



Neutral citation [2022] CAT 35

Case Nos: 1404/7/7/21

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

25 July 2022

Before:

SIR MARCUS SMITH  
(President)  
PROFESSOR JOHN CUBBIN  
EAMONN DORAN

Sitting as a Tribunal in England and Wales

**BETWEEN**

**DAVID COURTNEY BOYLE AND EDWARD JOHN VERMEER**

Applicants / Proposed Class Representatives

-and-

**(1) GOVIA THAMESLINK RAILWAY LIMITED**  
**(2) THE GO-AHEAD GROUP PLC**  
**(3) KEOLIS (UK) LIMITED**

Respondents / Defendants

-and-

**SECRETARY OF STATE FOR TRANSPORT**

Proposed Intervener / Objector

Heard at Salisbury Square House on 13, 14 and 15 July 2022

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**JUDGMENT (CERTIFICATION OF COLLECTIVE PROCEEDINGS)**

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## APPEARANCES

Mr Charles Hollander QC and Mr David Went (instructed by Maitland Walker LLP) appeared on behalf of Messrs Boyle and Vermeer.

Mr Paul Harris QC, Ms Anneliese Blackwood and Mr Michael Armitage (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of Govia Thameslink Railway Limited, The Go-Ahead Group PLC, and Keolis (UK) Limited.

## A. INTRODUCTION

### (1) The parties

1. Mr Boyle and Mr Vermeer apply, as proposed class representatives, for a collective proceedings order on an opt-out basis in these proceedings against, amongst others, Govia Thameslink Railway Ltd, as proposed defendants. We shall refer to Mr Boyle and Mr Vermeer as the **Applicants**, to the proposed defendants as the **Respondents** and to the application for certification brought by the Applicants as the **Application**.

### (2) The nature of the claim for which permission is sought

2. The claim that the Applicants seek permission to bring is a “standalone” claim alleging an abuse of a dominant position by the Respondents in breach of the Chapter II prohibition of the Competition Act 1998. Specifically, it is contended that the Respondents issued – and continue to issue – branded fares permitting travel on a single branded train service (so-called **Single-Brand Tickets**) at a lower price than fares permitting travel on multiple, differently branded, train services (which we will refer to as **Multi-Brand Tickets**). It is said that this discrimination between Single-Brand Tickets and Multi-Brand Tickets constitutes an abuse of a dominant position.
3. It will be necessary to describe the nature of the alleged infringement – and the claims said to arise out of it – in a little greater detail. However, we should stress at the outset that the allegations of infringement are disputed by the Respondents. Thus, in their written submissions for this hearing, the Respondents stated:<sup>1</sup>

“The [Respondents’] position is that the [Applicants’] claims are deeply flawed on the substance and highly unlikely to succeed at trial. A summary of some of the critical defects in the [Applicants’] claim is set out in §9 of the Response. In short, the [Respondents] deny that there has been any breach of the applicable regulatory regime and (in any event) deny that any such breach would constitute an abuse of dominance...the complexity of the legislative underpinnings of the applicable regulatory regime, the manner in which the regime has evolved over time and the role and discretion that the [Department

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<sup>1</sup> Paragraph 15 and 15(iii).

for Transport] exercises in regulating the sector in the public interest, in accordance with its statutory duties, which together have the effect that the [Respondents] would need to submit substantive, factual, evidence (including from the [Department for Transport]) in order to explain to the Tribunal why [the Respondents have] always been compelled to comply with the provisions of the regulatory regime when setting and imposing its fares.”

### (3) Approach

4. For reasons we will come to, it is unnecessary to consider the merits of the claim that the Applicants seek to bring in any great detail. That being the case, given the dispute that so clearly exists on the merits, it would be inappropriate to delve into those merits save to the extent that is necessary to understand and resolve the points that do arise out of this Application.
5. We also propose to avoid detailed statements of the relevant law in this area. Rather, we will adopt the statements of the law set out in *Michael O’Higgins FX Class Representative Limited v. Barclays Bank plc (O’Higgins)*,<sup>2</sup> as well as other statements of the law by other tribunals, as appropriate.

