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7 **IN THE COMPETITION APPEAL TRIBUNAL**

8 **BETWEEN:**

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

10 **1305/7/7/19**

11 **JUSTIN GUTMANN**

12 Proposed Class Representative

13 **– and –**

14 **(1) FIRST MTR SOUTH WESTERN TRAINS LIMITED (“FIRST MTR”)**
15 **(2) STAGECOACH SOUTH WESTERN TRAINS LIMITED (“STAGECOACH”)**

16 Proposed Defendants

17 **AND BETWEEN**

18 **JUSTIN GUTMANN**

19 Proposed Class Representative

20 **– and –**

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

22 Proposed Defendant

23
24 **PHILIP MOSER QC, STEFAN KUPPEN and ALEXANDRA LITTLEWOOD** (Instructed
25 by **Hausfeld & Co LLP** and **Charles Lyndon Ltd**) appeared on behalf of Mr. Gutmann
26 **TIM WARD QC and JAMES BOURKE** (Instructed by **Slaughter and May**) appeared on
27 behalf of First MTR
28 **SARAH ABRAM** (Instructed by **Dentons UK and Middle East LLP**) appeared on behalf of
29 Stagecoach
30 **PAUL HARRIS QC, ANNALIESE BLACKWOOD and MICHAEL ARMITAGE**
31 (Instructed by **Freshfield Bruckhaus Deringer**) appeared on behalf of LSER
32

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38 **Wednesday 10 March 2021**

1 (10.20 am)

2 **THE PRESIDENT:** Yes, Mr Moser, sorry, everyone, for the slight delay, we had
3 a technical hitch getting the transcript connected.

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

5

6 **Submissions by MR MOSER (continued)**

7 **MR MOSER:** Where we left it yesterday, I was going through my comments on my
8 learned friend's skeleton arguments.

9 **THE PRESIDENT:** Yes.

10 **MR MOSER:** I would like to begin, however, with a question that was put to me about
11 the agreement, the agreement insofar as it relates to the Travelcards, that is
12 the other item of disclosure, as it were, in this case.

13 We had a freedom of information request public version, but we have had
14 a confidential version of it disclosed to us. That confidential version, in whole
15 or in part, should have made its way to the Tribunal, I think this morning.

16 It is headed "Confidential" and so --

17 **THE PRESIDENT:** Has it come ... yes, I think I have it here. Yes. Is it headed
18 "Amendment and restated agreement"?

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

20 What that is is it's the 2018 restatement of the agreement that attaches to it the 1995
21 version of the agreement. One sees that at -- well, a few pages in there's a new
22 page 1. The agreement was made the date -- whatever, 1995.

23 It is confidential, although I don't think I am going to go to anything incredibly secret
24 within it. What I propose to do is simply to seek to show --

25 **THE PRESIDENT:** Before you do that, do we have a suggested place for it? It's been
26 paginated 713 and on. Is that reference to -- is that the core bundle?

1 **MR MOSER:** Tab 24 of the core bundle. The core bundle I think is our one location
2 where we have reliably confidential things.

3 **THE PRESIDENT:** Yes. Thank you.

4 **MR MOSER:** This agreement governs the acceptance of Travelcards on rail services,
5 and also the apportionment of Travelcard revenue between the TOCs and TfL.

6 The TOC parties are listed at pages 6 and 7 -- that's 717/718 -- earlier versions would
7 have included Stagecoach.

8 Then schedule 4 is the one that matters. That starts at 721, "Revenue apportionment
9 principles and methodology".

10 I will not read it out, but you will see what it says at principles 1.1 and 1.2. If I can ask
11 the Tribunal, please, to read those.

12 **(Pause)**

13 **THE PRESIDENT:** Yes.

14 **MR MOSER:** One sees that plainly the drafters of the agreement have envisaged that
15 the same sort of problem would be faced that is faced by the proposed class
16 representative, because this isn't data -- as we have said in open -- that is
17 captured as such.

18 As a result, there is a need to estimate it in the way described at 1.3. If I could ask
19 you just to cast your eye down at 1.3.

20 **(Pause)**

21 **THE PRESIDENT:** Yes.

22 **MR MOSER:** At 2.1a, we see that the methodology starts in much the same place
23 where ours starts, before a variety of adjustments are then made to it.

24 At 2.2, we have the key part of the methodology, and you see what that is.

25 **THE PRESIDENT:** Do we know if that's been carried out? Does it say how often?
26 It's not clear how often that's to be done.

1 **MR MOSER:** I don't think we know that, sir. If somebody knows, sitting behind me,
2 I'm sure I will be told.

3 The reference -- I think this is not a state secret, there's a reference to out-boundary
4 at 2.2. This is a more recent version to the previous one and initially it was all
5 done in the way that's described --

6 **THE PRESIDENT:** When you say more recent, this is the 1995 document, isn't it?

7 **MR MOSER:** Yes, it is, but this particular schedule is an amended version of the 1995
8 document, so that the schedule has been updated.

9 **THE PRESIDENT:** Yes, I see. I am not sure what's confidential about this,
10 nothing -- at least in the passages you have shown us -- appears remotely
11 confidential.

12 **MR MOSER:** Well, there it is. I was asked this morning not to read it out and so
13 I haven't done so.

14 If at some stage you could discuss it, then perhaps we can explore that.

15 **THE PRESIDENT:** Yes, I would be grateful if whoever produced it can take
16 instructions on that. There may be some figures somewhere that are
17 confidential, but people are, as I have observed elsewhere, far too ready to
18 claim confidentiality for things which are really not confidential on any sensible
19 view.

20 **MR HARRIS:** Sir, it's Mr Harris speaking, I am sorry to interrupt.

21 Sorry, Mr Moser.

22 Can I just say that from our perspective, LSER, this is not so confidential that it can't
23 be referred to.

24 Since Mr Moser has adduced it overnight, I wonder if he would be kind enough to just
25 quickly draw the Tribunal's attention to sections 2.9, 2.10 and 2.13 and 2.14,
26 the whole series, apportionment and adjustment factors.

1 **THE PRESIDENT:** Yes.

2 **MR MOSER:** I am happy to -- I don't know where the other parties stand on
3 confidentiality.

4 **THE PRESIDENT:** Perhaps Ms Abram and Mr Ward can take instructions, you will
5 need to get instructions, they have heard what I have said.

6 You carry on in the meantime, without reading it out.

7 **MR MOSER:** There isn't very much more to say. As Mr Harris says, we will see that
8 there's a reference to validations starting at 2.6. That's new, the electronic stuff.
9 Before that, it was all as per the previous side heading on page 722 and at 2.2,
10 because that was all there was.

11 There's now electronic means, but that is itself not perfect, and, as Mr Harris says,
12 then a variety of apportionments and adjustments need to be made, and of
13 course I ask the Tribunal, perhaps in its own time, to look at that.

14 **THE PRESIDENT:** Yes. I am not sure this is -- I have not seen this document
15 before -- the complete version. It's certainly not, I think, the complete version
16 of the 2018 agreement, or at least not of the 1995 agreement, because one can
17 see that what you've been looking at is schedule 4 and the 1995 agreement
18 starts on page 720 and ends that page, mid-sentence.

19 **MR MOSER:** That's right. I have the agreement here (indicated).

20 **THE PRESIDENT:** It may be some of the things have been left out. It might be helpful
21 to see if the other one came in in July 2018, and your claim starts
22 in October 2015, to see the agreement that applied as at October 2015, which
23 may have been the 1995 agreement or there may have been some other
24 amendment at that time. I don't know.

25 **MR MOSER:** We haven't, I think, been given a confidential version of the previous
26 agreement. We do have the publicly available version, I think, of the previous

1 agreement --

2 **THE PRESIDENT:** Is it in the bundle?

3 **MR MOSER:** No. Perhaps the most sensible thing to do is if we provide the complete
4 agreements for both the previous period and this period --

5 **THE PRESIDENT:** Yes.

6 **MR MOSER:** -- for the Tribunal's benefit.

7 **MR HOLMES:** It's clearly a substantial agreement, because I see we jump from
8 page 1 to page 87 in the actual agreement.

9 **MR MOSER:** It's substantial, it's not monstrous and it has, I think, in excess of 100
10 pages, but that's --

11 **THE PRESIDENT:** Anyway, in schedule 4 you have shown us 2.2 and what that's
12 talking about. We don't know if that was carried out as it was required to be
13 carried out.

14 **MR MOSER:** There is some evidence of this, sir. If we look at the witness statements,
15 which are in core bundle -- if we look at Mr Cameron's witness statement, for
16 instance, in core bundle 8 at paragraph 75 and following, again I don't know to
17 what extent this is said to be confidential.

18 But we see there how the surveys are said to be carried out -- of course we have not
19 had disclosure yet, we can't test that.

20 **THE PRESIDENT:** Yes, so they're carried out quarterly?

21 **MR MOSER:** Quarterly, yes.

22 **THE PRESIDENT:** That's obviously surveys, as reflected in clause 2 of schedule 4.

23 **MR MOSER:** Yes.

24 **MR HOLMES:** The surveys ceased in early 2017, am I reading that correctly? That's
25 inbound. Sorry, outbound continued, apologies, yes.

26 **THE PRESIDENT:** Yes.

1 **MR MOSER:** That's what we have. We are not saying that this is data -- so there's
2 no confusion about this -- that we are going to be using for our own assessment.
3 All we are saying is that the use of surveys is common, the use of adjustments
4 afterwards is common. It's not surprising -- obviously you cannot just rely on
5 the survey. Obviously, if this were central to our own methodology, we would
6 have put it in the bundle in the first place.

7 I am grateful in fact to have had the opportunity to show how they do it, and it does go
8 to two points I make.

9 It goes first to the use of survey as being an accepted and acceptable way of providing
10 the reasoned estimate.

11 It goes, secondly, to the factual underpinning for our allegation -- well, our observation
12 of double charging. I think this is where the President started the enquiry with
13 me yesterday, because it shows how the revenue is shared between the TOCs
14 and TfL, and that it is directly referable, via a methodology, to the use of the
15 TOCs networks by Travelcard holders.

16 **THE PRESIDENT:** Yes. Now Mr Harris wanted us to look at 2.9, 2.10, 2.13 and 2.14.
17 Let's just quickly cast our eye over those while we have it open.

18 **(Pause)**

19 You presumably, Mr Moser, have not at this stage -- that's not a criticism of
20 anyone -- seen any documents of the Travelcard apportionment working
21 group? Is that right?

22 **MR MOSER:** No, we have not. In fairness, we don't particularly expect to find
23 fantastically relevant data therein.

24 The adjustments made to their survey are adjustments they make to their survey for
25 their purposes and the way their survey has been designed.

26 The analogy is that we also have a survey, we also have adjustments. Ours is the

1 one explained by Mr Holt.

2 **THE PRESIDENT:** Yes, I only thought it might be relevant because they are seeking
3 to get a reasonably accurate assessment of Travelcard usage.

4 **MR MOSER:** I can see that, I can see that.

5 **THE PRESIDENT:** Which is something that I think Mr Holt is also interested in. This
6 is obviously, as I understand it ... yes.

7 **MR MOSER:** I am not going to talk ourselves out of the disclosure of this. It will be
8 interesting to see what can be gleaned at trial.

9 **MR WARD:** Mr Moser, if you don't mind, can I come in to add one detail? Mr Holmes
10 made the point about whether the surveys were still continuing, at least the
11 outbound and in fact if you look at the witness statement of Ms Hinde, which is
12 the second witness statement served by my clients, she explains that in fact
13 they have also come to an end. They were initially suspended because of
14 changes in travel patterns because of coronavirus.

15 Just for the transcript, this evidence is in the core bundle under tab 9, in paragraphs
16 16 through to 18.

17 **THE PRESIDENT:** When did they come to an end, Mr Ward?

18 **MR WARD:** I can take you to the evidence, sir, if it's helpful. It was suspended on
19 17 March, so that would have been the end. And then a decision was later
20 taken not to proceed with them.

21 **THE PRESIDENT:** When lockdown came in, effectively?

22 **MR WARD:** Yes, exactly.

23 **MR MOSER:** I am grateful for that intervention.

24 **THE PRESIDENT:** Yes.

25 **PROFESSOR MASON:** While we are there, it may be worth just quickly reading
26 paragraph 18 of the same witness statement.

1 **THE PRESIDENT:** This is Ms Hinde.

2 **(Pause)**

3 Yes, thank you.

4 **(Pause)**

5 **MR MOSER:** That's all I propose to say about the Travelcard agreement. We will

6 make sure that the Tribunal gets copies of the whole agreement in both forms.

7 I have, I suspect, five minutes worth of observations, general observations, left on my

8 learned friend's skeletons from yesterday.

9 **THE PRESIDENT:** Yes.

10 **MR MOSER:** There was reference in the skeletons to the fact that it is accepted by

11 us, in our claim form at paragraph 38, that boundary fares were in principle

12 available. Quite a lot is made by the Proposed Defendants of the availability of

13 the boundary fares. I respectfully submit that the availability is greatly

14 overstated.

15 We do not, as they say, accept their evidence on the availability of boundary fares,

16 simply because they have put in witness evidence at the summary judgment

17 stage doesn't mean we agree with everything that's in it. We haven't been able

18 to challenge it yet.

19 Apart from the Decidedly report, which of course I started with, which is the general

20 facts as we say they're going to be found at trial, we reject the assertion that

21 these fares being available in principle is anywhere near enough. In fact, that

22 is the very problem. They only available in principle in most cases.

23 Yes, they are there, they're buried somewhere in the many different tickets and fares.

24 They are there, if you're lucky, if you ask for them directly. You might find them

25 on the ticket vending machines of one of the franchises, but not, we know, the

26 other.

1 It's like a shopkeeper who has cheaper chocolate for sale but keeps it under the
2 counter where no one can see it and says, "Oh, well it's available, you just have
3 to know it's there and ask for it by name", and then it might be produced.

4 We reject that point.

5 Of course, as I say, on other channels, boundary fares are not even available in
6 principle. Websites, mobile applications, on the phone for South Eastern or on
7 South Eastern's ticket vending machines.

8 Then my learned friend Ms Abram says, at paragraph 17 of her skeleton argument,
9 well we have no direct evidence against her clients, against the previous
10 franchisee, Stagecoach. Well, there is evidence. There's data on the number
11 of boundary fares sold before and after the franchise was transferred from
12 Stagecoach to First MTR. There was no sudden dip in the numbers sold after
13 it was transferred to First MTR in August 2017, and that's in our reply at
14 paragraph 120.

15 There's no evidence that there was any different situation beforehand, indeed it would
16 be highly surprising, and it is not asserted, importantly, that the situation was
17 different before the franchise.

18 There is a criticism that we have no mechanism for resolving non-common issues.

19 First of all, my submission is the authorities don't say that at this stage we have to
20 have a mechanism for resolving non-common issues. As Chief
21 Justice McLachlin says, "You will deal with that when we come to it".

22 Our case, anyway, is all of the main issues that we seek to have determined
23 collectively, market definition, dominance, liability, causation, quantum, they
24 are all common issues for the whole class.

25 The only properly so-called individual issues that need to be considered would be
26 those that arise at the distribution stage, where individuals will submit evidence

1 of their individual claims and their individual journeys.

2 I think we dealt with yesterday, already, in relation to point-to-point fares with the
3 confusion around whether we've accepted, in paragraph 88 of our reply, the
4 universal availability of point-to-point fares. I think the Tribunal has that point,
5 as it were, which is obviously we all know about point-to-point fares, that's what
6 all rail tickets generally are. It's those point-to-point fares that are said to double
7 as boundary fares from the edge of the boundary that we were referring to as
8 being obscure.

9 We had the conversation yesterday about point-to-point fares and whether they are
10 properly part of the definition.

11 It's worth reminding ourselves briefly that before October 2016 point-to-point fares
12 couldn't easily be combined with Travelcards, we see that in the witness
13 statements. And to avail themselves of this option customers used to have to
14 have a longer Travelcard or to limit themselves to trains stopping at that station.
15 We have seen the references to, "Well, you will have to alight at the station, get
16 a ticket and carry on".

17 There is that bit that I showed you in the contract between the TOCs and the travellers
18 that says in principle if you want to combine it with another ticket from a later
19 station, you will have to get it at that later station.

20 **MR HOLMES:** Which are witness statements are you referring us to there, please?

21 **MR MOSER:** If we have a look at Mr Backway's first statement at tab 15 of the core
22 bundle, for instance, then we see, at pages 490/91, paragraph 51:

23 "Instead of purchasing a boundary fare, that passenger could also purchase a fare
24 from a particular station in Zone 6 (for example St Mary Cray) to Whitstable.
25 Again, under the same condition of the National Rail Conditions of Travel, the
26 train on which they choose to travel would not need to call at St Mary Cray in

1 order for the fare from St Mary Cray to Whitstable to be valid. This was not
2 always the case: for Travelcards with less than seven days' validity, the ability
3 to use a point-to-point ticket in combination with the Travelcard without the train
4 calling at the origin station of the point-to-point ticket was introduced with a new
5 version of the National Rail Conditions of Travel on 1 October 2016."

6 For at least the first year -- Mr Harris has his hand up.

7 **MR HARRIS:** I'm so sorry, just on a point of detail, Mr President, members of the
8 Tribunal, Mr Moser possibly just in passing said both yesterday and today that
9 that meant that the passenger would have to alight and that's not right. It's
10 never been the case that the passenger would have to alight at any point. The
11 difference has been whether the train calls at or doesn't.

12 **MR MOSER:** I am grateful for that. That is probably a genuine misunderstanding by
13 me and I of course accept what Mr Harris says.

14 There is also the statement of Mr Joyce at core bundle 12, page 418 is paragraph 42
15 of Joyce. To similar effect. If I could ask the Tribunal just to read that to itself.

16 **(Pause)**

17 **THE PRESIDENT:** Yes. Yes, that explains it quite clearly.

18 **(Pause)**

19 **MR MOSER:** I am grateful. I was asked to point out paragraph 62 of Mr Backway as
20 well. I think the Tribunal has the point that at all times these point-to-point fares
21 were anyway only sold by staffed sales channels, not by ticket vending
22 machines, by LSER. That's at the end of Backway, tab 15, paragraph 62, from
23 page 495, going on to page 496, the bit in brackets.

24 **(Pause)**

25 That's point-to-point fares. We had the discussion yesterday I think sufficiently,
26 I submit sufficiently, around the definition. Obviously if the Tribunal isn't

1 persuaded that either the incidence of point-to-point fares is simply a matter for
2 the methodology, in that if the TOCs are right then there would simply be zero
3 loss for passengers who have bought a point-to-point fare instead of
4 a boundary fare.

5 That maybe is the most obvious way of dealing with it.

6 Or there's then the alternative argument of whether there is an excessive price, in
7 which case I said that would be a matter for trial.

8 Our primary approach to this has always been that it's simply a matter for the
9 methodology. If it turns out that the TOCs are right and people who have bought
10 a point-to-point fare have no loss, then that can be adjusted for and there would
11 be no loss.

12 Obviously if the Tribunal is against me on all of those points in relation to point-to-point
13 fares, then ultimately the position would be that the class definition excludes
14 not only boundary fares but also this species of point-to-point fare which, as we
15 say on the limited evidence available, do seem to be reasonably rare.

