

1 This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its  
2 judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public  
3 hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The  
4 Tribunal's judgment in this matter will be the final and definitive record.

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  
30  
31  
32  
33

34 Digital Transcription by Epiq Europe Ltd  
35 Lower Ground 20 Furnival Street London EC4A 1JS  
36 Tel No: 020 7404 1400 Fax No: 020 7404 1424  
37 Email: [ukclient@epiqglobal.co.uk](mailto:ukclient@epiqglobal.co.uk)  
38  
39

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

(10.30 am)

(Proceedings delayed)

(10.40 am)

**THE PRESIDENT:** Good morning. Sorry to keep you waiting, we were just seeking to make clear that we all have some additional material in various places that I think was produced overnight. We have got a note, Mr Moser, from you, Mr Kuppen and Ms Littlewood in response to the LSER note.

We have only very quickly skimmed it in the last few minutes, so don't expect we are on top of it.

We also have a new bundle of Travelcard agreements.

**MR MOSER:** Yes, that's right. There was also one further authority.

**THE PRESIDENT:** Yes. From Newberg on Class Actions.

**MR MOSER:** I believe that's it.

**THE PRESIDENT:** Yes.

I believe it's over to you, isn't it, Mr Moser?

**MR MOSER:** Mr Harris said he wanted five minutes.

**THE PRESIDENT:** Yes, I had forgotten that.

Yes, Mr Harris.

**MR HARRIS:** I think actually what had been suggested was that the Defendants would have an opportunity to make brief submissions in response to Mr Holt's oral evidence. If it's acceptable to the Tribunal, I agreed with Mr Ward that in fact he would go first on this and I probably only have one point to make on it, which will take five minutes, but, with your permission, Mr Ward will make some brief submissions first and I am happy to go after Ms Abram and it may shorten what I say as well.

1 **THE PRESIDENT:** Yes.

2 **MR MOSER:** Although we have lost Ms Abram.

3 **THE PRESIDENT:** Yes, so we had better wait.

4 **(Pause)**

5 **MS ABRAM:** I think you have paused for me, I'm very sorry that happened again, sir.

6 **THE PRESIDENT:** We're pleased you are back.

7 Yes, Mr Ward.

8

9

### **Submissions by MR WARD**

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

11 The Tribunal's questioning of Mr Holt yesterday reinforced just how critical the survey  
12 is to the Applicant's case, and how challenging it will be to execute. It's not just  
13 a refinement of the model, but in some cases it's going to be the Applicant's  
14 only hope of plugging an important gap in that model.

15 So, it's going to be used to identify passengers who might be making a point-to-point  
16 journey in combination with a Travelcard. We can see that at pages 84 and 85  
17 of the transcript.

18 It's also going to be used to try to identify the type of Travelcard used at a particular  
19 station. That is a number that Mr Holt accepted would have a material impact.  
20 Page 79, line 13.

21 Of course, also, it's going to be used to refine the estimate of the critical number of  
22 passengers who make in-scope journeys holding valid Travelcards.

23 Now, of course the Tribunal will appreciate that none of that comes close to addressing  
24 the kind of detailed factual questions which we say lie at the heart of this claim,  
25 so: the reasons for the choices made; what information was available to the  
26 passenger; whether the passenger could have mitigated by buying

1 a point-to-point fare.

2 But this is the closest thing there will be to anything resembling passenger-specific  
3 information, so it will be a central piece of evidence to prove this very large  
4 claim.

5 We also heard how ambitious it's going to be. Mr Holt confirmed that the idea is to  
6 ask people now about historical travel patterns going back over seven or eight  
7 years and, as Professor Mason raised with him yesterday, that raises obviously  
8 questions of reliability of such evidence, and, in my respectful submission,  
9 whether such evidence could ever discharge the burden of proof.

10 You have seen, of course, in Mr Holt's second report, highly detailed questions he  
11 intends to ask passengers about their purchase history, all the way back to  
12 2015. That's paragraph 3.6.16 of that report.

13 In my respectful submission, it's very hard to see what weight could ever be put on  
14 that kind of evidence. Mr Holt also explained it would involve speaking to  
15 people both using a Travelcard and not using a Travelcard. That's page 94 of  
16 the transcript.

17 All of this complexity, and the weight that's going to be put upon it, raises real questions  
18 about how the survey would be designed. There are an awful lot of stations,  
19 there are 100 million journeys at stake, and of course a very large number of  
20 passengers in different situations.

21 Mr Holt gave, in my submission, a very sensible answer, that some kind of  
22 representative sample would be used. But what is that sampling exercise going  
23 to look like if it is going to be statistically significant and robust enough for this  
24 case? How many passengers? How many stations will be involved?

25 Now, unfortunately, the Tribunal, and the Proposed Defendants cannot know the  
26 answer to any of these questions. We have no chance to subject them to

1 scrutiny at this critical gateway stage because what Mr Holt said, at page 92,  
2 is: I have to say I haven't yet formalised or spoken to a survey-design company  
3 to specify the precise nature in which the survey would operate.

4 That's no criticism of Mr Holt at all, but the absence of this does need to be put into  
5 context. The litigation and cost budget filed by the claimants with the claim form  
6 in February 2019 tells us that, by this stage, the CPO stage, the certification  
7 stage, they planned to have spent £4,529,385.

8 In fact, that may have been a bit conservative, because, for reasons relating to  
9 Merricks, we have had rather more procedural hearings before the Tribunal  
10 than was expected. But what this means is it would be very hard to argue that  
11 finance was a key constraint here. What we have, therefore, is the Applicant  
12 seeking to prove key elements of this claim, which on South West alone is more  
13 than 50 million at the date of issue; it was incumbent on the Applicant to come  
14 to the Tribunal with a properly developed proposal and not to ask the Tribunal,  
15 and indeed the Proposed Defendants, to simply take it on trust that this could  
16 be done.

17 Thank you, that was all I wanted to say.

18 **THE PRESIDENT:** Thank you.

19 I think, Ms Abram, you're next.

20  
21 **Submissions by MS ABRAM**

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

23 There is nothing that I want or need to say in respect of Mr Holt's evidence, but I do  
24 owe you an answer to the questions that you asked me yesterday, sir, about  
25 the channels through which boundary fares were sold by Stagecoach.

26 For your note, sir, the exchange was at transcript Day 3, pages 29 to 30. There were

1 three channels that you asked me about.

2 1. Online sales through Stagecoach's own website. The answer to that question is

3 Stagecoach did not sell boundary fares online through its own website.

4 2. Trainline. Looking back at the transcript, I have realised that I was answering

5 a different question on Trainline from the one that you asked, sir. So

6 Stagecoach did sell tickets through Trainline, but Trainline didn't sell boundary

7 fare tickets for Stagecoach.

8 3. Then TVMs. The answer on that is in two parts.

9 The first is that boundary fares were available on most of Stagecoach's TVMs from

10 around April 2017 onwards.

11 Second, from 2016 onwards, so the previous year, some TVMs had a sticker on them

12 saying that not all tickets are available on TVMs and encouraging customers to

13 phone call centres, the Stagecoach call centre, if they want a ticket that's not

14 available on a TVM.

15 **THE PRESIDENT:** Following on from that, if you phoned the call centre -- this is

16 Stagecoach's own call centre, as I understand it?

17 **MS ABRAM:** Yes.

18 **THE PRESIDENT:** Could you get a boundary fare there?

19 **MS ABRAM:** You could get a boundary fare from Stagecoach's call centre, yes.

20 **THE PRESIDENT:** Yes, thank you very much.

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

22 **THE PRESIDENT:** Mr Harris.

23  
24 **Submissions by MR HARRIS**

25 **MR HARRIS:** Yes, briefly then. We adopt and endorse everything that Mr Ward just

26 said about Mr Holt's evidence and the problems with the survey. May I just give

1 you a fairly vivid illustration of the scale with a few numbers and a reference  
2 back to that lovely large-scale coloured map that we had yesterday.

3 For the survey to even stand the chance of starting to be representative -- and then of  
4 course only of existing behaviour not of past behaviour -- it would have to be  
5 able to cope with all of the relevant point-to-point origin/destination flows in this  
6 case. That means that as an absolute bare minimum it would have to cater for  
7 every single origin station.

8 But, in LSER's case alone, and of course the same point will apply to South Western,  
9 though I don't have their number to hand, but in my case alone, that is 71  
10 stations within the TfL zones. That's just the origin stations. Of course, you  
11 can go anywhere from an origin station, so the flows are literally thousands and  
12 thousands, but there we go.

13 That's a monumental task even if it were just 71 stations, especially bearing in mind  
14 that you would have to repeat the survey at multiple times of day, on different  
15 days of the week, in different weathers and in different seasons. So, a truly  
16 vast scale, even if it were just 71, but it's by no means limited to 71.

17 Here I would like to refer you to the map that we had yesterday. If you were to have it  
18 to hand. Just so I can give you a flavour of why it's much greater than 71 even,  
19 and that's just for LSER.

20 If you were to imagine -- the general point that I am about to illustrate is that you can  
21 access an LSER station by simply swapping platforms from some other  
22 location. You don't ever have to enter the station and you don't ever have to  
23 be on the concourse of the station. In other words, you are potentially not  
24 accessible to the surveyor in this hypothetical survey that we haven't actually  
25 seen.

26 Let me give you an illustration of the nature of the problem. If you were to go sort of

1 central top, I don't know how many members of the Tribunal are north  
2 Londoners like I am, but I know broadly where Kentish Town is, but if I can point  
3 to it, it's sort of central a little bit to the left (indicated). In any event, just by  
4 pointing at it you can see "Kentish Town" here. Kentish Town is on the  
5 Thameslink, that's not an LSER service, but the point is you can hop on at that  
6 origin station and then you can travel down through the centre of London and  
7 beneath the Thames, sort of in the middle, there is "Denmark Hill". It doesn't  
8 really matter the names but that's the point, the point is Denmark Hill is an  
9 ingress to LSER. LSER track goes left to right from Denmark Hill. But, of  
10 course, if you've got on in zone 2 at Kentish Town and then you access LSER,  
11 you just cross the platform and then you head east, for example to Falconwood;  
12 it doesn't really matter, anywhere along LSER's line that moves further out.

13 So, these people would never be even capable of being accessed by a surveyor who  
14 is on the concourse or at the entrance or egress point of Denmark Hill station,  
15 you just can't get your hands on them.

16 That would therefore mean that you would have to be able to survey every other station  
17 in London from which you can originate and then transfer on to, in my case  
18 LSER's tracks, obviously my learned friend's case is South Western's.

19 Just in this example that I have given you, that involves another 11 extra Thameslink  
20 stations beyond Kentish Town, so the same point obviously applies to every  
21 other Thameslink station on that route.

22 Then of course if you sit back and think but it's not limited to Thameslink I can access  
23 LSER's tracks without going in or out of an "origin station" from the DLR, from  
24 the Tube and from other overground rail services.

25 So, they would all have to be -- they are all origin stations for these purposes and there  
26 are 270 Tube stations in London and 45 DLR stations and I have not even

1 counted the other overground stations. The scale of the task is utterly vast and,  
2 as I say, multiple days and multiple times of year.

3 Second point, much, much shorter. Mr Holt's only solution to Professor Mason's if you  
4 like hazy memory question is he would discard those responses, what he or  
5 presumably the surveyors, who knows, regard as unreliable, but inevitably,  
6 absolutely inevitably, in light of his answer it would skew the survey in favour of  
7 responses from commuters, that was his answer well they will have a better  
8 recollection because they've probably been doing it for years. But commuters  
9 are not in this case, they are expressly excluded from this case.

10 So you would be -- talk about bias in the, if you like, economical statistical sense that  
11 Mr Holt refers to in his report. I can't imagine a more obvious case of bias. You  
12 are biasing it towards people who are expressly excluded from the claim, based  
13 upon all manner of subjective criteria about what's reliable and what's not  
14 reliable.

15 Then, lastly, Mr Holt's proposed survey is not an approximation or an extrapolation of  
16 the kind referred to in Merricks by Lord Briggs on the question of quantification  
17 of damage. That's exactly what it isn't.

18 What it is, or is proposed to be,<sup>2</sup> or would be proposed to be if we had seen it, is an  
19 attempt to establish causation and liability.

20 That's completely different.

21 Those are my submissions. Thank you.

22 **THE PRESIDENT:** Just to clarify, when you say "commuters aren't in the claim".

23 Commuting journeys aren't in the claim. A commuter with a Travelcard who  
24 takes another trip at the weekend is in the claim, I think.

25 **MR HARRIS:** Yes, I stand corrected. That is a fair representation, yes.

26 **THE PRESIDENT:** Yes. Thank you. You kept very nicely to time, Mr Harris.

1 I think, Mr Moser, it is then over to you.

2

3 **Reply submissions by MR MOSER**

4 **MR MOSER:** Thank you.

5 My learned friend Mr Harris started on Day 2 by introducing what he called his two  
6 major issues and he proceeded to spend most of his time on those, in particular,  
7 the first.

8 He characterised the first issue as whether the new regime for collective actions has  
9 done way with the requirement to show causation in the case of a top-down  
10 aggregate damages claim. He repeatedly described the CPR's approach, my  
11 approach, as one where:

12 "Causation issues that arise on the facts of the case can be brushed under the carpet  
13 by simply assuming that they are fulfilled."

14 He said that he and I were "diametrically opposed".

15 His second issue was (this is transcript Day 2, page 38):

16 Does a proposed class representative, a PCR, need to be able to show a workable  
17 methodology with a realistic prospect at the CPO stage? We say [this is  
18 Mr Harris]: yes, he does."

19 It may come as something of a disappointment to my learned friend that I do not  
20 disagree with him to the extent that he imagines.

21 On the second point, showing a workable methodology with, as I would put it, a more  
22 than arguable prospect at the CPO stage, I entirely agree with him.

23 As I will set out, I submit that Mr Holt, under questioning yesterday, defended his  
24 thesis extremely well. Showing a workable methodology with in fact, in my  
25 respectful submission, strong prospects at this stage.

26 I will come back to the comments we heard some moments ago shortly.

1 As to my learned friend Mr Harris's first point, no one is brushing anything under the  
2 carpet. We have never said that the Competition Act regime did away with the  
3 need to show causation, the need to show liability or the need to quantify loss,  
4 for that matter.

5 What we say is that it does not in all cases require common issues of causation to be  
6 proved at the individual level.

7 Indeed, and I will return to this, it would leave a massive lacuna in the UK collective  
8 actions regime if that were to be so.

9 Then my other learned friend, Mr Ward yesterday in concluding echoed the same sorts  
10 of arguments regarding the need for individual evidence, and then stepping  
11 back as he put it in relation to certification, he submitted essentially the same  
12 matters of individual evidence and heterogeneous consumer choices, as well  
13 as different losses rendered the case unsuitable for certification in any event.

14 I deal with that after I have dealt with the other two.

15 In between those two, for Stagecoach, Ms Abram made her submissions on abuse,  
16 including the submission, first made in the pleadings, but not pursued much in  
17 the skeleton arguments, that, and I quote her from Day 3, page 15:

18 "This isn't an abuse case at all, it's a consumer protection case. It's very important  
19 that the abuse concept shouldn't be expanded kind of by the back door to  
20 encompass what are really consumer protection concepts."

21 The structure of this, my reply to these submissions, is to start by making some general  
22 observations about the policy of the collective action regime and claims by  
23 consumers in particular.

24 Then I will go on to deal with certain of my learned friend's submissions. Obviously,  
25 I can't deal with all of them but you have our points. They are mostly well  
26 rehearsed in the skeleton argument so where I do not deal specifically with all

1 of my learned friends' points it's not to be taken in any way as acquiescence.

2 At the outset, again, the collective action regime and the Supreme Court in Merricks,

3 I do not propose to turn up Merricks at this point but for your note, sir, it was at  
4 paragraph 37 where Lord Briggs said that the policy aim is:

5 "... providing effective access to justice for claimants for whom the pursuit of individual  
6 claims would be impracticable or disproportionate ..."

7 That is really the heading for all of the points that I am going to make, all the points  
8 are going to be directed at that policy aim where it is impracticable or  
9 disproportionate to pursue the claims individually.

10 Then the three principal purposes of the regime -- this is all still from Merricks -- 1,  
11 judicial economy by avoiding unnecessary duplication in fact finding,  
12 unnecessary duplication in fact finding, as well as legal analysis.