### (4) Materials

6. The materials before the Tribunal were as follows:<sup>3</sup>
  - (1) A **Collective Proceedings Claim Form** dated 9 June 2021 by Mr Boyle and Mr Vermeer as proposed joint class representatives in support of their Application for a collective proceedings order pursuant to section 47B of the Competition Act 1998. The Collective Proceedings Claim Form attached various annexes, and was supported by a witness statement of Mr Vermeer (**Vermeer 1**), also with annexes and exhibits, and a witness statement of Mr Boyle (**Boyle 1**). Both of these statements bear the same date as the Collective Proceedings Claim Form, 9 June 2021. Additionally, the Collective Proceedings Claim Form was supported by two expert reports from a Mr James Harvey, director and

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<sup>2</sup> [2022] CAT 16.

<sup>3</sup> We do not list all of the material that was before the Tribunal, but we have taken it all into account.

co-founder of an economics consultancy known as Economic Insight Limited. These two reports consisted of:

- (i) A report dated 8 June 2021 (**Harvey 1**) considering the evidence of price differentials between Single-Brand Tickets and Multi-Brand Tickets.
- (ii) A second report, also dated 8 June 2021 (**Harvey 2**), setting out a methodology for calculating class-wide damages. In essence, Harvey 2 describes how Mr Harvey would identify the actual price charged by the Respondents for (what we term) Multi-Brand Tickets, and how Mr Harvey would assess the counterfactual price for those tickets, assuming the alleged abuse of a dominant position had never occurred.

(2) The Respondents filed a **Response** to the Collective Proceedings Claim Form on 4 February 2022. The Response raised a number of grounds as to why the Application should be dismissed, not all of which survived to the hearing of the Application. The Applicants responded in a Reply, to which there was a Rejoinder. In the course of these pleadings, multiple further documents were submitted, including further expert reports from Mr Harvey (**Harvey 3** and **Harvey 4**), and draft Amended and Re-Amended Collective Proceedings Claim Forms. Although the Respondents served some evidence in support of their contentions, they did not file any expert evidence in response to that of Mr Harvey.

7. We should say a word about the draft Amended and Re-Amended Collective Proceedings Claim Forms. At the outset of the hearing, two sets of amendments were in draft and unsanctioned by the Tribunal (i.e., both the amendments and the re-amendments). During the course of the hearing, the position was regularised in that:

- (1) The draft amendments (which, save as to costs, were uncontroversial) were allowed.

- (2) The draft re-amendments were in part uncontroversial (again, save as to costs) and in part controversial. We allowed the uncontroversial parts and left the controversial parts (which were supported by Harvey 4) for further consideration.
8. The controversial draft re-amendments – and Harvey 4 – were introduced late in the day by the Applicants, and necessitated a hearing (before the President alone) in order to determine whether, and if so how, this material might be adduced on the hearing of the Application. The approach we have taken is set out in the President’s Ruling of 5 July 2022 ([2022] CAT 30). We shall refer to the Collective Proceedings Claim Form as amended (as described in paragraph 7 above) as the **Claim** and to the controversial proposed amendments (supported by Harvey 4) as the **Amendments**.

**(5) Issues arising, and the structure of this Judgment**

9. A number of issues arise out of the Application. Specifically:
- (1) *The merits.* It is, we consider, clear law that the merits of a claim have no bearing on the question of certification.<sup>4</sup> There is no “merits condition” to be satisfied independent of the power of the Tribunal, on application by a party or of its own motion, to strike out or grant summary judgment in respect of a claim. At the hearing of the Application, there was no application by the Respondents either to strike out the claim or for summary judgment. Accordingly, we consider the merits no further in this Judgment.
- (2) *Authorisation: joint class representatives.* What O’Higgins refers to as the **Authorisation Condition** concerns,<sup>5</sup> in general terms, the appropriateness of the Applicants to act as class representatives. In this case, the Respondents contended that:

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<sup>4</sup> See O’Higgins at [40]ff.