16 There's then a criticism made -- this is the last one I propose to address today in the
17 skeleton arguments -- of the passage of time. I think I have already said
18 yesterday that that is not to be laid at the door of our clients. One has seen
19 collective actions in relation to matters that are considerably longer ago than
20 five years.

21 It would set a dangerous precedent in my respectful submission for collective actions
22 to say well in relation to consumer recollection as far back as five years ago,
23 that is too long.

24 It would undermine one of the central purposes of providing access to justice in
25 collective actions. It would always be over a period of time and it can be a very
26 long time.

1 We also respectfully submit that the difficulty is overstated. People are likely, I submit,
2 to remember whether they had a Travelcard and whether they had regular
3 travel patterns, in particular for work trips. There are diaries and bank
4 statements are available online nowadays. As we say in our pleadings, there
5 is the opportunity to get third-party disclosure from TfL on Travelcard holders.

6 **MR HOLMES:** Should we make a distinction between people recalling their travel
7 patterns in a general sense and their ability to evidence that?

8 **MR MOSER:** They are all different types of evidence, sir, and what we've seen in our
9 litigation plan and in the Epiq papers, which I will show you, is that when we
10 come to the distribution stage, there will be a questionnaire. There will be
11 different kinds of evidence and there will have to be a judgment made, of
12 course, as to whether people have, as it were, come up to proof.

13 If you can prove it with the actual ticket that would be ideal. If you can show credit
14 card receipts, that would be another way of doing it, and of course people's own
15 evidence of what they were doing, regular work trips, for instance.

16 **THE PRESIDENT:** The point made is a more general one, it's not about delay, and
17 no one is suggesting you have delayed bringing the proceedings. Then of
18 course the proceedings were held up because, as we know, of the Merricks
19 appeal. It's that given the amount of likely recovery, as accepting everything
20 Mr Holt says on his calculations, and the sort of evidence that Epiq says will be
21 required, is it plausible that all these people are going to -- even if they could
22 find that sort of information, because showing you had a Travelcard of course
23 is only one part of the story, that may be the easier one, certainly if you had
24 a monthly or annual one, but some people would have a seven-day one. But
25 you also have to show that you took these particular train journeys and what
26 sort of ticket you bought.

1 Is it realistic that -- are you just going to let people say so or once you start asking for
2 any kind of proof, for that sort of money are they realistically going to make the
3 effort? Some will, no doubt, but is it plausible that this 1 to 2 million people in
4 one case, I think the estimate is that around 2 million is the central figure, and
5 in the other case it's just under 900,000, that anything like a substantial number
6 are likely to do that?

7 **MR MOSER:** We submit it's highly plausible, on the basis that once the fund has been
8 secured, once the money is there, there is a high motivation for people to claim,
9 even smaller sums. Let us not forget that in many cases, because we are
10 dealing with journeys, one individual may have made many journeys over the
11 period of years. So we are not looking simply at whether somebody is going to
12 claim for £29, but maybe many multiples of £29.

13 The sort of evidence that is required is, these days, of electronic payment, and that
14 includes the entire period. Not as difficult as, with respect, the other side make
15 out. There are online credit card statements, people have them on their phones
16 nowadays. You can show with --

17 **THE PRESIDENT:** Not always going back that long period. Some banks even charge
18 for getting statements more than a few years old, if they are no longer online.

19 **MR MOSER:** Again, it will be a question of taking a view on the evidence. If
20 somebody can show that they travel regularly to Reading every month, have
21 done, say, for the past two years, then if they give evidence that that is not new,
22 that they were doing that throughout the period and there are other ways of
23 proving that individually, of course, when you fill in the questionnaire, then we
24 say that would be sufficient for a balance of probabilities that they have made
25 that journey.

26 We say it is plausible. We see, in relation to the north American distributions, where

1 of course they have far more experience of this than us, that there is always an
2 element with consumer-type class claims of erring on the side of distribution,
3 where you have a -- the greater danger, in our case, you would have
4 90 per cent of the relevant class who didn't avail themselves of the boundary
5 fare. There's always going to be some risk of someone in the minority of the
6 uninjured being overcompensated, but the much greater risk is the larger
7 groups being undercompensated or not compensated at all simply because it's
8 said, "Well, there could be difficulties in proving individual journeys".

9 There is an element of taking the best evidence available at that stage in the same
10 way that there is an element of taking the best evidence available when it
11 comes to the assessment of quantum in the first place.

12 **THE PRESIDENT:** This goes to the cost benefit point, which is something we do take
13 into account. I think, under Merricks, although distribution doesn't have to be
14 compensatory, it has to be fair and we are entitled to think about it at this stage.

15 If we look at what Epiq -- this is your proposal. If you had said, for example, no, that's
16 going to be too difficult so we want to just split it between everyone who held
17 a Travelcard, obviously the difficulties would be much less but you would then
18 be compensating lots of people who never -- your class would be different and
19 who never took journeys and so on, and it's not the method you are suggesting
20 as appropriate.

21 It's in the Epiq report, isn't it? Where is that? I think it's in bundle 1, isn't it, because
22 that was your original application?

23 **MR MOSER:** It's in bundle 1, at tab 11 and the claim filing process starts at page 337.

24 **THE PRESIDENT:** Claim filing, yes. It's really "Claim validation", 10.5.

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

26 **THE PRESIDENT:** Claim forms were requested, information, 10.6 ...

1 **MR MOSER:** "... contact details, Travelcard and rail journey details, along with
2 supporting documentations, receipts, bank account histories et cetera,
3 necessary to validate process and calculate payments. Processing of claims
4 shall be conducted manually or where possible programmatically. A calculation
5 will factor in aspects such as amount paid, quantity, type of fare, sufficiency and
6 so forth."

7 And so on:

8 "For those class members ... the claim may be rejected or the class member may be
9 requested to provide additional information."

10 At the moment, at this stage, this is of course at a very high level of generality. The
11 claim validation forms and processes are going to be refined as and when they
12 are received --

13 **THE PRESIDENT:** Yes, but you are going to want some -- either you do it just on
14 people's recollection. Of course, you will have the regular traveller who will
15 have a much bigger claim and they will be incentivised to get the information,
16 but the more of those you have, that means, given that I think Mr Holt's estimate
17 of loss per class member, that's just an average, so if some are having claims
18 of £300/£400, or indeed £1,000, that means some are going to have claims of
19 £5. Indeed, quite a lot on that basis, to make up the numbers, in which case,
20 really, the effort -- one has to be realistic on whether people likely to do it?

21 **MR HOLMES:** Your figure of £29, just putting it in context, is the average for MTR,
22 which as the President said must mean there are a lot of claimants with claims
23 smaller than £29.

24 **MR MOSER:** As I say, we take the view that once the fund is in place, people will
25 claim -- people will claim even for small amounts or amounts that may appear
26 to some to be small, but if someone for almost no effort by way of an online

1 claim can lay claim to £29, £10, £15, it is not nothing.

2 **THE PRESIDENT:** It's the effort, is the point. When you say for almost no effort. If
3 you can just say, "I remember I took a train journey to Winchester, I cannot
4 remember the exact date but it was some time that year and I cannot remember
5 how much I paid". But is that really going to be adequate?

6 The concern is -- of course it's only one factor -- that otherwise we end up with this
7 large award, some people claim but in fact there's a huge unclaimed fund and
8 it's for the benefit not of the class members, as a large class, but it's really then
9 for the benefit of the funder. Is that then an appropriate way for these
10 proceedings to go forward?

11 That's the concern that we have -- or I have, speaking for myself.

12 **MR MOSER:** First of all, there are likely, as Mr Holmes says, to be a number of claims
13 that are considerably larger than the average, as well as the likelihood of there
14 being smaller ones. So out of millions of potential claimants, there will no doubt
15 be a very substantial number of claimants who are claiming substantial sums
16 which, out of what we submit is going to be a conservatively estimated sum, is
17 going to take care of a lot of payments out.

18 Then, sir, there is not only the policy aim of rewarding those who have lost. There's
19 also the policy and purpose of collective proceedings to provide redress to
20 people who have low value claim, where it is disproportionate to bring individual
21 proceedings.

22 So to hold against me, as it were, that the claims are low value, I submit with respect,
23 it cuts against the grain of what this procedure is meant to be about.

24 **THE PRESIDENT:** Yes, I mean I fully accept that it can be a low value claim, and if
25 it's that you, because of some cartel among manufacturers of a certain input
26 into cars it means that you paid £12 more for your car, that's a very low-value

1 claim, certainly no one is going to start proceedings for that, but pretty much
2 everyone can evidence the purchase of a car. And you prove that and you get
3 £12, not a lot of money, but people do it -- or most people would do it, some
4 wouldn't bother. Even though very few people might have purchased two cars,
5 so really it is only £12 for most people and there are no, even, people able to
6 recover £100.

7 Here, it's the complication of what might have to be produced and the scepticism of
8 whether many might be able to do it that is of concern. Not the fact that the
9 amount in itself is low.

10 Similarly, if a telecoms operator overcharged subscribers, well they will know who the
11 subscribers are, they can credit them on their phone bills or their account, even
12 if it's only £4.50. One couldn't say, "No you shouldn't bring a collective action
13 because it's only £4.50 and that's trivial", if the mechanism is straightforward.

14 It's the combination here, as I say, it's what is likely to happen, which I accept we don't
15 really know, but one has a certain sort of real world scepticism.

16 What I am not clear about, Mr Moser, is quite how the funding arrangement works.
17 We presumably received the funding agreement, but I think heavily redacted in
18 the bundle ...

19 I think it would help me just to understand how it works. If suppose this goes ahead
20 as a collective proceedings and then there's a settlement of -- say it settled for
21 £25, including your costs after you have spent £5 million. In that scenario, how
22 much would the funder get?

23 I don't expect you to answer that off the cuff and it may be confidential, but if you can
24 do it in a note after the proceedings are over.

25 Equally, as a second possibility, if the case is not settled and it goes to judgment and
26 you get a judgment of £50 million plus costs, after expenditure of

1 £11 million -- I think that's the anticipated budget. Assuming you get your costs,
2 out of the 11 million you get costs of 10 million paid by the other side, so you
3 get 50 million, you get 10 million for costs and the costs spent are 11 million.

4 Again, how much would the funder get -- in those circumstances -- out of the
5 unclaimed damages?

6 If you could just send us the answers to those questions, which obviously involve
7 someone looking at the funding agreement, I would get a clearer picture of what
8 is the financial reality of this.

9 I mean, it's not questioning -- I make it quite clear -- Mr Gutmann's motives in bringing
10 this case. I think he's clearly acting in good faith, he feels very strongly about
11 this, he's been a consumer advocate, as it were, for a long time. But that's
12 different from the Tribunal having to think: are a substantial proportion of the
13 class actually going to benefit or is it really going to be a hugely expensive
14 exercise with the real financial benefit going to someone else?

15 That's, putting it clearly, the question that goes through my mind.

16 **MR MOSER:** I know Mr Harris wants to say something, I don't mind if he does before
17 I respond.

18 **MR HARRIS:** Sir, simply on that point, I am assuming that the Proposed Defendants
19 would have the opportunity, if they needed it, to comment on any submission
20 put in after the proceedings are over as regards how the litigation funding plan
21 works?

22 **THE PRESIDENT:** Well, it will be supplied to you. I am not asking for a submission.
23 I am asking for some factual information. I do not expect long submissions
24 saying, "This shows the following ..."

25 If you think it's wrong --

26 **MR HARRIS:** That's my point.

1 **THE PRESIDENT:** -- and the calculation has not been properly made under the
2 agreement, yes, you can of course correct it and it will be supplied to you within,
3 I imagine, the confidentiality ring.

4 **MR HARRIS:** Thank you.

5 **MR MOSER:** Sir, yes. We will gladly provide such a note.

6 Yes, sir.

7 **MR HOLMES:** Sorry, respond to the President and I will back to my question.

8 **MR MOSER:** I was going to say we would gladly supply such a note.

9 I think, Mr Holmes, if you want to ask the question, I think before I move on.

10 **MR HOLMES:** Okay. I was just coming back to the question of the ability to evidence
11 a claim.

12 You have taken us earlier, understandably, to North American case law in this area,
13 and we have referred to real-life experience. Is there anything that you might
14 be able to help us with in terms of real-life experience of consumers making
15 claims and evidencing them in relation to small claims? Perhaps from North
16 American experience, I know those instructing you have eminent background
17 there.

18 **MR MOSER:** I will give a few off-the-cuff examples and it may be helpful if we respond
19 during the hearing with a fuller note.

20 There are a number of ways that we see these matters dealt with in North America.

21 One way is simply to pay something to broadly all the members of the class, and
22 seeking in that way to reward those who have lost out.

23 Another way of doing it is to find a way of broadly identifying the people who are
24 suffering -- or have suffered -- the abuse and allow them to benefit in as best
25 and approximately a way as possible.

26 For instance, if you have a class of regular rail travellers, instead of giving everyone

1 a small amount of money, you get the companies to provide rebates over
2 a certain period until a sum that is said to have been suffered has been paid
3 off. In that way, you are, by proxy, rewarding those who lost out, but by creating
4 some other benefit for people who broadly fit into that class.

5 Another way of doing it is by having essentially a form of short affidavit at the
6 distribution stage and taking people's words for it.

7 There is of course the sort of cy-pres type arrangement, similar to the first one
8 I mentioned, where you pay into a fund for something that has a charitable
9 purpose similar to whatever it is that is thought to have lost out.

10 **THE PRESIDENT:** We can't do that, of course, we do not have the cy-pres, I think,
11 here.

12 **MR MOSER:** You do have rule 93(6), of course, of the rules where, subject to any
13 order made for distribution, the Tribunal shall order that all or part of any
14 undistributed damages are paid to a charity designated in accordance with
15 section 47C(5).

16 **THE PRESIDENT:** Yes, that's The Access to Justice Foundation but that is that they
17 can benefit from the unclaimed funds, but it doesn't deal with what Mr Holmes
18 was asking you, namely experience of, as it were, take up on small claims
19 where one has to provide some statement or evidence, as opposed to -- say
20 a lot of North American class action are shareholder actions and you have
21 a shareholder registry and they just send these cheques for \$2.09 to every
22 shareholder or whatever.

23 **MR MOSER:** As I say, I think the more sensible thing rather than my seeking to give
24 evidence of the North American experience on my feet is that we compile a note
25 on that.

26 **THE PRESIDENT:** That would be helpful and, again, if the defendants want to --

1 **MR HOLMES:** That's very much the sort of thing I had in mind, thank you.

2 **THE PRESIDENT:** -- respond on that, that would be useful.

3 **MR MOSER:** It is helpful.

4 There is this issue -- I would say two things about the distribution at this stage.

5 The first is that I repeat my submission that we do submit that it is more likely with rail
6 journeys that people will remember them than perhaps with other off-the-cuff
7 consumer purchases. You take a rail journey to visit somebody out of London
8 or to go to do a particular job. People have diaries, electronic and otherwise.
9 It is something that people do remember and therefore are able to have
10 a starting point for saying: what evidence do I need to show that I made that
11 journey? And they will know they didn't buy a boundary fare, because they will
12 have the sort of eureka realisation that these things exist and that they haven't
13 availed themselves of them.

14 That's partly a question almost of marketing, what Epiq describe. But as in my case,
15 once one is told about the boundary fare, it makes perfect sense and you
16 think: why did I never think about it? The fact is that that is something that
17 would be known to people, they will know that they haven't bought a boundary
18 fare because it's ... if you didn't know about it, you know you haven't done it.

19 It's not as peculiar and difficult as the other side make out.

20 The final point I want to make on this is that there is another limb to the policy, and
21 that is deterrents. It isn't just about rewarding the class members who have lost
22 out, it is also to deter the dominant undertaking from repeating or continuing
23 with the abuse.

24 So there is that other function.

25 **PROFESSOR MASON:** Mr Moser, just before you move on further to deterrents, if
26 you are going to expand on that point, I just want to put in one further related

1 question to the issue that we've been discussing but from a somewhat more
2 statistical angle. It might be that Mr Holt needs to respond further when he has
3 the opportunity.

4 We have so far discussed the average value, and I think there were some statements
5 that there will be some claimants above the average and some below the
6 average, that much must surely be true.

7 The distribution of these things though tends to be very skew, in part because the
8 distribution is truncated at zero of course, but often you get a large volume of
9 small claims and the average is dragged up by a small number of very large
10 claims.

11 Is there any evidence or any analysis that talks about the distribution of claim sizes?

12 If not now, is there likely to be at some stage?

13 **MR MOSER:** This comes back, sir, to the discussion we had about high, medium and
14 low yesterday. The evidence on distribution is effectively that table that we
15 looked at in relation to high, medium and low. Yes, the distribution will be very
16 varied. But at this stage, I do not believe Mr Holt has found himself able, on
17 such evidence as there is, to be more precise about exactly where the sums
18 lie.

19 I think that's all I can say on that at the moment. You will have an opportunity, I'm
20 sure, to put it to Mr Holt, who I imagine is listening to the livestream and will
21 have heard Professor Mason's question and we will see whether he can do
22 more.

23 **PROFESSOR MASON:** Okay, thank you, Mr Moser.

24 **MR MOSER:** Excuse me for one moment.

25 **THE PRESIDENT:** Sure.

26 **(Pause)**

1 **MR MOSER:** That's as far as I would like to take that point at the moment.

2 A quick comment on the witness statements -- we have dipped into one or two,
3 Mr Backway and Ms Hinde -- that the Proposed Defendants have produced
4 some witness statements. I do not propose at this stage to go through them
5 and comment on each point.

6 I would like to make some high-level remarks, and subject to my learned friends'
7 submissions on their own statements, I might need to reply, or perhaps not.

8 The main part of the witness statements for the other side seems to be around why
9 other fares might be cheaper than boundary fares, or why boundary fares may
10 not always be the most appropriate ticket for a passenger holding a Travelcard.

11 The first point is the one I addressed yesterday, which is when reading those witness
12 statements I would ask the Tribunal to bear in mind our case, which is that
13 boundary fares should be available, in principle, for any regular type of ticket,
14 and so many of the points, such as should they be available for advance fares
15 and so on, essentially argue past our case, or misunderstand our case.

16 Further, it will be a matter for proof at trial as to whether there are specific situations
17 where a passenger would not have suffered loss. I submit that the Tribunal is
18 not in any position, at the strike out or summary judgment stage, to reach a view
19 on whether the evidence is as it were right or wrong. There will be some
20 situations such as the one that we concede, which is Kids for a Quid, that one
21 example that we acknowledge, which, as Mr Holt explains, can without
22 exception be reflected as an exclusion to the class definition. A person who
23 purchased a paid for a fare which was not a boundary fare or a Kids for a Quid
24 fare, that's not a problem.

25 There are many pages of examples in the evidence that may at a high level look to
26 the casual observer like a significant number of circumstances where we might

1 need to say the definition could be further adjusted, and in particular LSER's
2 skeleton suggests that this calls the whole class definition into question.

3 Apart from our argument about where boundary fares should be available for all
4 tickets, all that I want to address in opening this is that, on any view, in my
5 submission, we are again dealing with a small number of cases here. Because
6 the examples that they referred to are advance fares or a variety of other fares.
7 We know from the ORR that in total -- I can probably show you this best in
8 Mr Holt's second statement, core bundle-tab 6 at page 231.