13 2 - improve access to justice by the fixed litigation costs being distributed.

14 3 - ensuring that actual and potential wrongdoers modify their behaviour. It's not all  
15 about the recovery by the claimants.

16 This is all still Lord Briggs then quoting Chief Justice McLachlin in Hollick and her  
17 judgment:

18 "... it is essential therefore that courts not take an overly restrictive approach to the  
19 legislation, but rather interpret the act in a way that gives full effect to the  
20 benefits foreseen by the drafters."

21 If the Proposed Defendants are right that this type of claim by an essentially highly  
22 homogenous group of customers, London rail travellers, all faced with the same  
23 array of sales channels and information, it's this claim is too diverse, too  
24 complex, too specifically based on the fact of individual customer experiences,  
25 and must therefore be individually tested or not certified. If that is so, then  
26 an entire genre of collective action will be simply locked out of the UK regime

1 before it's really got going.

2 Directly contrary to the injunction that it is essential to avoid being too restrictive.

3 So that's my general observation on the policy. My general observation on  
4 Ms Abram's consumer point. It's of course the very essence of the concept of  
5 an abuse of a dominant position that in the oft-repeated words of the ECJ it  
6 relates to a position of economic strength enjoyed by an undertaking which  
7 enables it to prevent effective competition being maintained on the relevant  
8 market by giving it the power to behave to an appreciable extent independently  
9 of its competitors, of its customers and ultimately of its consumers.

10 The present regime was of course introduced by none other than the Consumer Rights  
11 Act. I need only cite what Lord Briggs says at the beginning of Merricks -- I will  
12 just briefly turn it up but you don't have to, sir, because it's paragraph 2 of  
13 Merricks. I just want to get the words right. There, between E and F, his  
14 Lordship said --

15 **THE PRESIDENT:** Yes, just for the note it's authorities bundle 5 at tab 59. You are  
16 at page 2577, I think.

17 **MR MOSER:** I am, sir, I'm grateful. Between E and F:

18 "It enables whole classes of consumers to vindicate their rights to compensation and  
19 the large cost of the necessary litigation to be funded, before an expert Tribunal,  
20 the Competition Appeal Tribunal ... which is given exclusive jurisdiction over  
21 collective proceedings. The prospect that the rights of consumers can be  
22 vindicated in that way also serves to act as a disincentive to unlawful  
23 anti-competitive behaviour of a type likely to harm consumers generally."

24 But the rights of consumers and the likelihood of harm to consumers generally, right  
25 at the heart of the regime.

26 I do not shrink or apologise for the fact that this is a competition law case being brought

1 for the benefit of consumers. The fact that for most of its history competition  
2 law was largely out of the reach of the ordinary consumer, is, in large part,  
3 responsible for the introduction of the collective action regime so that by this  
4 tool, and, yes, the availability of litigation funding from funders willing to take  
5 a risk, for a fee, to invest millions up front so that in this way competition law  
6 can be enforced directly by consumer claimants in the national court.

7 So much for my general introduction. I will now address my learned friends' points in  
8 roughly the order in which they were made.

9 Mr Harris for LSER. On Day 2, the transcript reference, sir, is page 44, Mr Harris  
10 began:

11 "... a conceptual approach to a claim has to show a realistic prospect of success at the  
12 CPO stage. It has to be, if you like, to quote you, sir ... from Merricks [in the  
13 CAT] it has to be 'methodologically sound'."

14 And from Pro-Sys and Hollick in the Canadian Supreme Court it has to be "...  
15 'grounded in the facts'" of the actual case."

16 Again, we agree. Of course, my learned friend and I then diverge. But in my  
17 submission, you have the methodologically sound approach taken by Mr Holt  
18 in his report. As he explained in evidence being questioned by  
19 Professor Mason and the others yesterday.

20 It is grounded in the facts of the actual case, since it is directly related to the incidence  
21 of Travelcard holding and boundary journeys without boundary fares.

22 There will be data, as we heard, on the journeys and there will be evidence.

23 Where we really part company is only on whether, in order to show a non-fanciful  
24 prospect of success on his strike out, we also need to provide individual  
25 causation stories for 2.5 million class members.

26 We part company first and foremost for the clear policy reason that I have started with.

1           If that's what's required, then no such case will ever be certified. If, as my  
2           learned friend says, one starts with the conceptual approach, then conceptually  
3           he must be wrong.

4 Before I turn to my learned friend's cases, I will deal briefly with the attack on my table.

5           Sir, you had my learned friend's note of yesterday.

6 **THE PRESIDENT:** Yes.

7 **MR MOSER:** And you have had our response in the note today.

8 **THE PRESIDENT:** Just a moment, let me put away ... yes.

9 **MR MOSER:** For convenience, my advocacy note of yesterday is annexed to our note  
10           of today at page 6.

11 **THE PRESIDENT:** Sorry? The table you mean, yes?

12 **MR MOSER:** The table, yes. You may have it elsewhere also.

13 The attack that Mr Harris rides in his note, and to some extent in his oral argument, is  
14           that the journey numbers are not reliable and therefore my figures are going to  
15           be out. That's in its briefest form.

16 When I introduced this table yesterday, I did make it clear this is my table --

17 **THE PRESIDENT:** It was the day before yesterday.

18 **MR MOSER:** I'm so sorry, time flies. Indeed, it may have been the day before the  
19           day before.

20 **THE PRESIDENT:** When you opened, yes.

21 **MR MOSER:** Tuesday. On the first day. I did say against me, I suppose, that the  
22           boundary fares figures were an understatement. I could have gone on to say  
23           of course the journeys are also going to be subject to the weighting in Mr Holt's  
24           expert evidence.

25 I am going to let our note of today speak for itself rather than go through it, but the  
26           headline point is that of course Mr Harris is correct to observe that the

1 illustrative calculation in the table is a simplification and it does include other  
2 journeys.

3 **THE PRESIDENT:** Can you just help me on one point of detail, because it's not the  
4 response you give in your note, I think. If you have Mr Harris's note -- I say it's  
5 Mr Harris, I am sure Ms Blackwood and Mr Armitage had a part in it as well, but  
6 the Proposed Defendants' note, the important point is in paragraph 6 where he  
7 lists four categories ... do you have the note?

8 **MR MOSER:** I do, yes.

9 **THE PRESIDENT:** He says -- well only C is relevant.

10 Just A, just trying to understand this, because he says that's included, as I understand  
11 it, in the Travelcard journeys. Indeed, that is what he says in paragraph 6,  
12 "Travelcard journeys include, therefore, A, journey ..."

13 But Travelcard journeys are calculated by Mr Holt from in-scope journeys. That's his  
14 figure. As I understood it, but maybe I misunderstood it, A is not an in-scope  
15 journey and it's not in the figures. You have given a rather more elaborate  
16 explanation. Your figures are taken from Mr Holt's table 6.1, I think, for in-scope  
17 journeys.

18 **MR MOSER:** Yes.

19 **THE PRESIDENT:** No, sorry, 6.5. I think that's right. Yes, 6.5 which then feeds into  
20 another table, that's where you have taken the figures from --

21 **MR MOSER:** Yes.

22 **THE PRESIDENT:** -- for in-scope journeys. 6.4 for South West and 6.5 for South  
23 East, that's where they come from.

24 So, it's his figures for in-scope journeys. But he has explained, hasn't he, at his table  
25 6.1 on page 146 of the bundle, just above paragraph 6.2.9, what are in-scope  
26 and what isn't.

1 If you look at point 4 there, origin: travel zone 1-2, destination: travel zone 1 to 2, it's  
2 not in-scope.

3 So, as I understand it, it's not in the figures at all. Have I misunderstood that?  
4 Because you give a much more elaborate discussion about A.

5 **PROFESSOR MASON:** If I may, that point is also present in table 6.4 that you referred  
6 to, so on the fourth line of figures you can see there's a deduction for flows  
7 inward or within same TfL travel zone.

8 **MR MOSER:** Yes, sir --

9 **THE PRESIDENT:** You can come back on that if you like.

10 **MR MOSER:** I will come back on it if I need to, but I will have an attempt at explaining  
11 it, which is that that is -- absolutely, of course, Professor Mason is quite right.

12 Mr Harris's example is a bad one, because we treat zones 1 and 2 as one zone.  
13 There's likely to be a very small number of journeys that have made it into this  
14 figure --

15 **THE PRESIDENT:** You can get a pure zone 1 Travelcard, can you? I've never seen  
16 one. I've always thought zone 1-2 are sold, that's what you buy, but perhaps  
17 you can.

18 **MR MOSER:** Perhaps you can. Perhaps somebody can tell me if so, but I was under  
19 the same impression.

20 **THE PRESIDENT:** I mean even looking at the map that we've been given, there is  
21 a zone 2, yes, there's an outer zone 2, yes, so maybe you can get an inner  
22 zone 1, I don't know how many of them -- there will obviously be figures of how  
23 many -- and Mr Holt has some figures for the different Travelcards holding in  
24 table 6.6. But he puts zones 1 and 2 together, which rather reinforces my  
25 supposition that they are sold as a 1-2 Travelcard.

26 **MR MOSER:** Sir, yes. And they may well be. Perhaps to some extent our concern

1 is overstated. It is yet again a somewhat obscure example and either not  
2 a concern at all or a concern that is allayed by the explanation that we give that  
3 there are other adjustments made in Holt that thoroughly remove any such  
4 inaccuracy.

5 The headline point on this table, sir, is that even if one takes all of that into account,  
6 the movement of the denominator would have to be enormous for the outcome,  
7 which is that over 90 percent of relevant journeys are made without the benefit  
8 of boundary fares to be significant affected.

9 I submit that there is a high degree of confidence in my principal point, which is that  
10 although my advocacy table uses the gross figures in the tables, and  
11 sometimes there are adjustments, not only does that go both ways -- because  
12 the numerator is affected as much as the denominator potentially -- but the  
13 actual fact is that the change is not as great as my learned friends' --

14 **THE PRESIDENT:** Yes.

15 **MR MOSER:** That's really all I sought to do and I'm sorry if the note is more  
16 complicated than it need be.

17 **THE PRESIDENT:** Yes, Mr Harris?

18 **MR HARRIS:** Sir, thank you. I'm sorry, just because it will be a lot quicker to do it  
19 while the document is open. If you could have regard to line 3 of table 6.1, that  
20 illustrates the same problem as what is referred to in our note at 6A, and they  
21 are in-scope journeys. The in-scope journeys include moving from  
22 somebody -- I take your point that there may be people with zones 1 to 2  
23 Travelcards, but if you see in line 3 of table 6.1, those people who are moving  
24 into a destination in zones 3-6, they are included. Those people can be people  
25 for whom it's entirely within the scope of their Travelcard, because of course  
26 you are not limited to a Travelcard that's zones 1 to 2 but you can have one that

1 goes out to 3 and/or to 4 and/or to 5 and/or to 6.

2 If you look, obviously, in the final column, they are expressly in-scope journeys, so the  
3 same point --

4 **THE PRESIDENT:** Which final column of what?

5 **MR HARRIS:** Table 6.1 of Mr Holt's first report on page 146 of the bundle.

6 **THE PRESIDENT:** Yes. If you are moving beyond -- to a destination beyond the  
7 scope of your Travelcard.

8 **MR HARRIS:** No, no, if you are moving into a zone that's further out. You see the  
9 columns are described as origin and destination, not the type of Travelcard.

10 Line 3 is the most illustrative one and footnote 2 says it:

11 "Journey 3 [so line 3] represents a journey from one ... [Travelcard] zone to another  
12 distinct ... [Travelcard] zone further [away]."

13 Yet a journey from somewhere in 1 to 2 into either 3, 4, 5 or 6, that's the journey that's  
14 in-scope. But, of course, somebody who does any one of those examples, into  
15 either 3 or 4 or 5 or 6, could have -- some people will have -- a zone 3  
16 Travelcard or a zone 4 Travelcard or 5 or 6, and those people will be travelling  
17 entirely within the scope of their Travelcard, notwithstanding that they are  
18 travelling on what is expressly described as an in-scope journey.

19 What it means is that whilst I accept by reference to line 4 of this table that the precise  
20 way that paragraph 6A of the note is characterised is inaccurate, it could simply  
21 be rephrased to refer to any of the journeys in line 3 of the table, and then it is  
22 accurate.

23 **THE PRESIDENT:** Yes.

24 **MR HARRIS:** So, the point stands. Thank you.

25 **THE PRESIDENT:** Yes.

26 If one says a zones 1 to 2 Travelcard holder travelling from zone 1 to zone ... no.

1 **MR HARRIS:** It's any person who is doing the journey from somewhere in to  
2 somewhere further out, it's absolutely inevitable that some of those people will  
3 have a Travelcard that covers the entirety of the journey, and yet it is  
4 an in-scope journey. That's where the problem arises.

5 **THE PRESIDENT:** I understand what you are saying, yes. Thank you.

6 **MR MOSER:** Sir, we don't disagree with Mr Harris on that point. We say that, to the  
7 extent that the figures, as I say, are at a high level in that way, we explain at  
8 paragraph 5 of our note why such incidents are going to be rare. So that at the  
9 level at which I pitched this, there's highly unlikely to be a substantial  
10 overstatement for the reasons given.

11 **THE PRESIDENT:** The example that Mr Harris has just given is not, as I understand  
12 it, within your class definition?

13 **MR MOSER:** That's correct.

14 No, it's not within the class definition -- sorry, I am just hearing noises off.

15 **THE PRESIDENT:** It's the way that you have defined the proposed class, because  
16 they have to travel to a station beyond the boundary of the zones for which they  
17 hold a Travelcard.

18 **MR MOSER:** Exactly. That I took in fact to be Mr Harris's point, sir. I don't disagree  
19 with him on that.

20 Apologies, that's taken longer than probably it should. As always doing an advocacy  
21 exercise on figures is liable to be not as accurate as the experts.

22 The point is it may still be safely assumed that we are dealing with a relevant boundary  
23 fare take up of less than 10 percent, so that the overarching criticism fails, even  
24 if we agree with Mr Harris on some of his points. In that sense, I apologise if  
25 I have started a hare running that has led to this extra exercise.

26 Before I come to the cases that my learned friend took you to, the principal difference

1 between us is whether it is necessary to have individual disclosure and  
2 cross-examination of claimants. We say no, not just because it's impossible in  
3 this case but also because it is not necessary.

4 It's vitally important to stress that that is absolutely not the same as saying that we  
5 assume causation or assume liability. Our position on those points in a nutshell  
6 is, first, on liability, this will be largely a matter of the conduct of the Defendants.  
7 We say it's clearly not going to be a question for cross-examination of individual  
8 passengers. It will be also dealt with, of course, by railway experts, as well as  
9 surveys and evidence around the market and disclosed evidence.

10 On causation, the Defendants will of course be --

11 **THE PRESIDENT:** By "railway experts", sorry, do you mean sort of on ways of selling  
12 tickets or how vending machines can be designed or whatever? Is that what  
13 you mean?

14 **MR MOSER:** Yes. If necessary. The defendants already have their experts, as it  
15 were, because presumably they are quite expert in their own conclusion.

16 On causation, the defendants will be able to advance their defences to whatever extent  
17 they wish on, for instance, the frequency and availability of alternative fares at  
18 trial. I note in passing we generally haven't been given figures, for instance  
19 from LSER, on all these other ticketing options. It's only been raised that they  
20 exist.

21 They will have the opportunity to adduce all this evidence at trial and their rights of  
22 defence, in my submission, cannot be thought to be unfairly curtailed just  
23 because they cannot cross-examine passengers about this.

24 It is, in my submission, a good illustration of what we saw yesterday about the  
25 discussion around point-to-point fares in relation to Mr Ward's argument and  
26 Clapham Junction.

1 Mr Ward and Mr Harris posited that it would require a searching examination of the  
2 passenger on the platform at Waterloo, what were her motivations, what did  
3 she know on the day in question and of every passenger on every day since.  
4 But in fact, as was demonstrated not least by Professor Mason's careful  
5 questioning of Mr Holt, this kind of matter is capable of being approached  
6 conceptually. Including the likely incidence of point-to-point fares from  
7 somewhere like Clapham Common to Guildford on journeys from Waterloo,  
8 including by survey.