<sup>5</sup> O’Higgins at [50]ff.

- (i) The statutory regime did not permit (as a matter of jurisdiction) the appointment of two, joint, class representatives.
- (ii) In any event, even if jurisdictionally possible, the appointment of two, joint, class representatives was inappropriate in this case, and that there were good reasons not to appoint Mr Vermeer. The Respondents had no objection to Mr Boyle acting as sole class representative.

We consider the question of authorisation in Section B below.

- (3) *Authorisation: other points.* Three other points arise under the Authorisation Condition. They are as follows:

- (i) First, the extent to which there is a proper plan, on the part of the proposed class representative(s), for taking the collective proceedings forward.
- (ii) Secondly, the extent to which a “cap” ought to be applied to the remuneration of the proposed class representative(s).
- (iii) Thirdly, the extent to which the proposed class representative(s) will be able to pay the Respondents’ costs, if ordered to do so.

We consider these points in Section C below.

- (4) *Pro-Sys v. Microsoft and the Eligibility Condition.* In *MasterCard v. Merricks*,<sup>6</sup> the Supreme Court considered the “common issues” requirement that forms a part of the **Eligibility Condition**.<sup>7</sup>

“40. One of the many issues in the *Microsoft* case<sup>8</sup> was whether the requirement for common issues was satisfied. In a passage which has come to assume a central place in the submissions in this case, at all

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<sup>6</sup> [2020] UKSC 51.

<sup>7</sup> O’Higgins at [55]ff.

<sup>8</sup> I.e., *Pro-Sys Consultants Limited v. Microsoft Corp*, 2013 SCC 57, [2013] SCR 477 (Supreme Court of Canada).

levels, Rothstein J said this, at [118], about the expert methodology put forward in support of the claim:

“In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis, so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e., that passing on has occurred).<sup>9</sup> The methodology cannot be purely theoretical or hypothetical but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.”

41. Subsequent reported decisions in Canada have fortified this “low threshold” approach to meeting the conditions for certification. In *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187, 25 BCLR (6<sup>th</sup>) 268 ([105] to [109]), the British Columbia Court of Appeal warned against imposing an excessive burden on the provision of expert evidence about the likely availability of data at the certification stage, in particular because it necessarily preceded the processes of disclosure which would become available after certification. The “some basis in fact” test required only a minimum evidentiary basis and was not an onerous one...”

The Eligibility Condition concerns whether claims are eligible to be certified for inclusion in collective proceedings, and raises questions such as:

- (i) Is the class identifiable?
- (ii) Does the claim raise common issues?
- (iii) Is the claim suitable to be brought in collective proceedings?

Satisfaction of these requirements (in particular the *Microsoft* test described by the Supreme Court) – or rather the contention that these requirements had not been satisfied – lay at the forefront of the Respondents’ submissions that the Application be refused. We consider these points in Section D below.

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<sup>9</sup> The case was thus concerned with pass on, but we take what was said as being of general application.

## **B. AUTHORISATION: JOINT CLASS REPRESENTATIVES**

### **(1) Jurisdiction**

10. The Respondents contended that there was no jurisdiction to appoint joint class representatives because the wording of the relevant legislation was, explicitly, in the singular. Thus, section 47B(8) of the Competition Act 1998 provides that “[t]he Tribunal may authorise a person to act as the representative in collective proceedings”.<sup>10</sup> Similarly, the Competition Appeal Tribunal Rules 2015 (the **Tribunal Rules**)<sup>11</sup> refer to authorising “an applicant to act as the class representative”,<sup>12</sup> and refer generally to “the applicant” throughout.<sup>13</sup>
11. The Applicants, for their part, contended that the use of the singular was nothing to the point and in no way precluded a joint appointment. The Interpretation Act 1978 – which applies to both the Competition Act 1998 and the Tribunal Rules<sup>14</sup> – makes clear that “words in the singular include the plural and words in the plural include the singular”, unless the contrary intention appears.<sup>15</sup>
12. We do not consider that there is anything in either the Competition Act 1998 or in the Tribunal Rules that is indicative of any contrary intention. The legislation (and we include subordinate legislation) consistently uses the singular, but does nothing to displace the presumption that words in the singular include the plural.<sup>16</sup>

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<sup>10</sup> Emphasis added.