9 Table 2.1 shows us the journeys by fare type. We see, of all the journeys, even
10 advanced, which is the biggest category of non-anytime, peak, off-peak, are
11 only 6.5 per cent of fares, and all of the other promotional fares -- they are not
12 even split out -- but they are all going to be part of that line "Other: 2.8", so
13 some fraction of 2.8 are all of the other promotional fares.

14 We are again dealing with a very small percentage.

15 **THE PRESIDENT:** You say the only one that's remotely significant as an individual
16 category is advance fares. You say well there should have been an advance
17 boundary fare?

18 **MR MOSER:** Yes.

19 **THE PRESIDENT:** That's a matter for argument, as to whether there should or
20 shouldn't. The rest are not of such -- no individual one is of such significance
21 that it should lead to denial of certification?

22 **MR MOSER:** Correct. If the TOCs seeks to make much more of the arguments in
23 submissions, there are points I can make about each of them. But I submit that
24 at a strike out summary judgment stage, it's not appropriate to say there we
25 are, we have raised these points, it's not even arguable -- well it's not arguable
26 in a non-fanciful way that there are going to be answers.

1 As far as certification is concerned, it shouldn't hold up certification at this stage
2 because it's going to be very small.

3 On advance fares, I say a similar thing. I say in particular it can't be said that it's not
4 even a more than arguable case that there should be boundary fares on
5 advance fares. How can that not be more than arguable?

6 **THE PRESIDENT:** I see that point. I didn't quite follow when you said well shouldn't
7 accept the evidence. I mean, when they say this was the saving if you bought
8 a boundary fare or this would be the cost if you buy the boundary fare, but in
9 fact if you get a group fare or whatever it is, it's cheaper. I mean, that's not the
10 kind of thing that's going to be contested, is it?

11 **MR MOSER:** I am sorry, I put it loosely --

12 **THE PRESIDENT:** One can accept these individual statements from people and the
13 train operating companies, "These were the prices and that would have been
14 the result".

15 **MR MOSER:** Quite. I put it loosely as a general argument that at a strike out stage
16 it's not enough to say there's no opposing evidence and that's it.

17 I don't say that they are lying or untruthful when they say this is the price.

18 That really, sir, and particularly mindful of the time, brings me to the point where I think
19 I can start concluding my opening submissions.

20 The skeleton argument is there. On summary judgment/strike out, the paragraphs
21 that are particularly relevant, and which to an extent I've been talking to as I've
22 been going along, are paragraphs 18 to 39 of our skeleton argument.

23 Just using it, as it were, as a very quick speaking note, if we look at paragraphs 18
24 and 19 of our skeleton argument, I hope I have addressed the unrealistic
25 counterfactual criticism. You recall the point I made yesterday that viewed
26 through the correct prism then the strawman points, we say, fade away.

1 It may all become even starker in disclosure if one sees what the actual internal
2 awareness of boundary fares was or wasn't.

3 As far as the alleged over-inclusiveness of the class definition is concerned, well I have
4 made two types of point about this.

5 The first type of point I have made is a legal one, that you do not need to have a class
6 that contains only injured class members. A class may have -- may
7 have -- uninjured class members. We have seen the Canadian authorities on
8 that, and that is only logical, as I said yesterday, in a collective action of this
9 type.

10 It is no more broadly drawn or tightly drawn than it need be, but it is the requisite
11 definition of the class.

12 It can be refined further, of course, in ways discussed, and if necessary at trial. The
13 class definition doesn't necessarily have to be set in stone at the end of the
14 certification stage. It will depend in the end also on the evidence.

15 I have made the point just now as to how the prevalence of situations where boundary
16 fares are not the cheapest option are likely to be very limited, which is dealt with
17 at 25.

18 I have skipped over 24, which is the headline point, customers would not choose to
19 purchase a boundary fare if it was aware of its existence. I suppose the point
20 to be made here in relation to customer behaviour, but also in relation to
21 sufficiently available and the selling systems, is that boundary fares are
22 obscure, Travelcards are not. Travelcards are not an exotic ticket. They're well
23 known to the public and of course well known to the TOCs, they have a whole
24 agreement about them.

25 The boundary fare that goes with the Travelcard whenever you're travelling across
26 zones and out into the outer world beyond the London zones, the boundary fare

1 is the necessary corollary, it ought to be just as unexotic as the boundary fare
2 it's the yin and yang if you like of travel out of the London zones. The yin of the
3 Travelcard is well known, the yang appears to have been largely unknown.
4 That is the difference between the real world and the counterfactual that we
5 advocate for.

6 All the criticisms that are made, that somebody might make a mistake, somebody
7 might not be carrying their Travelcard on the train. These are criticisms that
8 could be made, again, of almost any class definition, that there could be human
9 error or similar.

10 Two points about that.

11 The first is that it's de minimis.

12 The final analysis, if at trial some real issue emerged in relation to any one category,
13 it could always be discounted from the definition, to reduce the aggregate ...

14 I think I have made my points about the alleged imprecision of the counterfactual. The
15 counterfactual world is one where boundary fares are as available as
16 Travelcards themselves, and always have been. There is some argument
17 over: what do you mean by sufficiently available? I've made my submissions.
18 It's not for us to say at the certification stage how one would bring about now in
19 the real world the situation as it ought to be in the counterfactual.

20 These are arguments around the counterfactual and how it might be created, but they
21 are not an argument about the abuse itself. The abuse, I submit, I have dealt
22 with in detail.

23 I have dealt yesterday with causation and I don't propose to repeat it.

24 In relation to the alleged lack of data, we have had the exchange --

25 **THE PRESIDENT:** I think you have made all these submissions, Mr Moser.

26 **MR MOSER:** That's the end of that point.

1 That only leaves the similar, although not identical, points around certification.
2 They are dealt with at paragraphs 40 and following of our skeleton argument. Again,
3 I submit I have really made these points.
4 In relation to authorisation of Mr Gutmann, there's no opposition.
5 In relation to eligibility for inclusion in collective proceedings, and rule 79, the same
6 points now arise. What has happened, of course, in this case --
7 **THE PRESIDENT:** Just pausing a moment, on the authorisation of Mr Gutmann, who
8 you are absolutely right it's not being opposed, it is still something the Tribunal
9 has to be satisfied that it's appropriate.
10 **MR MOSER:** Absolutely.
11 **THE PRESIDENT:** Because that's what's unusual about these proceedings, that the
12 actual claimants are not before us.
13 I don't think we need anything more about Mr Gutmann himself. Can you just point
14 me to, just for my note, the litigation plan, it's in bundle 1, isn't it?
15 **MR MOSER:** It is.
16 **THE PRESIDENT:** Yes, tab 10, that's your litigation plan.
17 Then you have a cost budget at tab 12, which is quite hard to read here, but am I right,
18 your budget is a bit under 11.1 million. Is that right?
19 **MR MOSER:** That sounds right.
20 **THE PRESIDENT:** I cannot read the detail very easily. Through to trial. Is that
21 correct?
22 **MR MOSER:** That's correct. Would it help if we obtained a bigger copy of this?
23 **THE PRESIDENT:** That would certainly help. As I say, I want to just -- I just want to
24 get the headline figures.
25 You have funding from Woodsford Litigation Funding which covers that 11.1 million.
26 Is that right?

1 **MR MOSER:** Yes. I need to get this right, one moment, sorry.

2 **(Pause)**

3 **THE PRESIDENT:** If it's easier for you, you can deal with it in reply, it's not technically

4 a reply, but it's not an issue with the defendants.

5 **MR MOSER:** The correct answer on the figures is that not the entire sum is funded

6 by the funder, there is a difference which is made up by way of CFAs,

7 conditional fee arrangements.

8 **THE PRESIDENT:** Yes, I see. Difference from CFAs ...

9 As far as adverse costs, liability, is that through ATE insurance or is it from the funder

10 who itself may cover its liability by insurance?

11 **MR MOSER:** That's through ATE insurance.

12 **THE PRESIDENT:** ATE insurance. That's covers an exposure of ...

13 **(Pause)**

14 It may be in tranches, as they sometimes are, that it's not all in one go.

15 **MR MOSER:** Yes, and there is also, sir, as you will recall, there's an indemnity. There

16 was some discussion of that --

17 **THE PRESIDENT:** Yes.

18 **MR MOSER:** -- at the CMC. So it's partly ATE insurance, partly the indemnity.

19 **THE PRESIDENT:** Indemnity from the funder?

20 **MR MOSER:** Yes.

21 **THE PRESIDENT:** Right. It's the first of those, of how you cover your budget, that it's

22 in a sense the most important for our purposes.

23 Thank you.

24 **MR MOSER:** We will get you a larger copy of that.

25 **THE PRESIDENT:** Yes.

26 Right, you were just mentioning that certification is dealt with, from paragraph 40

1 onwards, and you had gone on to rule 79, paragraph 48.

2 **MR MOSER:** Indeed, sir.

3 There is an element to which the arguments that were originally, at least by two of the
4 PDs, of the TOCs, originally brought as certification arguments, have
5 been -- I don't mean that in a pejorative sense -- rebranded as strike out
6 arguments after Merricks. So, many of the same arguments that normally we
7 would have addressed only as collective procedure arguments have already
8 been addressed in the context of the strike out summary judgment.

9 I do say much of the same that I have said in relation to strike out, and I say that if the
10 Tribunal is with me on the cause of action, any of the points in relation to strike
11 out, then it is a fortiori in relation to the lower bar, as the Supreme Court has
12 explained it, for the CPO, on those points.

13 Again, I do not propose to deal in enormous detail with all of these points, we have,
14 again, the question of the -- and rule 79(1)(a) and we see our skeleton
15 argument -- identifiable class of persons. We have dealt with that. If they're
16 sufficiently identifiable and acceptable to be acceptable for strike out purposes,
17 I say they are for certification purposes.

18 We have explained why there is no risk of double recovery and so on.

19 Common issues I have gone through in some detail.

20 The same, similar or related in the UK way, or, as we have seen broadly the Quebec
21 way, is it's broader even than the common law provinces of Canada.

22 **THE PRESIDENT:** I think to be fair, Mr Moser, you have made all these points.

23 **MR MOSER:** Yes. I would simply say that in my respectful submission it can't be
24 reasonably maintained that these points, and I have listed them, including
25 mitigation and contributory negligence as the other side call it, but we say they
26 are really just species of quantification, that they are not similar or related, at

1 the very least.

2 If one then skips on to whether this is suitable to be brought in collective proceedings,
3 what Merricks tells us about the suitability under rule 79(1)(c) and 79(2) is that
4 it is a relativist approach. So are they suitable to be brought in collective
5 proceedings, as opposed to separately?

6 I may simply have to repeat that the headline, which is that the alternative, speaking
7 with Judge Posner loosely, is not 2.5 million individual claims, but zero claims.

8 A big plus factor in the balance, speaking with Lord Briggs at paragraph 62 of his
9 judgment, is that all the big issues in dispute are common issues in this case,
10 making it particularly suitable.

11 We say the benefits will outweigh the costs -- obviously we have had the discussion
12 this morning, sir, around costs and who is going to claim. We do take the view
13 that if you build the fund, then they will come, and even people who have --

14 **THE PRESIDENT:** Mr Moser, sorry to stop you, but we have these points and you
15 are now just repeating them. I don't think you need to do so to get them across.
16 If there's something new you want to say -- I appreciate you have taken me to
17 your skeleton and previously you were doing it orally, but I think at the moment
18 all the points you are making off the skeleton are points you have addressed
19 us on.

20 **MR MOSER:** I will, at the third time of asking, sir, take your hint and rest my case
21 there. Unless there are points on the CPO which I can further assist the
22 Tribunal at this stage?

23 **THE PRESIDENT:** I think the sensible thing to do is to take our break. You have gone
24 on longer than anticipated, but we did ask you, particularly on the cost benefit
25 side, quite a lot of questions, and we had always anticipated we might need
26 Thursday morning for the Proposed Defendants.

1 If we take a break now until 12 o'clock, if we have any questions we'll put them then,
2 and if not, one or other -- no doubt you have agreed between you -- the
3 Proposed Defendants' counsel will then address us.

4 We will metaphorically rise until 12 o'clock.

5 **(11.50 am)**

6 **(A short break)**

7 **(12.02 pm)**

8 **THE PRESIDENT:** Mr Moser, just one thing I raised with you yesterday this question
9 of breaches post-issue of the claim form, and I think it was through you that we
10 were sent a short extract from McGregor on Damages.

11 What do you say is the answer to that?

12 **MR MOSER:** Sir, I realised in the short break that we had done that and I hadn't yet
13 taken you to it, so that was the only point we had also.

14 The basis for our claim beyond the date of issue. We submit that the answer is as
15 follows -- I say immediately that the answer is not as clear as I would like it to
16 be. We submit that we are entitled to claim damages up to the date of judgment,
17 and we have brought the passage from McGregor on Damages about the
18 history of these things in relation to certainly High Court claims.

19 As you recall, there was old authority about, in continuing wrongs damages in common
20 law only being awarded for loss occurring before commencement of the claim.

21 That was then modified, or abrogated by the previous rules of court, the RSC -- RSC
22 order 36, rule 58, which later became renumbered, eventually it ended up as
23 RSC order 37, rule 6. That allowed damages to be assessed in a continuing
24 cause of action case "down to the time of assessment". That is all set out in
25 (inaudible)'s text.

26 This is taken from the current edition of McGregor on Damages, the last edition that

1 McGregor on Damages himself would have had a hand in.

2 The relevant section is at 11-027. It doesn't seem to happen very often because the
3 only clear case in which the rule was applied dates from 1894, it was a nuisance
4 action, and one can see how in general tort cases it would arise most often in
5 nuisance actions.

6 What McGregor says at the bit starting just after footnote 122:

7 "However, nothing to the same effect as the old rule of court makes an appearance in
8 the Civil Procedure Rules, this apparent lacuna suggests that there is no longer
9 provision for assessment of damages down to the date of trial, which would be
10 an unfortunate and presumably unintended result. It would be particularly
11 unfortunate in nuisance cases."

12 I might add a footnote, "... and in competition law cases":

13 "In whole ... the Court of Appeal seems to have considered the jurisdiction to award
14 damages down to the time of assessment was derived from the then RSC order
15 36. If this is so, logic would suggest that providing that one of the CPR rules
16 can be found to be broad enough to encompass the power previously contained
17 in order 36 and its successors, the sensible and highly convenient jurisdiction
18 to award damages to the date of assessment may be taken to have been
19 preserved. The obvious candidate is CPR rule 1.1. This states in its subrule 1
20 that these rules are a new procedural code with the overriding objective of
21 enabling the court to deal with cases justly."

22 He draws the parallel with order 26.

23 A few lines down:

24 "It may be of course the compilers of the CPR are not troubling to replace the form ...
25 but are relying on the fact that in practice an assessment of damages to trial
26 would be agreed between the parties [that is a practical way of doing it], as it

1 can be in the interests of neither that otherwise fresh actions would have to be
2 brought in a continuum with all today's high costs implications of such
3 a procedure."

4 The authors go on to say that the alternative then is to sue again.

5 Where does that leave the CAT? What we submit is that there is the possibility, under
6 the rules of the CAT, which mirror the CPR, in particular that is rule 4, which
7 has the same sort of effect as -- to do the McGregor manoeuvre, as it were.

8 If McGregor is right, then we seek the claim period that I explained yesterday.

9 That might be complemented by the fact that the CAT's statutory power to award
10 damages, or any other sum under section 47A of the Act -- which is in
11 authorities bundle 1, tab 1 -- is in my submission more than arguably wide
12 enough to include damages up to the date of judgment.

13 The CAT guide says, at paragraph 5.5:

14 "Generally, if the claim for damages or sum of money, whether follow-on or
15 stand-alone, could be made in civil proceedings in any part of the United
16 Kingdom, then it can be made in proceedings before the Tribunal."

17 My short submission is a more than arguable case for the longer claim period to go to
18 trial. Obviously if I lose on that at trial, it will be the shorter claim period.

19 **THE PRESIDENT:** Yes, and you have not found anything that has actually --

20 **MR MOSER:** No.

21 **THE PRESIDENT:** -- considered this, there is reference, you have said, to a case
22 from 1894, but there's nothing that has actually addressed this in recent times?

23 **MR MOSER:** There is one very recent case that mentions Hole v Chard Union, but
24 not in a way that is relevant.

25 I am afraid our researchers have turned up nothing more recent.

26 **THE PRESIDENT:** Right, okay, thank you very much.

1 **MR MOSER:** Thank you.

2 **THE PRESIDENT:** Who is it who goes first?

3 Mr Harris.

4

5 Submissions by MR HARRIS

6 **MR HARRIS:** Thank you, sir, members of the Tribunal, good afternoon. I appear with

7 Ms Anneliese Blackwood and Mr Michael Armitage for LSER, in one of the two
8 claims.

9 **A** quick roadmap for my submissions, I deal principally with those issues in the case
10 that we say, as defendants, are apt for summary dismissal.

11 For the same reasons that they are apt summarily to be dismissed, they also mean
12 that the case is not suitable for a CPO under the certification regime, and
13 certainly in combination with the other reasons of non-suitability that are to be
14 developed by Ms Abram and Mr Ward.

15 I have six topics, but you will be delighted to hear the first two are by far the largest
16 and will take up the bulk of my submissions, and they relate to two very
17 important questions, not yet addressed in the new regime.

18 The six topics are set out in the subsections of my skeleton, and in a moment I will
19 complete the roadmap to tell you what the other four are. But the first two -- by
20 far the most important for my submissions and in my respectful submission for
21 this case -- are.

22 First, has the new regime for collective actions done away with the requirement to
23 show causation in the case of a top-down aggregate damages claim? Such
24 that heterogeneous and bespoke causation issues that arise on the facts of the
25 case can be brushed under the carpet by simply assuming that they are fulfilled.

26 That's the first topic. A fascinating topic and we are diametrically opposed. We say

1 no you cannot just assume away all these bespoke heterogeneous causation
2 issues but Mr Gutmann says you can. That's what I will turn to first in a moment.
3 Notably, this first issue is not confined to the CPO stage. Mr Gutmann's approach
4 does not allow for a defence by the defendants by reference to individual
5 aspects of causation and liability at any point. They are simply disappeared.

6 We shall see that that's not how matters proceed in either North American jurisdiction,
7 and it is certainly not how they were dealt with in Pioneer v Godfrey in the recent
8 Canadian Supreme Court case. So that's the first issue.

9 The second major issue is: does a Proposed Class Representative, a PCR, need to
10 be able to show a workable methodology with a realistic prospect at the CPO
11 stage? We say yes, he does, and that Mr Gutmann has not done so in this
12 case.

13 **THE PRESIDENT:** Sorry to interrupt you, a workable methodology, you say, with
14 a realistic prospect? Prospect of what, sorry?

15 **MR HARRIS:** Of being capable of worked on the facts of the given case. It has to be
16 workable and we will see that that very phrase appears in the Canadian case
17 law.

18 Workable methodology. If it's not workable, it doesn't have a realistic prospect.

19 **THE PRESIDENT:** Realistic prospect of being applied, yes.

20 **MR HARRIS:** Of being applied on the facts of the case, yes. That is very much a task
21 for the Tribunal at this CPO stage. Of course, you know what I pick up in this
22 regard, what I say and indeed it's common ground that it's absolutely critical to
23 Mr Gutmann's case that he's able to show the relevant overlap between an
24 in-scope journey and a particular Travelcard.