9 If necessary, the Tribunal can make a finding as to whether that is to be allowed or  
10 not, as part of the claim.

11 Of course, at trial they will have their own experts also --

12 **THE PRESIDENT:** When you say a finding, just so I understand, you mean whether  
13 point-to-point fares should be excluded --

14 **MR MOSER:** Yes.

15 **THE PRESIDENT:** -- from the claim?

16 **MR MOSER:** Yes, exactly so, exactly so. These points will no doubt be strenuously  
17 argued, also with the benefit of their own economic evidence, but I submit not  
18 as a matter of individual evidence in this case.

19 We then have my learned friend's response to that, in a sense, or his case on that,  
20 which are his trilogy of Canadian cases on the need to show causation. I do  
21 not need to spend too much time on these. It was said they weren't visited in  
22 opening. I respectfully suggest they were deservedly unvisited in my opening  
23 because they don't really take matters very far forward.

24 The first case was the case of Dennis, which is authorities bundle 6, tab 11,  
25 page 2875. That was my learned friend's case about a problem gambler.

26 **THE PRESIDENT:** Yes.

1 **MR MOSER:** Tab 11.

2 **THE PRESIDENT:** Yes.

3 **MR MOSER:** It may have been included because fortuitously it includes the phrase  
4 "best efforts". There was in my respectful submission an adventurous  
5 submission that "propensity to gamble is akin to propensity to seek price  
6 optimisation".

7 That was Day 2, page 54, so this was said to be a parallel to our case. I respectfully  
8 disagree.

9 But anyway, for my purposes, it suffices to go to paragraph 49 to see the test that was  
10 applied. Again, the test in my submission is not objectionable. It's between the  
11 two hole punches, the last few lines of paragraph 49 on page 2895:

12 "Is this a case in which the need for individualised enquiry is so pervasive that it  
13 overwhelms the Appellant's attempt to treat it as a case of systemic wrong?"

14 For the reasons I have explained and will elaborate on when I come to Mr Harris's  
15 skeleton argument and his paragraph 18 arguments, the need for individualised  
16 enquiry is not so persuasive in this case that it overwhelms the CPR's  
17 submission that this is to be treated as a systemic wrong.

18 I recall my opening, widespread, systemic and ongoing.

19 Of course, you, sir, the President, took Mr Harris to paragraph 64 and the case of  
20 Hickey Button. I gratefully adopt the suggestion that that is a more apt analogy,  
21 in which the court certified a claim by college students.

22 That's all we need from Dennis. Dennis is simply a case that on its facts is so far  
23 removed from the present case as to be of no assistance as to its outcome.

24 The next two, I submit I can take even more quickly, and perhaps Mouhteros I don't  
25 even need turn up. That was at authorities bundle 5, tab C1, page 2624. It was  
26 a misrepresentation case, the Tribunal may recall. Again, it was simply on the

1 facts of that case individual evidence was required. A completely different  
2 scenario to a competition law case like the present, where economic evidence,  
3 aggregate evidence, is specifically provided for and the principal means by  
4 which the questions of loss and damage are to be determined far, far from the  
5 case in relation to misrepresentation.

6 The third in my learned friend's trilogy of cases was Kett v Mitsubishi, and that's back  
7 in authorities bundle 6 at tab 20, page 3199. That was the case about the  
8 purchasers of cars, and the Tribunal may remember the definition of class at  
9 pages 3230 and 3231: all persons in Canada who purchased a new vehicle or  
10 motorcycle manufactured by various people.

11 Again, the problem in that case is what we see at page 3233 on the facts. That's from  
12 paragraph 124 onwards.

13 The issue was framed at the highest level. The Plaintiff had conceded there could not  
14 be a single answer for all components and all Defendants. The analysis would  
15 at best have to be performed on a product-by-product basis, and that's at  
16 paragraph 125. And so it goes on. 126:

17 "The problems run deeper ..."

18 127:

19 "Whilst it is true that nuanced answers can be given to a common question, in this  
20 case there is little unifying the pursuit of the answer from product to product or  
21 shipment to shipment."

22 The Plaintiff did not plead there was an overarching systemic wrongdoing in that case,  
23 we see that at 128. It was a conspiracy point. But no single conspiracy was  
24 alleged across the Defendants, we see that five lines down.

25 129 - this lack of an allegation of overarching systemic wrongdoing sets this case apart  
26 from other cases.

1 130 - it also sets the case apart from price fixing cases.

2 At 132 it's found that there the issue is simply not capable of providing a nuanced  
3 answer to a single common question, the court would need to provide separate  
4 answers to separate questions.

5 So, again, quite different. We submit that by contrast we have one systemic abuse  
6 that we allege, which I have explained in opening, and a highly homogeneous  
7 class definition, which I will also come back to when I address Mr Ward's points.

8 To seek to make good his arguments on the trilogy, my learned friend took the Tribunal  
9 to paragraph 18 of his skeleton argument. If I can ask the Tribunal to turn that  
10 up. It is at internal pages 6 and 7 of my learned friend's skeleton. I was  
11 criticised, in particular I think, for not having addressed the last three, which  
12 I will do so, but I am happy to address all of them again briefly.

13 Here are his examples. 18.1, another ticket for the full journey may have been cheaper  
14 than a boundary fare, for instance a discounted advance ticket.

15 This is a well-traversed point. Can I ask you, please, just to turn up again Mr Holt's  
16 second statement, which is in core bundle-tab 6 at page 231, and at 231 of the  
17 core bundle, we have that table 2.1, "ORR journeys by fare type ..."

18 **THE PRESIDENT:** Yes.

19 **MR MOSER:** The first line is the line that's addressed here, advanced tickets. Sir,  
20 I think you have our submission on that. It's first a submission of law that there  
21 should be a boundary fare available for advance tickets. It's based on the fact  
22 that, just because this is a ticket that's offered cheaper at certain times doesn't  
23 change the principle, it doesn't change our point on the law. We have paid, my  
24 clients would have paid, for part of it already.

25 My learned friend Mr Harris referred to it several times as the "double discount". But,  
26 with respect, it's not a discount to have paid for part of the journey already, and

1 so there's nothing double about it. It is just another ticket for which a boundary  
2 fare ought to exist.

3 I will gratefully adopt also the point made by you, by the President, that there are  
4 boundary fares of course for off-peak tickets. It is difficult to detect the  
5 difference in principle between the boundary fare for the off-peak and the  
6 boundary fare for the advanced fare. We say there is none.

7 Back then to paragraph 18(ii):

8 "The passenger may have been able to achieve some other preferable alternative  
9 discount, for instance a group discount."

10 Still looking at table 2.1, you have I think my submission. That all falls into the "other"  
11 category and the other category does not somehow grow in the counterfactual,  
12 sir, it's not as though one can say, "One has no idea in the counterfactual  
13 whether people would buy other discounted fares".

14 We know in the real world what ticket each passenger bought. So, if someone didn't  
15 buy, say, a group discount in the real world, it's simply not plausible to argue  
16 that we do not know what would have happened in the counterfactual, they  
17 would not have bought anything other in the counterfactual.

18 We remain within some fraction of the 2.8 here, which we say is de minimis.

19 As to 18(iii), getting another point-to-point ticket from somewhere in the outer zone of  
20 the validity of the passenger's Travelcard to the destination may have been  
21 cheaper. This, I submit, was dealt with yesterday. These are the point-to-point  
22 tickets. If they're on the boundary, they are not in the class. If they are just  
23 inside, they can be dealt with in the way Mr Holt explained, and I am not going  
24 to repeat.

25 Then (iv) really falls into two parts. The first is the passenger may not have had his or  
26 her Travelcard available at the moment of purchase.

1 As we know from the South Western ticket machine example, there's no economic  
2 reason why the traveller should have his Travelcard available at the time of  
3 purchase. It's just another hurdle that the TOCs put in place and so it's part of  
4 the system that we say is abusive.

5 The second part may not have had his Travelcard available at the time of travel. Well,  
6 it's a not dissimilar point, it's partly about revenue protection, but also it is a point  
7 one could make about almost any consumer-based action, he may have  
8 forgotten his ticket. I think Mr Harris said, "You might just forget it, I've forgotten  
9 it".

10 In a sense, the last three fall into a similar category, and I will have a submission about  
11 all of them at the end. I will just go through them: a Travelcard that was not  
12 valid for the requisite period; a passenger not having the inclination to develop  
13 extra effort, I think my learned friend said no time to fuff around; or, finally, may  
14 not have cared about price optimisation to begin with.

15 I say two things.

16 The first is that all of these are in a real sense either implausible or, if not implausible,  
17 de minimis.

18 In relation to (vi) in particular, I would add that the passenger shouldn't have to devote  
19 extra effort and fuff to buy a boundary fare in the first place. That's part of our  
20 complaint.

21 We will see, when I come to my learned friend's own US authorities and the case of In  
22 re Nexium, an example of an approach where it can be assumed against him  
23 on (vii) that people would not overpay willingly.

24 These three and a half points, I submit, are if anything conspicuous by their obscurity  
25 and relative unlikelihood, in particular, in relation to a strike out argument.

26 I would also pray in aid, sir -- we can put away now the core bundle for

1 a moment -- what is said in Merricks, and I am not going to trouble you to turn  
2 it up but I will give the citation and read it out. In authorities bundle 5, tab 59,  
3 page 2593. Which is Lord Briggs at paragraph 49, quoting Lord Reid in Davies  
4 v Taylor, and at D:

5 "... perhaps on an application of the de minimis principle, speculative possibilities  
6 would be ignored ..."

7 I think I made this point in opening, but I do rely on that, certainly at this stage the  
8 speculative possibilities at the strike out stage must be ignored. That's really  
9 the end of my learned friend's paragraph 18.

10 Mr Ward has his hand up.

11 **MR WARD:** Sorry, sir, I am very sorry to interrupt for such a prosaic reason, but my  
12 laptop is about to die and I see it's 11.45. I heard Mr Moser come to a pause,  
13 I wondered if, if it was convenient for everyone to take a break now, I can try  
14 and revive it or I might re-emerge as James Bourke, as he has kindly lent me  
15 his laptop as a substitute.

16 **THE PRESIDENT:** We thought you were about to intervene with some killer legal  
17 point, Mr Ward --

18 **MR WARD:** If only.

19 **THE PRESIDENT:** We will happily take a ten-minute break and you can return in  
20 whatever identity you wish to assume.

21 **MR WARD:** Thank you very much.

22 **(11.45 am)**

**(A short break)**

24 **(11.56 am)**

25 **THE PRESIDENT:** Yes, Mr Moser.

26 **MR MOSER:** Thank you, sir.

1 This is the second point Mr Harris dealt with on Day 2. I am going to be much more  
2 swift with this one than with the first.

3 I will also, in this section, deal with the comments on the economic evidence that we  
4 heard from the Defendants about today.

5 First, section on Day 2 where Mr Harris criticised Mr Holt's methodology and  
6 specifically on overlap. Mr Harris's criticisms were characteristically robust,  
7 delivered with admirable force but I say with great respect they simply cannot  
8 get him home on the strike out application.

9 Even highly expert competition counsel is not himself the expert. The criticisms are,  
10 naturally, submission. They culminated in some ways on Day 2, and again  
11 today, for instance in an allegation that the weather might render Mr Holt's  
12 survey unreliable. In the end, as we know, Mr Harris didn't ask Mr Holt any  
13 questions about the survey, or about the overlap, and the Tribunal has heard  
14 Mr Holt on this point of the overlap. That's of course the overlap between  
15 Travelcard holding and boundary fares.

16 I submit he amply met the threshold of having a methodology to deal with the overlap  
17 for the CPO stage and, for good measure, both as to strike out and suitability.

18 There was one micro point about the CLRT, the report, whether it dealt only with  
19 inbound or also outbound journeys. That was also resolved by Mr Holt in  
20 evidence.

21 **THE PRESIDENT:** Can you help me, where is that report in the bundle?

22 **MR MOSER:** I can, or rather I suspect Ms Littlewood or Mr Kuppen can. I'll give you  
23 that at the end of the section, if that's acceptable.

24 We then had my learned friends' submissions this morning. We first had my learned  
25 friend Mr Ward. His criticisms, I respectfully submit, are simply not ones that  
26 bite at this stage. He criticised Mr Holt for not having an actual survey design.

1 I say at this stage, at the CPO, it cannot be required for the expert to turn up  
2 with a survey design.

3 But even at a level of abstraction with which we are all familiar, without giving  
4 evidence, a survey design is not as difficult as the PD representatives make  
5 out. It's done all the time. The CLRT survey itself -- for which I hope to have  
6 a reference in a short period of time -- had about 40,000 interviews. Mr Holt  
7 was quite confident, and I submit rightly so, that a survey will be fit for purpose  
8 in this case, and of course we have seen in other cases, in North America and  
9 in Canada, that the use of surveys.

10 The reference to the termini survey is authorities bundle, D1, page 3 --

11 **THE PRESIDENT:** Which authorities bundle? Authorities?

12 **MR MOSER:** That will be authorities bundle 6, D1, page 3259. Yes, Central London  
13 Rail Termini.

14 That is only an extract. Would the Tribunal be assisted by having the whole thing?

15 **THE PRESIDENT:** Sorry, just let me find it.

16 **MR MOSER:** 3259.

17 **THE PRESIDENT:** Yes, 3259. We only have a page of it.

18 **MR HARRIS:** There's a much fuller extract, sir, at bundle 6, tab 3; there's some 20 or  
19 30-pages of it there.

20 In addition, there's the chapter 5 that I mentioned about travel patterns outside central  
21 London, that's to be found at supplemental bundle, so that's bundle 11, tab 17,  
22 page 260.

23 So, between those three places, you have quite a lot of the CLRT.

24 **THE PRESIDENT:** Yes, the first one is repeated.

25 **MR MOSER:** I am very grateful to Mr Harris.

26 Sir I am told that the whole survey is only 140 pages long. Would it assist if we sent

1 a copy?

2 **THE PRESIDENT:** The short answer is I don't know at this point, because I haven't  
3 looked at the significant extract we have where Mr Harris has just taken us.

4 **PROFESSOR MASON:** Might I --

5 **THE PRESIDENT:** By all means send in a copy, or a few copies, whether they'll add  
6 anything, the other pages, to what we have, I just don't know at this point.

7 Sorry, Professor Mason?

8 **PROFESSOR MASON:** Might I suggest that that would be helpful. I know that I have  
9 looked at the fuller document and the appendix is of some interest to us. So,  
10 I would suggest we are all looking at the same document, that that is sent in if  
11 possible.

12 **MR MOSER:** It shall be done. Thank you.

13 **THE PRESIDENT:** Just one thing I wanted to see on it ... it was done in the peak  
14 times, that's what I wanted to just see, the morning and the evening peaks, as  
15 I understand it ... yes. The morning and the evening peaks. So, if they were  
16 travelling with a Travelcard, it would have to be a peak-time Travelcard. It  
17 wouldn't be an off-peak Travelcard. That just goes to a small point that was  
18 mentioned.

19 **MR MOSER:** Any bespoke survey for this case would of course be targeted  
20 appropriately, there's no reason to assume the survey company wouldn't do so.  
21 I suggest, further, that, rather in the way that I submitted in relation to the overlap  
22 arguments on Day 2, as far as Mr Harris's points today were concerned, I make  
23 the same points mutatis mutandis, Mr Harris made submissions on statistics  
24 evidence but it is, I'm afraid, in my submission quite wrong to say that surveys  
25 need to be from every station.

26 The point of representative sampling is that we don't have to visit every station. You

1 make certain assumptions and you explain them in your survey. The weather,  
2 the time of day, whether LSER would allow a surveyor onto the platform, which  
3 is an interesting point, but that that ought not to be a matter for ... that cannot  
4 possibly be a point on which certification ought to fail.

5 If Mr Harris had these points, I don't think it's an unfair thing to say that he should have  
6 put that to Mr Holt. He didn't. There might have been an easy answer.  
7 Perhaps you have the survey person on the train and then he captures all of  
8 the stations. I don't know. But he didn't ask.

9 The final point about commuters was -- you had the point -- commuters are not  
10 excluded, it's only commuting season ticket journeys that are excluded, so  
11 asking commuters is not in itself a flawed methodology.

12 That's all I want to say about the criticism of the expert evidence, which brings me to  
13 Mr Harris's third point, which was the question of uninjured claimants.

