on the boundary of zone 2 and 3, it's not actually on  
14 the route to Guildford, but it's at least reasonably local.

15 Putney is in both, Clapham is in one. That means that a person who buys a point to  
16 point from Clapham has notionally, or by reference to the map at least, also  
17 bought a few hundred yards more track in the general direction of Guildford.  
18 Although that is a very artificial way of looking at this, because, as Ms Abram  
19 said this morning, rail fares are not actually sold by the yard or the mile at all.

20 But if the ticket is bought from Putney, then the journey is completely outside the class  
21 definition as far as we can understand it, because there's just no overlap. You  
22 have a Travelcard to Putney and a point to point from Putney to Guildford.

23 We are not sure if Mr Moser shares this analysis and we are not sure --

24 **THE PRESIDENT:** It's a question of whether the words "not on the outer boundary"  
25 are to be read in a very literal way, whether it means the last station in the zone.

26 **MR WARD:** That would be more logical, because of the fact that in reality you are not

1 paying for 200 yards of track past Clapham. But I raise the question rather than  
2 proffering an answer. But either way, if any of these tickets are caught, we do  
3 respectfully wonder what on earth the abuse can be.

4 **THE PRESIDENT:** I see that. If it meant the last station in the zone, that would  
5 exclude what you've been calling the alternative to a boundary fare, as it were.

6 **MR WARD:** Yes, and at various times -- sorry, sir.

7 **THE PRESIDENT:** Then would that -- I fully appreciate the point you are making.  
8 That would then have the effect of excluding the alternative, which you say was  
9 always available?

10 **MR WARD:** Yes. I am going to come on to why that is so important. Because it raises  
11 the point about whether in fact Travelcard holders did take this option. In other  
12 words, they exercised their common sense when they were standing on  
13 Waterloo station and if they were at all price sensitive thought, "Hang on  
14 a minute, I don't need a ticket all the way, do I?"

15 It also raises a very important point if they didn't think about that. That's mitigation,  
16 because, of course all claimants are under an obligation to reasonably mitigate  
17 their loss and bluntly if they are standing on Waterloo station travelling to  
18 Guildford and not thinking about the fact that their Travelcard covers them as  
19 far as Clapham, in my respectful submission that is not something that my client  
20 can be held responsible for.

21 That point is just as powerful even if boundary fares are top secret, locked away in a  
22 cupboard at the back of the supermarket, because the point-to-point fares are  
23 universally available in the Applicant's terms.

24 I am not running this point in the hope --

25 **THE PRESIDENT:** You need to know though -- you would have to have some sense,  
26 of what is the outer station in your Travelcard zone.

1 **MR WARD:** You would and it's not stretching credulity that a reasonable claimant  
2 could have a look at a map on that, which are generally plastered around all  
3 stations and about 4-foot wide, but I am giving evidence on that point.

4 **THE PRESIDENT:** You said you had a map.

5 **MR WARD:** I wish it were 4-foot wide, sir, it's very, very small. It's in bundle 3A,  
6 tab 3.1.

7 Luckily if you are --

8 **THE PRESIDENT:** Wait a minute, 3A?

9 **MR WARD:** 3A, tab 3.1.

10 **THE PRESIDENT:** I don't have a 3.1, I have a 1, 2, 3.

11 **MR WARD:** Well under 3 I have some sub tabs, maybe I've been blessed.

12 **THE PRESIDENT:** You have been blessed, Mr Ward. What's the page number?

13 **MR WARD:** Page 1.

14 **THE PRESIDENT:** Yes, that is indeed a Rail and Tube map.

15 **MR WARD:** This hopefully looks familiar. Indeed, you will be able to find it on the  
16 TfL website and apply some zoom, if it would help. I am so sorry because it is  
17 extremely hard to read. Just to see the example I've been discussing, if you  
18 look in the bottom left-hand corner just above the box that says "Planned  
19 engineering works", you can see "Towards Woking and Guildford", which is the  
20 example I've been using. If you follow the dotted red line back up, you can see  
21 a big cluster, which is Clapham Junction, sitting as the last station within zone  
22 2. Then, as I was just casting around looking for a good example, we can find  
23 Putney --

24 **THE PRESIDENT:** Where do you see the boundary of zone 2?

25 **MR WARD:** If you see the zones are shaded dark grey, light grey, dark grey, light  
26 grey in order to distinguish them.

1 **THE PRESIDENT:** Not in our copy.

2 **MR WARD:** That's very disappointing news, sir. Perhaps you can take it from me and  
3 if I can invite to you look online. We will send a better copy of this.

4 **THE PRESIDENT:** You say that ...

5 **MR WARD:** Clapham is sitting in zone 2. Then the next station along, which I think  
6 says Earlsfield, is actually in zone 3.

7 But, if you follow the dotted red line out towards the left, you can see Putney, and  
8 Putney is sitting on the boundary of zones 2 and 3, which might be why Putney  
9 is in a white box, I suspect, but that's a guess on my part -- yes I am looking at  
10 some other stations that are sitting on both.

11 That's where I took the example from.

12 **THE PRESIDENT:** I see. You say that there is a ... does this show zone 3 and zone  
13 4?

14 **MR WARD:** Yes. I am so sorry you cannot see the shading. Zone 2 stops just before  
15 Earlsfield and zone 3 stops just before Raynes Park and then zone 4  
16 encompasses Berrylands, and Surbiton is in -- sorry, that's zone 5; I have lost  
17 count somewhere -- and Surbiton is in zone 6.

18 We will send a colour A3 version that shows the shading for the zones, but it is on the  
19 TfL website too, because I admit I zoomed it on the TfL website to make sure  
20 I was reading it correctly, as the type is certainly too small for me.

21 My key point, sir, about all of this, which I hope I have not laboured excessively, is this  
22 is an obvious point of mitigation. In other words, if you could buy one of these  
23 tickets, there's clearly a fact sensitive question, at the least, as to why it wasn't  
24 reasonable for you to go and buy just such a ticket.

25 This also has a very powerful bearing on quantum, because if for some reason it  
26 wasn't viable for you to buy a point-to-point ticket, then the claim that you have

1 is not the £5 that Mr Holt has posited, but it may be as little as 10p or you might  
2 actually be £2 better off, according to the limited exercise that Mr Cameron has  
3 done.

4 There is one further point I would like to make about point-to-point fares, which is  
5 important as regards Mr Holt's methodology.

6 Because, as we understand it, Mr Holt's methodology makes no allowance for this.

7 He assumes that every passenger who held a valid Travelcard and purchased  
8 a non-boundary -- purchased a non-boundary fare but could have made  
9 a saving. In my example, Mr Holt assumes that the holder of the zone 1 and 2  
10 Travelcard would have bought a ticket from Waterloo to Guildford rather than  
11 a ticket from Clapham to Guildford.

12 So, he assumes that nobody had the common sense to carry out this elementary piece  
13 of mitigation.

14 I can show you why we think that, briefly. Of course, if there's doubt about it or it's  
15 contested, Mr Holt can no doubt explain this afternoon. But would it be helpful  
16 to show you why we think that just follows from the steps in his report?

17 **THE PRESIDENT:** Yes.

18 **MR WARD:** Sir, thank you. It's in the core bundle, as you know, under tab 5 -- I am  
19 now looking for my core bundle ...

20 Tab 5, page 173, please. These are just the now I think quite well rehearsed steps in  
21 Mr Holt's analysis.

22 At 6.3.3, he starts with total journeys in-scope, and that's where we see the figure of  
23 100 million.

24 Secondly, he applies the potential savings that would apply if all such journeys would  
25 have benefited from the weighted average boundary fare saving. So, he  
26 applies the weighted up average boundary saving to all of these journeys and

1 comes up with a figure of £500 million.

2 Thirdly, he makes various adjustments.

3 Then over the page, he says:

4 "The value of losses depends on the proportion of journeys where the boundary fare  
5 could have been validly used."

6 And he uses the number of people with Travelcards to make that adjustment. So, he  
7 assumes in the case of every journey from Waterloo to Guildford that  
8 18 per cent of people who use Travelcards could have made a saving. Rather  
9 than considering whether the people who held Travelcards might have had the  
10 wherewithal to buy the ticket from Guildford.

11 **THE PRESIDENT:** That's the mitigation point, isn't it?

12 **MR WARD:** It is, sir. Mitigation is the most obvious.

13 **THE PRESIDENT:** He is not counting the people who did buy the ticket from Clapham  
14 Junction or Putney. He is counting the people who bought the full ticket. Your  
15 point is --

16 **MR WARD:** He is applying the full Travelcard percentage. So if, say, the number is  
17 18 per cent of people have Travelcards, he says, "Well there we are,  
18 18 per cent of the people who travel from London to Guildford must have failed  
19 to buy a boundary fare".

20 What I am suggesting is, of those 18 per cent of Travelcard holders, the ones who  
21 were interested in going to Guildford might have had the good sense to buy  
22 a ticket from Clapham.

23 **THE PRESIDENT:** If the 18 per cent is a reasonable estimate of the number of people  
24 who bought the Waterloo to Guildford fare, then subject only to  
25 mitigation -- which is what I think he's doing, subject only to mitigation, which is  
26 separate argument, your point is right: they didn't buy a Clapham Junction to

1 Guildford ticket, they bought the Waterloo to Guildford ticket, and 18 per cent  
2 of the people who bought those tickets held Travelcards.

3 So, they either were extremely foolish because they didn't buy what we have called  
4 the point to point or they failed to get a boundary fare.

5 **MR WARD:** Sir that's right. It is right but we think -- we think -- that the logic of this is  
6 that, in a sense, the 18 per cent is an overstatement. Because if you  
7 imagine -- just to stylise the numbers in a way Mr Moser would definitely object  
8 to -- that half the Travelcard holders had the good sense to buy a ticket from  
9 Clapham to Guildford, then it shouldn't be 18 per cent of the Waterloo to  
10 Guildford people at all. It should be a reduced number to reflect the fact that  
11 the Travelcard holders actually did the right thing and bought a point-to-point  
12 fare.