25 But he simply cannot do that.

26 At the highest level, he cannot identify either the people who bought the in-scope

1 tickets or the people who held the particular Travelcards. He can't identify either
2 of them. That's common ground, that he can't do that.

3 Of course, not being able to identify either the people who bought the in-scope tickets
4 or identify the people who bought the Travelcards, he does not have any hope
5 of matching them up.

6 Mr Holt, to be fair to him, he acknowledges that he cannot do that, he says it's simply
7 impossible. Nevertheless, of course, Mr Gutmann and Mr Holt say that they
8 have what they effectively called an acceptable methodology. But it's important
9 to note that what they regard and submit as acceptable is not the actual overlap
10 that they need to establish. Let alone for a given transaction, and certainly not
11 for all transactions for which they make a claim.

12 Instead, what Mr Holt does, with respect to him, is he creates a double-proxy method
13 of creating a make-believe data set of overlap, make believe because it's not
14 the actual data and he acknowledges that.

15 But the problems that render it unworkable is that, again with respect to him, and for
16 what it's worth I have some sympathy because he's been set an impossible
17 task, but what he has to do is build in layer and layer of assumption and analogy
18 and averaging. It's best summed up for these introductory purposes by
19 Mr Holt's own words, you don't need to turn this up but the reference is
20 paragraph 3.1.5 of his first report. He says that what he is actually doing is:

21 "Forming a view, in the round, based on indirect evidence."

22 So he acknowledges he can't do what he has to do, so instead he's going to make
23 a view, in the round, on some indirect evidence. But as I will attempt to expose
24 when I deal with this point in more detail, there are just far too many flaws in
25 that attempt for it to be workable in anything resembling a reasonable and just
26 manner on the particular facts of this case.

1 Then, notably on the second topic, Mr Gutmann also appears to say, at least as
2 a fallback argument:

3 "Well, actually, you know what maybe I don't need to show a workable methodology
4 at this stage, because I can speculate or assert that I will be able to get some
5 more evidence at a later point and then I will be able to do something different."

6 We say, with respect, no. Methodological flaws in the method that's actually put
7 forward are apparent now, at this stage in this case, and they do not depend in
8 any way, shape or form on getting more data or evidence, in this case. So they
9 absolutely should be assessed now.

10 Those are the two major issues. Causation assumed and unworkable methodology.

11 In a moment I will identify the four much smaller issues on the roadmap, but before
12 I turn to those -- so you have the full roadmap in my opening introductory
13 comments -- just can I make a few introductory remarks about the scheme that
14 applies to these first two major issues.

15 The first remark is this: just because a PCR wishes to conduct a top-down aggregate
16 methodology, that does not mean that every time such a methodology
17 encounters a problem, making it unsound or not grounded in the facts of the
18 particular case, nevertheless the problem can simply be averaged or assumed
19 away. That is to put the cart before the horse.

20 The question is whether the claim is suitable to proceed in aggregate and top down.

21 It is not because I want to proceed in aggregate and top down, therefore
22 obstacles can be just assumed away or ignored. It is to be remembered, with
23 respect, members of the Tribunal, that collective proceedings do not have to
24 proceed by way of aggregate damage.

25 My second comment that relates to both of these major topics is it's simply not the
26 defendant's fault if the data doesn't exist for a top-down methodology.

1 It is up to the PCR to come up with a sound methodology that works, given the facts
2 and data of a particular case.

3 Again, it's worth remembering that it's not obligatory to pursue a top-down
4 methodology, even in an aggregate damages case.

5 It takes me on to my third remark, that in some cases a methodology on an aggregate
6 top-down approach just will not be possible. Those are the facts of life.

7 As it happens, they are the facts of this case. There is simply not the required data at
8 the aggregate level to determine the overlap, there just aren't, that's completely
9 common ground, and it's worth just remarking that that would not be a problem
10 in an individual claim. In an individual claim, you would assess these matters
11 individually, by reference to what evidence an individual had as to a particular
12 overlap.

13 It's because this is being sought to be done in an aggregate top-down manner that the
14 problem arises, but, as I have said a moment ago, you don't have to do
15 aggregate and you don't have to do top down.

16 On top of the overlap problem, there are also, that on the facts of this particular case,
17 the causation and counterfactual issues are simply too heterogeneous. They
18 go both to the question of whether there's even been an abuse and to the
19 question of whether or not there's even been a loss.

20 Mr Gutmann's answer is, well, I will just assume that they are in my favour.

21 As I shall develop in a moment, that's wrong in principle but it's also absolutely not
22 what happens in Canada.

23 Again, it's worth noting, that that's not what one does in an individual claim. Per
24 Merricks, Lord Briggs, we are in a relativist jurisdiction where we compare what
25 would happen in an individual claim with a collective claim. One does not, with
26 respect, in an individual claim, enter the courtroom and say, "I'm an individual,

1 I am going to have trouble showing liability or causation or loss, so let's just
2 assume it all in my favour".

3 That is anathema to the way in which an English court proceeds and it's not been
4 overturned by Merricks, I will come back to that.

5 The truth is that some cases are simply not apt for aggregate top-down approaches.

6 I will show you a trilogy of Canadian case law that Mr Moser didn't take you to
7 but which is cited in our skeleton argument, in which it's made abundantly clear
8 that in those cases, where there are bespoke and individualised causation and
9 counterfactual issues it's unlikely -- well, they are not suitable for certification
10 because they are not realistic.

11 Then, fourthly, it's not up to the Proposed Defendants to come up with data at the CPO
12 stage. With respect, Mr Holt's report, and to some extent Mr Gutmann's
13 skeleton argument, are replete with examples of them saying effectively, "Well,
14 the defendants have not produced any contrary data so let's just go with my
15 averaging and my assumptions".

16 With respect, that's the wrong way round, it's wrong in principle. It's for Mr Gutmann
17 and his expert to make out his workable methodology by reference to data and
18 assumptions that he puts forward at the CPO stage.

19 Closely related, fifthly -- I only have six remarks -- if it is said by a claimant that the
20 answer to any particular methodological problem is X, then X has to be spelled
21 out at the CPO stage. That's because the Tribunal has to test it.

22 We know from paragraph 4 of Merricks Supreme Court that the Tribunal today is
23 engaged in "an important gatekeeping role".

24 In my submission, it's not acceptable, given that that is your function, for a PCR to say
25 essentially:

26 "Well, oh well, don't worry, we'll think of some other solution at a later stage or we will

1 refine or alter this one in some fundamental manner later. So let's just kick the
2 can down the road."

3 The most obvious examples in this case are Mr Holt's basic outline of a proposed
4 customer survey. That is not identified in anywhere near sufficient detail for it
5 to be a solution, and that which is identified is, with great respect, riddled with
6 flaws that I will take you to in due course.

7 Then another one that I will take you to in specific detail is the one that's repeatedly
8 advanced by Mr Moser as his backstop answer to all of these problems, it is
9 effectively:

10 "Oh, I will just take out these transactions. If ever there's a problem, ultimately, don't
11 worry, I will just take them all out".

12 But, with respect, he cannot do so for reasons that I will elucidate in due course. He
13 would have to provide the precise methodology for doing it, and it's not good
14 enough to simply say, "Oh well, don't worry, somehow or other I will be able to
15 take them out". But there's a flaw in principle in this case in any event.

16 Sixthly, and finally, but an important point by way of general remark to these two major
17 topics, is that a lack of causation, or an inability to establish loss, those are
18 constituent elements of a cause of action. They amount to, or put another way
19 they amount to defences. If a defendant can show there was no causation or
20 there was no loss or both, then those are defences. Defences, in my respectful
21 submission, they can't simply be assumed away just because a PCR wishes to
22 proceed in a top-down aggregate manner. To do so would ride roughshod over
23 basic rights of due process and defence. And, as I shall show you, it's not what
24 happens in Canada.

25 Finally, by way of overview remark before finishing off the roadmap, I just want to
26 explain what is the lens through which we should view these two major issues,

1 these two genuinely interesting and genuinely large and genuinely new issues
2 for this regime in this country.

3 Our case is as set out in the skeleton. It is that a conceptual approach to a claim has
4 to show a realistic prospect of success at the CPO stage. It has to be, if you
5 like, to quote you, sir, Mr President, from Merricks it has to be "methodologically
6 sound". That was paragraph 77 of the Merricks Tribunal judgment, or it has to
7 be -- this is drawn from Pro-Sys which was preceded by Hollick in the Canadian
8 Supreme Court -- "grounded in the facts" of the actual case.

9 My submission is simple, if it is not sound, the conceptual approach, which includes
10 the methodology, if it is not realistic, if it is not grounded in the facts of the actual
11 case, then it shouldn't proceed.

12 That can be viewed through the lens of summary dismissal or certification.

13 Summary dismissal, it means there is no realistic prospect or no properly triable claim
14 or no reasonable grounds for making the claim, there I am just quoting from the
15 well-known terms of rules 41 and 43, which we looked at today.

16 Alternatively, through the CPO certification lens, it can be seen for those same reasons
17 the claim isn't eligible, because a claim that is not sound, not realistic, not
18 grounded in the facts is not suitable.

19 So the two essentially merge for my purposes.

20 I don't need or want to get caught up in the semantics or the case law, I don't take
21 issue with the principles in EasyAir or Swain v Hillman or any of the other
22 well-known summary dismissal cases, I simply remind you of two passages in
23 EasyAir that Mr Moser did not read it out. I do not need to turn it back up, if you
24 want the reference back to EasyAir authorities bundle 3, tab 22, Mr Moser took
25 you to these yesterday but he didn't read out in paragraph 15(iv) that you do
26 not have to "... take at face value and without analysis everything that a claimant

1 says ... it may be clear that there is no real substance in factual assertions made
2 ..."

3 That's absolutely what I say about this case.

4 Then at paragraph 15(vi), why does the court grasp the nettle of summary dismissal
5 at what we say is an important gatekeeping -- indeed Lord Briggs says is an
6 important gatekeeper stage here. Again I quote from EasyAir,
7 paragraph 15(vii). The reason you grasp the nettle is:

8 "The reason is ... simple: if the respondent's case is bad in law, he will in truth have no
9 real prospect of succeeding on his claim ..."

10 That's all the more acute in my respectful submission in the context of a massive and
11 very expensive CPO action in which, as was pointed out in Merricks in the
12 Supreme Court, there is a danger of oppression upon defendants, far more so
13 than in a ordinary claim.

14 My suggestion is that, with respect, if having made my submissions that there's an
15 obvious flaw and unfairness in the case as regards causation, and/or if, having
16 heard me, you are persuaded that there is a non-workable and non-fair,
17 non-reasonable methodology, then at this gatekeeper stage you will keep the
18 gate shut. Viewed through either lens, summary dismissal or CPO suitability.

19 As you know, in my submission there is no workable or realistic or sound methodology
20 on the facts of this particular case.

21 So then back to the roadmap, and this will be much quicker finishing off what the third,
22 fourth, fifth and sixth points.

23 The third point is some law: how does one approach a collective case at the CPO
24 case, in which it cannot be seen that there will ever be a way of determining
25 who has a claim and who does not?

26 Here there's an illustrative pair of US cases, In re Nexium and In re Asacol, as cited in

1 my skeleton argument. What the answer that they provide -- incidentally this is
2 also an answer that's provided in Pioneer v Godfrey, I will come back to that.

3 The answer is that in a case that doesn't suffer from the flawed causation assumptions,
4 such as our case, but let's assume we didn't have that problem, it is acceptable
5 to proceed when there is only a de minimis number of possibly uninjured
6 claimants, but, where it appears that there is more than a de minimis number
7 of class members who will or who may not have suffered a loss, as in this case,
8 then there simply must be a way, at the CPO stage, of winnowing out the injured
9 from the uninjured as part of the methodology.

10 Put another way, as we will see in the exact ratio of In re Nexium and then In re Asacol,
11 you don't have to have winnowed them out but you have to demonstrate to the
12 certification court that you have a methodology that is capable of winnowing
13 them out.

14 If you are not persuaded at the CPO stage that the methodology is even capable of
15 winnowing them out, then the claim cannot be certified.

16 That's for a very simple reason. Unless there is winnowing out, it would mean that the
17 defendants will end up paying for more than a de minimis amount in respect of
18 non-claims. Ie claims where the defendants have not broken the law and/or
19 where they have not caused any loss.

20 **THE PRESIDENT:** That will depend, will it, on how the loss is calculated? If it's
21 calculated based on the size of the class in terms of members, then it would. If
22 it's calculated some other way, then it might not.

23 **MR HARRIS:** The problem in this case as I shall develop, in the first point in detail, is
24 that you cannot -- I am talking about the facts of this case.

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

26 **MR HARRIS:** The only reason you can get to your aggregate top-down methodology

1 is to assume causation in every single transaction, then that is unrealistic and
2 it doesn't face -- that is not a realistic case to run. It is not grounded in the facts
3 of the case.

4 I take your point, sir, if -- if -- you had a case that didn't have these causation problems
5 and was aggregate top down, then that might be an answer. But this isn't that
6 case.

7 Indeed, *Pioneer v Godfrey* 100 per cent support the approach that I am advocating
8 and submitting. *Pioneer v Godfrey* when we turn back to it, it draws an express
9 distinction -- express -- between what needs to be shown at the certification
10 stage and what happens. You, sir, with respect made this point yesterday when
11 you remarked during my learned friend's traverse of *Pioneer v Godfrey* that it
12 refers to the so-called common issues trial and it draws a distinction between
13 what happens at certification and what happens at the so-called common
14 issues trial.

15 It points out, in *Pioneer v Godfrey*, that at the so-called common issues trial there has
16 to be an opportunity for the defendants to defend themselves, including on
17 issues such as causation and not causing loss. But this is not that case.

18 This case simply gives no such opportunity, ever, to test these matters. It means that
19 the defendants' defences are, as I said before, entirely swept under the carpet
20 for all time.

21 My learned friend, with respect to him, simply did not grapple with this point. He simply
22 asserts, "Don't worry, it's de minimis". As we shall see, he has not shown that,
23 and the burden is upon him and in any event it's plain in my respectful
24 submission on the material before the Tribunal that that's not right, plainly not
25 de minimis.

26 In any event, that's the third point and that will be much shorter when I get to it, I have

1 given an outline.

2 Fourth, fifth and sixth, much quicker.

3 My fourth point on the roadmap is that in any event, whatever view you take as to my
4 submissions on the first three points, there is no properly triable claim regarding
5 third-party retail vendors of LSER's tickets. In a that's because, as we shall
6 see, on the unopposed evidence, far from being agents of LSER for these
7 purposes, the third-party retail vendors are our competitors. That's inescapably
8 established in the material before the Tribunal that I will take you to. It's trite to
9 say that we are not responsible for the competing behaviour of our competitors.

10 That's all I have to say on that one for now. That leaves points five and six. Very
11 briefly, there's no realistic basis, whether pleaded or in the factual
12 evidence -- this is point five -- for the allegation that the defendants have broken
13 the law by not making available certain types of boundary fare altogether,
14 specifically advanced boundary fares and promotional boundary fares. It's not
15 pleaded. Even if it were properly pleaded it would be hopeless, it's undermined
16 by the admission by my learned friend that it doesn't even apply to all of these
17 cases, but without specifying which ones they are or how one is supposed to
18 determine that. In any event, it simply falls flat on its face because far
19 from -- the great irony of this point is that far from amounting to double charging
20 or overcharging somehow. To the contrary, if we did have a legal duty to make
21 available these fares, which we don't, but if we did it would amount to double
22 discounting. With respect, it's hopeless to suggest that we have a legal duty to
23 make available extra and double discounting.

24 Then last point on the roadmap, indeed I probably will not ever need to revisit this it's
25 so short, is just for the sake of good order and completeness, LSER does
26 continue to submit that dominance is not common. This is a point of contrast

1 between the LSER claim and the other two Proposed Defendants.

2 My learned friends will be addressing you in more detail later on about lack of suitability
3 arising from lack of commonality, but just so that you don't lose sight of it, we
4 do contend that there's a lack of commonality on dominance. For that we rely
5 upon, in particular, paragraphs -- you don't need to turn them up -- 23 to 26 of
6 first Backway, which is in the core bundle, I think it's tab 15 but I will be
7 corrected in a minute if I have that wrong.

8 What that shows is uncontested, and uncontroverted evidence under the heading
9 "Competition in the market for London regional travel" that there is significant
10 substitutability between some flows on some routes at some times of day.

11 It's simply not disputed, that evidence. There's no contrary evidence. In any event,
12 with respect, in my submission it's obvious.

13 On top of that, it sits alongside other uncontroverted evidence about LSER being
14 subject to considerable competitive renewal pressure and being heavily
15 regulated on this exact area of activity.

16 My simple point that I probably will never --

17 **THE PRESIDENT:** Sorry, the last point, heavily regulated, might be a defence to
18 dominance but it doesn't make it not a common issue, does it?

19 **MR HARRIS:** I am prepared to leave that one to one side.

20 For commonality purposes, the principal point is the uncontroverted evidence of
21 substitutability and the very point is that it relates to some flows on some routes
22 at some times of day and therefore to some of the transactions that are the
23 subject of Mr Holt's methodology. That means it's not common.

24 It's an important point because, of course, I hardly need to tell the Tribunal that if we
25 are not dominant in the first place there's absolutely no claim at all. So it's the
26 difference between having a claim and not having a claim at all.

1 You cannot say that a claim is the same, similar or related to a non-claim. It's
2 incoherent. That's why it's an important point and that's all I ever need to say
3 about it.

4 What I will do then, with the Tribunal's permission, is turn to the first of the two really
5 big topics, what I call causation assumed.

6 What I say here in a nutshell, and I am principally going to make these submissions
7 by reference to the trilogy of Canadian cases, is that you can't just assume
8 causation, that's what's done in the expert methodology in this case. Assuming
9 causation for every single transaction is simply not grounded in the facts, there
10 are far too many bespoke and individual variables. Therefore, to simply
11 assume them away is wrong in principle, and it tramples on our rights of
12 defence.

13 For good measure, of course, having realised that you can't simply assume causation
14 for every single transaction, which is what's done here, it leaves Mr Gutmann
15 with a fatally over-inclusive class definition, because his class definition
16 proceeds on the basis that every single in-scope overlap transaction gives rise
17 to a loss.

18 The best way, if I may respectfully suggest, to deal with this is by reference to these
19 three Canadian cases that you haven't seen.

20 The first is in authorities bundle 6, and it's the case of Dennis, and it is at tab 11.

21 It's a 2013 case in the Ontario Court of Appeal, so it's authorities 6, tab 11.

22 **THE PRESIDENT:** Yes.

23 **MR HARRIS:** It's worth noting, just on the front page, that it began life in the Superior
24 Court of Justice, then it was appealed to the divisional court and we are now at
25 stage three, Court of Appeal for Ontario.

26 It's worth also noting on page 2, second page, that's 2876 of the bundle, this was

1 a case in which there was a claim by so-called problem gamblers, that's people
2 who couldn't help themselves but to go to gaming casinos. The second line
3 down on page 2:

4 "The claim against OLG [that's the Ontario Lottery and Gaming Board] is based on the
5 allegation that OLG failed to exercise its best efforts to exclude him from his
6 facilities."

7 Of course I focus on that, because there's a very close parallel to what's said in this
8 case. A failure to make best efforts to exclude. What we will see in a moment
9 is that all three courts who considered it said, "Hang on a minute, we need to
10 decide what would have happened in the counterfactual. If there had been best
11 efforts, well what would any given person have done?"