<sup>11</sup> SI 2015/1648.

<sup>12</sup> Rule 78(1) of the Tribunal Rules. Emphasis added.

<sup>13</sup> See Rule 78 generally.

<sup>14</sup> See sections 21 to 23 of the Interpretation Act 1978.

<sup>15</sup> Section 6(c) of the Interpretation Act 1978.

<sup>16</sup> Particular reliance was placed on Rule 78(4) of the Tribunal Rules, which provides that:

“If the represented persons include a sub-class of persons whose claims raise common issues that are not shared by all the represented persons, the Tribunal may authorise a person who satisfies the criteria for approval in paragraph (1) to act as the class representative for that sub-class.”

We do not consider that this provision assists at all. It seems to us that – by reason of the Interpretation Act – it is perfectly possible to have joint class representatives and (different) joint sub-class representatives.

Equally, the fact that the provision regarding “carriage disputes” (Rule 78(2)(c) of the Tribunal Rules) refers to “more than one applicant” in no way precludes there being two rival applications for certification, each being pressed by competing proposed joint class representatives.

13. Accordingly, we conclude that we do have jurisdiction to appoint Mr Boyle and Mr Vermeer as joint class representatives.

**(2) Discretion**

14. The mere fact that we have the jurisdiction to appoint two persons as joint class representatives does not, of course, mean that we should exercise that jurisdiction. Both sides accepted that – assuming the Tribunal had jurisdiction (which we have concluded it has) – the Tribunal had a discretion whether or not to exercise that jurisdiction. We agree.

15. In the present case, we consider that this is a jurisdiction that we should not exercise and that we should rather appoint Mr Boyle as the sole representative of the class (on the assumption that certification is otherwise appropriate). We have reached this conclusion for the following reasons:

(1) We consider that the appointment of two or more natural persons as joint class representatives gives rise to potential problems where there is disagreement or deadlock.<sup>17</sup> We do not say that such potential problems are insuperable. Clearly, they are not. In this case, the Applicants stress that they have a good working relationship and will seek to work cooperatively. In the event of disagreement, there is provision for the obtaining of (non-binding) legal advice and – if that does not resolve the disagreement – for Mr Boyle’s view to prevail over that of Mr Vermeer. However, it is plain to us that a joint responsibility is one that is liable to give rise to divergences of judgement, which will involve cost, inconvenience and delay to resolve, and which must, therefore, be justified.

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<sup>17</sup> Such problems are less likely to arise in the case of legal persons, because of established processes for the resolving of disagreements or deadlocks within companies. However, they are equally to be deprecated, as giving rise to additional cost, and diluting the importance of the judgement of the class representative. The problem did not arise in O’Higgins because the corporate applicant in that case – Michael O’Higgins FX Class Representative Limited – only ever had or was intended to have a sole director and member: O’Higgins at [2].