14 This point has transmogrified slightly, because at the skeleton stage there was a much  
15 greater emphasis on classes having no uninjured class members at all.

16 It has migrated somewhat -- and in my submission rightly so if one looks at the case  
17 law and the practical reality -- to say that if there are uninjured claimants, then  
18 there has to be a winnowing out of non-injured class members, which is also,  
19 in fairness, the culmination of Mr Harris's skeleton on the point (for your note at  
20 paragraph 53) where he cites *In re Nexium*.

21 For this proposition, Mr Harris again relied on a trilogy of cases. He cited *Nexium* itself  
22 and then also *Asacol* and *Godfrey*.

23 Contrary to Mr Harris's submission that this sinks me, unsurprisingly I submit it does  
24 not sink me, as he ventured to suggest, because, as I explained in opening, the  
25 Supreme Court's approach in *Merricks* is clearly different on this point.

26 I will come back to that.

1 If we look first, sir, at the US system, where I didn't go in opening because it is as it  
2 were two steps removed from our system. It's not only like Canada, with its  
3 own differences in relation to this issue, it's also based on a rather different  
4 statutory framework. But of course it's always interesting to look at US practice.

5 The first case that my learned friend looked at was Nexium. That is at authorities  
6 bundle 6, tab 17. In re Nexium is that case about distinguishing injured from  
7 uninjured class members that he relies on. I rely on it, of course, or would draw  
8 your attention to the fact that it is also a case that in principle a certified class  
9 may also include a de minimis number of potentially uninjured parties. That's,  
10 for instance, headnote paragraph 14, which is the same as the Canadian case  
11 law I showed you in my opening.

12 The part relied on by Mr Harris is at 3127. It's on internal page 19, right-hand column,  
13 between the two hole punches:

14 "At the class certification stage the court must be satisfied that prior to judgment it will  
15 be possible to establish a mechanism for distinguishing the injured from the  
16 uninjured class members."

17 That is in all the Defendants' skeletons. I am going to say a number of things about  
18 that. When I come back to Merricks I'm going to submit that the majority in  
19 Merricks has made it quite clear that aggregate damages abrogate the  
20 compensatory principle and nothing puts it back again before judgment.

21 Sir, you will know better than I that that was in the context of the CAT in Merricks  
22 having found that aggregate damages could be acceptable, provided individual  
23 losses could be identified at a later stage. That was at paragraph 79, I don't  
24 think I need turn it up but it's in authorities bundle 3, tab 44, page 1583. The  
25 later stage that you identified, sir, was in that case distribution.

26 That was expressly not how the Supreme Court resolved it in Merricks. Not just

1 because it found that although distribution could be looked at in the round it  
2 wasn't decisive. That was paragraph 80 of Merricks, so you can't rely just on  
3 the distribution stage to decide this.

4 But also, crucially, because of the finding of the majority in Merricks, that nothing puts  
5 the individual compensatory scheme back again after the assessment of the  
6 damages phase. That's, for instance, at paragraph 58 of Lord Briggs in  
7 Merricks.

8 This is not a finding plucked from across the Atlantic that is somehow going to sink me  
9 in mid-ocean, because our regime, as newly reminted by Merricks, is simply  
10 different on this point.

11 Before I move on from Nexium to Asacol, I just ask you, because it's convenient, to  
12 look over the page at 3128, on a different point that I advertised earlier. If one  
13 looks at the right-hand column on page 3128, internal page 20, the court  
14 discusses ways in which a consumer can establish injury. We see at the top of  
15 that column the first would be to argue for a presumption that consumers would  
16 purchase the generic if it were available.

17 This is a medicines case and it's a much more adventurous case of maintaining that  
18 consumers, despite brand loyalty, would move to a generic merely on price.  
19 Rather different from our situation, self-evidently, where price is the only  
20 difference.

21 But, anyway, the court continues:

22 "A presumption that economically rational consumers faced with two identical products  
23 would purchase the less expensive alternative."

24 That was the point I made in relation to Mr Harris's sixth point under his paragraph 18.

25 I promised to show you the bit in Nexium, which I have now done.

26 The point about uninjured class members is at page --

1 **THE PRESIDENT:** So they say, as I understand it, first there could be a presumption,  
2 that's something for argument at trial, but that might be one way to deal with  
3 this. Or, if that's not appropriate, you could have ... I don't entirely follow the  
4 second paragraph in the right-hand column. They say in an individual case, of  
5 course you would have testimony from an individual consumer ... if such  
6 consumer test would be sufficient to establish injury in an individual suit, it  
7 follows similar testimony in the form of an affidavit or declaration would be  
8 sufficient in a class action ...

9 I am not quite sure who makes that affidavit.

10 **MR MOSER:** Neither am I, sir. In a sense, this is the bit that led to the problem of  
11 Asacol. Because Asacol, which we see in a moment, then follows, which is  
12 again a case where they say we are going to do it by affidavit, like in Nexium.  
13 Judge Kayatta -- Kayatta's revenge -- who is the dissenter in Nexium, in Asacol  
14 he gets his opportunity, and he says, "No, you cannot do that, you cannot do  
15 this by affidavit". That's really the ratio of Asacol in a nutshell. The problem  
16 arises precisely out of the second suggestion that you just pointed out.

17 **THE PRESIDENT:** Yes.

18 **MR MOSER:** It's not a suggestion I adopt, self-evidently.

19 **THE PRESIDENT:** Yes. You say the first is -- but you can argue for a presumption,  
20 which you would say is a common issue. And that's a matter for trial, whether  
21 that assumption is accepted or not. As I understand it.

22 **MR MOSER:** Yes, sir.

23 Of course, we don't have the problem of brand loyalty, because it's all the same  
24 product.

25 It might just be interesting in passing -- again it's a different system but to note at  
26 paragraph 13, page 3129, it's said, halfway down:

1 "It is difficult to understand why the presence of uninjured class members at the  
2 preliminary stage should defeat class certification."

3 What is perhaps more interesting still is at 3138, in the right-hand column between the  
4 two hole punches -- I am afraid not every paragraph is numbered, but the  
5 paragraph that starts:

6 "What counts as a de minimis deviation from a prescribed standard must of course be  
7 determined with reference to the purpose of the standard. We thus define  
8 de minimis in functional terms. If common issues truly predominate over  
9 individualised issues in a lawsuit the addition or subtraction of any of the  
10 Plaintiffs to or from the class should not have a substantial effect on the  
11 substance or quantity of the evidence offered."

12 This is the case where on page 3139, left-hand column in the middle:

13 "The Plaintiff's evidence has shown that the vast majority of class members were  
14 probably injured."

15 That was how that case was certified. Again, I don't adopt these things as word for  
16 word the law of the UK, but it is useful to look at the rational assumptions made  
17 in North America about aggregate damages and uninjured class.

18 We then have Asacol, and that is at tab 19. I have described it as "Kayatta's revenge",  
19 which might be a bit colourful, but that's in essence what we find, and Mr Harris  
20 explained.

21 Asacol has given rise to a certain amount of comment in the United States and on the  
22 first circuit. There are first instance judges on the first circuit in the US who  
23 have raised a number of points. One was troubled that 90 percent of  
24 consumers in a proposed class can be injured but have no practical resource,  
25 under Asacol. Another expressed the concern that while Asacol eliminates the  
26 possibility that some consumers might obtain a recovery for damages they

1 didn't suffer, it also ensures that a much larger number of consumers will  
2 receive no remedy for harm actually suffered. Another called, Judge Smith,  
3 has speculated that perhaps Congress will take up the issue.

4 Asacol, in headline form, is not a model that we wish to import. Asacol does create  
5 a problem. It recognises a problem which has arisen out of this argument of  
6 proof by affidavit and it recognises the problem at the one page that Mr Harris  
7 did not refer you to, which is 3192 of the report. This is against the factual  
8 background, it was argued in the alternative that perhaps 90 percent would be  
9 assumed to purchase the generic drug, and that's rejected.

10 In the last paragraph of 3192, there is a reference to the arguments of the plaintiffs  
11 confusing different types of aggregate damages scenarios and a reference to  
12 Newberg, which is why we have brought that bit of Newberg, really for your  
13 information more than anything else. It says:

14 "In some cases, the total damage caused by the defendant is independent of the  
15 number and identity of people harmed, Newberg gives us an example of  
16 a trustee's theft of money from a pension fund. Such a case perhaps might be  
17 tried as a class action without causing any harm for the defendant, no matter  
18 how the recovered funds are allocated."

19 About halfway down the first paragraph on the next page, there's a sentence that  
20 starts:

21 "Furthermore, here the district court has reasonably presumed that determining  
22 whether any given individual is injured and therefore has a claim turns on an  
23 assessment of the individual facts concerning that person. In such a case the  
24 Defendant must be offered the opportunity to challenge each class member's  
25 proof, the defendant is liable to that class member. Whether that opportunity  
26 precludes class certification turns on whether such challenges are reasonably

1 plausible in a given case and whether the Plaintiff cannot demonstrate that  
2 allowing for such challenges in a manner that protects the defendant's rights  
3 would be manageable and superior to the alternatives."

4 It was a rather odd case on the facts where -- can I just finish my point I know Mr Harris  
5 has his hand up.

6 It was a rather odd case on the facts, I submit, that it wasn't even suggested that  
7 aggregate damages would be possible. It is not our case.

8 I am sorry, Mr Harris, you had a point?

9 **MR HARRIS:** I'm so sorry, thank you, Mr Moser. Just for the sake of speed, I would  
10 also like the Tribunal, please, to have particular regard to the remainder of the  
11 left-hand side of page 3193, in particular the sentence that begins after the  
12 reference to Tyson Foods:

13 "In many other instances, as here, the aggregate damage amount is the sum of  
14 damages suffered by a number of ..."

15 **THE PRESIDENT:** Yes, I have read that, Mr Harris. When a case seems relevant,  
16 we will not just look at the passages that any counsel has cited. We will get  
17 a sense of the whole case.

18 **MR HARRIS:** Particularly at the end of that -- thank you very much.

19 **MR MOSER:** My learned friend is absolutely right and I do not shirk from the fact that  
20 this case is against me in its own context of first circuit of the courts of appeal  
21 in the United States.

22 What they recognise as the problem is at 3193, and again I will ask the Tribunal to  
23 read the whole page in its own time, but on the left-hand side, the passage that  
24 starts:

25 "We recognise that there remains the problem of how to deal with conduct that inflicts  
26 a: small amount of damages on large numbers of people. Rule 23 serves as

1 an important tool to address many such situations and talks that the policy at  
2 the very core of the class action is to overcome the problem that small  
3 recoveries do not provide the incentive for any individual to bring a solo action  
4 ..."

5 There are some interesting observations after that.

6 But, in my submission, sir, the court does not give a solution to its problem that it's  
7 identified and that it has created in Asacol.

8 **THE PRESIDENT:** It does appear from what they say on page 3194 that this is  
9 something that's divided the different circuits in the United States.

10 **MR MOSER:** It has, sir, it has.

11 **THE PRESIDENT:** No doubt a trawl through all the doubtless many judgments from  
12 all the circuits, I think there are ten of them, would produce different judgments.

13 **MR MOSER:** It would.

14 I am going to give you one example, if I may, because it's in the skeletons and also  
15 footnoted in Newberg, I am not actually going to take you to Newberg, Newberg  
16 is there to inform you. But there's one authority that's in the skeletons that has  
17 not yet been traversed by anyone, and that's Torres at tab 16 of this bundle,  
18 and that's from the ninth circuit.

19 It's certainly my submission that the ninth circuit and the first circuit are now at  
20 loggerheads on this point.

21 I won't take you through it at length, sirs, I just wanted, as it were, in the mix. That is  
22 a case of domestic farm workers.

23 **THE PRESIDENT:** Sorry, what's the tab for that?

24 **MR MOSER:** 16, 3099.

25 This is the ninth circuit, and we are now on the west coast, the land of Del Monte and  
26 fruit picking. It is a claim by domestic farm workers, who brought a putative

1 class action against farm operators alleging that the operators had failed to  
2 inform them of the availability of a better pay rate in violation of the Migrant and  
3 Seasonal Worker Agricultural Workers Protection Act, AWPA, and the  
4 Consumer Protection Act.

5 The court made a number of points, for instance at 4 in the headnote, bottom of that  
6 page:

7 "What matters to class certification is not the raising of common questions, even in  
8 droves, rather the capacity of a class-wide proceeding to generate common  
9 answers apt to drive the resolution of the litigation."

10 Then there is a reference, as we will see later on, that to satisfy the commonality  
11 prerequisite for class certification even a single common question will do.

12 The next column on 9:

13 "The predominance prerequisite for class certification is not a matter of nose counting,  
14 rather more important questions are apt to drive the resolution."

15 15 is relevant, the headnote, on page 3101:

16 "The presence of individualised damages calculations does not defeat predominance."

17 At 20, at 3102, the use of aggregate data would not defeat predominance.

18 This is an interesting case, we submit. If one looks just at --

19 **THE PRESIDENT:** The predominance requirement under the federal rules of Civil  
20 Procedure is in fact a more onerous requirement --

21 **MR MOSER:** It is.

22 **THE PRESIDENT:** -- than the UK legislation.

23 **MR MOSER:** They don't have similar, they don't have related.

24 **THE PRESIDENT:** That's the definition of common issues, but I am not sure what  
25 their definition of common issues is, but the predominance requirement is that  
26 the common issues must predominate over the individual issues.

1 **MR MOSER:** That is right. That's why I didn't go to the US authorities, as the Supreme  
2 Court didn't, partly because they are different. So, all of this carries a health  
3 warning. The reference to the presence of non-injured class members, for your  
4 note, sir, is at 3110. In that case we see at the bottom of that page going on to  
5 3111, the class definition was reasonably co-extensive.

6 **THE PRESIDENT:** Sorry, 3110 at?

7 **MR MOSER:** 3110 at the bottom -- the whole column on the right-hand side I would  
8 ask --

9 **THE PRESIDENT:** This is the claim that the presence of certain non-injured  
10 individuals?

11 **MR MOSER:** Yes.

12 **THE PRESIDENT:** Yes, I see. A subset of people exposed to but yet ultimately not  
13 harmed.

14 **MR MOSER:** And:

15 "... class members' claims will not fail on the merits, a fact generally irrelevant to the  
16 district court's decision on class certification. If presence of certain non-injured  
17 individuals within the inaccurate information class defeats predominance ..."

18 Then also of interest is 3114 and 3115. This time on the point that you raised with me,  
19 and I am sorry I went to the wrong bit, but on predominance, paragraph 20 on  
20 3114:

21 "It is also claimed that defending against the aggregate underpayment claims would  
22 require individualised defences, thereby defeating predominance. The  
23 Plaintiff's approach would result in a trial by formula, without allowing Mercer to  
24 engage in individual enquiries."

25 So very similar to what's being said against me here. There's then a reference to  
26 Tyson Foods and then it says:

1 "Here proof is not a matter of probability, it is a matter of logic that an aggregate  
2 underpayment means that Mercer underpaid some, possibly all, subclass  
3 members. In this context the Plaintiff's method of establishing liability for  
4 underpayment in the aggregate is a permissible means of proceeding."

5 So, we are not just dealing with quantum here, establishing liability for underpayment  
6 in the aggregate is permissible:

7 "There is no absolute requirement that ... where they are they may be all that the  
8 plaintiffs need to prove."

9 And that's Newberg:

10 "Particularly where Mercer has allegedly failed to keep adequate accounting records  
11 specific to each employee, class members may be compelled to resort to  
12 an aggregate method of proving wage underpayment."

13 I say that that is an interesting analogy with our case. They do not say, "Oh, Mercer  
14 has failed to keep adequate accounting records so now you, the farm workers,  
15 must do your best with bank accounts or otherwise, to prove an individual  
16 method of proving wage underpayment".

17 No, they say that essentially defendant disclosure is not going to be adequate, and  
18 that will be solved by an aggregated method.

19 At 21 I think is the clearest indication of the conflict between the first and the ninth  
20 circuit:

21 "This of course may lead to individual calculations, those calculations would not impact  
22 a defendant's liability for the total amount of damages."

23 There's a comment at the end of that:

24 "In wage and hour disputes individualised damages enquiries are common ...  
25 typically do not defeat certification."