12 Then they go on -- to steal my own punchline -- to say that was far too bespoke and
13 individualised, we cannot possibly do that on an across-the-board basis.

14 **THE PRESIDENT:** It's not a claim on which the merits jump out on one, is it?

15 **MR HARRIS:** I didn't catch that.

16 **THE PRESIDENT:** It does not seem a claim in which the merits spring out in the
17 favour of the Applicants.

18 **MR HARRIS:** I would like think that I am not a problem gambler or one in Ontario, but
19 to be fair to the problem gamblers, what they said was, "Hang on a minute we
20 signed a form and gave it to you, OLG, and specifically said: don't let us in".
21 The allegation was that having signed the form and handed it in, OLG failed
22 really to do anything sensible about it.

23 To be fair to the gamblers that's what they said were their merits. They were trying to
24 help themselves and they have not been helped in return.

25 I just want to pick it up at, first of all, on page 2887 of the bundle, paragraph 27. Under
26 the heading "Class definition".

1 **THE PRESIDENT:** Paragraph 27?

2 **MR HARRIS:** Yes. Here it's talking about the motion judge, so that was the first
3 instance judge. I simply draw your attention to that paragraph, because one of
4 the reasons that he described it as not a case for certification was because the
5 class as identified was over-inclusive, and this is the last two lines:

6 "... as it cannot be assumed that everyone who signed the form is a vulnerable
7 pathological gambler."

8 All right? So that's parallel to our case because our class definition for Mr Gutmann
9 does assume in every case.

10 **THE PRESIDENT:** Where is the class definition?

11 I think it's paragraph 2, is it? All residents of Ontario and the US --

12 **MR HARRIS:** Yes.

13 **THE PRESIDENT:** -- who signed a self-exclusion form.

14 **MR HARRIS:** That's right. That's the parallel. It was assumed in his case that every
15 single time somebody signed a self-exclusion form, then when best efforts had
16 been made in the counterfactual, they would have been excluded. What this
17 case says is:

18 "No, absolutely not, you have to look at them one by one because in the counterfactual
19 they could all have reacted very, very differently depending on who they were
20 and what their precise situation was."

21 But, the identification of the class simply assumed that they were all victims. That's
22 paragraph 27. Turning to it in more detail, if you please turn to paragraph 29,
23 this time under the heading of "Common issues", it says in paragraph 29:

24 "The vulnerability of each class A member [that's the actual gamblers, class B was
25 family members of gamblers] is essential to the validity of the claims. Whilst it
26 can be presumed that most self-excluded patrons were at least apprehensive

1 about their vulnerability, the degree of their addiction, if any, and the significance
2 to be attributed to the concept of personal autonomy could only be determined
3 on an individual basis."

4 Then the motion judge -- this is again recalling the first instance, I will obviously take
5 you to the remainder of this Court of Appeal, he rejected the contention that the
6 problem of the heterogeneity of the proposed class could be overcome by
7 statistical evidence, "... indicating that approximately 87 per cent of
8 self-excluded individuals would be likely to be pathological gamblers."

9 Exactly, that's exactly what Mr Gutmann tries to do, and in this case they were said
10 no:

11 "The motion judge explained that the liability could not be determined on the basis of
12 statistical probability, as the CPO is a procedural statute that does not abrogate
13 the requirement that a defendant can be found liable only to those persons who
14 can prove their claims. In the motion judge's view liability could only be
15 established by an enquiry into the personal circumstances of each class
16 member at particular times, their gambling history, the extent of their addiction
17 or compulsion to gamble and [this one is the most relevant] their likely
18 behaviour if OLG had exercised its best efforts or reasonable care."

19 Exactly, that's exactly our case. What would have happened in the counterfactual on
20 these individualised, bespoke and heterogeneous circumstances? The court is
21 saying sorry the facts of this case are such that that's too individualised and the
22 defendants have to be allowed to defend themselves.

23 So parallels to our case.

24 Propensity to gamble is akin to propensity to seek price optimisation, or propensity to
25 spend more time and effort for a nil or tiny boundary-saving reward.

26 It's also bespoke as to whether or not these people in Mr Moser's proposed class are

1 likely to get reimbursement.

2 I shall develop all these points, but I am just explaining for the moment that there are
3 many, many parallels to the individualised circumstances, and even more
4 so -- this will be developed when I get to paragraphs 18 of our skeleton
5 argument, a key paragraph -- is: what would happen by way of purchase in the
6 counterfactual world? There are myriad other tickets that could have been, and
7 could well have been, bought. It all depends upon the circumstances. Could
8 have bought an advanced fare. Could have bought a point-to-point fare. Could
9 have bought a promotional fare. Could have bought a group discount fare.
10 Could have bought a Kids for a Quid fare and Mr Moser, with respect to him
11 and Mr Gutmann and his expert, they have no idea, and they never will.

12 They simply assume that in every case: it must be a boundary fare. That's wrong in
13 principle.

14 As the motion judge is recorded as having said -- I beg your pardon this is now the
15 Court of Appeal in 32, over the page at the first hole punch:

16 "The issue of causation would also require an individual enquiry into whether there
17 was a causal link between losses incurred by class members and the alleged
18 breaches by OLG ..."

19 **THE PRESIDENT:** I think this is still the motion judge, isn't it, they're summarising?

20 **MR HARRIS:** Yes, I beg your pardon, yes, I have gone ahead of myself.

21 Then the motion judge, if you could perhaps just read to yourself the indented citation
22 at 34, makes the similar points, it's quicker to read to yourself.

23 **(Pause)**

24 No need to read the next page.

25 Then the next heading at 2891 is "The divisional court", which is the next level up in
26 the appeal chain. You will see that the majority agreed with the motion judge.

1 Second sentence:

2 "Even if the interpretation of the self-exclusion form was a common issue, entry without
3 ejection by each class member is a necessary element of the alleged breach of
4 contract."

5 Pausing there, just like it's a necessary element in our case for any breach of duty that
6 the class member was abused and that he would have bought a boundary fare
7 and that it would have been cheaper.

8 Yet, next sentence:

9 "... there was evidence that some class members did not try to re-enter and there were
10 some who were stopped by security."

11 The parallel in our case is there is uncontroverted evidence that there are all of these
12 other ways in which a given passenger in a given transaction might have
13 reacted in the counterfactual. What's more, as I shall develop in due course,
14 some of them are extremely economically rational and every bit as plausible as
15 Mr Moser's suggestion. Then they go on and in a nutshell it says of course this
16 issue must be proved on an individual basis. Over the page at 39, again, it
17 says, three lines down:

18 "... depends on the individual circumstances of class members and the knowledge of
19 OLG of those circumstances ..."

20 Then refers to the individuality of the issue of breach and significant individual issues
21 involving contributory negligence and causation, all of which find a direct
22 parallel in our case.

23 Then that takes us to the Court of Appeal on 2895 under the heading "Analysis", so
24 that's paragraph 49. The learned leading judgment says:

25 "I will set out what I consider to be the central issue that arises on this appeal: is this
26 a case in which the need for individualised enquiry is so pervasive that it

1 overwhelms the appellant's attempt to treat it as a case of systematic wrong?"

2 That's exactly what I say, as you know, about our case. On the facts of this case the
3 Court of Appeal agreed. At 50 it talks about requiring an individualistic enquiry
4 into the nature, degree and consequences of each class member's gambling
5 propensity, and over the page, whilst it says:

6 "... there will certainly be cases in which an appropriate procedure to deal with
7 a systematic wrong, a wrong that is said to have caused widespread harm to
8 a large number of individuals ..."

9 Then, importantly, it goes on to say:

10 "... when a systematic wrong causes harm to an undifferentiated class of individuals."

11 Therein lies the difference. Our class is massively differentiated, to take your example,
12 sir, Mr President, undifferentiated class might be simply: did you or did you not
13 buy a car? But that's not this case. This is: what were you told? What did you
14 already know? How did the conversation go? What advertisements were
15 available to you? What information was available to you, depending upon the
16 precise method of purchase? That might have been different even for the same
17 individual between two transactions even on the same day. Then: how did you
18 react? Including by reference to things like your propensity to even be bothered
19 about trying to save 10p or 20p by reference to things like how much of a hurry
20 you were in, by reference to whether or not you are going to be reimbursed.
21 Mr Moser's claims simply cannot cope with any of them, so what does it do?
22 Just assumes all of them in his favour.

23 Then what happens is the Court of Appeal then says there are certain cases -- I am
24 picking it up now at 2897, just above the second hole punch, it cites five, six or
25 seven other Canadian cases and it says:

26 "In these cases, liability essentially turns on the unilateral actions of the defendant."

1 To go back to your car example, Mr President, unilaterally, did the defendant
2 overcharge by whatever, £500 a car? These cases above, they are not
3 dependent to any significant degree to the individual circumstances of class
4 members. But, at the risk of repetition, that's obviously not our case.

5 **THE PRESIDENT:** Just going on, the only remaining issues requiring individuals are
6 whether and to what degree the conduct harmed the class members.

7 Even so, there's an individual issue of whether the class member suffered any harm.

8 **MR HARRIS:** That's what we will turn to in Pioneer, where it makes a very express
9 distinction between what happens at the class certification stage and what
10 would happen at the so-called common issues trial, when those individual
11 issues of causation and liability can and will be tested, but again at the risk of
12 repeating -- it's such an important point it's worth stressing.

13 Mr Moser's claim for Mr Gutmann never allows that opportunity, it is constructed such
14 that that opportunity cannot and will not occur.

15 **THE PRESIDENT:** Yes, I am just looking at the point here, what the distinction is, that
16 liability turns on the actions of defendants. And not, to any significant degree,
17 on the class members. But loss, whether there's loss, may be individualised.
18 That's all right, so that's the distinction they're making. Is that right? How they
19 are explaining the cases above?

20 **MR HARRIS:** It's all right, because in Canada you can go off to the common issues
21 trial and then you can say --

22 **THE PRESIDENT:** I am just trying to understand what's said. Because if you look at
23 the first example, operation of a school designed to create an atmosphere of
24 fear, intimidation and brutality, the degree to which any child at the school
25 suffered fear or intimidation might be hugely variable. Very variable, and some
26 may have been so robust they didn't suffer it at all.

1 So it's the system of the school which is not dependent on individuals, but the degree
2 to which they were affected can be individualised, and that, on this case -- you
3 might take us to another case in a minute -- that's the distinction I see they
4 seem to be making. Is that right?

5 **MR HARRIS:** Yes, and you have my answer to that. It's because in Canada you can
6 have this second stage common issues trial. It's worth noting that in our case
7 the problems for Mr Gutmann arise at both liability and quantification, because
8 if it's the case, as we contend and all the examples in the evidence and in our
9 skeleton at paragraph 18, that in the counterfactual world you quite properly
10 would not have even bought a boundary fare, quite properly and quite rationally,
11 quite plausibly, then there is no liability at all. So it's a liability point.

12 **THE PRESIDENT:** I understand that point, that's the point they are making, yes.

13 **MR HARRIS:** Yes.

14 Then I will just invite you -- in particular, it is essentially more of the same at 56. If you
15 just note these down, I do not want to read these all out because it will take too
16 long, and 57 and the first line of 57:

17 "The issue of OLG's alleged fault cannot usefully or fairly be considered in the abstract
18 and without reference to the circumstances of each individual class member."

19 Two sentences down:

20 "Without answers to those specific and individualised questions, it would be impossible
21 to assess whether OLG was at fault or whether OLG bears any legal
22 responsibility to protect them from their own actions."

23 That's our case. Let me give you another example. There are going to be some
24 cases, even on instances of transactions even on Mr Moser's case, where best
25 efforts were made. He doesn't even have a case for those, but yet every single
26 transaction is included in his claim.

1 Then there will be lots where, as I said a moment ago, it would be perfectly lawful, with
2 no abuse whatsoever, for the passenger who presents himself or herself at a
3 counter or at an online vendor, or any means of -- and says, "Oh, well actually
4 now I have looked into it, the boundary fare is not the suitable or the cheapest
5 fare ..."

6 Then if I could just invite you to get the full flavour of it by reference to -- if you were to
7 read -- I will not do it -- 58, 59, 62 and 63.

8 It's summed up, if I may -- I will just finish with two more remarks and that may be
9 a good moment.

10 At 63 -- and this takes us right back to the best efforts, so in other words our case as
11 it's now presented. Picking up, just above the second hole punch:

12 "The gap, between a finding that OLG failed to use best efforts to exclude and an
13 actionable claim in law, is unacceptably wide."

14 I say the same in our case:

15 "That gap could only be filled with detailed enquiries into the individual circumstances
16 of each and every class member, revealing the fatally over-inclusive nature of
17 the proposed class definition."

18 Again, that's our case.

19 Finally, 65, between the two hole punches:

20 "In the case of OLG, and self-excluded --

21 **THE PRESIDENT:** Just looking at 64:

22 "This case is distinguishable from Hickey-Button, which the court certified ... for breach
23 of contract based on the college. Failure to provide an option it had promised,
24 Hickey-Button, the college had promised every student a programme option ...
25 allegedly failed to provide that option. Class definition was not over-inclusive
26 ... contract was breached by the unilateral failure to provide the option it had

1 promised ... it did not hinge on individual conduct of the students. Damages ...
2 likelihood the individual student would have taken up the option. All students
3 had a claim for failure to provide the option."

4 **MR HARRIS:** Yes, absolutely.

5 **THE PRESIDENT:** Would that suggest that if a failure to provide the option of
6 a boundary fare; it's not an answer to that to say, "Well, some passengers
7 wouldn't have taken it up".

8 **MR HARRIS:** It's not, sir, because what we will do -- the second of the trilogy of cases
9 is a Canadian college case, Mouhteros. If you wanted to start to cast your
10 eye --

11 **THE PRESIDENT:** I am just trying to understand this case before we get to the next
12 one, the distinction that he is making.

13 **MR HARRIS:** In my respectful submission, the answer is that that was a simple case
14 for one leg of the claim, because it was a single fact, "was an option provided
15 or not", just like "was a car provided or not", and it depended entirely, as it says
16 in line 2, on the defendant's unilateral failure. It doesn't depend --

17 **THE PRESIDENT:** If one then says, as they do, "You should have provided
18 a boundary fare where you are selling an advance ticket", whether people
19 would have taken it up, I don't know, but you didn't, nobody did; that option
20 wasn't available.

21 That would be a unilateral -- on this analysis, a unilateral breach by the defendants,
22 wouldn't it?

23 **MR HARRIS:** Yes, but there are two problems with that, my Lord, on this case. The
24 first is that that's a hopeless contention, newly advanced in the reply and needs
25 to be struck out, for reasons that I will develop in due course.

26 But, even if I were wrong on that, it only then leads to the very same problems that

1 Mr Moser has for every other transaction, which is one has to ask oneself the
2 question: if that had been available conceptually, what would have happened
3 to that passenger for that transaction in the counterfactual world if the advance
4 boundary fare had been potentially available?

5 **THE PRESIDENT:** Isn't that what they are saying in the last sentence?

6 **MR HARRIS:** No, no absolutely not, because it goes to the question of liability. Let's
7 assume against myself, that we should be providing an advance boundary fare,
8 right, it doesn't follow, in every given transaction -- which is Mr Moser's
9 methodology -- it doesn't follow that in every transaction that that would have
10 been bought. Just because it was available, it doesn't mean it would have been
11 bought.

12 In just the same way that -- even if -- it's exactly the same point as boundary fares. It
13 simply does not follow that, just because a boundary fare might have been
14 better made available, that anybody would have bought it, let alone everybody.
15 So it's an exact parallel.

16 And, on top of that, we have the point that I have now mentioned twice, that in Canada
17 you go to the common issues trial and, as we will see when we get to Pioneer
18 v Godfrey, it says, in terms: at that point, you might have to split off to have
19 individual trials of other matters going to liability or quantum.

20 But my point is that's not Mr Moser's case. It's simply not. He will never, ever do that.
21 Conceptually, it's not how the case is set up and can never happen. So
22 my Lord, that might be a convenient moment.

23 Where I am going to go, for the Tribunal's note, the two other cases in the trilogy are
24 Mouhteros, a Canadian college case, which is authorities bundle 5, C1.

25 **PROFESSOR MASON:** Mr Harris, sorry, before you take us on to the two others in
26 the triptych or the trilogy, whatever you want to call it, could I just check

1 paragraph 58 of the case that we have just discussed with you.

2 In particular, I would like to understand from you whether you are suggesting that
3 a test that we ought to be applying is contained in the last couple of lines of that
4 paragraph. In particular, resolution in terms of a generalised systemic wrong
5 would not, or would, significantly advance the claims of the individual class
6 members.

7 **MR HARRIS:** Yes, sir I am happy to answer that now if you like.

8 **PROFESSOR MASON:** Please do.

9 **MR HARRIS:** I do say that. Even if and insofar as there is an allegation of systemic
10 wrong here, it's nowhere near good enough, on the facts of this case. Because,
11 as I said, let's assume against me for the moment that we have done something
12 wrong and we have not made these fares sufficiently available and we should
13 have done some more things to make them more available, it simply cannot
14 grapple with the individualised issues that still would have to be resolved, in
15 each transaction, to determine both liability and quantum.

16 Because even if we had made the best imaginable efforts that people would know
17 about boundary fares, it does not follow that they would have bought the
18 boundary fare because there are all of these eminently sensible and plausible
19 and rational other things that they could or would have done.

20 That's why it's absolutely essential, Professor Mason, with respect, to recall how my
21 learned friend's case has morphed from his initial case, which was that we had
22 to ensure that everybody bought a boundary fare, to his case that's now
23 presented which is that, "It's nowhere near ensuring, it's just making best
24 efforts".

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

26 **MR HARRIS:** Thank you very much.

1 **THE PRESIDENT:** Then the other two cases, one is the Mouhteros case.

2 **MR HARRIS:** Much more rapidly is the case of Kett v Mitsubishi, which is authorities
3 bundle 6 at tab 20.

4 **THE PRESIDENT:** Thank you.

5 We will return at 2.05.

6 **MR HARRIS:** Thank you.

7 **(1.05 pm)**

8 **(The luncheon adjournment)**

9 **(2.05 pm)**

10 **THE PRESIDENT:** Yes, Mr Harris, back to Canada.

11 **MR HARRIS:** Yes, I'm very grateful, my Lord, thank you. We are at Mouhteros, which
12 is a Canadian college case, and that's to be found at volume 5 of the authorities
13 bundle at tab 59.

14 What you can see from the headnote is that this was a --

15 **THE PRESIDENT:** I think actually, sorry, I think we have it at tab C1.

16 **MR HARRIS:** I beg your pardon, that was my mistake.

17 **THE PRESIDENT:** Page 2624, yes.

18 **MR HARRIS:** Yes, 2624. It was an action against a particular college and the action
19 was for damages for negligent and fraudulent misrepresentation that plainly
20 would have to have -- as in this country, you have to rely and to your detriment,
21 so there have to be misrepresentations that operated on a particular person,
22 upon which they relied, and that caused them damage. You can see on the
23 first page at the bottom it was held that it was not an appropriate case for
24 certification. What we are about to see is the reason for that was there were
25 too many bespoke variables, in particular in the counterfactual. The factual
26 positions that presented themselves to the alleged claimant class and how that

1 couldn't be dealt with on a causation assumed basis or on anything other than
2 an individualised basis.