- (2) In this case, it is said that “Mr Boyle and Mr Vermeer have complementary skillsets from their respective professional lives – Mr Boyle is a journalist, author, think tank expert, and independent reviewer for government and Mr Vermeer an IT expert with experience in assisting vulnerable rail passengers”.<sup>18</sup> Given that the Applicants have retained the services of an expert clearly capable of performing the econometric and numerical analyses necessary to support the proposed claims (we will refer to the evidence of Mr Harvey in due course), we are not persuaded that IT expertise is particularly valuable in a proposed class representative – which militates against the “complementary skillset” of Mr Vermeer.
- (3) On the other hand, Mr Boyle is, in our judgement, clearly an appropriate class representative whereas – for reasons we are only going to touch upon – it seems to us that the same cannot necessarily be said of Mr Vermeer. More specifically:
- (i) Mr Boyle describes how he personally satisfies the various demands of the Authorisation Condition in Boyle 1, and we are satisfied that he has demonstrated the necessary requirements to be authorised. Indeed, this was not seriously disputed by the Respondents. It is equally clear, given the primacy accorded to Mr Boyle over Mr Vermeer in the Application that the Applicants themselves consider that greater weight ought to be accorded to the judgement of Mr Boyle.
  - (ii) Mr Vermeer’s dedication to the claims he wishes to bring in a joint representative capacity is not in doubt, but we do consider that the extent of his tweeting and the tone of some of those tweets to the Respondents raises questions as to his judgement. The essence of a class representative is not merely – and certainly not primarily – dedication to bringing a claim against certain parties, but rather to having the judgement and good

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<sup>18</sup> See paragraph 21(a) of the Applicants’ written submissions in support of the Application.

sense to ensure that what are usually complex and difficult claims are appropriately taken forward and resolved. We are not persuaded, in this regard, about Mr Vermeer.

It is unnecessary for us to go any further in this regard. As we have noted, the appointment of joint class representatives is not a cost-free option, and needs to be justified. In this case, we consider (for the reasons we have given) that justification to be insufficient.

**C. AUTHORISATION: OTHER POINTS**

16. Vermeer 1 contains a litigation plan, which Mr Boyle (in Boyle 1) has endorsed. Without setting out the plan in any great detail – it runs to some 125 paragraphs, plus annexes – we consider that it appropriately sets out how the proceedings, if certified, would be brought on. The Respondents made no specific criticism of the plan, and we have only one point to make, which is this. Other class representatives have put in place an advisory panel of consultants to act as a sounding board for the class representative. We consider that Mr Boyle would be well advised to establish such an advisory panel, although (we make clear) this is not a requirement for certification.

17. The only specific criticism that the Respondents made was in relation to the costs budget for the proposed litigation, which comprises another annex/exhibit to Vermeer 1. Essentially, the Respondents said that:

(1) The £45,000 budgeted for the costs of the joint proposed class representatives should be converted to a “cap” in a like amount. The Respondents pointed out this was generous if Mr Vermeer (as we have decided) were not to be approved as a class representative. We do not consider that a “cap” is appropriate, given the uncertainties of litigation and the fact that we have suggested the constitution of an advisory panel to assist Mr Boyle. Our decision not to impose a cap should in no way be taken as an invitation to exceed the sums budgeted for.

(2) No provision had been made for “surveys”. As we will come to describe, the Applicants rely upon the expert evidence of Mr Harvey, who has submitted four reports for the purposes of this Application. Those reports make reference to the need to carry out a number of “surveys”, yet these are not budgeted for. The Respondents suggested that this was a very clear indicator that the Applicants’ preparations were “undercooked” and inadequate. We do not accept this contention. The fact is that applications for certification come at an early stage in the proceedings, before there has necessarily been any articulation of the respondent’s defence (as was the case here) and well before disclosure. Applicants for certification cannot be expected to anticipate – and so budget for – every potential future litigation need.

18. One factor that must be considered is the extent to which the proposed class representative will be able to pay the Respondents’ costs, if ordered to do so. This was a point on which we heard very limited submissions. The Respondents indicated that, whilst they were seeking clarification in relation to the anti-avoidance provisions in the Applicants’ after-the-event insurance, this was a matter that was likely to be capable of agreement and – if not – was something for the Tribunal to resolve on the papers.

19. Accordingly, save to note that there is nothing in the Applicants’ insurance arrangements that cries out for explanation as a potential barrier to certification, we say no more about this point.