13 That comes back to Mr Harris' point yesterday that one just doesn't really know what  
14 any individual person did.

15 Sir, I am afraid I am going a bit slower than I had hoped. It's 1 o'clock and I think  
16 I have an absolute maximum of 15 -- I should not say "maximum", really, as  
17 confidently as that. I am almost two-thirds of the way through what I wanted to  
18 say.

19 **THE PRESIDENT:** I think we can allow you half an hour, but no more. But we will cut  
20 down the time for any supplementary questions of Mr Holt, because we are  
21 certainly not going to ask him to come back tomorrow.

22 **MR WARD:** I gratefully accept that offer.

23 **THE PRESIDENT:** I think it's really not, as I said -- or as you were told in the  
24 letter -- it's not really an occasion for cross-examination of Mr Holt.

25 So, you finish your submissions comfortably in half an hour and we will then start with  
26 Mr Holt at 2.30.

1 **MR WARD:** Sir, I am grateful for the indulgence.

2 **THE PRESIDENT:** We will return at 2 o'clock. Thank you.

3 **(12.59 pm)**

4 **(The luncheon adjournment)**

5 **(2.02 pm)**

6 **THE PRESIDENT:** Yes, Mr Ward, we have over lunch, with great efficiency on the  
7 part no doubt of different solicitors, received not one but two slightly different,  
8 but equally coloured, maps with different presentations, but both of them being,  
9 I think, National Rail and TfL maps of the Rail and Tube services.

10 **MR WARD:** Thank you, sir, I am very grateful to those who managed to generate  
11 those so quickly.

12 I was going to move on to a different topic, which is a general observation about the  
13 nature of the Applicant's case.

14 The Tribunal will be well aware that we have challenged what we have seen as a strict  
15 liability approach in the Applicant's claim. That, for example, just for your note,  
16 is in the claim form at paragraph 3, where the complaint was failing to ensure  
17 that customers are aware and buy an appropriate ticket.

18 Now, of course, if you take that strict liability approach, then all of the problems of the  
19 individual circumstances that we complain of are substantially ameliorated. The  
20 problem is it's been rightly abandoned, because it is of course unarguable.

21 What was striking was that, on Tuesday, when Mr Moser was making his submissions,  
22 even though he disavowed the strict liability approach, he could not help but  
23 lapse into it on a number of occasions. I just want to mention a couple.

24 Right at the very outset of his submissions he said the breach was charging customers  
25 twice (Day 1, page 5, lines 1 and 2).

26 But that case proceeds on the basis that any time a customer fails to buy a boundary

1 ticket, that is a breach.

2 Again, he said, in a realistic counterfactual we will see "materially all eligible customers  
3 purchasing a boundary fare".

4 I am sorry, sir, I can hear some interference, I hope you can hear me.

5 **THE PRESIDENT:** I can hear you, perhaps someone does not have their microphone  
6 muted.

7 **MR WARD:** As long as you can hear me. He said "materially all eligible customers  
8 purchasing a boundary fare", and that's in the transcript on Day 1, page 99,  
9 lines 11 to 12.

10 That too is a form of strict or almost strict formulation. But once you abandon that, as  
11 they had to, and focus only on best endeavours, it does become inescapable  
12 that individual circumstances matter.

13 I have already talked about Merricks, but there was another way that Mr Moser tried  
14 to avoid this conclusion. He argued that these kind of factual issues didn't  
15 matter, because it was not necessary to consider them to prevent overrecovery  
16 (Day 1, page 81).

17 The argument was that the aggregate amount would be unaffected, but in our  
18 respectful submission that is quite wrong. The driver for the quantum, the  
19 aggregate quantum, is the number of journeys affected. The more journeys  
20 that are in the pot, the more the aggregate damages. So, it becomes critical to  
21 establish whether individual journeys are in or out. This has implications for the  
22 quantum modelling and the class identification. Starting with the quantum, of  
23 course Mr Harris has made a lot of quite sophisticated points about this  
24 yesterday and I want to just make a much simpler one, which will be familiar  
25 from our, and indeed my friends', skeleton arguments.

26 Namely, that Mr Holt's methodology is essentially premised on the strict liability

1 allegation. It assumes that any case in which a Travelcard holder did not buy  
2 a boundary fare there is a claim. I don't think there can be any doubt about that  
3 at this relatively late stage of the hearing, but I will just give you one reference  
4 which encapsulates it. It's in Mr Holt's first report at paragraph 6.2.1 where he  
5 says:

6 "... the claim is the difference between what the passenger paid for a relevant rail  
7 journey, and the cheaper boundary fare that the passenger should have  
8 purchased instead, given that the passenger held a Travelcard providing the  
9 right to travel for at least part of their journey."

10 That is an expression of the strict allegation. All such failures to buy a Travelcard -- I'm  
11 so sorry, failure to buy a boundary fare are within the claim.

12 **THE PRESIDENT:** Yes, whether one calls it strict liability, it's not necessarily under  
13 that head. It could, it seems to me, follow from the abuse as explained by  
14 Mr Moser, but it's assuming causation in every case, which is not quite the  
15 same thing as strict liability.

16 **MR WARD:** It gets to the same destination by a slightly different route, and I am quite  
17 content not to dispute that formulation.

18 The core proposition is all failures to buy boundary fares are culpable and sound in  
19 damages.

20 Part of the problem here, and the reason why the Applicant has persisted with this  
21 approach, is that once one gets away from -- if you will forgive me for still using  
22 the term "strict" -- the strict approach, what we are left with is a very amorphous  
23 kind of breach, because it does involve an allegation of failure to use best  
24 endeavours over hundreds of stations, over eight years, over 100 million rail  
25 journeys.

26 As Ms Abram was submitting this morning, this notion of best endeavours is very

1 imprecise. One can see it's quite difficult to formulate a methodology which  
2 would capture at an aggregate level all of the people who had somehow fallen  
3 on the wrong side of the line in terms of not getting quite enough information.

4 It's not the case that there is no information, it's that there is according to the Applicant  
5 not enough.

6 So, when Mr Holt says, in his second report, he can adjust the methodology to remove,  
7 for example, advance fares, that doesn't help at all with what we would  
8 respectfully submit is the more fundamental issue, which is: where does the line  
9 lie between lawful and unlawful conduct here?

10 Mr Moser used a very revealing example here. He said, both in his skeleton and  
11 indeed orally, that off-peak fares were a good example of what he would regard  
12 as sufficient availability. That's on Day 1, page 105, line 6 and in his skeleton  
13 argument at paragraph 34.

14 In fact, they illustrate the problem not the solution because off-peak fares are not  
15 available on all flows.

16 Mr Cameron gives the example of Waterloo to Woking, that's in paragraph 60D of his  
17 evidence at page 335.

18 Also, one can see immediately that knowledge of passengers is not likely to be perfect  
19 in this regard. If we consider my example of someone at Waterloo station  
20 wanting to travel to Guildford, supposing it's 3 o'clock on a Wednesday  
21 afternoon and they are coming back the next morning, how confident are they  
22 likely to be that an off-peak fare is available? They may feel that it's necessary  
23 to make further enquiries to get the answer.

24 This is, in my respectful submission, a good example of why, even on Mr Moser's  
25 preferred version of his case, there is a very imprecise and fact-sensitive  
26 question about which kind of journeys would be caught.

1 That matters for the next head of both certification and suitability I want to talk about,  
2 which is the requirement to have an identifiable class. You will recall that rule  
3 79(1) says the claim must be brought on behalf of an identifiable class and rule  
4 79(2)(e) under suitability asks "whether it is possible to determine in respect of  
5 any person, whether that person is or is not a member of the class".

6 Here we make no complaint about the ability of people to identify whether they are in  
7 the pleaded class. Subject to the questions of proof, which I am going to come  
8 on to, it's quite a black and white question whether you have the right type of  
9 tickets, although we were discussing this morning there may be some unclarity  
10 about it in the detail.

11 The problem with that class definition is that too reflects what I'm calling the strict  
12 approach. It's any buyer of overlapping tickets, so it doesn't match the best  
13 endeavours allegation that we are now facing. In the language of the Canadian  
14 cases, it lacks what the courts call a rational relationship with the breach. Just  
15 for a reference for that, there are many, Hollick is one such case in authorities  
16 bundle 5, tab C5, page 2972.

17 Our criticism here under identifiable class is not really about the pleaded class, but it's  
18 just that class cannot stand. The problem is there is no other class which would  
19 enable people to identify whether they are within it.

20 I would like if I may to go back to the CAT guide at this point to see what is said about  
21 this. It's in the first authorities bundle, tab 4, page 45.

22 **THE PRESIDENT:** Yes.

23 **MR WARD:** Thank you. Right at the bottom of the page there is an indented  
24 subheading:

25 "The claims must be brought on behalf of an identifiable class."

26 It explains the purpose --

1 **THE PRESIDENT:** Paragraph 6.37?

2 **MR WARD:** It is, sir, yes:

3 "It must be possible to say for any particular person, using an objective definition of  
4 the class, whether that person falls within the class."

5 Then it explains why that's needed:

6 "An identifiable class ... serves several purposes. It sets the parameters of the claim  
7 by ... delineating who is [in] the class and who is not ... It affects the scope of  
8 the common issues ... And it has practical implications ... in relation to the  
9 requirements to give notice."

10 In addition, we place emphasis on the next paragraph which says:

11 "Accordingly, class definitions based on subjective or merits based criteria (for  
12 example 'persons having suffered loss as a result of the ... conduct') should be  
13 avoided."

14 That would be obviously unsuitable because it would not define the parameters of the  
15 claim and would not enable anyone to know whether they were in the class or  
16 not.