3 You can pick that up above the first hole punch on 2625 where, again, it's the same,
4 if you like, bifurcation, the class definition in the case was over-inclusive, many
5 of the students encompassed in the claim might have no claim against the
6 defendant, let alone a claim which raised a common issue.

7 I rely upon that. Precisely in our case, there are many claimants in the counterfactual
8 world, even if we had done what we are said to have a legal duty to have done,
9 which, as you know, we don't accept we have done anything wrong, and, as
10 Ms Abram will develop, we all say it's not a proper cause of action case.

11 Leaving that to one side, even if all that were right, there would still be many cases in
12 which there is simply no claim, there is no liability, because they would not
13 properly have bought a boundary fare they would have done something else.
14 Let alone which raises a common issue.

15 Again, I just emphasise the one example. This is a case in which it's every single
16 transaction that could be different. We were talking before, in the part where
17 you dealt with the litigation plan with Mr Moser and the Epiq distribution plan,
18 that some claimants might have multiple claims. That's right, they might have
19 made multiple different transactions but each transaction is bespoke.

20 It might be, as I said in my sixth roadmap point, there wasn't even dominance in one
21 of them. End of story.

22 But even if there were, it might be that for that particular transaction, the proper
23 counterfactual would have been, "I will buy a group discount because I am
24 travelling at the weekend with two of my friends" or, "I would have bought a kids
25 saver fare" or, "I would have bought an advanced fare" or any one of all of the
26 other very live possibilities, many of which are rational.

1 Then in this case, what you can see in the first hole punch is it talks about the nature
2 of the representations being made in advertising and promotions. That's why
3 we picked the case. The first case was picked because it was best endeavours,
4 obviously relevant. This one is advertising and promotions and content of
5 advertisement.

6 What you see is that you have to decide the question of whether there's been a misrep
7 and whether there's been reliance and detriment by a reference to different and
8 bespoke factual situations.

9 If you trace down to the second hole punch and picking up in the first sentence:

10 "... assuming that the misrep issues were capable of a common resolution ..."

11 Which by the way they found wasn't right, even if you assumed that:

12 "... the plaintiff would have to prove reasonable reliance on a misrep negligently
13 made."

14 It's a little bit like Dennis, even if it had been right that the OLG gaming commission
15 board had made best endeavours to keep them out, having signed an exclusion
16 form, it doesn't follow that they would have been kept out. They might
17 nevertheless have pushed their way in or insisted on their way in or disguised
18 themselves or done any number of things and still got in. Or they might not
19 have bothered to try even to come back.

20 What this case says at the second hole punch is:

21 "The question of reliance must be determined based on the experience of each
22 individual student."

23 I just pause there. Our case is a fortiori this case, because in our case we know from
24 the Decidedly survey that Mr Moser showed you that what happens in the
25 buying story depends critically on who says what, to whom, when and in what
26 manner they say it.

1 For example, Mr Moser read out that part which says, "Oh, the sales staff might be
2 defensive", and they might not sell the ticket because they get upset about how
3 they are being probed. Well, exactly, it's entirely and utterly bespoke. Did they
4 get defensive? Why did they get defensive? Did they get defensive at 10.00
5 in the morning when person A bought a ticket to Basingstoke but not defensive
6 at 10.00 in the evening when the same person bought a ticket to Whitstable
7 et cetera?

8 What it goes on to say, beneath the second hole punch:

9 "Damages would require individual assessment, certification would result in
10 a multitude of individual trials which would completely overwhelm any
11 advantage to be derived from a trial of a few common issues."

12 Professor Mason, that's, again, the point from paragraph 58. In this case, just like in
13 Mouhteros, in our case, just like in Mouhteros, even if there were some
14 generalised common issues, they simply don't get you to either liability or to
15 quantum. They don't get you past causation and you would inevitably have to
16 have a multitude of individual trials which completely overwhelm everything
17 else and render the entire exercise totally unsuitable.

18 The case is delightfully short, and I do commend it to you. I am only going with those
19 introductory remarks to identify for you certain passages. In particular, you
20 ought to know, as relevant background facts, at the bottom of 2627 -- sadly
21 there are no paragraph numbers -- that it refers to 76 different field
22 representatives, I'm reading beneath the second hole punch, and 46
23 on-campus admissions officers, with a variety of manuals and scripts.

24 I mention that simply because, as in our case, there are all manner of different means
25 and modes of selling, which on any given day would have said different things
26 to different people.

1 Over the page, above the first hole punch on 2628:

2 "There were approximately 67 television commercials aired."

3 The point is: a massive variety of bespoke variables as to what the people were told
4 in the first place. Just like our case.

5 Then it goes on -- I mean obviously I don't have time to read through the whole
6 thing -- to identify the alleged misreps and then --

7 **THE PRESIDENT:** Don't worry, Mr Harris, we'll read it.

8 **MR HARRIS:** I am very grateful.

9 **THE PRESIDENT:** Because otherwise, if you had to read every judgment right
10 through, you would obviously be taking up everybody's time.

11 **MR HARRIS:** What I will then just pick on then is, having identified the misreps,
12 alleged contrary and then the fact that you need reliance, at 2630, just beneath
13 the first hole punch, I am going to be coming back to this one later, but it says,
14 as we know indeed from cases like Pro-Sys in the Supreme Court:

15 "The Class Proceedings Act 1992 is an entirely procedural statute. It does not create
16 any new cause of action, nor is a decision on certification a determination on
17 the merits of the action."

18 I will be coming back to that when I address you on Merricks and one of Mr Moser's
19 supposed answers to this trilogy of cases.

20 I pick it up now on 2632, and that's at the first hole punch. It reads:

21 "In the present case, however, the class definition is over-inclusive, the proposed class
22 encompasses all students of DeVry [that's the college] in the relevant period,
23 however many of these students may have no claim let alone a claim which
24 raises a common issue."

25 Then tracing it down one more sentence, between the two hole punches:

26 "The essence of the claim is that the members of the proposed class relied to their

1 detriment on misrepresentations of the defendant as to the quality of a DeVry
2 education and its marketability to prospective employers. However, the class,
3 as presently defined, includes all students of DeVry, including those who
4 successfully completed their programmes, who were satisfied with the
5 education they received and went on to obtain employment related to their field
6 of study."

7 That's the parallel with our case, even if best efforts had been made and as you know
8 we don't accept we didn't, and even if that were a legal duty, it still doesn't follow
9 there would have been any liability or any loss.

10 It goes on, obviously, to say, the last sentence at the bottom of 2623:

11 "In addition many of the proposed common issues would not be common to all class
12 members."

13 That's because of the number of bespoke variables that arose on the facts of that
14 case.

15 In the interests of time, the last passage I am going to take you to is 2638, picking it
16 up in the paragraph that starts just above the first hole punch:

17 "Assuming that the misrepresentation issues identified above were capable of
18 a common resolution, such resolution would be but the beginning and not the
19 end of the litigation. With respect to the claim for misrepresentation in tort, the
20 plaintiff must prove reasonable reliance on a misrep negligently made.
21 Reliance is an essential element of the tort."

22 I pause there, just like in our case liability, causation and loss are essential elements
23 of tort that's alleged against my client.

24 Going back to the text:

25 "The question of reliance must be determined based on the experience of each
26 individual student and will involve such evidentiary issues as how the student

1 heard about DeVry [the parallel here is what was our individual transaction
2 person/passenger met with], whether the student saw any of the
3 advertisements, and if so which ones."

4 An exact parallel in our case, what did they actually see:

5 "What written representations were made to the student prior to enrolment."

6 Another direct parallel in our case. What was said to a particular passenger in a
7 particular transaction as regards the availability of particular fares? I give you
8 another example. In the evidence that Mr Backway has exhibited, on our
9 TVMs, for LSER, they say clearly, "Do not sell", "We do not sell here all types
10 of tickets".

11 That's a representation that would need to be factored in to whether we have somehow
12 done some wrong in not selling all types of ticket at a station ticket vending
13 machine that says "we do not sell all types of ticket".

14 **THE PRESIDENT:** I don't think there's a misrepresentation claim, is there? In our
15 case.

16 **MR HARRIS:** No, not misrepresentation, but it is a question of how did a particular
17 passenger in a particular transaction react and/or react in the counterfactual
18 world to the information that was given to him?

19 **THE PRESIDENT:** I think there's a little bit of that, but it's more about making them
20 available. Your TVMs, you just couldn't buy them. Isn't that right?

21 **MR HARRIS:** Yes, but the point that --

22 **THE PRESIDENT:** The fact people might have been told you cannot buy them, I do
23 not think they are even mentioned on the TVMs at all.

24 **MR HARRIS:** Our TVMs say in terms, I can get the reference --

25 **THE PRESIDENT:** Do they say, "If you want a boundary fare go to the ticket office"?
26 I thought they say nothing about boundary fares.

1 **MR HARRIS:** No, they don't, but the point that I'm making --

2 **THE PRESIDENT:** So there is no misrepresentation issue.

3 **MR HARRIS:** I am not suggesting there's a misrepresentation, I am suggesting it's

4 a question of bespoke factual circumstance that would have to be assessed in

5 the counterfactual and the bespoke factual circumstances are different, just like

6 in this case the representations or alleged misrepresentations are different.

7 That's my point.

8 Then whether the student met with an admissions officer. Again, did they go to a ticket

9 machine, did they use an online or did they go to a ticket counter? So there's

10 another parallel.

11 Then whether the student relied upon some or all of these in deciding to enrol in DeVry.

12 Again, another parallel. A non-price maximising optimising consumer doesn't

13 rely on any of this, it's not relevant to that person, or, as I shall come on to

14 develop, a person who is going to get reimbursed couldn't care less.

15 That's entirely rational, indeed -- I will come on to develop that. Anyway, that's all

16 I have to say about Mouhteros.

17 Then there's a third in the trilogy I am going to be much shorter with this because it's

18 a much, much longer case and I venture to suspect with great respect that this

19 case you may find yourself being addressed on in future collective actions,

20 notably in the Trucks cases. It is to be found in volume 6 at tab 20 of the

21 authorities, and it's called Kett v Mitsubishi.

22 The reason I am going to be much briefer is because it's essentially more of the same.

23 It's a Supreme Court of British Columbia --

24 **THE PRESIDENT:** Just a moment. **(Pause)**

25 It's tab 20, is it?

26 **MR HARRIS:** Tab 20 of --

1 What the case was about was an alleged class of people who had bought cars, who
2 complained that Japanese manufacturers of some very intermediate elements
3 that went into somewhere in the manufacturing process of the car had been
4 sold in an unfair manner. In particular, things like hadn't been properly tested
5 or the testing results had been fudged or weren't up to specification or the
6 specification results had been fudged.

7 You can see that in paragraph 2 on 3202 the allegation is:

8 "Wrongdoing towards by a manufacturer of a consumer product under the Business
9 Practices and Consumer Protection Act."

10 What you would do, if you were to read the first ten or so pages about the facts -- I am
11 going to summarise them in a minute -- is that you would see that it is a highly
12 complex, as you would expect, value and production chain in the manufacture
13 of bits that go into other bits, that go into other bits, that then go into cars that
14 might make their way to Canada. Unsurprisingly.

15 So very many variables and complications. I don't pretend that this is a direct analogy
16 on the facts with our case. What I do say is it's another example of a case that
17 couldn't be certified because there were too many bespoke variables and you
18 are trying to cram together in something that is supposed to be collective and
19 common something that isn't. The court said no.

20 For example, the bits between 3 and 13 are detail but the headline is at 13, "The
21 automotive supply chain is global and complex". It then gives a lot more detail
22 about how complex it is.

23 It includes detail on page 3206 about the pricing being complex.

24 It includes detail on 3207 about obviously the class size being very complex, you could
25 not even tell quite how many cars had got into Canada, let alone how many had
26 the intermediate parts or the intermediate, intermediate parts.

1 Then the misconduct is identified at the bottom of 3207.

2 **THE PRESIDENT:** Sorry, I am trying to take this in. The class is, what, purchasers,
3 end consumers, is it?

4 **MR HARRIS:** Yes, that's right.

5 **(Pause)**

6 **THE PRESIDENT:** Yes, I see.

7 The class is -- I am just trying to see where is the ... just to understand it, the class
8 definition, proposed class definition.

9 **MR HARRIS:** My learned junior will no doubt find that in a moment. I can't
10 immediately ...

11 **MR MOSER:** If I may, I think it's found at pages 3230 and 3231.

12 **THE PRESIDENT:** Thank you. Is there a proper class? Plaintiff -- yes, 113, "All
13 persons in Canada ..."

14 **(Pause)**

15 They modified it to make it only new vehicles, but also motorcycles, I think.

16 **MR HARRIS:** They added in some more manufacturers, that's right.

17 **THE PRESIDENT:** And some more manufacturers, but only new models ... yes.

18 **MR HARRIS:** To complete the picture, the allegations of wrongdoing were highly
19 individualised as well, I don't mean this in a pejorative sense but they were
20 presented or dressed up as generic but in fact on analysis they were highly
21 bespoke. They are to be found at 3207 at the bottom in paragraph 30.
22 Generally the misconduct identified ... if you could just read A, B, C and D,
23 please.

24 **(Pause)**

25 **THE PRESIDENT:** Yes.

26 **MR HARRIS:** Then if we skip, in the interests of time, through to the common issues

1 section, which is obviously the one with which we are most concerned. You
2 find that on page 3232, beginning at paragraph 121.

3 I won't read that out but it's recitation of the CPA, the BC one that we have seen before.

4 A reference to Dutton and then a list of the proposed common issues. I want
5 to pick it up, if I may, at the court's analysis of the first of the proposed common
6 issues, which is in bold between the two hole punches on 3233.

7 This was proposed as a common issue:

8 "Did the defendants fraudulently alter quality control certifications for their automotive
9 products?"

10 Then:

11 "Defendants complained that this issue [the one I just read out] is framed at the highest
12 level of abstraction, I agree. As the court stated in McKinnon, the common
13 issues have an appearance of commonality because of the generality with
14 which they are stated. If the common issue is restated in the manner in which
15 it must be addressed, it becomes apparent that it is not a common issue."

16 That's what they then did, and that's our case.

17 Mr Moser manfully and eloquently, I may say, states, "Oh well, it is all to be dealt with
18 in a generic, high-level, abstract manner". But the facts of this case don't allow
19 that. The facts of this case demand that there be questions asked of whether
20 there would even have been an abuse and even if there was an abuse, would
21 that abuse have caused any loss at all, as well as of course how much would
22 the loss have been.

23 What this court said was when you drill down, because you are grounding yourself in
24 the actual facts of the actual case, you can't pretend that just because you are
25 setting something out at an abstract high level, it's common.

26 On the contrary, at 125, the court says:

1 "Notably, the plaintiff could see there could not be a single answer for all the
2 components manufactured by the defendants."

3 I know Mr Moser does not concede it, but my submission is that is absolutely the facts
4 of this case. Although he does not concede it, it is hopeless not to do so.

5 Then there is, over the page, a reference to Pioneer v Godfrey but because I am going
6 to take you to Pioneer v Godfrey, I will skip over that section. I just invite you
7 to note that what I am about to say in a moment about Godfrey v Pioneer is
8 also supported by these remarks.

9 You will note that this is an extremely recent case, so it postdates even Godfrey v
10 Pioneer.

11 Then, last two parts of this, in the interests of time, at 134 the court, the Superior Court
12 BC says:

13 "A common issue should be one in which all class members at least have an interest."

14 Of course, whether or not Mrs X at 10 pm on a Thursday night leaving to Whitstable
15 from London Bridge might have been abused in the legal sense and that it
16 caused her some loss on the particular transaction, specific factors of that case,
17 has absolutely nothing to do with whether Mr Y, travelling north on a Sunday
18 lunchtime with four family members -- I mean they are just ... they are not
19 related.

20 Even if you were to decide as to Mrs X, it has nothing whatsoever to do with Mr Y.

21 That's the point that's made in 134. Even if you were to prove that there were one of
22 these types of wrongdoing, which is highly bespoke and individualised for
23 a certain car part or a certain shipment of car parts on a certain day, that made
24 its way into certain cars, it's utterly irrelevant when you are asking yourself the
25 question about what happened to some other car part in a different car on
26 a different day, going to some other person.

1 Then, just to pick up a couple of other points. This is the case that states that you
2 must propose a workable methodology at the certification stage, and if you want
3 that reference, it's 3239 at paragraph 148.

4 **THE PRESIDENT:** Isn't that in Pro-Sys?

5 **MR HARRIS:** It's very similar, it is very similar.

6 **THE PRESIDENT:** Which is the Supreme Court of Canada, isn't it?

7 **MR HARRIS:** Absolutely, yes.

8 **THE PRESIDENT:** They are probably just following through.

9 **MR HARRIS:** Yes.

10 Although I will not read them out, on the facts of this case, about car supply chains,
11 the different bespoke and variables are nicely identified at 151, 152, 153 and
12 then 154 is where the expert for the defendants identifies what I have already
13 identified, which is that you need to do an individualised enquiry if you are to
14 have any hope of establishing an abuse or causation in a given case.

15 Then a nice way of summing it up is the last line of paragraph 159, that you will find
16 on 3243, having cited Pro-Sys at 118 -- a passage of which we are all of course
17 intensely familiar -- the conclusion was that Dr Allen, that's the expert for the
18 claimant class in this case:

19 "... never truly wrestles with the implication of this reality, ie that the analysis for one
20 shipment cannot be extrapolated to the members of the class whose vehicle
21 contained parts from other shipments."

22 That was essentially my point a moment ago, of Mrs X and Mr Y.

23 Anyway, there we go. The last part that I would commend for particular attention,
24 though I simply don't have the time to read it out, are paragraphs 172 to 183.
25 What it says -- the most germane part, I am only going to read one part out, is
26 in 183, this was my fourth introductory comment in the opening section of my

1 submissions about unfairness to the defendants. If we take the citation from
2 Justice Winkler, as he then was, I'm reading from 183 in this judgment and
3 Justice Winkler in *Caputo v Imperial*, what he said at 72, he or she said -- I am
4 afraid I don't know --

5 **THE PRESIDENT:** He.

6 **MR HARRIS:** As he then was:

7 "Here, notwithstanding the ability of the plaintiffs to define an acceptable class in
8 relation to the causes of action alleged, it appears that any class would be
9 comprised at least several million people."

10 We know that's our case too:

11 "The eight remaining legal bases for asserting claims allegedly arise from multiple fact
12 situations, spanning at least 50 years."

13 Now we have multiple years and multiple fact situations, I obviously don't pretend it's
14 50 years:

15 "... but during which prevailing circumstances changed dramatically."

16 That we do have, it's completely common ground the buying patterns changed
17 dramatically since October 2015, with the further pick up and use of various
18 types of contactless pay and various types of Oyster card. That's completely
19 common ground.

20 Then it goes on, and I emphasise these two next sentences in particular:

21 "The legal principles underlying the claims asserted require enquiry into the
22 circumstances of each individual class member in order even to ascertain
23 liability, let alone damages."

24 You know that's my submission.

25 Then finally:

26 "This would be necessary on a procedural basis to ensure that the defendants are

1 treated fairly."

2 Exactly. You cannot sweep these matters under the carpet, because that's tantamount
3 to denying the rights of the defence. In a case where there are too many
4 bespoke and individualised causation issues. I want to just emphasise that.
5 I am not making some across-the-board, generic submission about what one
6 does about causation in every single case.