20. We consider that the Authorisation Condition has, in this case, been met so far as Mr Boyle is concerned.

## **D. THE ELIGIBILITY CONDITION**

### **(1) Introduction**

21. There is, we consider, a danger in eliding the *Pro-Sys v. Microsoft* requirement described above with a merits analysis. We repeat that, absent an application for summary judgment or an application to strike out a claim, certification is not

concerned with the merits of a case. The methodological requirement articulated by the Canadian Courts, and endorsed in this jurisdiction by the Supreme Court, cannot be used to so augment the scrutiny that a claim receives on the merits so as to distort the law as clearly stated in *Merricks*. *Merricks* stands as clear authority that there is no merits requirement independent of strike out/summary judgment.

22. The *Pro-Sys v. Microsoft* requirement is simply concerned to ensure that, through the use of the Eligibility Condition, only arguable cases are certified as collective actions. The standard is a very low one, and it turns on the difference between what must be pleaded in an individual claim compared with what must be pleaded in a collective action.

23. Pleading an individual claim or cause of action obliges the claimant to assert (but not prove) every fact which it would be necessary for the claimant to prove if put in issue by the defendant.<sup>19</sup> Collective actions often cannot be pleaded in this way. If it were necessary to articulate the factual elements of each individual claim in order properly to constitute a class action, then such actions would be no more than a grouping together of individuated claims, rather than genuinely collective proceedings. The cause of action in collective proceedings can be made good by a generic methodology, by which methodology some or all of the issues in the case can be established on a class basis. This facility applies to all issues, including liability (this is, we remind ourselves, a “standalone” claim), quantum and any relevant defences (including pass on).

24. We approach the Eligibility Condition in this light.

**(2) Satisfying the Eligibility Condition**

**(a) Liability**

25. We do not need to consider the question of liability any further. Although not conceded, the Respondents have not brought an application to strike out the

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<sup>19</sup> See *Coburn v. Colledge*, [1897] 1 QB 702 at 706 to 707.

allegation of an abuse of a dominant position. Although we have no doubt this issue will be hard fought, no question of arguability presently arises. We should also note that this question is essentially a generic one: the allegation of abuse of a dominant position would be framed in exactly the same way whether the proceedings are individual or collective.

*(b) Loss and damage*

26. The question of loss and damage is a different matter. Here, it is quite clear that the Applicants propose to establish loss and damage on a generic or class-wide basis, and not on an individuated basis. Accordingly, the question of methodology becomes important.
27. The process that the Applicants propose will be followed (stripped to its essentials) is to identify overcharged Multi-Brand Tickets and to work out what their price should have been in the counterfactual world where there was no abuse of a dominant position. The difference between these two prices (the actual and the counterfactual) – multiplied by the number of Multi-Brand Tickets purchased – represents the loss claimed for the class.<sup>20</sup>
28. Harvey 2 says this about the calculation of this difference:<sup>21</sup>

“2.9 In the counterfactual, i.e., the situation where [the Respondents] had not been unlawfully imposing brand restrictions, there would have been no brand restrictions on fares. Therefore, **[the Respondents] would not have been able to set different prices for fares depending on whether they were restricted by brand.** I would therefore expect prices to be the same across fares that would have been interchangeable, but for the brand restrictions. In other words, while passengers may have been willing to purchase more expensive fares without the brand restrictions in the actual world where [the Respondents were] imposing the unlawful brand restrictions on cheaper fares, once the brand restrictions had been lifted in the counterfactual, [the Respondents] would not have been able to charge different prices for otherwise equivalent fares.

2.10 My starting point for the counterfactual prices charged for the cheaper equivalent single-brand or dual-brand fares would be to identify the prices of the cheaper equivalent fares in the actual world, using the methodology discussed in the section above.

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<sup>20</sup> Subject to the “set-off” point considered below.

<sup>21</sup> Emphasis in original.

2.11 Once this has been done, it would be necessary to assess whether the prices of the cheaper equivalent fares might have been different in the counterfactual, absent the alleged infringement. However, it is my understanding that [the Respondents] cannot independently set the prices for all fares, but [are] in some instances limited by the conditions of [the] franchise agreement with the Department for Transport...and other regulatory conditions and/or Government policies restricting the prices of fares.”