17 Here the problem is the claim is compiled of individual journeys and one of the  
18 functions of the class definition is to delineate the journeys that would be within  
19 the scope of the claim. But it must not be subjective or merits based. So how  
20 does one formulate a class to match the allegation that the fares were not made  
21 sufficiently available?

22 We are looking for people who were not enabled to buy a boundary ticket because  
23 they didn't receive sufficient information. That is obviously not a bright line  
24 criterion, such as whether you bought an optical disk drive or a defective tractor,  
25 as in one of Mr Moser's other examples.

26 Any definition that involved whether a person believed they didn't have sufficient

1 information or anything of the kind would be subjective or merits based. Any  
2 definition that said a person who does not know about the boundary fares fails  
3 to match the allegation of breach, because of course it's quite possible that  
4 people will not all know about boundary fares, even if there is sufficient  
5 information.

6 We made these points at the outset in our initial response and there really hasn't been  
7 any satisfactory answer to them.

8 In our respectful submission, this lack of precision in the allegation, which would be  
9 quite tolerable in a single claim, single abuse of dominance claim, is simply fatal  
10 to a claim brought on a class basis.

11 With that, I was going to turn very briefly to some of the remaining criteria in respect  
12 of suitability.

13 The next one is costs and benefits. Our overarching submission is that the costs would  
14 be exceptionally high, and the action would be for very little benefit other than  
15 for funders and their lawyers. Ms Abram this morning mentioned some really  
16 quite eye-catching fees. What I would like to do is respond to some of what  
17 Mr Moser said in regard to the practicalities of making a claim.

18 Firstly, he recognised that the Epiq plan, the claim administration plan, meant that  
19 class members would have to bring forward significant documentary evidence.

20 To quote from the transcript, Day 2, page 17, he said:

21 "... Travelcard and rail journey details, along with supporting documentation, receipts,  
22 bank account histories, et cetera, necessary to validate, process and calculate  
23 payments."

24 That was a fair summary of what is said in the Epiq plan, and I will not turn it up unless  
25 you would like me to take you there, but it's paragraph 10.6 of the Epiq plan in  
26 volume 1, tab 11, page 338.

1 It's our respectful submission that it is highly unlikely that many people will have this  
2 material. It could be as much as eight years after the claims began before any  
3 of this is resolved, and what's required here to make a claim is not just a bank  
4 statement that shows a debit was made out to a railway company, it's  
5 necessary to know what kind of journey it was and what kind of ticket.

6 Of course, it is possible there are some people who keep old train tickets for eight  
7 years. But in our respectful submission that is not likely to be 100 million  
8 people. As the President said yesterday, this is very different from the kind of  
9 consumer good where one is much more likely to keep a receipt, whether it be  
10 a car or a computer like in Pro-Sys.

11 The second point is that Mr Moser said that people will be incentivised to claim once  
12 the fund is in place, even for smaller sums. That was Day 2, page 15.

13 But that still would only be the case for claims that were actually worth the bother. We  
14 know that Mr Holt's weighted average per journey is £5.09 for South Western,  
15 and of course as Professor Mason said yesterday -- I'm so sorry, it was  
16 Mr Holmes -- that that may conceal a great deal of variation within that average.  
17 There may be people who made a lot of journeys, but that's not a person -- so  
18 this person may have a larger claim but that large claim is still itself built up of  
19 all of these individual journeys, where the average benefit might be £5. It might  
20 be as little as 10p of course, if there was an equivalent point-to-point fare.

21 If a person has a lot of claims they are going to need a lot of proof, a lot of old railway  
22 tickets or something of the kind.

23 Of course, all of this is for the Applicant to satisfy the court and the Applicant could  
24 have come to court with some material to show that it is more plausible than it  
25 sounds that people will be able to prove the claims. They might, for example,  
26 have produced evidence that people have come forward to them or expressed

1 their willingness or interest in bringing a claim.

2 Part of their litigation plan is that there was a claims website launched in 2019 and the  
3 litigation plan said significant efforts will be undertaken to promote it and  
4 consumers will be invited to register their details.

5 That, for your note, is in bundle 1, tab 10, page 302, paragraph 35.

6 We haven't had any evidence that anyone has ever come forward, still less people  
7 armed with old railway tickets and all the necessary forms of proof.

8 Then finally under this head, my third point is that beyond these concrete types of  
9 evidence referred to in Epiq, Mr Moser at least hinted at the possibility that other  
10 sorts of indirect evidence might suffice. Again, on Day 2, page 15, he said:

11 "This may require taking a view on the evidence and that passengers would give  
12 evidence."

13 But of course, by the time passengers are proving their claims, we are at the  
14 administrative not the judicial phase. This court will decide a question of  
15 aggregate damages, but their claims handling will be dealt with by Epiq or  
16 somebody similar.

17 Once we get into the territory of claims administrators having to make evaluative  
18 judgments, with the best will in the world and without any discourtesy to Epiq  
19 and the people who work for it, that is fundamentally different from a judicial  
20 determination of a claim.

21 Stepping back and summing all of this up, we would respectfully submit that this fails  
22 the test set in Merricks at paragraph 58 in respect of distribution, where  
23 Lord Briggs said:

24 "The only requirement, implied because distribution is judicially supervised, is that it  
25 should be just, in the sense of being fair and reasonable."

26 In our submission, it is neither fair nor reasonable to have a significant damages award

1 for which very few of the millions of supposed class members will ever claim.

2 Sir, very, very briefly now, I see the time, stepping back and looking at all these factors  
3 in the round, we submit the claim fails the tests for certification and suitability in  
4 particular.

5 The Supreme Court made clear that what's required is a multifactorial balancing  
6 exercise, that is Merricks paragraph 64, and the factors against certification are  
7 in my submission overwhelming.

8 There is one factor I haven't mentioned yet that the Applicant prays in aid, which is the  
9 uneconomic nature of the individual claims. He says the claims are suitable for  
10 certification because the value of the claims is so low.

11 In my respectful submission, that cannot be enough on its own. Otherwise, there  
12 would be no need for all of this complex machinery and any low value class  
13 action would fall to be certified.

14 What we submit, in a nutshell, is the claims cannot fairly be tried by collective action  
15 and so the Tribunal should not certify them simply because individual claims  
16 may be uneconomic.

17 That takes me to what one might call suitability in a relative sense. Lord Briggs's  
18 formulation for the majority in Merricks, where their Lordships said:

19 "The question is whether the claims are suitable to be brought in collective  
20 proceedings, rather than individual proceedings."

21 We know the minority differed on that. In our submission, all of the difficulties we have  
22 identified, except perhaps the one of proof, arise because the proceedings are  
23 pursued collectively.

24 The consequence is the proceedings would be simply unfair and not an effective  
25 means of disposing of the claims, because they cannot proceed by  
26 determination of any of the vital individual issues.

1 As a result, using the relative formulation, the claims are not more suitable to be  
2 brought collectively than as individual claims. The burden is on the Applicant  
3 to show that they are more suitable and he has entirely failed to do so.

4 That's all I was going to say, subject to what is essentially a housekeeping point, if  
5 I may.

6 These are just two short notes I wanted to make, really for the Tribunal and for the  
7 transcript.

8 They both deal with the position of third-party vendors. The Tribunal will have noted  
9 that unlike LSER, my client and Stagecoach did not make a strike out  
10 application in respect of third-party vendors based on the factual relationship  
11 between third-party vendors and TOCs. We do have our own strike out  
12 application, which is in the core bundle under tab 17, and if successful that  
13 would of course include the third-party claims because it was an application in  
14 respect of the entirety of the case. Also, Ms Abram developed some legal,  
15 purely legal, submissions about third-party vendors as part of that.

16 But, unlike LSER, we haven't brought a challenge, at this stage at least, based on their  
17 factual relationship to the TOCs.

18 Just really for the Tribunal's note, we are not seeking to take the benefit of, or adopt,  
19 the parts of LSER's submissions that dealt with that factual relationship, which  
20 include their skeleton argument from paragraphs 55 to 58.

21 My second, related point, relates to our evidence, which was filed as you know on  
22 behalf of Mr Cameron. Again, just for your note, at paragraph 28 he gives some  
23 very brief evidence about the position of third-party retailers by reference to the  
24 third-party investor licence. There is more detail about that in Mr Backway's  
25 statement. But, as Ms Abram explained this morning, there are other types of  
26 third-party agreement.

1 I don't have detailed instructions on those, but if Mr Cameron's evidence is read, it  
2 should be seen in that light. It is incomplete, and in fact we don't need to rely  
3 on that paragraph for any purpose that we are advancing.

4 Sir, and members of the Tribunal, unless there's anything further I can assist on, those  
5 are the submissions for First MTR.

6 **THE PRESIDENT:** No, I think what we will do is take a ten-minute break before  
7 Mr Holt comes to give evidence. If we have anything to ask you, Mr Ward, we'll  
8 ask you then.

9 Thank you very much.

10 **MR WARD:** Thank you, sir.

11 **THE PRESIDENT:** We will come back at just after 2.35.

12 **(2.26 pm)**

13 **(A short break)**

14 **(2.35 pm)**

15 **THE PRESIDENT:** Thank you, I think we have Dr Holt with us.

16 Can you hear me?

17 **THE WITNESS:** It's Mr Holt but, yes, I can hear you. Thank you.

18 **THE PRESIDENT:** I think for form's sake we ask that you be sworn or affirmed, which  
19 will be done by the member of the Tribunal staff.

20

21 MR DEREK JAMES HOLT (affirmed)

22

23 Questions from THE TRIBUNAL

24 **THE PRESIDENT:** Thank you very much. We have read your two reports, the reports  
25 of February 2019 and September 2019. It seems a long time ago now.

26 **A.** Yes.

1 **THE PRESIDENT:** We are very conscious of the fact that these are just preliminary  
2 reports at the outset of this litigation and nothing like the sort of full report that  
3 you might put in for trial if these cases came to trial and have all the caveats  
4 that result from that.