26 In short, sir, my answer to Mr Harris's points is the one that I gave at the outset, and it

1 applies equally to the US and to Canada in the case of Godfrey, which I don't  
2 need to turn up again. It is that this is not the law as it stands after Merricks in  
3 the UK.

4 It's not so much the points I have just dealt with, but the overarching point that  
5 Mr Harris made, that you somehow have to find your way back to  
6 an individualised assessment before judgment, that is not our law.

7 My case, I submit, is on all fours with the approach of the majority in Merricks, whereas  
8 my learned friends' approach proves too much in relation to Merricks. In  
9 Merricks, it's not going to be necessary before judgment to return to the  
10 individual level and assess individual injured class members or distinguish them  
11 individually between injured and uninjured class members.

12 That is clear from the judgment of the majority. I don't need my Lords Sales and  
13 Leggatt for that, but of course I do also rely --

14 **THE PRESIDENT:** I think the theory in Merricks is that all members of the class, save  
15 from probably some small exceptions, which were never explored, but given  
16 the nature of the wrong in that case, all members were injured, but the extent  
17 of individual injury will vary hugely. So that you can calculate the aggregate  
18 loss of the class without too much difficulty and you ignore the fact that there  
19 will be some -- I mean, I shouldn't say too much about it, because it's not been  
20 certified yet and Mr Harris will be back to argue that shortly, but there almost  
21 certainly are some who never made any such as residents of care homes, and  
22 we know that sadly from the last year's events there are actually quite a lot of  
23 those people who may not have made any purchases, but the overwhelming  
24 majority will have, so you have your causation, you just don't know how it's  
25 apportioned.

26 **MR MOSER:** I am not going to seek to go too far and ask you rule one way or the

1 other on Merricks.

2 **THE PRESIDENT:** No, but I am just saying that the issue that was raised here, namely  
3 that it goes to the calculation of the causation of the aggregate loss, although  
4 it's in other words that you can't calculate the aggregate loss on an aggregate  
5 basis. That's the argument here.

6 **MR MOSER:** Yes. Perhaps I will draw only one small conclusion from the facts of  
7 Merricks, which is that even in that case, as in any case, there will be some  
8 de minimis uninjured class members.

9 **THE PRESIDENT:** Yes.

10 **MR MOSER:** Taking us back to the principle, however, and bearing in mind that, as  
11 Mr Harris rightly says, for the reasons you have mentioned sir, it wasn't squarely  
12 addressed in Merricks. There is, however, in my submission no sensible way  
13 of reading Merricks consistently with the other side's arguments in this case.  
14 I have made my submissions on what I say is the non-dissenting part of Lords Sales  
15 and Leggatt and again I do not think I need turn it up yet again, but it's  
16 paragraph 97, authorities bundle 5, page 2606.

17 That is that for all purposes antecedent to an award of damages, including proof of  
18 liability as well as the quantification of loss, aggregate damages have done  
19 away with the need to undertake an assessment of the amount of damages  
20 recoverable in respect of the claim of each represented person.

21 It is only logical, with great respect, even in a follow-on case, that the antecedent steps  
22 may also be approached on an aggregate basis. As it happens, the facts of  
23 that case, not all 46 million people over 16 years will have had the same  
24 pass-on story, but it is with respect obviously right when their Lordships say  
25 that under our system if the assessment of damages stage means that the only  
26 fair way of proceeding is by way of aggregate damages I submit the same must

1 follow in relation to the antecedent points in cases like the present, not in  
2 Merricks but in cases like this case, for the antecedent steps you have to have  
3 the same approach, or you may have the same approach, because otherwise  
4 it makes no sense to say, "Oh, well at the assessment of damages stage we  
5 can aggregate". Before that you have to have individual evidence.

6 Clearly, the opinion of the majority makes no sense if one says well after that you have  
7 to go back to individual assessment.

8 Because at 58 of course we have Lord Briggs, who says:

9 "The compensatory principle is expressly, and radically, modified. Where aggregate  
10 damages are to be awarded, section 47C ... removes the ordinary requirement  
11 for the separate assessment of each claimant's loss in the plainest terms.  
12 Nothing ... in relation to the distribution of a collective award [which happened  
13 to be the facts of that case] among the class puts it back again."

14 There is no individual approach before, and there's nothing that puts it back again  
15 afterwards. That is why I say, under Merricks, the North American approach of  
16 saying "At some stage before judgment you have to get back to the individual"  
17 is not ours.

18 Finally, in this regard, I come back to Hollick, because we pursue this claim not  
19 because -- as Mr Harris says -- we wish to as an aggregate damages claim, but  
20 because it is a suitable aggregate damages claim.

21 If that is not capable of certification, then claims like the present simply cannot be  
22 brought. That is why there is this question of policy in this, potentially, the first  
23 certification in this jurisdiction.

24 That deals with Mr Harris's main points. He had three subsidiary further points at the  
25 end, his points four, five and six, and I hope to deal with them very quickly.

26 His fourth point was the advance fare pleading point. It's already addressed in our

1 pleadings and skeleton argument. This is the point, sir, you may recall that it is  
2 said that we haven't properly pleaded out the argument about advance fare  
3 boundary fares.

4 Perhaps I can deal with it simply by giving the Tribunal a reference to where we say,  
5 "No, we did plead it". It's in our amended reply at paragraph 26ba, that's core  
6 bundle, tab 19, page 572.

7 It is in our skeleton --

8 **THE PRESIDENT:** Sorry, your amended reply 26ba.

9 **MR MOSER:** 26ba, I think that's the right ... yes.

10 **THE PRESIDENT:** In any event, this action is just at the outset. If that's a point you  
11 want to put forward if you need to amend your pleading, you would get  
12 permission to do so, it's part of your claim.

13 Forget about class actions, in an ordinary action you can't strike out if it's something  
14 that can be cured by amendment, and no one could say this is a late  
15 amendment, because indeed we haven't even had defences yet.

16 **MR MOSER:** Indeed, indeed.

17 **THE PRESIDENT:** I don't think you need pursue the pleading point, as long as we  
18 are clear what it is you wish to claim, what's the claim you wish to make. You  
19 say, and you have been quite unambiguous about that, that if there's an  
20 advance fare there should be an advance boundary fare that you can use in  
21 combination with that form of ticket.

22 **MR MOSER:** I am grateful, sir. I won't pursue that point further at this stage,  
23 therefore.

24 Mr Harris' fifth point was the third party strike out point. Which in briefest summary  
25 I am going to say is a matter of fact for trial, in fact it's another reason why a trial  
26 is appropriate.

1 Mr Harris referred to the statement of Mr Backway. Can I just ask you to turn it up  
2 briefly? It's at core bundle, tab 15.

3 **THE PRESIDENT:** Can we put away North America?

4 **MR MOSER:** We can. Mr Backway, core 15 and at page 485, paragraph 32,  
5 Mr Backway says LSER services can be purchased from multiple channels,  
6 including from third-party retailers such as Trainline.com. There's the  
7 suggestion there that they compete with the TOCs and we are told:

8 "Around 5 per cent of tickets sold for use on LSER's services are sold by third-party  
9 retailers (see the LSER journeys data, which shows the proportions of journeys  
10 made on LSER services by retail channel ...)"

11 The suggestion that Trainline is a competitor was also made by Mr Harris himself.  
12 I want to say two things about that.

13 The first is --

14 **THE PRESIDENT:** Is that said -- sorry to interrupt you -- by Mr Backway, that we  
15 regard Trainline as competing with us?

16 **MR MOSER:** He says it in the second sentence. He says they compete with the  
17 TOCs --

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

19 **MR HARRIS:** And the final sentence, sir, of that paragraph.

20 **MR MOSER:** And the final sentence of that paragraph.

21 I say two things about that.

22 The first is that we disagree on competition. We don't just disagree in the sense that  
23 I say that's wrong. We have Mr Holt's conclusion in his report that there is no  
24 separate market for ticket sales. That's core bundle, tab 5, paragraphs 4.6.18  
25 and 4.6.19.

26 I make, further, the general point Mr Holt makes also, that they are selling LSER's

1 services. They are not selling some other ticket product, they are selling the  
2 same services and all the same tickets.

3 Whilst there is an assertion, sir -- at the moment it is just an assertion -- that there are  
4 no restrictions on third parties selling boundary fares, it is remarkable in that  
5 case that according to Mr Backway's exhibited evidence, they don't actually  
6 seem to sell any, or only very, very tiny numbers.

7 Could I ask you to turn, please, to bundle 5, which I think is a bundle we haven't visited  
8 yet. Tab 3 is Mr Backway's exhibit, JB1. I think Mr Harris took you to  
9 a Trainline response document at page 313 of the bundle. Not at the next page,  
10 which is 314, page 236 of the exhibit. That's a table that's headed "Boundary  
11 fares sold for use on LSER services". Do you see that?

12 **THE PRESIDENT:** Yes. Just one second. **(Pause)**

13 I am just trying to understand the reference in paragraph 32, JB1/218, and we are in  
14 JB1.

15 **MR MOSER:** 218 is at page 296 of the bundle.

16 **THE PRESIDENT:** Thank you.

17 **MR MOSER:** What that shows, sir, is something that Mr Holt mentions in his report,  
18 and Ms Abram mentioned in passing yesterday, that there are these four ways  
19 of selling the same tickets.

20 The TOCs selling their own tickets.

21 Also, other TOCs selling each other's tickets.

22 Then Transport for London sells some.

23 And the third-party retailers sell some.

24 When we are talking about the strike out point in relation to third-party retailers like  
25 Trainline, we are only talking about the last column on --

26 **THE PRESIDENT:** Yes.

1 **MR MOSER:** That's what I am addressing and that's what Mr Harris was addressing.  
2 We then have a breakdown on page 314 of the bundle, the boundary fares sold for  
3 use on LSER services. Despite the fact that we are told in evidence that third-  
4 party retailers do sell boundary fares, the Tribunal will see that it seems that in  
5 the years 2015 to 2019 they in fact sold ... well, it says 14, but one wonders  
6 about the figure of 14 because there are some negative figures in the  
7 penultimate column, whether that's just a balancing figure or what.

8 To all intents and purposes they don't seem to sell any --

9 **THE PRESIDENT:** That's why I was looking for the other table. I just don't understand  
10 how 314 ties with 296. Is the table that you have just taken us to at 314, that  
11 will be referred to, presumably, by Mr Backway somewhere in his witness  
12 statement?

13 **MR MOSER:** Yes. I can answer it, sir. The table at 314 is just boundary fares,  
14 whereas the table with the percentages on 296 is all tickets.

15 **THE PRESIDENT:** I see, yes, I'm sorry, I was being a bit slow. Yes.

16 **MR MOSER:** Not at all. Third-party retailers we are told sell 5 per cent of all tickets  
17 but actually no, or as much as it matters, no boundary fares.

18 **PROFESSOR MASON:** Mr Moser, I do not want to dive too deeply into figures, but  
19 since there are some anomalous numbers in the table on page 314,  
20 "anomalous" in the sense that they are negative. Should we be troubled that  
21 these figures are difficult to reconcile with other figures that we have looked at  
22 for boundary fares, such as the ones in your summary table which were taken  
23 from the reference that you give? It's very difficult to see the connection  
24 between those different sets of figures.

25 **MR MOSER:** Sir, we should be troubled and I was coming to that. It is not at all clear  
26 that we are getting the whole picture on boundary fares, or more topically, on

1 third-party resellers.

2 As far as third-party tickets are concerned, we invite you to be troubled. As far as the  
3 overall figures for boundary fares are concerned, we don't share that concern  
4 because that can be reconciled. If necessary, I can hand up a note that  
5 explains that, but there is no concern as far as the boundary fare figures in my  
6 table are concerned and the reconciliation with this, on boundary fares as such.

7 As far as third parties selling boundary fares are concerned, we do say that there is  
8 something that will need to be done at trial here. I would note in this regard,  
9 sir, that Mr Ward, on behalf of First MTR, yesterday disavowed LSER's third-  
10 party point. That's transcript Day 3, page 70 to 71.

11 And Ms Abram of course, today, corrected the evidence from the bar, inadvertently  
12 given yesterday, in relation to Trainline offering boundary fares and explaining  
13 that they did not offer boundary fares.

14 None of this is anywhere in evidence for those other parties. Mr Ward I think has  
15 withdrawn his evidence on this.

16 The non-incidence of boundary fare sales from third parties, we know they are not  
17 available online from Trainline at least, is clearly a matter for evidence. Even if  
18 one accepts my learned friend Ms Abram's umbrella analysis, at least for  
19 present purposes it is perfectly arguable, more than arguable, that TOCs  
20 influence the behaviour of the sales channels such as Trainline.

21 We will need to see the actual terms and agreements, it's not a strike out point, and,  
22 sir, I say that as far as strike out at least is concerned, the point on third-parties  
23 fails, even on the facts, even before one looks at the law, where we say they  
24 are clearly agents and all the rest of it, which is also more than well arguable.

25 Sir, that's all I propose to say on that.

26 I wonder, Professor Mason, would you like to have a short note on the reconciliation?

1 **PROFESSOR MASON:** I think that would be helpful, if part of your case is questioning  
2 certain numbers I think it's important then to understand all of the numbers then  
3 in that particular table.

4 **MR MOSER:** Yes.

5 Of course, the table is not our table. I cannot explain all of the numbers in this  
6 particular table. What I can say is that our boundary fare figures -- perhaps  
7 I can do it in a sentence actually and then see whether we need more.

8 If you recall my advocacy table (indicated), the lower half of it -- I am not quite sure  
9 where it's most conveniently found for you, sir -- is South Eastern. The first line  
10 is boundary fares sold by South Eastern, as disclosed. That line, 81,000,  
11 168,000, 155, 146, should add up to the 550,000 that we see in the last column,  
12 bottom line, of the boundary fares table on page 314.

13 I haven't done the maths in my head but that's -- just by looking at it, it's near as ...

14 **PROFESSOR MASON:** Yes, that adds up to about 552,000, so that reconciles it well  
15 enough for now, thank you.

16 **MR MOSER:** I am grateful.

17 I can finish with my learned friend Mr Harris's points in the remaining two minutes or  
18 so of the morning. I hope to be shorter with the rest of the points.

19 Mr Harris's sixth point was his dominance assertion. My learned friend said several  
20 times that he maintains the substitutability argument in relation to parts of some  
21 flows. That is dealt with, sir, by Mr Holt.

22 We can put away bundle 5 for now -- or forever -- and look at the core bundle and  
23 tab 5, page 137. That is section 5.5 of Mr Holt's first report, dealing with  
24 overlaps. For present purposes, I will ask you just to note pages 138, 139. At  
25 5.5.12 is Mr Holt's conclusion:

26 "My analysis of the data does not suggest that coach services are a sufficiently close

1 constraint on rail services ... to negate any findings of dominance."  
2 There are similar findings in relation to dominance generally, conclusions on  
3 dominance are at 5.8.  
4 Whilst I don't say that this is a decided matter, for the purposes of a strike out  
5 application it is clearly going to be a matter for trial as to whether or not certain  
6 parts of certain flows are subject to substitutability and dominance arguments,  
7 as my learned friend Mr Harris asserts. It's not something that is going to get  
8 him home at this stage.  
9 That is all I had to say about Mr Harris's submissions.  
10 If that's a convenient moment, sir, I will come to Ms Abram's other points, other than  
11 those already addressed, after lunch.  
12 **THE PRESIDENT:** Thank you. We will say 2 o'clock.  
13 Mr Harris?  
14 **MR HARRIS:** Just to say that as matters stand there are four or five items that have  
15 been raised newly, upon which I would like a very short opportunity to respond.  
16 I apprehend that since Mr Moser is going to now move on to what was said by  
17 Ms Abram and Mr Ward that may be the sum total. For example, Torres was  
18 raised for the first time, and there are four or five examples.  
19 As things stand I apprehend that that could be done in 15 minutes with the permission  
20 of the Tribunal, and of course they are intended to refute my application, the  
21 strike out application.  
22 **THE PRESIDENT:** Yes, you can certainly respond on Torres, and we will see what  
23 the other issues are. I said yesterday that we will give you an opportunity.  
24 Mr Moser, have you a sense of -- you will know where you are in your  
25 preparation -- about how much longer you will be?  
26 **MR MOSER:** I would assume that I would finish certainly by 3.30.

1 **THE PRESIDENT:** That's no problem at all.