29. We consider that this approach clearly satisfies the *Microsoft* requirements. It would be unreasonable to require further granularity in terms of this methodology, given that (i) the precise nature of the abuse is in dispute, and (ii) disclosure of data in the hands of the Respondents has yet to take place. Quantum is clearly being assessed generically, and we consider the approach to be clear and comprehensible.
30. There was a question whether – on the material presently available to the Applicants – it would be possible for the Applicants to identify penalties paid by the class as a result of passengers having the wrong type of ticket (e.g., as where a traveller with a Single-Brand Ticket gets on the “wrongly” branded train). We accept that there appear to be some difficulties as matters stand in stating how such losses might be identified. We do not consider that such difficulties so undermine the methodology articulated by the Applicants as to stand in the way of certification.

(c) *Defences*

31. So far as defences are concerned, two fall for consideration. These are pass on and set off. We consider them in turn below.

(i) Pass on

32. Pass on arises as a defence in the following way:
- (1) According to the claim as pleaded by the Applicants, the claimant class constitutes those who have purchased Multi-Brand Tickets at the higher (abusive) price, which will include those businesses which have purchased tickets on behalf of their employees or who have indemnified

employees in respect of ticket purchases they (the employees) have made.

- (2) In such circumstances, the Applicants accept that the “proper” claimant is the business and not the employee, and that such a business may pass on the cost of the ticket to its customers.
- (3) Of course, not having the data, it is very difficult for the Applicants to be any more specific as to how they would deal with pass on. We consider that it would be entirely unreasonable to expect (at this stage) any further detail to be pleaded in relation to what is, after all, a defence incumbent upon the Respondents to plead in the first instance.
- (4) We propose to say no more about pass on, save that an indication (albeit in an entirely different context) as to how the Tribunal will approach questions of pass on is provided in *The Merchant Interchange Fee Umbrella Proceedings*.<sup>22</sup>
  - (ii) Set-off

33. The question of set-off arises out of the Amendments, in the following way:

- (1) In his other reports, Mr Harvey accepted the possibility that, in the counterfactual world, the price of Single-Brand Tickets might rise as a result of the downward adjustment to the price of the Multi-Brand Tickets.
- (2) The Respondents, in consequence, contend that any member of the claimant class claiming for over-priced Multi-Brand Tickets would have to give credit for the increased cost in the counterfactual world of any Single-Brand Tickets purchased by them. Any failure to do so, *pace* the Respondents, would result in over-compensation to the class – and would mean that, for this reason alone, the Application ought to be rejected.

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<sup>22</sup> [2022] CAT 31.

- (3) Harvey 4 sought to set out how the Applicants would deal with this point. We consider that in rising to the Respondents' point, the Applicants have confused what they should plead and what the Respondents should plead. We consider that it is by no means clear that even if the price of Single-Brand Tickets rose in the counter-factual world, credit would have to be given for the "saving" occurring in the real world. Whilst we do not decide the point, we consider:
- (i) That the Applicants' claim is properly framed by reference to the loss arising in relation to Multi-Brand Tickets, leaving out of account any Single-Brand Ticket "saving".
  - (ii) If and to the extent that the class' loss is to be reduced by reference to the "savings" made in relation to Single-Brand Tickets, that is a matter for the Respondents to plead and – once pleaded – for any legal and factual issues to be resolved in due course.
- (4) Accordingly, and substantially on the grounds of relevance, we decline to allow the Amendments in relation to this point, and we decline to admit Harvey 4 on this point. We stress that the reason for this is simply that this point is one for the Respondents to take, if so advised, in due course. It is not a point relevant to the Application.