5 We see that the method that you have developed, which you summarise in your first  
6 report at 3.4 -- you have your reports with you, I assume, have you?

7 **A.** I do, sir, thank you.

8 **THE PRESIDENT:** Yes. At 3.4 of the first report, where you have set out the four  
9 steps that you've used --

10 **A.** Yes.

11 **THE PRESIDENT:** -- which we have looked at.

12 Then, in your second report, you explain -- I think it's at paragraph 3.1.7 -- that when  
13 dealing with the calculation of this kind, where you are having to make  
14 estimates and assumptions and so on, plus incomplete data, the concerns  
15 being one of bias and imprecision.

16 **A.** Yes, that's correct.

17 **THE PRESIDENT:** You've now, I think, seen all the witness evidence, including some  
18 supplementary statements from some of the witnesses, explaining what data  
19 and what information the TOCs have that you might have access to in due  
20 course.

21 What we wanted to do really is just to go through these four steps, make sure that we  
22 have understood them properly and explore which of the assumptions you have  
23 had to make have the greatest significance in the final estimate of aggregate  
24 loss, or, put another way, which are the most sensitive assumptions in terms of  
25 the calculation.

26 Secondly, for each of the steps, whether there's any material that you expect to get on

1 disclosure or on further analysis that you think will obviate or reduce the scope  
2 of the assumptions you have to make.

3 **A.** Yes, that's absolutely fine, I'm happy to speak to those points.

4 **THE PRESIDENT:** Before we do that, is there anything at a more general level that  
5 you would like to say, you don't have to, about the sensitivities in your  
6 computation, to various assumptions and any sort of lower and upper bound.  
7 You have given a lower and upper bound of members of the class, but in fact  
8 I think that doesn't affect the calculation -- that affects the average of course  
9 but it does not come into the calculation. On the calculations itself, anything  
10 about that that you would like to say more generally before we go into the  
11 particular steps?

12 **A.** I think only that I recognise that there is --

13 **THE PRESIDENT:** Before you do that, could you pause a moment, we have an echo.  
14 I don't know where that's coming from, but if someone who is on the Teams  
15 platform has not muted their microphone, if they could please do so.

16 Let's try again, go ahead.

17 **A.** I am sorry about that.

18 The fact that I have not put forward a range for the damages estimate does not  
19 suggest that I do not consider that there is uncertainty around it, but that the  
20 information that we would expect to collect through the disclosure and further  
21 analysis is unknown in terms of the precise consequence, so I don't have  
22 a particular range in mind around my estimate at this stage.

23 **THE PRESIDENT:** Yes, understood.

24 Then we will perhaps start by looking at step 1, which is the in-scope journeys.  
25 Perhaps just to clarify that, you have had, I think, some estimates, but is it right  
26 that you should get information on all outward journeys and tickets sold in the

1 relevant period from the TOCs on disclosure, that that will be a known data?

2 **A.** Yes, I think that's what I'm expecting to receive upon disclosure.

3 I'm aware of course that under the LENNON system there are some elements of  
4 estimation that go into that in terms of the allocation of fares across different  
5 TOCs, where there are multiple TOCs using the same stations and so forth.  
6 But, essentially, I do expect to get that data and would replace certain  
7 assumptions I made with that data.

8 **THE PRESIDENT:** Yes, that should not be problematic.

9 Then we go to step 2, the savings, perhaps Professor Mason may want to explore that  
10 with you.

11 **PROFESSOR MASON:** Thank you. In fact, if it's all right, just before we move on to  
12 step 2, if we could just do one last check on step 1.

13 I'm still getting an echo. Mr Moser, I know you may well need to come in at some point  
14 but I wonder whether if you were to mute that might help the problem.

15 **MR MOSER:** I am muted, I think.

16 **PROFESSOR MASON:** It didn't look like it on the -- there you go, that's muted now.  
17 Okay, well we shall proceed as best we can.

18 Mr Holt, if I could take you to -- just so that we could understand in a little bit more  
19 detail what we have just discussed. Table 6.4 of your first report -- that's at  
20 tab 5, core bundle, page 152 of the bundle numbering.

21 **A.** Yes, I have that.

22 **PROFESSOR MASON:** Very good.

23 This obviously relates just to South West, but I just thought it might be helpful to have  
24 a specific set of figures in front of us.

25 If we look at that table, I would find it very helpful if you could just clarify which numbers  
26 you expect to be exact about on further disclosure and which numbers you feel

1 you would still need to make assumptions about, or estimate.

2 Then I will ask you a third question in just a moment, but I will pause there.

3 **A.** Okay. So, I think the total entries might well be quite accurate already, in the sense  
4 that they already reflect data which is from the ORR, which reflects the  
5 underlying fares data that I was alluding to, but I do expect to update several of  
6 the other aspects.

7 Just to make a brief point about the way that this data set has been constructed. With  
8 that data I have then constructed an origin destination profile, which is not the  
9 actual one because I do not have that data, but which is instead based on  
10 essentially station size driven estimates of the proportion of traffic between any  
11 given two points.

12 I have made some other adjustments which relate to removal of season tickets, which  
13 is a known item, so I think that should be relatively accurate, even  
14 post-disclosure. I have made some other estimates as to the adjustments that  
15 might need to be made for example for certain fare types such as Pay As You  
16 Go, so that might be more accurate once we have disclosure. So that's one of  
17 the adjustments there.

18 I think I would get more accurate data in terms of things such as assumed return  
19 journeys, because I've used a proportion which is sourced from the ORR in  
20 terms of the mix of different types of fare types, but is not precise to each  
21 individual TOC. So that one would also be updated.

22 I think that ... sorry, the other key issue of course is that instead of my approach which  
23 estimates the origin destination matrix by station size, with a couple of further  
24 adjustments which I propose not to go into in detail but they are set out in the  
25 report, I would have the actual origin destination, so that would be a substantial  
26 improvement in accuracy in terms of what origin and destinations people are

1 buying tickets for.

2 **PROFESSOR MASON:** Thank you, that does help.

3 Let me just, if I could, follow up very briefly on a couple of aspects.

4 The Oyster/Pay As You Go line, which currently is estimated at 80 per cent.

5 **A.** Yes.

6 **PROFESSOR MASON:** And clearly, therefore, has a substantial effect on the  
7 journeys that flow through to the bottom line, as it were.

8 Do you anticipate being able to determine that with complete accuracy or will there still  
9 be some residual assumption that needs to be made about that proportion?

10 **A.** I have to admit I am not sure about that, that would depend on the nature of the  
11 data held by the Proposed Defendants.

12 If their data does track the Pay As You Go status, then it would be a more precise  
13 adjustment.

14 At the moment, it's an overall adjustment, which is informed by TfL evidence on the  
15 overall network as opposed to being specific to any specific stations.

16 **PROFESSOR MASON:** Understood, thank you.

17 Similarly, I'm assuming that on the assumed return journeys and proportion of returns  
18 that are out of scope, which you currently estimate or assume to be 27 and  
19 50 percent based on, I understand, average data. Again, you would get  
20 improved accuracy but still some residual uncertainty about those parameters?

21 **A.** I would get improved accuracy. The question I guess is whether I would get the  
22 actual returns data. I think I would get that so I don't think there would be much  
23 remaining uncertainty on that.

24 I think the disclosure of the fares data should give a precise indication of this on  
25 a TOC-by-TOC basis.

26 **PROFESSOR MASON:** Okay, thank you, that's helpful.

1 As the President suggested, perhaps we could move on to the second step of your  
2 calculations. Here, if we could go forward a short distance in your first report,  
3 so we are now going to page 155, and it's that page and over the page, so  
4 tables 6.6 and 6.7. Particularly, if we look at paragraph 6.2.35, which sort of  
5 brings it all together. This is for journeys beginning in zones 3, 4 and 5 you give  
6 an illustration that assumes 80 per cent of passengers for zones 1 to 3 and so  
7 on.

8 Again, if you could just say a little bit more about two things.

9 First of all, the choice of 80 per cent for that particular model parameter and the  
10 sensitivity of the final number, the aggregate loss, to that parameter  
11 assumption.

12 **THE PRESIDENT:** Mr Holt, sorry to interrupt, have I rightly understood that when you  
13 say 80 per cent of passengers, you mean of passengers holding a Travelcard?  
14 Is that right?

15 **A.** That is correct. That is correct.

16 This segment is on essentially the distribution of the Travelcard holdings for the people  
17 with Travelcards, assumed according to what zone the Travelcard applies to.

18 The information set is based on TfL evidence on the actual mix of the Travelcard sales,  
19 according to different sort of zone coverages and periods of time.

20 Then I make a number of assumptions at the moment as to what the mix of holdings  
21 will be for any given station.

22 Those assumptions would be updated but they would be updated through the  
23 proposed survey. As has been discussed previously, I would not expect the  
24 TOCs to have specific information on Travelcard holding.

25 **PROFESSOR MASON:** I see, okay.

26 That is one where a further survey may help to ... well, I suppose increase confidence

1 in the point estimate for the parameter you have chosen in the model.

2 To the second question, and I am not looking for an overly precise answer to this  
3 question, because that would require a lot of further work. But the sensitivity of  
4 the aggregate loss to a particular parameter assumption. If you just split it  
5 between a little, moderate or highly sensitive, that would be a good enough  
6 level of resolution.

7 **A.** Okay. Would it be helpful to try and describe what the factors that would affect  
8 that would be or would you like me to dispense with that sort of thinking and  
9 sort of just go straight to: is it material or not?

10 **PROFESSOR MASON:** In your hands, Mr Holt, I think you understand the model well  
11 enough to know the right way.

12 **A.** At the moment I don't have a precise sensitivity analysis to sort of quote to, which  
13 is sort of why I thought the suggestion of explaining some of the factors would  
14 be relevant in that context.