7 I am talking about this case. I am talking about this case is parallel to Mouhteros, to
8 Dennis and to Kett, because of on the facts there are too many bespoke and
9 individualised issues.

10 I just invite you, before moving on then, to note that Mouhteros was specifically cited
11 and approved in Hollick in the Supreme Court. If you would like the reference
12 to that, it's authorities bundle 5, tab C5 at page 2732.

13 Lastly, you may recall, although I will not turn it up, from when Mr Moser went through
14 it yesterday, Hollick itself was a case where there were too many bespoke and
15 individualised causation issues. Hollick was the one about the waste dump and
16 it was said that it was near Toronto and there were all kinds of different ways in
17 which people could have reacted or would have been affected or wouldn't have
18 been affected. They just said it's too individualised and too bespoke, you can't
19 get certified. It went all the way to the Supreme Court and they rejected it on
20 that basis, so I also rely upon that.

21 That is what I say about the law.

22 Can I just remind you the critical facts and why the assumption across the board of
23 causation in this case is simply unfair, unsafe, and indeed implausible.

24 I am going to do that, if I may, by reference to -- in the first instance -- my skeleton
25 argument at paragraph 18, which you will find almost at the very back of the
26 core bundle, tab 23, although a new document has since been added at tab 24.

1 These are distilled from the uncontroverted evidence. Mr Moser, I understand why,
2 loves to submit, "Don't worry, we will get some more evidence". But not on
3 these points, this is uncontroverted. He could have controverted this if he had
4 wanted to, especially after the lapse of time and the amendments and the new
5 reports but he didn't. These are examples of other things that could very
6 plausibly, and would very plausibly, and indeed rationally, have happened in
7 the counterfactual world that he simply has to assume away in every single
8 case.

9 **THE PRESIDENT:** Are you in your skeleton?

10 **MR HARRIS:** Yes. Paragraph 18, I beg your pardon.

11 **THE PRESIDENT:** Paragraph 18, yes.

12 **MR HARRIS:** It's a very important paragraph for this case, in my submission. (i):

13 "Another ticket for the full journey may have been cheaper than a boundary fare, for
14 instance a discounted, advance ticket."

15 His case, as originally presented, was, "I am just going to assume that didn't happen".

16 Although I accept that it's now his fallback, his subsidiary case is, "Oh, well let's
17 just take them out", but I will deal with that in a minute.

18 That's a completely unsafe assumption to make. It is entirely plausible, and entirely
19 economically rational, indeed it is the rational thing to do economically, that if
20 you go to a ticket counter and you are having a -- or whatever, an onsite website
21 and you are having a more involved discussion about the right ticket, and more
22 enquiries are being made of you as to how you are travelling, that's the
23 counterfactual world, that's what we are being told. Then if you are told, "Oh
24 well, actually the better ticket is an advance discounted ticket", well that's the
25 one you would buy.

26 That of course is -- I will go through the remainder in a minute, but it's also a complete

1 answer to Mr Moser's table that he's placed so much weight upon at the
2 beginning of his case.

3 He says but look at all these in-scope fares, look at them all, and look at the tiny
4 number where a boundary fare was actually bought. By the way, we totally
5 dispute the figures and I will come back to that, the figures are utterly unsafe.
6 But even if they were safe -- I will come back to that -- this is the answer.
7 Boundary fares don't get bought very much because there are lots of other more
8 suitable and indeed cheaper fares, and there would be in the counterfactual
9 world. Mr Moser cannot deal with that. He cannot deal with it, so he assumes
10 it's wrong. He just assumes, "No, no, absolutely all of them would have been
11 boundary fares". He's completely wrong and implausible and he has no
12 evidence to support it.

13 As I say, I will come back to what he then says, "Oh, I will just take them out", he can't
14 do that.

15 But it doesn't end there, 18(i) is just the tip of the iceberg, 18(ii):

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

18 Again this is in the evidence, uncontroverted. There are all manner of discount cards,
19 there's group savings, there's people travelling with friends and family, there's
20 people travelling with children, there's armed forces, there's old-aged
21 pensioners. All of these people get discount cards and in the counterfactual
22 world where there's a more involved discussion and toing and froing about
23 what's the best ticket, absolutely utterly plausible that lots of people would have
24 used a different discount. Not a boundary fare.

25 **THE PRESIDENT:** Have you put in any figures for the number of group discounts you
26 sold and armed forces tickets?

1 **MR HARRIS:** No, we haven't.

2 **THE PRESIDENT:** I mean we know there are thousands of different fares but the
3 question of when you say that's the answer to the table. Well the answer
4 depends, I suppose, on how much they were actually sold.

5 **MR HARRIS:** I have two answers, Mr President, to that.
6 The first is it's not my job, it's not my onus, it's not my burden at the CPO stage to put
7 in that evidence and one of the cases says that in terms. I will take you to that
8 case. I appreciate we are not bound by US authority --

9 **THE PRESIDENT:** We are being told we should make an assumption, you say the
10 assumption isn't valid. We have seen some figures, I don't know if they're
11 disputed, I haven't seen other figures, about what proportion of tickets were
12 advance tickets, what proportion of tickets were other kind of tickets.
13 So we have the absolute proportions.

14 **MR HARRIS:** I have three answers.
15 The first I have given: it's not my job. One of the cases says that in terms.
16 The second one is: even on Mr Moser's figures, this was his table 6.1, I believe, but in
17 any event the figures were 6.5 per cent for advance fares and 2.8 per cent for
18 other. That's nearly 10 per cent.

19 **THE PRESIDENT:** Are you disputing those figures?

20 **MR HARRIS:** Not for today's purposes --

21 **THE PRESIDENT:** Sorry, I misunderstood you, I thought you said the figures are
22 wrong. So we can work on those figures, yes.

23 **MR HARRIS:** The figures on Mr Moser's table that he opened his submissions with,
24 the one that was an aid to his submissions, they are wrong. I will come back to
25 that, but not the figures in -- I think it was --

26 **THE PRESIDENT:** Mr Holt's?

1 **MR HARRIS:** Yes. In any event those are the percentages, 6.5 and 2.8, that's nearly
2 10 per cent, that's not de minimis on any view of the world.

3 Then the third answer is all of these are utterly plausible, because they are completely
4 rational. If you take the third one -- this is uncontroverted evidence in the
5 witness statements of all three defendants, not just LSER. That point-to-point
6 fares are almost universally available for every single transaction and they are
7 either the same price or indeed in some cases cheaper than a boundary fare.

8 I accept that the evidence does say that in a handful of cases they might be a little bit
9 more expensive. The example at least in my evidence is 10p or 20p, for some
10 transactions.

11 My point is these are utterly plausible and obviously economically rational.

12 Don't forget, what I am faced with, I am not faced with any evidence in response, I am
13 just met with, "Oh, but it's economically rational in every single transaction for
14 this not to happen".

15 That is his case, it's in every single transaction it's economically rational that those first
16 three possibilities that you put forward would not happen, and that's why
17 I include every single transaction in my methodology.

18 All I am saying is, "Absolutely not, there are lots of instance, just in the first three
19 categories, of different types of fare that are much more plausible, they are
20 much more rational, even on your own view of the world, about people always
21 insisting on buying the cheapest ticket". Which, as I shall come on to say in
22 a minute, is not the real world.

23 In any event, I now move on to a slightly different example, number 4, the passenger
24 may not have had his or her Travelcard available at the moment of purchase
25 and/or at the time of travel.

26 There is a dispute about the moment of purchase, but I am not particularly bothered

1 whether that's right or not. The point is it's common ground that you physically
2 have to have your Travelcard with you for the boundary fare part of the journey
3 if you are going to do it. If you don't do that, you are not allowed to use the
4 boundary fare.

5 The point is that this does happen, that people don't take their Travelcards. It's not
6 my job to give anecdotal evidence from the bar, but I'm sorry to say that's
7 happened to me on multiple occasions. Simply don't have my Travelcard with
8 me, I cannot be alone in that regard.

9 My point is that Mr Moser's own case demands that there be a physical possession
10 overlap. Because otherwise the boundary fare is not valid and yet it doesn't
11 happen in the real world and, as I shall come on to demonstrate when I get to
12 the overlap part of the case, he has no methodology at all to cope with that
13 point, but I will come on to that.

14 Next one, you may not have had a Travelcard that was valid -- it might not have been
15 a relevantly valid Travelcard. This is obvious. If you buy a Travelcard for zones
16 1 to 2, but the out-boundary fare which is included in the methodology is actually
17 from, say, the outer boundary of zone 5 to wherever, Whitstable. The fact that
18 you have a zone 1 to 2 Travelcard is completely and utterly irrelevant. You
19 cannot buy a boundary fare from zone 5, which is the journey that you are
20 actually taking, using a zone 1 to 2 Travelcard, the two don't match at all.

21 But he has no way of taking those out, or even knowing what they are.

22 Then there are others and Mr Moser to some extent, I don't mean this at all
23 pejoratively, for advocacy reasons, he scoffs at some of the other examples.
24 Most notably he scoffs that the case is really, "Oh, well people are just making
25 some mistakes or pressing the wrong buttons". Do you know they are not even
26 in this list. They don't place any particular reliance upon a casual mistake or

1 pressing the wrong button, not at all, but he repeatedly says, "Oh, that's what
2 the case that's against me is".

3 Not at all, in fact my items 6 and 7 are different. There are entirely rational
4 passengers -- I ask rhetorically, I wonder how many people indeed on this very
5 Microsoft Teams platform fall into this category. Some people nevertheless
6 who plausibly and rationally say do you know what I can't be bothered going to
7 any more trouble of any kind on any sales platform to fuff about, trying to obtain
8 myself a boundary fare for a possible saving of 10p.

9 **THE PRESIDENT:** I think there are not many where it's 10p, is it?

10 **MR HARRIS:** No, the uncontroverted evidence is that the savings over a point to point
11 are largely nil, because they're priced in --

12 **THE PRESIDENT:** Point to point, yes, sorry, I can see that.

13 Indeed, it is not clear to me you that if you bought a point to point you suffered in most
14 cases any loss, but leaving aside the point to point, if it's a full journey fare or
15 a boundary fare then the savings are rather more than 10p, aren't they?

16 **MR HARRIS:** Yes, but my point is Mr Moser just asserts that that is the vast bulk of
17 the transactions, he just asserts it, and it's not right. Maybe that's an opportune
18 moment to take you to --

19 **THE PRESIDENT:** What is the "vast bulk" of the transactions?

20 **MR HARRIS:** Let me explain this by reference -- members of the Tribunal, do you still
21 have Mr Moser's advocacy table from yesterday morning? The one pager that
22 looks ...

23 **THE PRESIDENT:** Yes.

24 **MR HARRIS:** Mr Moser's case, and he put very great store on this, repeatedly, was,
25 "Oh, it just shows that 90 per cent of basically the people in each franchise
26 should have bought a Travelcard". But I have just explained to you why that's

1 not plausible or economically rational, for many, many different types of reason,
2 I am going to come back to the last reason in a minute, which I missed off.

3 On top of that, the figures are very misleading in this sense. What this table is
4 supposedly showing is that all people who had any kind of Travelcard should
5 be making a boundary fare purchase whenever they make an in-scope journey.
6 That's all people, for all transactions, but the table gets -- it's just not right, that
7 this presentation gets us anywhere close to the number of journeys by
8 Travelcard holders for which a boundary fare should have been bought.

9 Let me give you two generic explanations, and then I will give you two specific
10 examples that illustrate them.

11 The Travelcard, which is in the percentage of -- in each table where it says "assumed
12 Travelcard holders", the Travelcard may well not have been valid for that
13 journey at all. It could have been the wrong zones or the wrong time period.
14 Or otherwise invalid. Mr Moser's table simply takes no account of that at all, so
15 it's grossly over-inclusive.

16 **THE PRESIDENT:** You say not valid for the journey because it's wrong time period --

17 **MR HARRIS:** Or wrong zones.

18 **THE PRESIDENT:** By "wrong time period", you mean it wasn't a Travelcard covering
19 the date on which they took the journey?

20 **MR HARRIS:** Yes, absolutely. That's the overlap he needs, but that's the overlap he
21 ignores in this table, or one of the many overlaps.

22 Let me give you an example of that precise category. This table includes, for example,
23 a journey from zone 1 into zone 2 -- I will use a slightly different one actually to
24 better illustrate the point.

25 It includes an in-scope journey from zone 5 into zone 6. But the person who made
26 that journey may have only had a zone 1 to 2 or a zone 1 to 3 Travelcard.

1 **THE PRESIDENT:** Zone 5 to zone 6, you mean the starting point is zone 5 and the
2 end point of the journey is zone 6?

3 **MR HARRIS:** I do, but you could easily flex it, you could easily say starts in zone 5
4 and goes to Whitstable, Brighton, Basingstoke, somewhere miles away.

5 The point of the example is that the person in this table who is said to have a relevant
6 Travelcard, because it's assumed in every case there's a relevant Travelcard,
7 in fact doesn't have a relevant Travelcard, because "Travelcard holders"
8 include zones 1 to 2 Travelcards. There's a table in Mr Holt's evidence that
9 unsurprisingly shows that most Travelcards are zones 1 to 2.

10 That's the completely irrelevant journey. There's no double charging and you would
11 not be able to buy a boundary fare at all using that Travelcard, the Travelcard
12 is an irrelevance for that journey.

13 Likewise, what you may find is -- this is the generic point and then I will illustrate
14 it -- this table takes no account whatsoever of the fact that many journeys are
15 entirely within the Travelcard zone for which the person has a valid Travelcard.
16 They are still going out of London and crossing zones, but the Travelcard
17 covers that entire travel.

18 **THE PRESIDENT:** I thought these are not in-scope journeys for which tickets were
19 purchased?

20 **MR HARRIS:** These are in-scope journeys, which means travelling out of London,
21 crossing zones, going out of a zone. But my point is simply that some of these
22 journeys will be journeys for which the Travelcard covers you entirely anyway.

23 **PROFESSOR MASON:** Mr Harris, just so I am clear what you are arguing here, are
24 you disputing the figures themselves or the inferences that might be drawn from
25 the fact that the propensity to hold a Travelcard is a factor of ten or twenty
26 greater than any propensity to have received a boundary fare? Is it the

1 numbers or the inferences?

2 **MR HARRIS:** For today's purposes it's principally the latter. You will appreciate that
3 if this case ever goes to trial we don't accept that the percentages of assumed
4 Travelcard holders are safe. But, as you will have appreciated, we have not
5 picked up on that at the CPO stage, that's because we do recognise that in that
6 instance, unlike some of the other ones I am going to pick on when we get to
7 overlap, more data will become available.

8 Anyway, so my points -- I am going to have to move on in light of the time -- is that
9 there are lots of good, rational and economically plausible reasons for not
10 buying these tickets, indeed because many times there is cheaper tickets.

11 **THE PRESIDENT:** We have that point.

12 **MR HARRIS:** The last one is not to be overlooked at all, because indeed it's one of
13 the most rational, it's 18(vii):

14 "... the passenger may not have cared about price-optimisation ..."

15 That breaks down into two subcategories, there are some people who just don't care
16 about minor savings when it comes to this type of transaction, particularly
17 I might venture to say, in London.

18 More importantly than all, this claim expressly encompasses tickets that are bought by
19 businesses for their employees. Those people are going to be reimbursed.
20 Those people do not care, especially when the saving, on any view of the world,
21 for a particular transaction is minor.

22 Indeed, it's economically rational for that person to not buy a boundary fare because
23 if that person doesn't buy a boundary fare but buys the full journey fare, that
24 person will get a bigger reimbursement. I am not casting any aspersions about
25 the morals of any of this, we are talking about the real world and plausibility.

26 **THE PRESIDENT:** As long as you don't work for the court service, where we are

1 required to say that we have obtained the cheapest fare available to get
2 reimbursed.

3 **MR HARRIS:** Not everybody has that pleasure, Mr President.

4 **PROFESSOR MASON:** Mr Harris, again sorry to detain you, because I know you
5 want to move on, but it would help me further to understand your argument
6 here, because you mentioned it earlier today and elsewhere: how many of
7 these factors would arise in an individual claim rather than a class?

8 **MR HARRIS:** I am delighted, Professor Mason, you asked me, I am just about to turn
9 to that.

10 The answer to your question in general is: all of these things can be tested in
11 an individual claim. They can be tested. I don't pretend that there would
12 necessarily be perfect evidence on any or all of them, but they can still be
13 tested. I could cross-examine, I could seek disclosure, I can test the likelihood,
14 I could test things like: are you being reimbursed? I could test whether there
15 was a more valid fare.

16 But, in this case --

17 **PROFESSOR MASON:** Whether I had my Travelcard with me at the time?

18 **MR HARRIS:** I could do that, absolutely.

19 I am not suggesting that people would necessarily have dead-on proof from six years
20 ago, but what somebody could easily say to me, and I might find it difficult to do
21 anything about, is:

22 "No, Mr Harris, what you don't appreciate is I used to buy a green 7-day Travelcard
23 every morning when I stopped at Holborn tube, for that week, for 16 years when
24 I worked in Gray's Inn, and I used to keep it in the top left-hand slide pocket of
25 my brown wallet, made of leather".

26 Realistically, what am I then going to do? The Tribunal simply has to be persuaded

1 on the balance of probabilities.

2 So even that one I could test. Whether I would or not is a different matter. What
3 I would do if I got those answers is a different matter. The critical point is, in
4 Mr Moser's claim there are no actual claimants, so I will never get any actual
5 disclosure from any of them. I will never be able to cross-examine any of them,
6 notwithstanding that there are all these bespoke causation and liability points
7 and at that point Mr Moser says, "That's because I'm doing an aggregate
8 top-down claim".

9 He says:

10 "How can it be aggregate and top down if there have to be actual questions of actual
11 witnesses?"

12 That's his answer. That's the cart before the horse submission that I adverted to in
13 opening.

14 If there are, on the facts of any given case -- again I am only talking about this case -- if
15 there are, as there are in this case, all manner of bespoke and individualised
16 causation and liability issues, then you cannot proceed in an aggregate and
17 top-down manner.

18 There's no answer to just say, "Oh, I want to, so I will just ignore them all or assume
19 them all away". For all the reasons I have given, including that that rides
20 roughshod over my rights of defence.

21 I also, Professor Mason, adopt your point. Let's compare ourselves with an individual
22 claim, as we are told to do in Merricks. In an individual claim these problems
23 do not arise. I can test them, I can get disclosure on them, if needs be I can
24 cross-examine on them.

25 Then Mr Moser has another answer at that point, after having said, "That is what I
26 want to do so I should be allowed to do it", he then says, "I have another

1 answer: Merricks". Merricks in the Supreme Court, he says it does away with
2 the need for causation, indeed it does away, according to his submission, with
3 the need to establish liability all together.

4 Then, secondly, he says I can take them out anyway, I can take all these transactions
5 out, every single one that you have mentioned I can take them out. Although
6 note, by reference back to my skeleton argument, that when he says he can
7 take them all out, he doesn't mean take them all out. He simply doesn't address
8 (iv), (v), (vi) and (vii) in my paragraph 18. He ignores them altogether.

9 He doesn't even say to you today, as a backstop, "Don't worry, I can take them out",
10 he just ignores them. He only says, "Well, advance fares, I could take them
11 out. Discount fares I could take them out, point-to-point fares I could take them
12 out".