***(d) A new claim?***

34. Harvey 4 also raises the spectre of a new claim, accruing to the benefit of those class members purchasing (over-priced) Multi-Brand Tickets, but also purchasing (under-priced) Single-Brand Tickets. In such a case, Harvey 4 contends for damages assessed by reference to the "loss of the flexibility" arising out of the Single-Brand Ticket purchase, this loss existing because the ticket purchased in the counter-factual world would have been more "flexible". Given that we accept that the Respondents have not have sufficient time to consider Harvey 4 and make any response, we are not going to give permission to take this claim forward at this stage. Should the Applicants (or, rather, Mr

Boyle) wish to apply to amend, then (of course) we will hear and consider such an application. It may be that the point was only raised in response to the “set-off” point which (for the reasons given above) we consider does not, at least at present, arise. In these circumstances, it may be that this new claim will not be pressed further by the Applicants.

35. However, in the event that an application to amend along these lines is made, we should make clear that we do have difficulties with this claim, which we would want to have addressed on any amendment application:

(1) Given that – by definition – the purchaser of a (cheaper) Single-Brand Ticket will have eschewed the availability of a (more expensive) Multi-Brand Ticket, it is unclear to us whether there is any arguable claim for a loss (of “flexibility”) at all. Certainly the method mentioned in Mr Harvey’s paragraph 2.21(ii) would not work. The fact is that each such claimant will have chosen not to pay the higher price, and will have consciously selected the lower priced Single-Brand Ticket.

(2) Even if this claim passes the arguability threshold, it is difficult to see how – methodologically – the claim could be made good. In short, we have some doubts as to whether the *Microsoft* test is passed in this case. The most that could be said on the data we have seen is that those buying (cheaper) Single-Brand Tickets did not value flexibility enough to buy (more expensive) Multi-Brand Tickets. The data held by the Respondents will provide no indication of what value such purchasers did attribute to flexibility, and Harvey 4 provides no concrete indication as to how such loss of flexibility might methodologically be ascertained.

36. For all these reasons, apart from the Amendments (which are not – at least for the present – allowed and should not proceed), the Eligibility Condition is satisfied.

37. Until the oral hearing of the Application, the Respondents disputed that, if certified, the claims should be certified on an opt-out basis. During the course of the hearing, the Respondents accepted that if there was to be certification, it

should be on an opt-out basis. We consider that this is a matter appropriately to be certified on an opt-out basis, but given the fact that this was effectively common ground, we say no more.

**E. CONCLUSION, DISPOSITION AND PROPOSED FURTHER DIRECTIONS**

38. We conclude, for the reasons we have given, that the Application should be granted and the claims set out in the Claim Form certified as collective proceedings. To be clear, no such certification is made in relation to the Amendments.

39. We are conscious that these proceedings – even though they have only just been certified by this Judgment – have a long history and that this Judgment is being handed down shortly before the summer vacation. Accordingly, and in order to progress matters, we propose that the parties consider the following directions, and make written submissions in relation to them by no later than 29 July 2022:

- (1) The Applicants – or, more specifically, Mr Boyle – should consider the extent to which the Department for Transport ought to be joined as a party. The Department for Transport has made clear its desire to intervene, but we consider that (in light of the Respondents’ point that they were only implementing the Department’s policies) substantive joinder of the Department for Transport should be considered and – if so advised – amendments pleaded by no later than 31 August 2022.
- (2) The Respondents and the Department for Transport to plead a defence or (in the case of the Department) a statement of intervention by no later than 30 September 2022.
- (3) The parties – including the Department of Transport – to give consideration as to how expert-led disclosure can be managed, with a view to a substantive trial of these proceedings before the end of the summer term 2023, with a time estimate of one week.

40. We would anticipate fixing a case management conference, to further articulate directions to trial, for October 2022. Nothing that we say affects the right of either party to seek permission to appeal this Judgment.

41. This Judgment is unanimous.

Sir Marcus Smith  
President

Professor John Cubbin

Eamonn Doran

Charles Dhanowa O.B.E., Q.C. (*Hon*)  
Registrar

Date: 25 July 2022