2 Very well, 2 o'clock.

3 **(1.00 pm)**

4 **(The luncheon adjournment)**

5 **(2.00 pm)**

6 **THE PRESIDENT:** Yes, Mr Moser.

7 **MR MOSER:** Thank you.

8 Coming then, as I say, to Ms Abram's points other than those already addressed.

9 Ms Abram started by dealing with a case on developing law in strike out  
10 applications. That was the case of Hudson, at authorities bundle 2, tab 16. If  
11 I could ask you, please, to turn it up. It starts at page 526. These are the former  
12 members of the armed services who were members of the armed forces  
13 pension scheme, there was no specific fund.

14 Ms Abram took you to this case. It's worth noting what the legal argument was that  
15 was said to be developing in that case. One sees that on page 532, starting at  
16 paragraph 43 of the judgment, the arguments on this appeal, and  
17 Lord Justice Jonathan Parker explains:

18 "In the course of a discursive argument, Mr McCormick made the following  
19 submissions.

20 "He submits that whilst informed the scheme is non-contributory, it is in substance  
21 contributory."

22 I am going to skip a bit, probably not doing justice to the full force of Mr McCormick's  
23 argument, but over the page at 50 we are told that he further submitted that  
24 "the law of restitution is a rapidly developing area of the law".

25 **THE PRESIDENT:** Sorry, this is page?

26 **MR MOSER:** This is page 533, at paragraph 50 -- I have leapt --

1 **THE PRESIDENT:** Paragraph 50, yes.

2 **MR MOSER:** The kernel of his argument was:

3 "... restitution is a rapidly developing area of the law ... thus, he submits, even if under  
4 the law as it stands today the Appellants would not be entitled to a remedy. It  
5 does not follow that the claim may not succeed at trial."

6 Mr Crow of counsel, at 54, submitted, perhaps understandably, the last line of that  
7 page that this argument was "doomed to failure".

8 At 55, he points out that, for the reasons explored in that case, no question of any  
9 restitutionary remedy can possibly arise.

10 It's in light of that that unsurprisingly the Court of Appeal makes the findings that  
11 Ms Abram took you to at page 536 of the bundle, paragraphs 66 and 67:

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

14 Well, indeed, sir.

15 At 67 is the principle that Ms Abram urged upon the Tribunal, which is not one on  
16 which I disagree with. That is, three lines down:

17 "... the court will require to be satisfied that there is at the very least some real prospect  
18 of that [that is the development in the relevant area of jurisprudence] occurring.  
19 If there is such a prospect, then by definition the claim is not (on that ground)  
20 hopeless: if there is not, it is."

21 I do sincerely hope, and certainly submit, that my arguments on competition law are  
22 not in the category of clearly doomed to fail, and certainly, in developing in  
23 a way that is different to simply saying, well, we know that the law in this area  
24 is apt to change, who knows, it might change in my favour by the time this  
25 comes to trial.

26 **THE PRESIDENT:** They are the submissions that were described variously as

1 absurd, quite a strong remark from a judge, and extravagant.

2 **MR MOSER:** My Lord, indeed, I didn't want to ... anyway. Indeed, that is right.

3 I have explained how by contrast I hope it is in fact realistic, likely indeed, that there  
4 will be developments in the law, for instance, by reference to the passages to  
5 which I referred you, sir, in your own judgment, in Preventx, in opening. There  
6 would be developments in relation to what I have broadly described as selling  
7 systems and section 18.

8 Beyond that, sir, my learned friend, I completely understand, takes general exception  
9 to my analogies with Deutsche Post and others, what Ms Abram calls my five  
10 cases.

11 I am going to summarise that -- no doubt doing her a disservice -- by saying that  
12 broadly her argument on all of those points was, well, boundary fares exist so  
13 this is not a case known to competition law. We say of course the fact the  
14 boundary fares exist is, in this case, not the crucial point. The allegation is that  
15 it is nigh on impossible, or highly impractical in practice, to access them. That  
16 is in effect the same as if they didn't exist. And competition law is about the  
17 effect of the actions or inactions of the defendant.

18 If the numbers show a very small take up indeed, as we say they do, there's not only  
19 an arguable case but we say a good prospect that we will show that customers  
20 were faced with a situation where they could not help being double charged  
21 and/or that there was a systemic problem with the way these fares were being  
22 sold in this case.

23 My learned friend makes a related point of detail on the language of section 18(2) of  
24 the Competition Act. I will just deal with it briefly if I may. It's in authorities  
25 bundle 1 at page 7. Abuse of a dominant position.

26 My learned friend alighted on the term "imposing" in 18(2)(a) as in "imposing unfair

1 trading conditions", and submitted that that is talking about imposing on  
2 competitors not on consumers.

3 **THE PRESIDENT:** I don't, Mr Moser, think Ms Abram's point was about competitors  
4 it was indeed imposing, and it goes back to your point that boundary fares were  
5 available. She was saying you cannot equate this to a situation where there  
6 are no boundary fares and they were forced, therefore, to -- I see Ms Abram is  
7 nodding.

8 **MR MOSER:** I see Ms Abram nodding --

9 **THE PRESIDENT:** So, it's the point you have made, it's not about competitors. I think  
10 she accepts, as is well known, that excessive pricing can be about consumers,  
11 it's not -- it's an exploitive abuse.

12 **MR MOSER:** I am grateful. In that case I have made the point and I see Ms Abram  
13 nodding and I agree with her.

14 I have made my submissions on consumer versus competition law generally in my  
15 earlier remarks this morning and I will not repeat them.

16 **THE PRESIDENT:** Yes.

17 **MR MOSER:** I just want to pick up on, really, Mr Holmes's point about transparency.

18 I merely echo, sir, respectfully, the points you made at Day 3, page 14.

19 I might add that it is trite law that transparency is one of the fundamental principles of  
20 EU law, according to the CJEU, according to which other treaty articles fall to  
21 be interpreted, thus also article 86. Hence, by way of effect on our law, chapter  
22 2.

23 I make that as a sort of footnote to that discussion.

24 That is all I had to say about Ms Abram's submissions.

25 That brings me in my reply to Mr Ward. Mr Ward made the first part of his submissions  
26 by reading from paragraph 6.37 of the CAT guide.

1 I am not sure we need to turn it up, it's tab 4 of authorities bundle 1. The overarching  
2 point I want to make about all of the points Mr Ward makes in relation to the  
3 guide is that if we are right on our points in relation to Merricks, then parts of  
4 this guide, including the parts on certification, will have to be revisited.

5 Insofar as Mr Ward is relying on matters already traversed in my reply in response to  
6 Mr Harris, he is relying on, essentially the law as it stood before Merricks and  
7 not as it stands now. I repeat here, *mutatis mutandis*, my points on the policy  
8 and aggregate damages after Merricks.

9 Also, that at the certification stage the Tribunal should err on the side of generosity.

10 If I say that aggregate damages may well be appropriate and may be so appropriate  
11 in a way that obviates the need for individual evidence, indeed are appropriate  
12 and obviate the need for individual evidence, then Mr Ward's submissions on  
13 matters such as you will eventually have to come back to individual assessment  
14 and so on, they just relate to the same case law that we saw in North America,  
15 that I say has been overtaken by Merricks.

16 So not addressing the current law on these points in our submission.

17 Where I do agree with Mr Ward is at the transcript page 42 yesterday, where he  
18 submitted:

19 "What's needed in all cases is that there is enough commonality in the common issues  
20 that they can be adjudicated on a common basis fairly."

21 I have of course, in my opening, set out at length the commonality of our common  
22 issues, and I will make some further points here, again by reference to Merricks.

23 Mr Ward argued that our case lacks commonality because of all the alleged individual  
24 factors and factual points that arise. This is not at all a criticism, but that is not  
25 an original submission in the sense that all of these cases, including cases such  
26 as Pro-Sys and Merricks, had the defendants arguing that issues -- in Merricks

1 it was pass on -- are far too individualised to be resolved on a common basis.

2 If we look at the Court of Appeal in Merricks, which I think we haven't looked at yet,

3 it's just convenient to see how these points were made. Sir, you know these

4 points well of course. The Court of Appeal in Merricks is authorities bundle 5,

5 a (inaudible) as yet unseen, 5/51.

6 We see at page 2312, paragraph 18:

7 "Mastercard's pleaded position in relation to the assessment of damages even in the

8 form of an aggregate award was that it was necessary to show that the

9 infringement had caused loss to each member of the class. Difficulties about

10 individual assessment could be overcome by the adoption of a 'sound

11 imagination' and 'the practice of a broad axe' ... But this does not mean that the

12 assessments should be conducted on the basis of pure guesswork. The

13 proposed representative, they say, must provide as much certainty and

14 particularity as possible. Damages are not at large ..."

15 Sir, you will remember -- I do not think we need to go to it -- that in your own judgment

16 the differences, for your note, it's at paragraph 49, page 1575 of bundle 3 is

17 Merricks in the CAT. The differences that were said to exist were pass-through

18 rates of different merchants, purchasing history of different individuals and

19 benefits received by individual cardholders. That's paragraph 49 of your

20 judgment, sir.

21 Those arguments are firmly rejected by the Court of Appeal, and the Supreme Court,

22 which regarded pass on as sufficiently common, despite these supposed

23 problems.

24 In Merricks, at paragraph 47, that's at page 2323 of this Court of Appeal report, we

25 see that the Court of Appeal found, at 47 by E:

26 "To require each individual claimant to establish loss in relation to his or her own

1 spending and therefore to base eligibility under Rule 79 on a comparison of  
2 each individual claim would, as I have said, run counter to the provisions of  
3 47C(2) and require an analysis of the pass-on to individual consumers at  
4 a detailed individual level which is unnecessary when what is claimed is an  
5 aggregate award."

6 In the context of the facts of that case:

7 "Pass-on to consumers generally satisfies the test of commonality of issue necessary  
8 for certification."

9 **THE PRESIDENT:** The previous sentence, I suppose, the last sentence of the  
10 previous paragraph:

11 "The issue of whether the MIF overcharge was passed-on to consumers generally and  
12 in what amounts is an issue common to all such individual claims."

13 **MR MOSER:** Indeed. One might say in our case the issue of whether there was  
14 double charging, and if so what amounts, is common to all the members. Well,  
15 all the claims.

16 **THE PRESIDENT:** It's a common question, in other words.

17 **MR MOSER:** It's a common question. We know from the case law that you don't have  
18 to have common answers. We know that you don't have to have members of  
19 the class all being identically situated -- the words of Chief Justice McLachlin --  
20 *vis-a-vis* the Defendants.

21 The question is common, the key issue, whether the issue is common, that's quite right  
22 in paragraph 46 of Merricks, sir, and it passed the test of commonality in that  
23 case, and I say, by analogy, ours passes it in this case.

24 One sees it in -- the examples are legion, for instance in Pro-Sys Microsoft also argued  
25 that the alleged instances of overcharging over 24 years and 19 different  
26 products meant it was impossible to prove loss on the part of each member.

1 That's Pro-Sys at paragraph 109, but that was of course rejected by the  
2 Supreme Court in Canada as an obstacle to commonality.

3 I have explained, sir, that if I am right about the UK regime and aggregate damages,  
4 then Mr Ward's, as it were, micromanaging approach to identifying the issues  
5 and assessing whether they are common: what did the passenger think on the  
6 platform at Waterloo in relation to a boundary fare to Guildford? That is simply  
7 not sustainable.

8 To bolster this point, Mr Ward's next point was the requirement in the Canadian cases  
9 for a rational relationship between the class and the common issues. He took  
10 you who Hollick at paragraph 21, which is where the court explained the  
11 requirement for a rational relationship.

12 First of all, I have no problem with that. As I have explained, there's a perfectly rational  
13 relationship between the common issues and all effective class members.

14 But also, I don't think Mr Ward went to that part of Hollick where the Supreme Court in  
15 Canada explained that the common issues requirement is not a onerous one.  
16 So that that requirement for a rational relationship between the class and the  
17 common issues is a very low bar, and rightly so.

18 I mean, for your Lordship's note, that's authorities bundle 6, C5 at page 2732 at  
19 paragraph 21 of Hollick.

20 Again, I have no particular problem with how Mr Ward puts the test, subject to that last  
21 point, but I do submit that, certainly at this stage, we easily satisfy commonality.

22 He then moved on to suitability, and of course again I agree with my learned friend  
23 that suitability is relevant. Well, it's in the statute. But because he views these  
24 issues, as he puts it, through that lens for the sake of certification, doesn't alter  
25 all of the same legal points I have just explained, on which I have already  
26 addressed the Tribunal.

1 If we are right on those points, then again causation can and will be proved collectively  
2 and by way of economic evidence based on the facts. This is entirely suitable  
3 to be dealt with in the way that we propose.

4 Just as an aside, there was a repeated reference -- to bolster the idea of diversity -- to  
5 100 million in-scope journeys. I submit that was an error. The in-scope  
6 journeys are going to be whatever percentage of that relates to the Travelcard  
7 holding, so perhaps 15 per cent or so, but anyway that's a sort of side remark.

8 Mr Ward repeated his case on strict liability. Sir, I think you have my remarks on strict  
9 liability from opening. Nothing that Mr Ward says, with great respect, requires  
10 me to revisit or bolster them.

11 Then there was, again, next, a similar attack on Mr Holt's methodology to the attack  
12 made by Mr Harris. Where I do say that if that is not a sufficient argument for  
13 strike out, and it isn't, then there should not be a greater merits review of the  
14 methodology at the certification stage. That's, again, entirely on all fours with  
15 Merricks.

16 Mr Ward of course then went on to say well there's no identifiable class. So I took you  
17 to our paragraph 88, where we have set out our class. Now, I resubmit, as I did  
18 before, that in relation to any one member, it is possible to tell whether they are  
19 or are not a member of the class.

20 **THE PRESIDENT:** I think Mr Ward accepted that.

21 **MR MOSER:** But he left out of account for these purposes that for the purpose of  
22 certification a class can have uninjured class members. He said, "but some will  
23 be uninjured", but that, with respect, is not a valid argument against  
24 certification. If I'm right, and I say I am, about a class that may contain  
25 uninjured members. It's that extra point, sir.

26 I take your point, absolutely, it didn't demur on the overall point.

1 So, the objection proves too much.

2 Then there was an attack on funding and what Mr Ward called "little benefit", there's  
3 going to be little benefit.

4 The Tribunal has asked about the funder's return in the context of the costs and the  
5 benefits of the action, and that's in accordance with rule 79(2)(b) and those  
6 instructing me are drawing up a note, as promised, setting out the answer to  
7 the President's question on this point. It will come -- I don't think we promised  
8 it before the end of today, and in any event it is going to be factual so ought to  
9 be uncontroversial. I think -- sir, you have already said if there's anything  
10 arising, the other side can of course make their observations.

11 There are two general observations, however, that I would like to make about this point  
12 and that are appropriate for me to make.

13 The first, which I am sure is firmly on the Tribunal's mind, is that of course the funder's  
14 return would be paid out of undistributed damages, that is the class would  
15 always be paid first.

16 The second is the more general point I raised on policy at the outset. In reality, these  
17 cases need to be funded by third parties, and in reality that of course would  
18 always come at a cost.

19 This really poses the question at this stage, at this stage of this case and this stage of  
20 the development of the jurisdiction of this country, if the Tribunal were to go  
21 behind pricing, as it were, of the litigation funding --

22 **THE PRESIDENT:** I don't think that that was our concern, Mr Moser. We accept that  
23 funders are going to take big risks, they are commercial entities, they'll only do  
24 it for the prospect of significant reward. That's the reality of third-party litigation  
25 funding.

26 Our concern was more about likely take-up by class members.

1 **MR MOSER:** I understand. That's very helpful and so I will say nothing more about  
2 funding at this stage. We'll have the factual note.

3 I wonder whether close of business on Tuesday would be acceptable?

4 **THE PRESIDENT:** Yes. We are not in a desperate hurry for that, so if it comes in the  
5 course of next week, that's fine. If we said by the end of Wednesday and then  
6 other parties can comment if they want to by the end of Friday. We are not  
7 going to be producing a judgment on Monday, so that's not an issue of concern.

8 **MR MOSER:** Good.

9 In that case, I will address head on, sir, your point on distribution and deal with  
10 Mr Ward's points at the same time.