15 I think it's fair to say that the assumption is material to the extent that the Travelcard  
16 that you are deemed to have held will have an impact on the size of the  
17 boundary zone saving, so obviously for a given train fare between, let's say,  
18 Clapham and Guildford, depending on whether you are assumed to have  
19 a zone 1 and 2 Travelcard or a zone 1 to 6 Travelcard would have an impact  
20 on the size of that particular saving.

21 In general, I think it's fair to say that the Travelcard mix is a material impact, or could  
22 have a material impact.

23 Obviously, my starting point is from TfL evidence on the actual mix of Travelcards.

24 The main uncertainty wouldn't be that the starting point is one in which it's  
25 a completely random assessment of what the Travelcard mix is, it's actually  
26 informed by the sales of Travelcards as reported by TfL.

1 Having said that, that is at the aggregate level for TfL not relating to holdings in any  
2 particular set of stations.

3 I think the further evidence that I would expect to get in that regard would allow for  
4 more precise estimates on that. I don't have a view as to which direction that  
5 could go or indeed whether it's likely that the outcome would be significantly  
6 different. It's possible, and Mr Ward made one point that is an interesting point  
7 earlier today, and that would be the sort of issue that might be aired out in the  
8 survey.

9 But then there are equally plausible factors that might suggest that, for example, my  
10 80 percent assumption on holding the smallest Travelcard that covers the  
11 station in question for the other stations might be conservative. I don't have  
12 a good way of knowing at this stage.

13 **PROFESSOR MASON:** Okay, thank you.

14 Again, it might not be answerable immediately, but just to crystallise the question that  
15 I'm asking. Again, if you look at 6.2.35, if you look at that assumption that  
16 80 percent of passengers have the respective Travelcard and the other  
17 20 percent are split according to the proportions mentioned in the earlier table.  
18 So just focusing on 80/20.

19 **A.** Okay.

20 **PROFESSOR MASON:** Which is the assumption that you don't base on other data?

21 **A.** That's true, the 80 percent in that case is not informed by specific data. I think it's  
22 broadly reasonable that the sort of rationale is that for these outer stations it is  
23 quite likely that many of the people attending those stations would be living in  
24 the area, so that's the reason for the assumption.

25 **PROFESSOR MASON:** Forgive me, Mr Holt, sorry, I am not questioning the  
26 reasonableness, it's the sensitivity. I am not suggesting that 50 percent is

1 a more reasonable number, but if the assumption were 50/50 rather than 80/20  
2 would that have a small, medium or large effect on the final calculation?

3 **A.** I think it would have at least a medium effect, the reason being that with  
4 an 80 per cent assumption as it currently stands, a large percentage of  
5 journeys would be having a lower boundary fare saving compared to the  
6 scenario where it would only be 50 percent. The difference between  
7 a boundary fare saving if you have a zone 1 to 3 versus a zone 1 to 6, for  
8 example, could be quite significant. I think it could be in the order of a couple  
9 of pounds, which in the context of a £5 average could be very significant.

10 **PROFESSOR MASON:** Okay, thank you. Thank you very much.

11 If I could take us on to an issue which spans step 2 and step 3, so step 3 being  
12 estimating travellers holding Travelcards. We are particularly  
13 interested -- I know you will no doubt have been following earlier discussions  
14 and submissions made -- about the treatment of travellers who hold  
15 point-to-point tickets.

16 **A.** Yes.

17 **PROFESSOR MASON:** We would just like to check with you, first of all that such  
18 ticket holders are within your numbers, as it were, currently.

19 **A.** Yes.

20 **PROFESSOR MASON:** Just to check, that is the case?

21 **A.** Let me just make sure I understand the precise question before I just give a blanket  
22 yes or no answer.

23 **PROFESSOR MASON:** Of course.

24 **A.** "Point-to-point" being in this context a passenger who actually did buy  
25 a point-to-point fare towards -- at the outer boundary of the last station before  
26 the boundary of their Travelcard holding, as opposed to one from the station at

1 which they actually got on. That's my understanding of the point-to-point  
2 definition. So let's just -- unless that's not your interpretation -- proceed.

3 **PROFESSOR MASON:** No, so I'm with you on that. We have yet to apply in your  
4 model the proportion who hold a Travelcard, which is going to come at the next  
5 step. I am just checking that in all of the journeys which are currently included  
6 in your in-scope number --

7 **A.** Yes, okay --

8 **PROFESSOR MASON:** -- that does include journeys which could be taken as  
9 point-to-point fares by a traveller who has travelled part of their total journey  
10 with a Travelcard and then the final leg of their journey with a point-to-point fare.

11 **A.** I think the answer is yes. The reason for that is that if the station is not on the  
12 boundary, so it's, for example, the Clapham Junction that was discussed earlier  
13 today, then my data will include cases where the fare purchase was for  
14 Clapham Junction onwards, and that is despite the fact that passenger may  
15 have got on at Waterloo for example. So that would be showing up as an entry  
16 at Clapham Junction in terms of the fare.

17 My data does include the point-to-point traffic that would be associated with that  
18 particular case.

19 It may be that, depending on the Travelcard assumption holding of the mix of  
20 passengers at that particular station, obviously then there is some proportion of  
21 those who are deemed to have a Travelcard under the methodology.

22 A significant proportion of those would be for the zoning in question. For example,  
23 zone 1-2 for the Clapham case. So people getting on at Clapham, some  
24 percentage of those would be assumed to have a zone 1-2 Travelcard, a small  
25 or zero boundary fare saving would be assessed in that case. It might be zero,  
26 it might be small.

1 I think that perhaps answers your question. I understand that there's some  
2 debate -- oh, sorry, I think Mr Harris has a question.

3 **MR HARRIS:** No, I'm so sorry, Mr Holt, I do not have a question.

4 **A.** I'm sorry. So yes, I think at the moment -- unless sort of instructed otherwise  
5 because there would of course be a means of saying anyone who is assumed  
6 to have a -- you know, a journey where the Travelcard matches up to the station  
7 just before the boundary, that exclusion could be made for that case. That  
8 would obviously have some implications. It would have a modest amount,  
9 almost virtually nil I guess on the aggregate damages part because these cases  
10 are generally the lowest possible savings, but it would take out a number of  
11 affected journeys or in-scope journeys that are paired with a Travelcard.

12 So, through the class size estimate that would reduce the estimated class size  
13 estimate, and therefore increase the average loss per claimant to some extent,  
14 I think.

15 **PROFESSOR MASON:** I am not sure about the latter, but I am not sure we need  
16 necessarily to -- at the moment, I just want to understand the mechanics of the  
17 model and how any particular set of journeys, if necessary, could be excluded  
18 under the current set of assumptions and in the event that there are further data  
19 from disclosure.

20 Just to go back, and forgive me if I missed part of your explanation. I think at the  
21 moment journeys that are made as a point-to-point component to complement  
22 a Travelcard portion of a journey, they are within the in-scope number of  
23 journeys in your data set. I think that's correct, isn't it?

24 **A.** Yes, I think there's an exception in cases where the station is on the boundary, the  
25 Putney example from before, because we treat that as a zone 3 station, not  
26 zone 2, so there would be no crossing of a boundary in that particular case, so

1 in that case it would not be an in-scope journey.

2 **PROFESSOR MASON:** Understood. I think you were arguing, even with the current  
3 data and the set of assumptions that accompany them, you could construct  
4 a means by which point-to-point journeys made by Travelcard holders as part  
5 of that overall compound, I think you were beginning to describe how you might  
6 go about excluding those particular point-to-point journeys, or  
7 did I misunderstand part of your response?

8 **A.** No, that's correct. At the moment, as I mentioned earlier, we only have estimated  
9 rail trips, so I would still need the disclosure information to revise and update  
10 that.

11 But even on the current assumed rail traffic, then you could identify, for the cases  
12 where -- for the cases where the starting point is, for example, Clapham and  
13 where it's assumed that they have a zone 1-2 Travelcard, then you could  
14 remove that proportion of journeys from the in-scope journeys.

15 **PROFESSOR MASON:** Just to use the example that seems to be very popular in this  
16 discussion, I think it's Waterloo to Guildford we end up discussing quite  
17 frequently, via Clapham Junction.

18 There will be trips from Clapham Junction to Guildford which are people only travelling  
19 from Clapham Junction to Guildford and there will be trips from Clapham  
20 Junction to Guildford which are Travelcard holders who have come from  
21 Waterloo to Clapham Junction and then bought a point-to-point fare from  
22 Clapham Junction to Guildford?

23 **A.** Yes.

24 **PROFESSOR MASON:** Let's just deal with those two categories for now. Between  
25 those two categories that's the entirety of the journeys between Clapham  
26 Junction to Guildford. How would we disaggregate that total number to isolate

1 one or the other?

2 **A.** I don't think I have the data to do that at this time.

3 **PROFESSOR MASON:** Right.

4 **A.** So that would be the evidence that would be derived from the further survey --

5 **PROFESSOR MASON:** Okay.

6 **A.** -- because that's the evidence that would provide a more specific breakdown of  
7 the Travelcard holding status of people at any given station.

8 **PROFESSOR MASON:** Okay, thank you.

9 **A.** I don't know that anybody is doing that, that particular route, ie getting on at  
10 Waterloo but getting a point to point from Clapham Junction. Obviously to the  
11 extent that people are doing that, then that will increase the number of trips in  
12 the Clapham Junction origin part of the model.

13 So, if that is happening, then it will feature in the evidence in the model, and indeed in  
14 the evidence to be disclosed, as an increase relative to people not using this  
15 strategy, in the level of Clapham Junction originating trips as opposed to, for  
16 example, London Waterloo.

17 **MR HOLMES:** Sorry, can I just clarify that: my understanding is that you have the  
18 data in this example from Clapham to Guildford as a point to point, used in the  
19 general sense, but you can't distinguish at the moment between those which  
20 are journeys originating in Clapham and finishing in Guildford, from those where  
21 it was a Waterloo to Guildford journey, where somebody was using the  
22 Clapham to Guildford point to point as a supplement to Travelcard and you  
23 would need that from the survey evidence. Have I understood that correctly?

24 **A.** That's right, because in each of those two cases the fares data would basically say  
25 "Clapham Junction to Guildford".

26 **MR HOLMES:** Understood, thank you.

1 **A.** Yes, that's right.

2 **PROFESSOR MASON:** Thank you, Mr Holt, that's very helpful.

3 Let us, if it's okay, move on to step 3 of the model and the set of calculations. This is  
4 the estimation of the proportion of train travellers holding a Travelcard.

5 We understand that you've used data from the TfL termini report in 2010/2011. We  
6 just wanted to get a better understanding from you of the -- I suppose the  
7 potential for any bias there that we ought to be aware of. I know you responded  
8 to this in part in your second report, but it would be helpful for us to hear it again  
9 and to discuss it with you.

10 Given the set of travellers surveyed, would you be able to comment on how  
11 representative that set of travellers is of the entire set of travellers in your  
12 in-scope journeys? I hope I expressed that well enough, I think you know what  
13 I mean.

14 **A.** Yes, sir, I do know what you mean, thank you.

15 I acknowledge that there is not a data set that reflects in-scope journeys. Therefore,  
16 I have used the best estimate available, based on other sources. That includes  
17 the central London termini report, but also other sort of evidence from TfL  
18 relating to Travelcard usage on other modes.

19 I think your question was about whether it's representative. It's clear that the central  
20 London report focuses to a greater extent on commuting than what would be  
21 like -- than the in-scope journeys, so the in-scope journeys are not themselves  
22 commuting journeys and so I acknowledge that.

23 I think it's important to understand though that what I'm using this evidence for is to  
24 understand not the Travelcard usage of these trips, given they are not in-scope  
25 journeys, but rather to inform the likelihood that people making in-scope rail  
26 journeys will have a Travelcard.

1 On the basis that people making in-scope journeys would fall into a number of  
2 categories, including regular rail users, less regular rail users, people who use  
3 other modes and so on, then at least for some part of that set of in-scope  
4 journeys, this evidence would be relevant.

5 Just to be a bit more precise about that, I would expect that amongst the people being  
6 surveyed in the central London report would be a material amount of in-scope  
7 journeys. In part because some share of the journeys are not commuting  
8 journeys at all, so there's, I think, about 20 percent of those. But then even for  
9 the 80 percent of commuting journeys, which are acknowledged and agreed  
10 not to be themselves in-scope journeys, the people who are using rail in those  
11 cases will, I would expect, be making a material number of in-scope journeys.  
12 They are showing themselves to be rail users and so I think that that is in part  
13 why I have used that evidence.

14 You asked about the risk of bias, and I think clearly if it were the case --

15 **PROFESSOR MASON:** I'm sorry, just to be clear, as in all of these, these are not  
16 direct questions about the reasonableness of your assumptions, it's more about  
17 sensitivities and bias one way or the other actually, so we're very interested just  
18 to -- so it's not questioning the reasonableness, it's just understanding the  
19 sensitivity and bias.

20 **A.** I certainly understand that.

21 I think I have acknowledged that there is certainly uncertainty about this parameter,  
22 and that's why I've carried out a crosscheck on it and I have also proposed how  
23 to derive more evidence that would be more specific to the in-scope journeys.

24 So, I think that is clear.

25 As to factors that might sort of push it in either direction, I think it may well be that there  
26 are some in either direction. I think the concern that the respective defendants

1 have is that maybe the commuters are much more likely, for example, to have  
2 Travelcards and therefore that's overstating the case.

3 I should take a step back. The commuters -- I am estimating holding of Travelcards  
4 by looking at usage and so I think their concern is that the evidence which looks  
5 at the usage of other modes, such as the Underground, might overstate the  
6 usage of the Underground for people who are making in-scope journeys and as  
7 a result, therefore, the holding of Travelcards might be overstated.

8 I can't rule that out, I obviously don't know at this stage what it's at, holding of  
9 Travelcards of the in-class journey makers.

10 I think a couple of points which leave me to be confident that there's no particular  
11 reason to suppose it's substantially less, for example, are that -- I mentioned  
12 before that these people would be expected to be making journeys, and it's the  
13 fact that they have a Travelcard, not the fact that they are doing a journey that  
14 isn't relevant in the survey, which is the more important consideration.  
15 Because, of course, the fact that they have a Travelcard based on this survey  
16 evidence means that they will have that Travelcard with similar proportions for  
17 when they are doing in-scope journeys.

18 I think the other question would be what about people who are making in-scope  
19 journeys who are not sort of, you know, the people in this survey, and what  
20 about them, would they have a Travelcard holding that would be at risk of being  
21 materially less?

22 Again, having thought about that, I don't think that there's any good reason to suppose  
23 that. One reason for that is that people making in-scope rail journeys are in  
24 a sense by definition users of public transport and the more in-scope journeys  
25 you are making the greater the use of public transport you are exhibiting.

26 Clearly, increased use of public transport tends to be correlated with a greater reason

1 to have a Travelcard in general. I think just perhaps to add another sort of  
2 comparison that one can make, if the people who are not in the Central London  
3 Termini study and therefore are not doing rail commuting on a daily basis, but  
4 are nonetheless London residents who are doing in-scope journeys, then they  
5 may very well be doing other modes on a regular basis. The evidence from the  
6 other surveys that I quoted in the report, which relate to Travelcard usage on  
7 the Underground and on the bus networks, tend to show much higher levels of  
8 Travelcard holding than what I have assumed in my model.

9 There are a number of reasons why I think therefore I don't have any particular  
10 concern about bias in this particular case.

11 **PROFESSOR MASON:** Okay, thank you, but it was helpful to have a little bit more  
12 detail about the factors on either side of the central estimate that you have  
13 taken.

14 I think we are quite close to moving on to questions about any future survey that you  
15 might run. Before we get there, just a few smaller questions to clear up  
16 ambiguities.

17 I think at some point yesterday we were trying to determine whether the TfL Termini  
18 survey involved only arriving rail passengers at the London stations or arriving  
19 and departing. I will confess that, having read the appendix of that report,  
20 I struggled to be absolutely confident that I knew the answer. I wondered if that  
21 was something that you might be able to educate us about.

22 **A.** It's both, it's both arriving and departing, they look at AM and PM peaks, they look  
23 at people both arriving and departing and they look at access and egress  
24 journeys.

25 **PROFESSOR MASON:** Very good, thank you, that's helpful.

26 **MR HOLMES:** Can I just ask in terms of survey methodology, they are standing on

1 the concourse and they are surveying people getting off TOCs' trains coming  
2 into London and people coming into the concourse through other means,  
3 whether it's on foot or by coming out of the Underground or whatever it may be.  
4 In a sense it's a random cross-section of people on the concourse at the time?

5 **A.** Yes, I think they are getting them before they know what mode they are about to  
6 use. Obviously if they watched them walking in, then they would know that  
7 they're walking. I think it's meant to be from the concourse before -- to  
8 understand what will be their subsequent mode.

9 **MR HOLMES:** Thank you.

10 **A.** Yes.

11 **PROFESSOR MASON:** Okay --

12 **A.** Sorry, could I just make one specific point. It has been made I think in my reports,  
13 but I think there was a bit of misunderstanding about the implication of it in the  
14 discussion yesterday, which is the fact that while I do clearly want to understand  
15 holding of a Travelcard amongst people making in-scope journeys, this  
16 evidence looks at onward modal travel and then I use a further source to assess  
17 the use of the Travelcard on those modes.

18 I think there is an important distinction there. I am essentially measuring the usage of  
19 a Travelcard on a specific journey and of course that's an underestimate of the  
20 holding position in terms of that Travelcard, because it's obviously a necessary  
21 condition to have a Travelcard in order to make a Travelcard journey, but it's  
22 not symmetric, it's not a necessary condition to make a Travelcard journey if  
23 you have a Travelcard. You could be walking that day, you could always walk  
24 but use other leisure trips and have a Travelcard for those reasons. I think it is  
25 something that I have pointed out in my reports, but I wasn't sure if that point  
26 had been clarified in the previous discussion.

1 **PROFESSOR MASON:** I think we understand that usage cannot be an overestimate  
2 of holding --

3 **A.** Thank you.

4 **PROFESSOR MASON:** -- since the one is a subset of the other.

5 **A.** That's right.

6 **PROFESSOR MASON:** Okay. If we could move on and discuss with you, just so that  
7 we better understand how it might work, any further surveys that you may carry  
8 out to refine some of the estimates.

9 **A.** Yes.

10 **PROFESSOR MASON:** To go in part to Mr Holmes's previous question: how you  
11 might -- it's rather technical but it's an important question, I think -- construct the  
12 samples that you'll need to take, how many stations, how many people and so  
13 on, to give sufficient data given the level of information that you are wishing to  
14 extract from these data, thoughts that you have about the sampling process.

15 **A.** Okay. So, I think what you would need to do is to have a representative sample  
16 across the types of stations in the respective TOC's networks. You would want  
17 to weight that to some extent by your sort of prior expectations on where are  
18 the most relevant sort of stations for in-scope journeys being made.

19 You would, I think, obviously want a substantially sized sample in order to allow for  
20 some variation at any given station between people who are doing different  
21 types of journeys by origin, destination and fare type.

22 Then you would also obviously want a sufficient size of sample, again across those  
23 boundaries, in order to understand Travelcard experience for those individuals.

24 I think that would not necessarily mean that you need to have a huge survey at every  
25 single station, because there would be groups of stations that by some degree  
26 of prior assessment could be grouped together to share certain characteristics.