11 As we know, in paragraph 80 of Merricks, it was held by the Supreme Court that take  
12 up distribution shouldn't generally be looked at. I submit that it's premature to  
13 look at it with an intensity that's potentially certification ending at this stage.

14 It can be looked at in the round and we don't fear it being looked at in the round.

15 Here again, sir, you have given us a bit of homework on the North American  
16 experience, which I hope we might get before the end of the hearing ... in our  
17 dealings with North America, it looks like it will also be in the course of next  
18 week, I'm afraid. Something will be produced essentially on the same terms.

19 **THE PRESIDENT:** I mean, the issue in the Supreme Court was of course: what's the  
20 method of distribution and does it have to be compensatory? And they have  
21 said quite clearly it doesn't and it just has to be fair. Nobody is suggesting the  
22 method you have proposed is unfair. This goes to the cost benefit point that if,  
23 in all likelihood few class members are going to be able to claim and then one  
24 looks at the funder and says well for whose benefit is this case being brought  
25 or who is going to benefit from this case? If a lot of class members do recover,  
26 then out of the unclaimed funds they want their whatever many millions it is, it's

1 not that that's then too high a sum and, as you say, we supervise the distribution  
2 anyway.

3 You have the point, I think.

4 **MR MOSER:** I have.

5 **MR HOLMES:** Can I ask, in the context of that note in relation to North America which  
6 was looking at, I think, in particular at potential examples of take up where the  
7 amounts concerned were relatively small, whether people did and how it was  
8 evidenced and so forth. If you would like to in that consider what I think is the  
9 comment by Lord Briggs in paragraph 77 of his judgment, where he said:

10 "In many cases the selection of the fairest method will best be left until the size of the  
11 class and the amount of the aggregate damages are known."

12 If you have any thoughts in relation to that, I think that might be helpful to us.

13 **MR MOSER:** Yes. Sir, I'll attempt to do so now so that everybody can hear what  
14 I have to say about that today.

15 **MR HOLMES:** Thank you.

16 **MR MOSER:** Then we will take matters from there.

17 The empirical evidence from class actions in North America is going to show  
18 that -- almost notoriously -- there is often a low uptake in class actions, but that  
19 has not halted or prevented class actions from flourishing in the United States.

20 There are a number of factors in this case and in this jurisdiction where we submit it is  
21 not likely that there will be a low take up. We are dealing here with London train  
22 passengers -- who are a particularly vocal and active consumer group, as  
23 evidenced by the vibrant community of online train fora -- and we believe that  
24 the characteristics of this group make it likely that class take up and reaching  
25 the class will be relatively high and relatively easy respectively.

26 The evidence of this can be seen in what's mentioned in pleadings, and of course it's

1 only an analogy, by reference to the delay-repay schemes that the TOCs run.  
2 There's delay repay DLR15, compensates passengers for delay of 15 to 29  
3 minutes. Passengers are eligible for delay repay 30 where they are delayed by  
4 30 minutes or longer. The TOCs are right in pointing out that's a very short time  
5 period, you make that claim within about a month, but there is a high uptake for  
6 relatively very small amounts of money.

7 When I say very small, let us not forget that very small is also a relative quantity. One  
8 should not disdain the £5 claim, which for many people, especially in these  
9 times, is a more than negligible amount of money to claim.

10 **THE PRESIDENT:** The figures for the uptake in the delay repay scheme, where do  
11 we find those? I know it's mentioned in the skeletons, I think.

12 **MR MOSER:** We will provide in our note a link to the biennial Rail Delays and  
13 Compensation Survey, that interviewed over 11,000 rail users, and reported  
14 findings that up to 55 per cent of all passengers were eligible to claim and  
15 37 per cent of those eligible passengers claimed for a delay.

16 **THE PRESIDENT:** 37 per cent of eligible passengers claimed?

17 **MR MOSER:** Yes.

18 **THE PRESIDENT:** No doubt there will be a long report somewhere but if you can just  
19 give us the headlines. The average pay-out or the average claim that was paid;  
20 do you have an average figure?

21 **MR MOSER:** I don't have that at my fingertips.

22 **THE PRESIDENT:** It's just helpful to have a figure, that's all.

23 **MR MOSER:** There will be a figure.

24 **THE PRESIDENT:** Yes.

25 **MR MOSER:** By way of submission, the majority of the class members in this case  
26 are geographically placed in London. As I said in opening, many, as I also have

1 already said, will be likely to have made more than a one-off journey.

2 Advertising can be targeted, particularly once people are travelling again. There's the  
3 Evening Standard, the Metro, there are ways of reaching these particular  
4 passengers that give an advantage over, for instance, the enormous US class  
5 action spanning a number of, if not all of the states, where targeting all class  
6 members is significantly harder.

7 In this day and age, the prevalence of social media provides a further opportunity to  
8 reach potential claimants. We will see that -- for the Tribunal's note, it's detailed  
9 in Epiq's plan, bundle 1, tab 11A, pages 330 to 332.

10 There has not yet been, but will be, a social media campaign targeted at frequent rail  
11 users in and around the London area, which could bring a large proportion of  
12 potential claimants to the table.

13 This is a new avenue nowadays, with a lot more scope for reaching people, Facebook  
14 and so on brings a new dynamic to collective actions brought today.

15 As far as evidence is concerned, there was some mention in the discussion, Mr Ward  
16 talked about it could be up to eight years until people are asked for evidence.  
17 Well, open-source material tells us, sir, that people will have accessibility to  
18 bank statements and public websites show that most of the big banks will have  
19 bank statements available for seven years. Barclays, Lloyds, HSBC, NatWest.

20 This is not a matter of impossibility and of course, we don't require, and Epiq won't  
21 require, every kind of evidence, we don't need the ticket and the Travelcard and  
22 the bank statements. There will be an element of evidence.

23 As Mr Holmes points out, this, the certification stage, is also not the be all and end all  
24 for how this is to be done. The certification stage, as Lord Briggs says, is  
25 neither the beginning nor the end of a class action claim. Of course, we know  
26 that there is provision in the rules for review of everything, including certification,

1 from time to time.

2 In particular in relation to distribution, there would be members within the class -- this  
3 is 77 of Merricks -- who maybe heard about the proposed distribution method,  
4 even after judgment on quantum.

5 This is by no means the last word, and the Epiq report is by no means designed at this  
6 stage, given everything that we know about prematurity and distribution, to be  
7 writ in stone. We are not saying that this is the way it has to be and there cannot  
8 be other approaches, such as a more, how shall I put it, homogenised  
9 distribution of the monies or other way of dealing with it in such a homogenous  
10 class.

11 **THE PRESIDENT:** I think the Epiq report was written at the time of your original  
12 application when you had the CAT Merricks judgment and you didn't yet have,  
13 am I right, even the Court of Appeal judgment?

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

15 **THE PRESIDENT:** Of course, the CAT judgment required a more compensatory  
16 method.

17 **MR MOSER:** Yes. Sir, you are absolutely right, one does not want to go into too  
18 much of the advisory side of these things, but it was aimed at a slightly different  
19 target to the one that presents itself today.

20 So, there's absolutely scope for doing this differently. Again, as a matter of policy, if  
21 you can't have claims for small amounts, what we on this call are pleased to  
22 call small amounts, like £30, not small amounts for everyone, then how can  
23 such a claim ever be brought? It cannot be right, again conceptually, for  
24 distribution to become an unmanageable final hurdle in a case such as this.

25 Then finally, sir, Mr Ward stepped back, metaphorically, and said let us apply the  
26 multifactorial approach, it's too many things, it's just unsuitable.

1 My response -- I regret, as always, disagreeing with Mr Ward QC -- is the very  
2 opposite. This is an entirely suitable claim, of millions of train passengers all  
3 facing the same difficulties, the same, similar or related difficulties, and ending  
4 up being double charged. It's a case with no pass-on problems. There are, in  
5 my respectful submission, compelling legal arguments on abuse and a strong  
6 methodology presented by a highly capable expert, even at this stage strong  
7 reasons for an opt-out.

8 On suitability, it will be efficient to resolve the common issues. The common issues  
9 which are all of the main issues in the case, emphasised as being a particularly  
10 important factor by Merricks in the Supreme Court.

11 No separate proceedings are being brought. The nature of the class is homogeneous,  
12 it will be easy to target them for distribution. An aggregate award is suitable  
13 and workable and there's no suitable alternative dispute resolution procedure  
14 that presents itself.

15 Viewed in the round, and respectfully disagreeing with my learned friend Mr Ward,  
16 I say if this case isn't suitable for a collective action under the new regime, what  
17 case will ever be?

18 My Lord, I didn't in the end take nearly as long as I thought I would, but that's all  
19 I planned to say. I am happy to answer any further questions.

20 **THE PRESIDENT:** Just pause for a few moments and we will confer.

21 **(2.40 pm)**

22 **(A short break)**

23 **(2.47 pm)**

24

25 **Questions from THE TRIBUNAL**

26 **THE PRESIDENT:** Mr Moser, just looking at the class definition, which we can take

1 in your claim form in the core bundle on tab 1, page 19, paragraph 88, in b,  
2 where you say:

3 "... from a station within, (but not on the outer boundary of) ..."

4 There was this discussion about there are some stations that are slap bang on the  
5 boundary, but many of them of course are not.

6 Would it not better reflect the way the case is developed to say, "Not the last station  
7 before the boundary"? Would that, as we understood it, fit with the analysis  
8 that was being put forward?

9 **MR MOSER:** May I take instructions for a moment?

10 **THE PRESIDENT:** Yes.

11 **MR MOSER:** Thank you.

12 **(Pause)**

13 Thank you for letting me have that time. The reason we haven't made what might  
14 otherwise perhaps seem like the obvious point in our own response, is that at  
15 the moment of course we don't have full visibility of what the pricing really is.

16 If it is indeed the case that station prices from just within the boundary are exactly the  
17 same as a boundary fare, or that the loss is a mere 10p or whatever, then it  
18 makes eminent sense.

19 We've been reluctant to go there prior to more data or disclosure of what the value of  
20 this concession would really be.

21 **THE PRESIDENT:** Yes.

22 **MR MOSER:** I see the sense of it entirely, sir, if the situation is as presented by the  
23 TOCs.

24 **THE PRESIDENT:** Because that relates to the other point, which is -- we haven't  
25 reached a decision, of course, but if we thought that point-to-point fares should  
26 fall outside the in-scope journeys, that's to say that where someone holds

1 a Travelcard, took a journey that goes beyond the zones, didn't buy a boundary  
2 fare but bought a point-to-point ticket. Conceptually, of course the  
3 point-to-point ticket would be from the last station before the boundary, because  
4 it has to be from a station.

5 **MR MOSER:** Exactly, the two are really two sides of the same coin.

6 **THE PRESIDENT:** Yes. So that could be done. I can see there's the possibility  
7 there's a slight loss to some people, who lose out because the boundary fare  
8 might be slightly different if it's calculated from the boundary, but it's not going  
9 to be significant, I would have thought, financially.

10 **MR MOSER:** One would have thought not, we simply don't know.

11 **THE PRESIDENT:** I understand the point.

12 **MR MOSER:** I need not elaborate and you may be against me on that and if that  
13 stood between certification and --

14 **THE PRESIDENT:** Mr Moser, you have just frozen.

15 I don't know if Mr Moser can hear me but it's probably best if he exits and comes back  
16 in.

17 Have other people frozen?

18 **(Collective head-shaking)**

19 No. Can someone send him a message?

20 I don't know whether someone can communicate with him -- Mr Ward is doing that.

21 I think what we will do -- we have no further questions for Mr Moser, so I think what  
22 we will do in the light of that is we will rise until 3 o'clock so he can sort out his  
23 ...

24 We will take the short break a bit earlier so we will come back at 3 o'clock.

25 **(2.53 pm)**

26 **(A short break)**

1 (3.02 pm)

2 **THE PRESIDENT:** Yes, Mr Moser.

3 **MR MOSER:** I do apologise, sir, we have had a general technological breakdown, but  
4 I'm back.

5 **THE PRESIDENT:** Yes.

6 **MR MOSER:** There was little more I could say in fact.

7 Obviously if the Tribunal feels that it's a strike out point, it's a matter for the Tribunal.

8 As far as we're concerned, we simply don't know whether this is really a matter  
9 of 10p or whether there are stations that are far away from the boundary that  
10 are priced differently. That's why we drafted it the way we did.

11 I hope it's not too unreasonable for me to say that certainly my primary submission is  
12 to stand by that drafting.

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

14 **MR HOLMES:** I think when we lost you, Mr Moser, you were about to comment in  
15 relation to the point-to-point matter which the President had just made.

16 **MR MOSER:** Really essentially the same point applies. Before disclosure we  
17 consider this is of a piece. Again, if the Tribunal feels it's heard enough on the  
18 point then I can see that that's the obvious qualification.

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

20 Very well, we have nothing further to ask you.

21 **MR MOSER:** Thank you.

22 **THE PRESIDENT:** We know Mr Harris wants to say something. If we start with him  
23 and then if anyone wants to, we won't exclude them.

24

25 **Reply submissions by MR HARRIS**

26 **MR HARRIS:** I am very grateful, sir, members of the Tribunal, I will confine myself

1 strictly to new points that arose.

2 The first of which was that by reference to the case of Nexium my learned friend said  
3 for the first time that in fact he is now going to seek to progress his case on  
4 causation using the presumption approach. That was, if you recall, drawn from  
5 a passage in Nexium which is to be found in AB6, tab 17. You don't need to  
6 turn this up again, but that's where he drew it from. It's important just to note,  
7 first, the other approach in Nexium he expressly disavowed. He will never even  
8 try to adduce any affidavits or any individual evidence from anybody.

9 **THE PRESIDENT:** I don't think he said that in terms, he didn't give an undertaking of  
10 that, he said that he doesn't say that that is a way of dealing with common  
11 issues, but it will depend on the evidence, the way it comes out, whether it's  
12 appropriate to have evidence from anyone.

13 **MR HARRIS:** I think, sir, we will check the transcript because my handwritten note  
14 was that he said, "I will not adopt that approach of affidavit", so we will check  
15 the transcript.

16 **THE PRESIDENT:** Yes, he wouldn't have affidavits at trial anyway.

17 But it's not seeking to -- that was as a particular approach to a particular problem, but  
18 it does not mean there may not be witness statements on other issues.

19 **MR HARRIS:** I accept that, but on this issue of causation, he said, and we will find  
20 the reference, "I am not going to do it by reference to individual witnesses",  
21 whether he called them statements or affidavits.

22 In any event, the more important point was --

23 **THE PRESIDENT:** You have muted.

24 Mr Harris, you have muted.

25 **MR HARRIS:** I'm so sorry. What he did say, more importantly, that what he will do is  
26 a so-called presumption approach across the board for the entirety of the class,

1 because he put this forward as an answer to the uninjured class members point.

2 So it's just important to note that what he says his case now is that by a presumption

3 that he intends to show is correct, that everybody for every transaction for the

4 entire period was in fact injured.

5 **THE PRESIDENT:** I think the presumption is, as I understood it, that if given the

6 opportunity to save money by buying a boundary fare it is to be assumed that

7 a passenger would have done so.

8 I think he said that in opening, as I recall.

9 **MR HARRIS:** The critical thing is that that means, in the context of an argument about

10 injured/uninjured, that if given the opportunity, every single passenger on every

11 single transaction would buy what he says is the cheaper fare. Because that's

12 how he gets round, he says, the fact that there may be individual differences.

13 He says, "No, I presume that it's going to happen in every single transaction".

14 That, of course, is exactly what we say is wrong with his case.

15 I will finish this point: as you know, we have submitted that it is totally implausible,

16 incredible, not grounded in the facts and not realistic to take the approach that,

17 on the facts of this case, with all of these other counterfactual possibilities, that

18 you will ever establish that every single person for every single transaction,

19 throughout the entire period, did in fact suffer a loss.

20 My first point, therefore, is I do invite you to strike out the presumption approach as

21 being totally unrealistic and not grounded in the facts.

22 Just before I move on to the second point, it's to be noted that if you were against me

23 on that at the certification stage -- if -- then it would be apt for a preliminary

24 issue. Immediately. Because, if he fails to make out the presumption for every

25 single person, for every single transaction, for the whole period, then his case

26 fails. On his own approach.

1 Because he has said, "I will prove causation by this presumption for everybody at all  
2 times". So, if he doesn't make that out, he fails.