1 I think that would be one way to sort of ensure that you have efficiency in the  
2 survey design.

3 I have to say that I haven't yet formalised or spoken to a survey design company, that  
4 normally would be the sort of organisation that we would work with, in order to  
5 sort of specify the precise nature in which the survey would be operated. But  
6 that's what I would propose to do.

7 Often, what we would do is explain the relevant parameters and sort of relevant degree  
8 of confidence that we would require, which would obviously be to have sufficient  
9 understanding of the issues that we're asking the survey to address. Then,  
10 using statistical principles, we would identify what a reasonable sized survey  
11 would be.

12 I don't have -- since we haven't sort of carried out that process, any sort of number  
13 that I would throw out, it would be a little bit speculative, I would hesitate to do  
14 that without perhaps having some further thought to it.

15 **PROFESSOR MASON:** That's fine. I think for now that's probably sufficient detail,  
16 although I reserve the right to come back to it once we have covered a couple  
17 of other questions.

18 Of course, an obvious concern is that a survey run now may have limited information  
19 about travel patterns and behaviour in the past, potentially quite a long way in  
20 the past, and certainly under quite different circumstances. Again, you address  
21 some of those issues in your second report. But again, I think we would find it  
22 helpful to just have a brief discussion with you as to what kind of adjustments  
23 you might apply, without going into great detail, but also how you will have  
24 confidence that the adjustments that you apply are bringing you closer to the  
25 actual numbers that you are trying to estimate through the surveys.

26 **A.** Yes, yes, okay.

1 I think the key question now is really if the survey is carried out at some point in the  
2 future, but obviously it needs to be -- the information needs to be applied to the  
3 relevant period, then what do we do about that?

4 I think the sorts of issues that we need to take into account in that respect would  
5 include changes in Travelcard holding behaviour and changes in in-scope  
6 journey behaviour. Those are essentially the two issues that the survey is  
7 designed to address. It's to help understand the more precise pattern of  
8 in-scope journeys, albeit that I would have a good understanding of that from  
9 their disclosure, but we could obviously use that to tailor the survey to the mix  
10 of surveyed passengers. Perhaps that wasn't very clear.

11 Given that we would know the disclosed actual in-scope journeys over the relevant  
12 period, we could construct a sample that would reflect that and ask people  
13 making those types of journeys, even if the actual pattern of journeys in 2022  
14 or whenever this survey would be carried out, might have been modified  
15 through circumstances, even post-Covid environment and so on.

16 I think that particular concern would be largely addressed. To the extent that the sorts  
17 of journeys that had been happening before, even if they had been modified,  
18 they're still happening, so you can still survey people doing those types of trips.

19 I think that would be one way to sort of ensure that the survey is sort of representative  
20 in terms of the relevant period for in-scope journeys.

21 In terms of the Travelcard holding, as has been alluded to, I think the most concerning  
22 issue in that in terms of getting the evidence to the relevant period is the  
23 increasing popularity of contactless and Pay As You Go. It's something that  
24 I took into account previously in terms of my earlier estimates, to reduce the  
25 Travelcard holding over time, given the knowledge that at an earlier date it was  
26 higher but then it was falling over time as people were switching to Pay As You

1 Go.

2 I would expect that that pattern has continued over time and therefore the share of  
3 Travelcards in use now, there are still some, but they will not be as prevalent  
4 as they might have been in the relevant period.

5 I think that is clearly an issue that needs to be adjusted for. I have proposed two ways  
6 of addressing that.

7 The first would be to look at TfL-level evidence to look at the trend that has actually  
8 been happening. I think it's fair to say that that does require one assumption to  
9 be made, which is that the trend in Travelcard holding for the in-scope journey  
10 makers would be consistent in terms of the move from Travelcard to Pay As  
11 You Go, as has been observed at the level that TfL is carrying out its surveys  
12 or recording its data. So that is an assumption, I think, that is likely to be needed  
13 to be made in order to apply that approach. Although I don't see any particular  
14 concern in making that assumption in terms of bias.

15 The other potential approach that I would adopt would be to speak -- through the  
16 survey of people doing actual journeys, this is journeys at the time of the survey,  
17 to understand, particularly for those who are not using Travelcard, whether  
18 there's any important factors that lead to that. In particular, the interesting  
19 question would be that they did indeed tend to use Travelcards but have moved  
20 on, like many people, to Pay As You Go, as contactless has become more and  
21 more popular. That would be a line of questioning that I would propose to  
22 include in the survey.

23 **THE PRESIDENT:** I follow that, and you have sketched out, obviously at a preliminary  
24 stage, the sort of questions you might ask in your second report.

25 **A.** Yes.

26 **THE PRESIDENT:** On page 28 of the report at paragraph 3.6.10. Of course in most

1 of those questions, it's about the journey that they're actually taking at the time  
2 or about to take, they have either come off the train or waiting for a train.

3 Then you are referring to the sort of last question, is it, asking them if their behaviour  
4 has changed in terms of Travelcards specifically.

5 Then possibly asking them about, as you say in 3.6.14, about what sort of Travelcards  
6 they bought in the past.

7 Is that what you are saying? That you would use those answers to try and inform an  
8 adjustment to the information you get about the present journey to what may  
9 have been the position in years going back? Have I understood that rightly?

10 **A.** Yes, that's right, that's one of the approaches, the other one being the adjustment  
11 that I referred to earlier in terms of looking at the TfL data.

12 **THE PRESIDENT:** Yes, on general Travelcard holding, yes.

13 **A.** That's right.

14 **THE PRESIDENT:** Professor Mason might be about to come on to this, but you  
15 explained in answer to his earlier questions when you were being asked about  
16 point to point and how one would seek to distinguish someone purchasing -- or  
17 who has purchased -- to use with their Travelcard what we have called point to  
18 point, in this rather special sense of point to point, a sort of supplementary point  
19 to point to use with Travelcard, from someone who just has a ticket for that point  
20 of origin, point of destination is not to be used with a Travelcard. Is that  
21 something you could feed into the survey in a meaningful way?

22 I think you said you would try to get some more information by survey evidence in  
23 answer to the earlier question about point to point.

24 **A.** Yes, that's right, sir. The way I would propose to do that is -- let's use an example  
25 of London Waterloo, which was the example before, going to Guildford, but  
26 some of the people might be buying point-to-point tickets from Clapham

1 Junction, if they have a zone 1-2 Travelcard for example. So, the way the  
2 survey would address that point would be by surveying people at London  
3 Waterloo, understanding what train fare they have and understanding what  
4 Travelcard holding they have.

5 The general sort of survey questions that we've been already discussing go essentially  
6 to those two points: what's your journey, what fare, and what's your Travelcard  
7 status?

8 Looking at London Waterloo people, let's say just for the sake of argument you've  
9 asked ten people and under my methodology let's say one or two might have  
10 a Travelcard. If it turns out that the only people with a Travelcard seem to have  
11 a ticket even though they are at London Waterloo that says, "I've got a ticket  
12 from Clapham Junction to Guildford", so that would leave fewer people, for  
13 example, who are at Waterloo and getting a London Waterloo fare origin ticket  
14 who might have a Travelcard.

15 So, it would directly address that question, I think.

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

17 **PROFESSOR MASON:** In that vein, if we move on to -- if you have it in front of you,  
18 your second report, it's paragraph 3.6.16. These are some of the questions you  
19 may ask to probe historic holding of Travelcards, if I've interpreted that -- I think  
20 that is correct, isn't it, Mr Holt?

21 **A.** Yes it is, sir, yes.

22 **PROFESSOR MASON:** Very good, okay. It's helpful to see these. My question about  
23 them is: how do you intend to -- do you have any thoughts about -- how you  
24 deal with hazy or inaccurate recollections?

25 **A.** Yes. I think the way to best do that would be to focus on the purpose -- basically  
26 to do a split by the purpose by which they would have had a Travelcard. Some

1 people would have had a Travelcard for a long period of time, or for commuting  
2 purposes. I think the risk about hazy recollection would be far less for that  
3 subset of the people than those who say, "Yes, I did have a Travelcard, I think  
4 I used one on 12 February 2017". I am not expecting people to off the top of  
5 their head remember that.

6 The interesting questions would be the people who would have good recollection of  
7 Travelcard patterns of behaviour because they would have been using it on  
8 a regular basis over a significant period of time, but then either have continued  
9 to do so or perhaps have for some reason not continued to have Travelcards.  
10 That might be because they just have no need for them or it might be because  
11 they have switched to Pay As You Go.

12 **PROFESSOR MASON:** Okay. Sorry, I missed, how do you combine those responses  
13 there? They are qualitatively different types of responses in terms of the  
14 confidence that you can place on the responses that are being given to you.

15 **A.** Yes, yes. In terms of the confidence being much higher for the group that would  
16 have used it sort of more systemically or for a certain period of time I think that's  
17 fair. Whereas it would be a bit less confidence instead of people who sort of  
18 irregularly might have used it for a short period of time.

19 I think I would focus more on the results that would be more -- you could have more  
20 confidence in, as a better sort of estimate of the two trends as opposed to the  
21 much more uncertain responses from people who didn't really use it very much.

22 **PROFESSOR MASON:** Okay, thank you. I think if I could go back almost to where  
23 we started, just to give you another opportunity to comment on -- we understand  
24 that in an exercise of this nature you have to break some eggs to make an  
25 omelette, you have to make some assumptions in order to arrive at a final  
26 calculation.

1 Again, which modelling parameters give rise to the greatest sensitivity for the final  
2 calculation?

3 **A.** The aggregate damages is largely the multiplication of three things: the in-scope  
4 journeys; the average boundary savings, albeit it's really broken down so it's  
5 the weighted average boundary savings; and the Travelcard holding overlap.

6 To the extent that those things multiply together in a sense to generate the loss, any  
7 one of them moving by 10 percent will have a 10 percent effect more or less on  
8 the overall aggregate cost. It's not quite exact because there's a fourth step  
9 that we have not come on to yet, and that certainly means it would be, I think,  
10 a bit ... I'm trying to work out ... I think it might be slightly more sensitive actually  
11 as a result of removing a small amount of actual boundary fares, but I don't  
12 think it would have a material impact. So more or less the three things  
13 multiplied together.

14 In one sense you could say they have equal sensitivity, because in any of those three  
15 cases a 10 percent change in the assumption would transmit more or less to  
16 a 10 percent change in the aggregate damages in either direction.

17 I think it's fair to say that some of the issues are the sum of a lot of calculations and  
18 hence one might expect that there's less uncertainty, or at least post-disclosure  
19 there would be relatively little uncertainty about that issue.

20 I think the first one, in terms of in-scope journeys, would fall into that category.

21 The boundary savings I think would also fall into that category, in the sense that  
22 despite the fact that a 10 percent change does have a significant impact,  
23 post-disclosure it could be measured precisely. I am obviously aware from the  
24 discussion over the past couple of days that there are disputes as to what is  
25 precise treatment of a case where there is no boundary fare, where there is an  
26 anomaly -- is how I would call it in my mode, because there's a negative

1 boundary fare which is driven by for example the need to take an average  
2 across two fares in a given circumstance.

3 I am aware that there are some uncertainties in terms of exactly how the Tribunal  
4 would come to a view on some of those points. But, leaving those aside, the  
5 actual fares data would be disclosed, and I think subject to very little remaining  
6 uncertainty.

7 Then the third area, the Travelcard holding, and I think it is fair to say that's the one  
8 where there's the greatest uncertainty, it's the one where the actual overlap  
9 data is, as I acknowledged, doesn't exist and I don't expect it to be forthcoming  
10 from the train operating companies. That's the area where the survey-based  
11 approach will be used to refine the existing estimates.

12 **PROFESSOR MASON:** Thank you.

13 Understood that in three largely independent modules to the final number, because  
14 I think that's what you are -- the number of in-scope journeys is largely ... your  
15 estimate of it, or calculation of it is largely independent from the average  
16 boundary saving that you calculate.

17 **A.** That is, I think, true in the sense that ... I'm hesitating because the average  
18 boundary saving does depend on the mix of in-scope journeys. It's not quite  
19 right to say that there is no interaction between the two, but certainly for -- if you  
20 just change the total number of in-scope journeys without changing the mix of  
21 O/D pairs and fare types then that would apply, that would be independent. But  
22 it is because of a mix issue, i.e. origin/destination and fare type.

23 Those things can have an impact on the average boundary saving. But, again, I think  
24 while that is true, I think in those two aspects the disclosure data would be  
25 relatively precise in fact. I don't think there would be a significant amount of  
26 remaining uncertainty. Again, leaving aside the areas of dispute as to exactly

1 in what case a boundary fare should be made and so on, which I think can be  
2 adjusted for in any event.

3 **PROFESSOR MASON:** Okay, thank you, you're right that there is that interrelation  
4 between steps 1 and 2, I think, what I referred to it as rather than modules.

5 Therefore, after disclosure, I think your response is that there will be residual  
6 uncertainty about Travelcard holding. That will be subject to any survey that  
7 you are able to run to improve upon your current estimates. I think we agreed  
8 also that there would be some uncertainty about the point-to-point fares in the  
9 way that we've been using them in this discussion.

10 **A.** Yes, that's right, and that would also be addressed in the survey. Yes.

11 **PROFESSOR MASON:** Indeed. That's about sensitivity.

12 I understand that you haven't, in this instance, presented, as you did with the number  
13 of claimants, a low, middle and high scenario, but just again to return to that to  
14 get any further thoughts and to check that I understood your reasoning for that.  
15 It is surely possible to present the uncertainty that's in your model in that way,  
16 because there is some uncertainty about the parameter values that you have  
17 to estimate or assume.

18 **A.** Yes. No, absolutely, sir. One could always, for each and every assumption, apply  
19 a lower value and a higher value and assess the sensitivity of that. I think in  
20 this case while I could have done that it would have obviously added a lot of  
21 complexity and length to the report. For relatively modest benefit, I feel,  
22 because it's a preliminary estimate that would be subject to refinements in a  
23 number of areas post-disclosure. Then, perhaps more importantly, the sort of  
24 alternative lower and higher values that I would potentially have plugged in in  
25 order to then have a low-high range would be in a sense fairly arbitrary.

26 By which I mean I could obviously say here is some assumptions that are 10 percent

1 lower and some that are 10 percent higher, but given that for the reason  
2 I mentioned, that the three things multiply together and a 10 percent increase  
3 in any one of those affects the overall result by 10 percent, that doesn't really  
4 take you any further than saying well if the central estimate is, whatever it is,  
5 80 million for example, then a plus or minus 10 percent on that is fairly obvious,  
6 without even really stating it. That was essentially my thinking.

7 **PROFESSOR MASON:** Thank you.

8 That's certainly helped me to understand much better your approach, Mr Holt, thank  
9 you.

10 **A.** Thank you.

11 **THE PRESIDENT:** Yes, Mr Holmes, do you have a question? No.

12 I think what we will do is we will give Mr Holt a ten-minute break and we will confer as  
13 to whether there's anything else we want to ask and then we will have half  
14 an hour if counsel want to put any supplementary questions to him.

15 Yes, Mr Harris?

16 **MR HARRIS:** I wonder, sir, if we might take either a 15-minute break -- because I for  
17 one would like to take instructions as to whether or not to ask questions or  
18 questions of a particular type. What I would absolutely be confident about is  
19 that, if I have questions, they will not take long and it may be that if we have 15  
20 minutes rather than 10 there will be no questions or there will be fewer.

21 **THE PRESIDENT:** I understand. If you have more time, you write a shorter letter.

22 We will take 15 minutes and we will come back at 4.05 pm.

23 **(3.49 pm)**

24 **(A short break)**

25 **(4.05 pm)**

26 **THE PRESIDENT:** I think we will just go through respective counsel in the order that

1           you made submissions.

2 Mr Harris, any questions?

3 **MR HARRIS:** No, sir, no questions.

4 **THE PRESIDENT:** Thank you.

5 Ms Abram, any questions?

6 **MS ABRAM:** Nothing from me, sir.

7 **THE PRESIDENT:** Mr Ward, any questions?

8 **MR WARD:** Nothing at all from me, thank you, sir.

9 **THE PRESIDENT:** Mr Moser, is there anything you want to ask by way of  
10           supplementary?

11 **MR MOSER:** There is not, sir.

12 **THE PRESIDENT:** Thank you very much, Mr Holt, for making time to come and give  
13           evidence.

14 I think sensibly would it then be appropriate that we adjourn now and we resume at  
15           10.30 for your reply, Mr Moser.

16 We are on target, time wise?

17 **MR MOSER:** We are on target time wise, sir.

18 There was in the plan, which I confess I was slightly baffled by, a suggestion that the  
19           defendants would have a further reply to themselves, or perhaps it was to  
20           Mr Holt on Friday morning, but I don't sense that that's something my learned  
21           friends are planning to do tomorrow morning.

22 So, I am just going to make my reply tomorrow, unless told otherwise.

23 **THE PRESIDENT:** Yes. I think -- just a minute. **(Pause)**

24 They took their applications, which effectively overlapped, as they all recognised with  
25           their opposition even though the test might be slightly different, as part of their  
26           submissions, so we have points on that. So, I think it's for you to reply.

1 Just one moment.

2 Mr Holt, you are released formally.

3 Mr Ward, you want to say something?

4 **(The witness withdrew)**

5

6 **Housekeeping**

7 **MR WARD:** Thank you, sir. Not that I wish to make an additional reply or anything of  
8 the kind, but I would like to make some really quite brief remarks about the  
9 submissions that Mr Holt has made this afternoon.

10 I am entirely in your hands about when would be appropriate. I think the maximum  
11 time required for that would be five minutes.

12 **THE PRESIDENT:** I think that's reasonable. We will allow each defendant counsel  
13 five minutes at the start tomorrow and then, Mr Moser, you can kick off.

14 Mr Harris?

15 **MR HARRIS:** Yes, sir.

16 As I think was mentioned in one of the letters to the Tribunal, because technically we  
17 are strike out applicants, if -- it may of course not happen -- and insofar as  
18 Mr Moser makes a new or a different point in his reply as regards those  
19 applications, then I would like the opportunity to make a very short, if you like,  
20 response/reply, call it what you like, but it's not, if you like, "I'm going to have  
21 another go", it's he's responding to my application and technically it's my  
22 application, so if there's something new in a matter of words, the response to  
23 that. Given that we have plenty of time and we drew your attention to this in  
24 the letter, we hope that ought not to prove too controversial.

25 **THE PRESIDENT:** I think we will see how we get on, but I tend not to be over technical  
26 about these things. If there is some point -- we don't want to cause an endless

1 toing and froing -- you want to pick up, and obviously if there's any new authority  
2 referred to, you are entitled to address us on it.

3 The other thing to mention is we have had a note under cover of letter from Freshfields,  
4 from you, Mr Harris, Ms Blackwood and Mr Armitage. We were given that just  
5 as we came in this morning so we haven't digested it. If, when we have, we  
6 have any questions for explanation or anything, obviously we will ask you, but  
7 meanwhile we will read it overnight.

8 **MR HARRIS:** Just so that you know, the topic was to put into writing what I submitted  
9 orally as to where we say the table that Mr Moser introduced as an advocacy  
10 piece and placed so much reliance upon, we say is, in a non-pejorative sense,  
11 untrustworthy and it's simply an aide-memoire of those points that I made  
12 orally.

13 **THE PRESIDENT:** That's helpful.

14 Mr Moser, you obviously have it, so you can incorporate it in your response.

15 Very good, 10.30 tomorrow morning.

16 **(4.11 pm)**

17 **(The hearing adjourned until 10.30 am on**

18 **Friday 12 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?