3 Be that as it may, you have my principal submission.

4 The next new point then led on from Nexium and into Torres, that's how he did it. He  
5 said look at Nexium and that takes us to Torres but it's important to note two  
6 points from Torres.

7 The first of them is -- I will just remind you of paragraph 20 in Nexium, because this is  
8 one of the two points in Torres. You don't need to turn this up, but I read to you  
9 the last sentence of paragraph 20 of Nexium, which is page 3140 of tab 17 of  
10 bundle 6. What that says is:

11 "We conclude that so long as it is established that such a mechanism can be identified  
12 [that means a winnowing-out mechanism] the presence of a de minimis number  
13 of uninjured class of members at the class certification stage does not defeat  
14 a class action."

15 It was completely clear that you had to have a mechanism for winnowing out, even if  
16 you have a de minimis number, and certainly if you have more than  
17 a de minimis number. That's relevant because now if we turn to Mr Moser's  
18 new case, Torres, which is in the same bundle -- I do invite you to just briefly  
19 turn this one back up. It's at tab 16 of authorities bundle 6.

20 I am going to make just two short points about Torres, and that is the first of them:  
21 namely that Torres was also a case where the court recognised that you had to  
22 have a winnowing-out mechanism. That is to be found at page 3111 in tab 16,  
23 in paragraph 16 at the second hole punch on the left-hand side. That final  
24 sentence reads:

25 "We conclude that such a fortuitous non-injury to a subset of class members does not  
26 necessarily defeat certification of the entire class, particularly as the district

1 court is well situated to winnow out those non-injured members at the damages  
2 phase of the litigation or to redefine the class definition."

3 That was exactly my point and Mr Moser has still not addressed that point. It seems  
4 there is no answer, he doesn't have a mechanism, he will never have  
5 a mechanism, one has not been identified now and I say, with respect, that's  
6 fatal at the certification stage.

7 That's the first of my two points on Torres.

8 The other one I can deal with simply by reference to the headnote. Because it is  
9 essential to understand what the facts in the cause of action were in Torres to  
10 see why that case didn't have a commonality problem and stands in sharp  
11 contrast to our case.

12 If you were to turn up headnote item 7 on page 3100, you can see, in the left-hand  
13 side halfway down, item 7 that this was a case of putative inaccurate  
14 information and the action, so the third line down:

15 "... in action by domestic farm workers alleging that the farm operator failed to inform  
16 them of availability."

17 Then it cites the Act, I am going to come back to the act by reference to headnote 12  
18 and 13, but a bit lower down, the allegation you can see just before the bottom  
19 was: providing false and misleading information under the Act.

20 That was the very nature of the cause of action. So not surprising then that if the  
21 allegation is you failed to provide us with information and the cause of action is  
22 you have failed to provide us with information, then the two go hand in hand.

23 But that's not a coincidence we have in our case.

24 Then, over the page, if you look at 3101 towards the bottom of headnote item 12, you  
25 will also see that there's a significant difference with the nature of the Act in that  
26 case. It says:

1 "The WCPA [that's the Worker Protection Act] was a remedial statute with liberal  
2 definition for injury and informational injury [that's what was alleged] need not  
3 result in direct pecuniary loss, in that injury resulting from any non-disclosure  
4 by an operator could include denial of opportunity."

5 Then 13, at the top:

6 "... the Act is a remedial statute that defines injury liberally to include the plaintiff's  
7 property interest or monies diminished, even if the expenses caused by the  
8 statutory violation are minimal the injury involved need not be great or even  
9 quantifiable."

10 **THE PRESIDENT:** I can understand that -- we are getting echo. Was this a damages  
11 claim -- were they seeking damages? What was the relief they were seeking?

12 **MR HARRIS:** My understanding is they were seeking, if you like, pecuniary remedy  
13 pursuant to these provisions of the Act. As just described.

14 **THE PRESIDENT:** I mean what the Act says, you can have a cause of action even if  
15 you don't have pecuniary loss as such, but the kind of loss members in the class  
16 will suffer, some may have had direct pecuniary loss and others not. That is  
17 what I am trying to understand. I don't know, because I have not read the case.

18 **MR HARRIS:** No, and I think it's fair to say there could be individualised questions of  
19 quantification by reference to those different types.

20 I will ask Ms Blackwood to check further and if we can find the reference I will come  
21 back to it.

22 **THE PRESIDENT:** We will read the case, don't worry.

23 **MR HARRIS:** Thank you.

24 Can I therefore, before I move on to the next point, just invite your attention to  
25 page 3107 because Mr Moser addressed this specific point in his closing  
26 submissions at paragraphs 4 to 5. He said actually you only need common

1 questions not common answers. That's flatly opposed by what it says at 4 to 5  
2 on 3107, first hole punch, left-hand side:

3 "What matters to class certification is not the raising of common 'questions' even in  
4 droves, but rather the capacity of a class-wide proceeding to generate common  
5 answers to drive the resolution."

6 As you know, the two parties are opposed on that.

7 That then takes me to my third point, extremely short. Mr Moser submitted that for the  
8 first time that we are trying to find out way back by reference to Merricks. But  
9 of course, the issue in Merricks was, having obtained damages and going to  
10 distribution do you then at distribution need to find your way back into  
11 an individual assessment of damages? So it's a completely different question.  
12 We are not trying to find our way back from distribution, we are trying to find the  
13 antecedent questions which are non-common of liability and causation.

14 Next point. Mr Moser submitted by reference to Holt table 2.1, and I do invite you  
15 quickly to turn this back up. It's in core bundle 6, page 231. It's a very short  
16 point.

17 **THE PRESIDENT:** The second report?

18 **MR HARRIS:** Yes, second report, tab 6, page 231, table 2.1.

19 It's a very short point. Mr Moser said, "Well, it all looks de minimis because even if  
20 you take all the advance fares out that's 6.5 percent and even if you were to  
21 take out all the other, that's 2.8 percent". I just pause to note there that that's  
22 not de minimis. That's, even by my rudimentary maths is 9.3 percent, which  
23 you will note Nexium said you would have to winnow out even where the  
24 percentage was between 2.4 percent and 5.8 percent.

25 My simple additional point is that that doesn't take any account of the point-to-point  
26 fares that we spent a lot of time on in this hearing. They aren't advance fares

1 and they aren't other fares, they come either at point-to-point any time peaks or  
2 point-to-point off-peaks. On any view you have to add, and that takes it, again,  
3 further away from de minimis.

4 As I said a moment ago, even in a de minimis case, you still have to winnow the people  
5 out.

6 The next point then is, again, extremely short.

7 Just for your note, my learned junior Ms Blackwood has helpfully identified the  
8 passage that I said I had manuscript notes of, it is [draft] transcript Day 4,  
9 page 50, line 18 and Mr Moser submitted: we rely on the presumption, not on  
10 witness evidence.

11 Next point then, and I only have a few more points, this one is extremely short.

12 Mr Moser made a brand new submission during his closing that he, and  
13 presumably we, should be adducing the evidence from some kind of "rail  
14 expert".

15 Well, that's the first we've ever heard of that. That's not in --

16 **THE PRESIDENT:** I don't think that's relevant to certification. I mean, he just said  
17 that at a trial there might be evidence from rail experts, and I clarified that and  
18 it's on what can be done on ticket vending machines or not done and so on.

19 **MR HARRIS:** If it were limited to that -- my understanding was it was being adduced  
20 as going to the question of causation, because he was saying I'm going to adopt  
21 a presumption and not individual witness evidence and don't worry because we  
22 can also have evidence from a rail expert.

23 **THE PRESIDENT:** I didn't get the impression that -- I mean, Mr Moser will correct me  
24 if I'm wrong, but the rail expert is going to go on causation of  
25 passenger -- whether people would buy cheaper fares.

26 I suspect that, on issues of abuse, you might seek to run objective justification

1 arguments, and one can see then about what can be done, risk of fraud -- it's  
2 flagged up in some of the witness statements. And that's where I can see that  
3 expert evidence might come in, but I don't think that's relevant for this stage of  
4 the procedure.

5 I don't think he suggested that causation was going to be established by expert  
6 evidence, which of course would be relevant, and I would expect it to have been  
7 made much more clearly as a point.

8 **MR HARRIS:** I am very grateful. I see Mr Moser nodding. So, for the record then,  
9 it's not part of the PCR's case that he will adduce this so-called rail expert on  
10 these questions of individualised liability or causation. That's fine, I will move  
11 on then, now that that's been clarified.

12 So, the next point then, he did say, again an extremely short point, when he was met  
13 with the criticism in particular from Mr Ward this morning regarding the survey,  
14 that in response to that he said, and I quote, I think this was transcript [page 44,  
15 line 23]:

16 "... you have the survey person on the train ... I don't know."

17 Well exactly, that falls slap bang into the criticism that we have of the survey. Does it  
18 have a surveyor on the train? Even Mr Moser does not seem to know, he said  
19 that. How can you test the -- not bona fides ... even representativeness of such  
20 a survey when he doesn't know what it is and it seems to be emerging out of  
21 the woodwork?

22 Next point -- nearly finished you will be pleased to hear -- is that as you know on  
23 advance boundary fares our point is not just a pleading point. I take your point,  
24 Mr President, if it were just a pleading point it would be capable of being fixed  
25 by amendment but, as you know, our point is double discounting, so what hasn't  
26 been pleaded is any sensible rationale or basis for why we should make double

1 discounting, and none has been provided by Mr Moser. That's the point.

2 **THE PRESIDENT:** Yes, we have that point, yes.

3 **MR HARRIS:** Then I think penultimate, or pre-penultimate, point very short again is

4 Mr Moser on the third parties that I advance -- of course it's nothing to the point

5 that in a separate claim, that doesn't involve my client, it is not being pursued.

6 In my case it is being pursued on the back of uncontroverted evidence and

7 that's the point Mr Moser simply said "we disagree". His response to my,

8 "There's uncontroverted evidence saying my TOC and third parties are

9 competing in the relevant sense", he simply said, "Well, I disagree".

10 But, with respect, this is a strike out and a reverse summary judgment application.

11 There's uncontroverted evidence, he's had plenty of opportunity to put in

12 evidence, he did put in other evidence and relevant reports. He didn't address

13 this at any stage and he now simply says "I disagree".

14 I know he disagrees, but that's not how the test works. It's uncontroverted evidence.

15 In particular, it's not good enough simply to say I disagree, because it is the

16 essence of the business model of the third parties that they compete in the

17 relevant sense.

18 Indeed, they could not exist except for competing with LSER in the relevant sense.

19 If Mr Moser disagrees, and he wants to avoid reverse summary judgment on this point,

20 he needs at the least to put in some evidence, he cannot simply say at the

21 hearing of the reverse summary judgment application, "Oh, well, I disagree".

22 **THE PRESIDENT:** Can they charge different prices?

23 **MR HARRIS:** They can, but they don't much because they only make a commission.

24 They can in theory use --

25 **THE PRESIDENT:** That's my point. Apart from a commission, can they just say, "We

26 are going to discount this product".

1 **MR HARRIS:** No, it's quite complicated, it's dealt with in the evidence, but, no,  
2 essentially they come bar the commission availability they charge the same  
3 price as LSER. But, critically, they compete for that exact same sale and the  
4 manner of doing it.

5 As I say, I have the evidence, Mr Moser doesn't. That's the end of the story.

6 Then the last two points, again very short. Mr Moser put in an extract from a textbook  
7 overnight, or perhaps this morning, and he said I don't address it. But I do very  
8 briefly. What you will see when you read the relevant parts of the extract is  
9 it's --

10 **THE PRESIDENT:** We are not going to look at it, I think, unless we are being asked  
11 to look at it --

12 **MR HARRIS:** If you are not going to look at it, no problem.

13 **THE PRESIDENT:** Is anyone asking us to look at it? We have lots of things in here.

14 **MR HARRIS:** Good, if it's --

15 **THE PRESIDENT:** I mean, if you think it's --

16 **MR HARRIS:** No, no, Mr Moser put it in, if he is not inviting you to look at it I will ignore  
17 it and make my final point, which is again very brief.

18 You were addressed at the end about the propensity of people -- by way of assertion  
19 I might add -- to make a claim. This was on the cost benefit analysis. Mr Moser  
20 raised delay repay. We will send you at least a link and/or a copy of the full  
21 report to which he then referred in oral submissions and said it's 37 percent.

22 When you get it, we will tell you the page numbers but it also shows that 32 per cent  
23 of these potential passengers who could claim never do so. Never. And that  
24 51 percent of them say, "I simply can't be bothered, it's not worth the effort".

25 **THE PRESIDENT:** That would be helpful to have that.

26 **MR HARRIS:** I am grateful.

1 **THE PRESIDENT:** It's been referred to in, I think, was it in the skeletons or possibly  
2 in the reply? But we haven't actually seen it.

3 **MR HARRIS:** We will have it sent over, sir. You may have even availed yourself of  
4 the scheme. You may not be in the 32 percent of never but, be that as it may,  
5 it's important to realise how this scheme works.

6 All you have to do is -- indeed, whilst you are on the very train that is delayed, and  
7 you're annoyed about the delays, take out your phone and send in an email to  
8 say, "I'm on this train, this is my name and it's now half an hour late so I want  
9 some money", when you have frankly got nothing else to do and you are  
10 motivated and it's as it's happening. Or when you get home that night. There's  
11 all the difference in the world between that and asking somebody to go back six  
12 or seven years.

13 So that's it, sir. So what it ends up with then is a situation, in our respectful submission,  
14 where there remains this massive legal block on assumed causation and the  
15 massive factual block on lack of overlap, and you have heard my submissions  
16 on that.

17 Unless I can assist further, those are the additional points.

18 **THE PRESIDENT:** Thank you very much. Ms Abram, is there anything arising out of  
19 what Mr Moser said that's new?

20 **MS ABRAM:** Nothing further.

21 **THE PRESIDENT:** Mr Ward?

22 **MR WARD:** Nothing from me, sir, thank you.

23 **THE PRESIDENT:** Mr Moser?

24

25 **Reply submissions by MR MOSER**

26 **MR MOSER:** Sir, we could continue this forever, but may I make three and a half very

1 short points of essentially factual correction arising out of the remarks by  
2 Mr Harris.

3 Perhaps you have them all, but my remarks on the presumption in Nexium were  
4 directed principally at his reply point 18(vi), and the transcript will reflect that.

5 On winnowing out, it's not that I never responded. I think the transcript will show that  
6 my point was: it's not UK law after Merricks, so that's why it's different.

7 On table 2.1, it was never my submission that we simply take away 6.5 per cent of  
8 advanced fare. That was Mr Harris's submission. My submission was that  
9 there should be a boundary fare for advanced fares.

10 **THE PRESIDENT:** Yes, you were referring, on your de minimis, to the 2.8, I think.

11 **MR MOSER:** That's right, which some fraction of the 2.8 is going to be the fares he  
12 refers to.

13 I think, sir, the half point is I didn't say we were going to have a rail expert for causation,  
14 but I think that's probably --

15 **THE PRESIDENT:** No, I think we clarified that. Yes.

16 **MR MOSER:** That's all I have, sir.

17

18 **Housekeeping**

19 **THE PRESIDENT:** You have all given us a lot to think about and we shall reflect on it  
20 and you will be informed in due course when a judgment is ready.

21 We will receive:

22 I think from the Proposed Class Representative, the computed examples of the  
23 funders' remuneration in the two scenarios that I posited;

24 A note about take-up, or any evidence, as it were, about North America, about class  
25 take-up, class member take-up, on which the Proposed Defendants can  
26 respond;

1 We will receive from LSER the delay-repay report;

2 We will receive from someone -- I can't remember who it was, but I think it's also

3 Mr Moser, from your side -- the full TfL termini station report on which Mr Holt  
4 relied and of which we have extracts.

5 That's it.

6 **MR MOSER:** I already have it, so perhaps it's already with you.

7 **THE PRESIDENT:** If it hasn't, I am sure it will very shortly.

8 We thank you for all the hard work you put in, and indeed those working with you and  
9 the, no doubt, considerable teams behind you.

10 **MR MOSER:** Thank you.

11 **MR HOLMES:** Thank you.

12 **(3.32 pm)**

13 **(The hearing concluded)**

14

15

16

17

18

19

20

21

22

23

24

25

26

1 |  
2 |  
3 |

### 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?