13 Anyway, I will come on to why he can't do that, but first let me deal with Merricks.

14 In my respectful submission for LSER the majority judgment in Merricks does not say
15 that one can dispense with causation or liability, it doesn't even come close.
16 Can I take you, please, to Merricks, for this purpose. It's to be found in
17 authorities bundle volume 5, tab 59.

18 I pick it up first, just to respectfully remind the Tribunal that in Lord Briggs's judgment
19 in his very first paragraph, paragraph 1 on 2577 in the letter C, he has in mind
20 the constituent elements of a tort claim, and he says what they are: proof of
21 breach, causation and loss. There's no suggestion that he does not have them
22 in his mind.

23 Critically, for today's purposes, they include causation as a constituent element of
24 what you have to prove.

25 Then what he says, I will pick it up at 45 to 46 where Mr Moser took you to. I will take
26 this quickly because you re-read this yesterday, but just above letter G in 45 he

1 makes the point that we saw echoed half an hour ago in the Canadian cases
2 and I quote:

3 "Collective proceedings are a special form of civil procedure ..."

4 It doesn't say, "A special form of new substantive civil rights", save for the one
5 exception that I'm about to come on to, on the compensatory principle. So he
6 has in mind the need for proof of breach, causation and loss. Then he's saying
7 it's just a Civil Procedure alteration. Then he deals with one specific thing.

8 Before we turn to the specific thing that has substantively been altered, what does he
9 say at G. He says:

10 "The claims which are enabled to be pursued collectively could all, at least in theory,
11 be individually pursued by ordinary claim ..."

12 I pause and I ask rhetorically: how many individual claims have we been ever involved
13 in? I would love to as a claimant's counsel go to court and say, "Well, you know
14 what, I know I have to prove causation but actually I am not going to bother in
15 this case because it all looks too difficult. So I am just going to assume that
16 causation is made out in my favour".

17 That's what Mr Moser is saying that you are to do in this case, but that's not what
18 Lord Briggs is saying. He is saying they have to be, in theory at least, capable
19 of being pursued by ordinary claim. You do not pursue individual claims
20 ordinarily by simply assuming away one of the constituent elements, let alone
21 in this case two or three. Because in this case liability is assumed and
22 causation and, for some of those, loss.

23 What has changed in the law as a result of the Act, it's not as a result of Merricks, it's
24 as a result of the Act. The answer is that section 47C(2) has changed the law.

25 I just invite you -- I don't go to it, but the same point is made by Lord Briggs in
26 46, he is talking about quantification of damages. Nowhere in that paragraph

1 does he say anything about liability or causation. It's simply not mentioned. All
2 that he is talking about is quantification of damages.

3 Then what he says at 57, he reverts to this topic at 57, and he is talking about what
4 difference is being made by dint of aggregate damages. You will see
5 this -- I pick it up just below H:

6 "The pursuit of a multitude of individually assessed claims for damages, which is all
7 that is possible in individual claims under the ordinary civil procedure ..."

8 Again, the very point I have just been making, constantly referring back to what you
9 could do in an individual claim:

10 "... is both burdensome of the court and usually disproportionate for the parties."

11 Then, this is the key point, this is what Merricks decides, because of what is said in
12 section 47C:

13 "Individually assessed damages may also be pursued in collective proceedings, but
14 the alternative aggregate basis radically dissolves those disadvantages ..."

15 The disadvantages he is talking about are individual assessment of damages, that's
16 why the sentence begins with those words:

17 "In general, although there may be exceptions, defendants are only interested in the
18 quantification of their overall (ie aggregate) liability."

19 Again, he is talking about quantification of damages.

20 58 is where he turns to the Act. What he says is:

21 "Another basic feature of the law and procedure for the determination of civil claims
22 for damages is of course the compensatory principle, as the CAT recognised."

23 Note, he does not say the compensatory principle and the principle of causation and
24 the principle of establishing liability. No mention of that at all.

25 On the contrary, he says:

26 "It's is another important element of the background against which the statutory

1 scheme for collective proceedings and aggregate awards of damages has to
2 be understood. But in sharp contrast with the principle that justice requires the
3 court to do what it can with the evidence when quantifying damages ..."

4 That's the topic, quantifying damages:

5 "... which s unaffected by the new structure, the compensatory principle is expressly,
6 and radically, modified."

7 The compensatory principle. Again, he does not say, "The compensatory principle,
8 and the principle of causation, and the principle of liability". He's not talking
9 about them at all:

10 "Where aggregate damages are to be awarded, section 47C of the Act removes the
11 ordinary requirement for the separate assessment of each claimant's loss in the
12 plainest terms."

13 In a moment I will take you to section 47C(2), it only refers to individual assessments
14 of loss in the context of damages. It says nothing whatsoever about doing away
15 with the need for causation or the need to establish liability.

16 It's little surprise in my respectful submission that it doesn't say anything about that,
17 because those points were not live or relevant in Merricks. As you know, the
18 issue was how would Mr Merricks be able to work with what the Tribunal had
19 found was a methodically sound approach to pass on, at the indirect level,
20 bearing in mind that it was such a large claim for such a long period in so many
21 different sectors.

22 The Tribunal said, "You can't do it, there won't ever be the data, that's why you fail".

23 That was the bit that was overturned, but it's important to note that that was all
24 about data. It wasn't about causation. We didn't have an argument about
25 causation in Merricks, and that's because, as we know from Pro-Sys at
26 paragraph 118, the answer for the certification stage was given in Pro-Sys.

1 What Pro-Sys said, in terms, was, in an indirect purchaser action, where you are
2 claiming at the indirect purchaser level, all you have to do at the certification
3 stage -- it was only concerned with certification -- is you have to show some
4 degree of loss to somebody somewhere in that chain, and that gets you past
5 certification.

6 The Tribunal found, and this was never overturned, there was a methodically sound
7 basis for doing that, it's just the Tribunal said, "You have not got the data and
8 you never will have", and that was what was overturned. On that point.
9 Distribution is a different point.

10 What we submit on behalf of LSER is that it's not surprising, not only does Lord Briggs
11 not refer to anything but the compensatory principle, but it's not surprising that
12 he didn't because it wasn't in issue.

13 As we shall see in a moment in *Pioneer v Godfrey*, the defendant still has to be able
14 to defend itself where there are not injured members of the class. What's more,
15 before I get to *Pioneer v Godfrey*, you might have thought, with respect, that if
16 such a radical additional change had been made to the law of England, or
17 indeed the law of the UK, then that would (a) have been brought about by
18 statute, so section 47C(2) would have also said, "Oh, you don't have to assess
19 individual causation or individual liability", but it doesn't say that.

20 (b) or you might have thought that the majority would have expressly said that. They
21 would have said, "Oh, well, as well as paragraph 58 and 7 where I am talking
22 about the compensatory principle, on top of that there's another principle that's
23 radically dissolved namely causation. Oh, and on top of that there's another
24 principle that's radically dissolved, namely liability".

25 But that isn't what Lord Briggs says, and the majority.

26 Then if we could just -- I can just read it out actually, that will be quicker, 47C(2) is in

1 the authorities bundle at tab 1. Just to remind you what it says is:

2 "The Tribunal may make an award of damages in collective proceedings without
3 undertaking an assessment of the amount of damages recoverable in respect
4 of the claim of each represented person."

5 There's no mention of liability or causation. I say respectfully on behalf of LSER that
6 there's just no support for the proposition in the majority judgment for the case
7 that Mr Moser has put forward.

8 That then leaves only the minority. Which, to be fair to him, is what he relies on,
9 principally.

10 This is what I have to say about that. There were only two issues in Merricks.
11 Suitability and distribution. The remarks at 95 to 97 that Mr Moser relies upon
12 are in the dissenting minority. With great respect, and obviously with the
13 greatest possible respect to the learned justices, that judgment is not the law of
14 England, that's the minority judgment. It flatly contradicts, on the major part of
15 the case, the majority, and in any event it's not the law.

16 It's equally important to note, because I appreciate that Mr Moser submitted yesterday,
17 and I think, Mr President, you certainly understood the submission he was
18 saying, "Yes, they are dealing with a separate point here, it's not contradicted
19 by what Lord Briggs said".

20 My first submission is that it's not consistent with what Lord Briggs, for the reasons
21 I have just given. In any event, what one has to appreciate in my submission
22 is that Lord Sales and Lord Leggatt, in the minority judgment, were being more
23 generous in this aspect to their approach to certification. Which is not adopted
24 by the majority, they don't deal with it because, as I say, it wasn't relevant.

25 But of course elsewhere Lord Sales and Lord Leggatt were being less generous,
26 indeed they would not have certified Mr Merricks' claim.

1 In my respectful submission it's not coherent for there to be a pick and mix approach,
2 whereby Mr Moser can dip into the part of the minority judgment -- that doesn't
3 represent the law of England in my submission for LSER -- and then only take
4 out of it the more generous bit, but forget that the more generous bit was said
5 in the context of a far less generous approach to certification by the same
6 justices, in the same judgment. Such that Mr Merricks wouldn't have even been
7 certified.

8 Then last, but not least --

9 **THE PRESIDENT:** The question, I suppose, is whether what the two justices say is
10 inconsistent. Or simply explaining the background to the legislation. Then they
11 go on to address the issues, where they disagree and where of course the
12 majority carries the day.

13 **MR HARRIS:** Yes, and you have heard me on that so that leaves me to finish off with
14 three final submissions.

15 In my respectful submission, whatever else one says about these passages from
16 Lord Sales and Lord Leggatt -- again, with the greatest respect they must be
17 obiter. They don't go to the ratio of either of the two points that were actually
18 decided in Merricks about availability of data or whether one can take into
19 account distribution mechanism at the CPO stage.

20 So, at their highest, they were obiter. In fact in my respectful submission they were
21 per incuriam, because the issue was not argued before them. None of the
22 cases that I have cited to you were put and the argument wasn't had. The
23 reason the argument wasn't had was because it wasn't relevant.

24 In fact, interestingly, to the extent that the topic was encountered in passing, which
25 I accept it was, it was encountered in passing but it wasn't argued, Lord Sales
26 gives the answer. He says at his paragraph 96 that on the Canadian cases that

1 were put before the court on the relevant points, and argued, in fact the answer
2 is the exact opposite.

3 He quotes from Justice Rothstein in Pro-Sys at paragraph 133 -- I am not taking you
4 to it but this is Lord Sales at 96 and Justice Rothstein said it:

5 "... not intended to allow a group to prove a claim that no individual could."

6 So this point that wasn't argued and wasn't relevant is diametrically opposed to how it
7 happens in Canada. What Mr Moser says at that point is, "Oh, well, you know,
8 when I was submitting earlier about how the Canadian authorities are all very
9 persuasive and should be followed and they pursue the same aims ..."

10 Oops, all of a sudden halt. At this point, where I get the wrong answer I jettison all of
11 that and say, "Canada is just wrong and Lord Sales is right".

12 We say, with respect, that truly is pick and mix.

13 One reason that the answer is no, this obiter, per incuriam observation is not correct,
14 is that it is completely common ground that the Canadian legislation, like the
15 UK legislation, is a new form of procedure. We have just seen exactly that in
16 the Canadian case that I cited and in paragraph, I believe, 45 of Lord Briggs.
17 Identical.

18 Yet Mr Moser says, "Identical except on this point where it's completely the opposite".

19 Finally, I respectfully submit, again on behalf of LSER, with as much respect as I can
20 muster, it's an extraordinary proposition because section 47C(2) expressly
21 dispenses with the need for assessment of damages but it simply doesn't
22 mention anything else. Lord Sales' words were Parliament has also done away
23 with "... all purposes antecedent to the award of damages, including proof of
24 liability ..."

25 You might have thought that that would be mentioned in the legislation if that were the
26 case, but it isn't.

1 I end on this point with just this: again, I am not talking about any other case. I am not
2 talking about a simple case in which there are binary questions of causation,
3 there are unilateral acts by the defendant. I am not talking for example,
4 Mr President, about your purchase of car case. That is not a difficult case about
5 causation and bespoke variables.

6 I make no comment about those sorts of cases, but this case, with which I am
7 concerned, is not that. This case is ineluctably a case per Kett and Mouhteros
8 and Dennis, where you cannot sweep causation under the carpets as if it
9 doesn't exist.

10 With respect, my learned friend's first answer Merricks, with great respect that's
11 hopeless, it doesn't work.

12 Then that leads -- maybe there will be time for a short break after this next submission,
13 and I will be turning on to overlap, with this.

14 His second answer is, "Don't worry, because ultimately if I am really pushed into
15 a corner I will just take out all these transactions", barring the ones that he
16 ignores in my paragraph 18. So always barring them, he just ignores them.

17 The answer fails for a number of reasons.

18 The first one I have just given, he simply does not deal with a failure to have physical
19 possession of a Travelcard, he doesn't deal with what kind of Travelcard it is,
20 and it might not be valid. He doesn't deal with cases in which you are not a price
21 optimiser, including for all kinds --

22 **THE PRESIDENT:** You have made that point. You drew attention to the paragraphs
23 in your paragraph 18 that are not covered, yes.

24 **MR HARRIS:** He does not deal with another one, which is where you buy for
25 somebody else --

26 **THE PRESIDENT:** You have made those points.

1 **MR HARRIS:** Then it's conceptually flawed for this reason. The counterfactual world
2 on Mr Moser's case, this is the answer to the query, or the proposition,
3 conceptually flawed. The counterfactual world is one in which consumer buying
4 behaviour is altered. That's the whole point of Mr Moser's case. He is saying
5 things will be done differently by the TOCs and that will alter the buying story.
6 The transactions that would be boundary fares in the counterfactual world, they
7 are simply not the same as the actual boundary fares in the actual world. That's
8 the whole point of his case.

9 Likewise, the advance fares, the promotional fares, the group discount fares or the
10 point-to-point fares would not be the same in the counterfactual world as in the
11 actual world.

12 Again, that's the whole point of changing the way in which you sell tickets, which is
13 said to be our legal duty.

14 That's the answer. What Mr Moser says, in every single case, is, "Oh, well I will just
15 take out the transaction data that I have got for boundary fares that were
16 purchased, or advance fares that were purchased, or promotional fares that
17 were purchased, or Kids for a Quid fares that were purchased".

18 He always says -- his last resort is, "I will just take out the actual fares", but it's
19 conceptually wrong. That's the wrong take out. You have to take out the
20 counterfactual transactions for all of these cases, but he simply has no idea
21 which ones they are and he never will have.

22 So he's taking out completely the wrong transactions. That is a complete answer to
23 his back stop.

24 Then for good measure and then -- if a convenient moment I will stop before moving
25 on to overlap and then the other more minor points, is we don't accept for
26 a minute that if you take out a massive range of transactions and passengers

1 who make those transactions, that then you just blithely carry on with the same
2 assumption as to the remaining passengers' use of Travelcards. In other
3 words, his Travelcard assumed holding percentage is for the entire class of
4 people, then his back stop is, "I will just take out masses of these people, but
5 I will not do anything about the Travelcard assumption". We don't accept that,
6 that strikes us as being utterly implausible.

7 Just by way of one example, if you are a person who buys advance fares or would buy
8 advance fares in the counterfactual, then you are probably more organised
9 when it comes to travelling and planning ahead. That's what an advance fare
10 is.

11 If that's right, then you are probably also more likely to buy a Travelcard, because
12 that's also a type of advance planning. I am not saying that that's definitely the
13 case, I don't need to. My point is that if you take out categories of people left,
14 right and centre who because of their behaviour in buying tickets in a certain
15 way, it's simply unsafe to assume that their purchase, their assumed purchase
16 of another type of ticket, namely a Travelcard, will remain exactly the same.
17 But that's what Mr Moser does.

18 My point is that's not safe, it's not reasonable, it's not fair and it doesn't matter to me
19 whether it might move the dial upwards or move the dial downwards. The point
20 is Mr Moser has no idea, and he never will know, and that's totally
21 unsatisfactory.

22 Sir, if that's a convenient moment, what I have left is the second major topic overlap,
23 which doesn't take as long, and then the last three matters.

24 **THE PRESIDENT:** Yes, because, as I understood it, the plan was that all three
25 prospective defendants could complete their submissions in a day. That's on
26 the timetable we were given. You started well before lunch and at the moment

1 it looks as though you are going to be well over half a day. Which doesn't seem
2 fair to Mr Ward and Ms Abram.

3 **MR HARRIS:** My response to that is it's been agreed amongst the defendant's
4 counsel that I will have more than a third. Mr Moser ended up having a day
5 and a quarter and it was always agreed -- at least as between defendants and
6 claimant -- that the defendants collectively would have the same time as
7 Mr Moser. We understand that Mr Holt may have to be interposed, but that
8 would, by my reckoning, if that that were to be a day and a quarter to him and
9 a day and a quarter for us, that would take us to tomorrow lunchtime.

10 **THE PRESIDENT:** If, between you, you finish by tomorrow lunchtime, that's fine.
11 I don't know how you have divided the time between the three of you, if you tell
12 me it's understood that you will have half the time of the defendants and
13 Mr Ward and Ms Abram a quarter each, that's fine.

14 **MR HARRIS:** It's broadly along those lines, and also bearing in mind that we do have
15 Friday, although I am not suggesting ...

16 **THE PRESIDENT:** We will need a bit of Friday for Mr Moser's response, yes.
17 Very well, so it's now 3.22, so we will return at 3.30.

18 **MR HARRIS:** I am very grateful, thank you.

19 **(3.22 pm)**

20 **(A short break)**

21 **(3.32 pm)**

22 **THE PRESIDENT:** Yes, Mr Harris.

23 **MR HARRIS:** Thank you, Mr President.

24 Overlap is the next topic, I am going to take this much more quickly, even though we
25 say it's every bit as major a flaw on the facts of this case. As you know, it's
26 common ground that at step 3 of Mr Holt's transaction he has to be able to

1 identify an overlap, but he can't do it. It's important to recognise that what he
2 should be therefore aiming for with his proxy are in-scope fares, by people
3 physically holding a particular type of valid Travelcard, which Travelcard was
4 bought prior to the fare purchase and where that ticket has been bought for that
5 person with that Travelcard.

6 That's the overlap that he needs to try to approximate, given that he will never be able
7 to find out what it actually is. But he doesn't do that. As a result, the entire
8 methodology is flawed and, we say, not fit for purpose because it's not
9 grounded in the facts of this case, it's not realistic and it's certainly not fair.

10 What instead he does is he aims to proxy, or to guesstimate, train passengers who
11 hold Travelcards at the time of their journey.

12 These are not the right train passengers, it's just train passengers generically, and
13 then he just says hold Travelcards, well that's not a particular type of
14 Travelcard, or necessarily a valid one, let alone one that's physically held. Nor
15 is it one that's bought prior to the fare purchase.

16 As I say, and he says at the time of their journey. That has to be physically held at the
17 time of the journey. The other thing he doesn't deal with, he doesn't even aim
18 to deal with, is where the purchase was for the person who actually held that
19 Travelcard.

20 His proxy is aiming at the wrong thing. It could never hit the target, because it's not
21 even aiming at the right target.

22 For good measure, it's patently not for the relevant period. His proxy is derived from
23 data, from one instance from 2010 as regards the CLRT, that's the Central
24 London Rail Termini, and just for your note that was a handful of days only, at
25 a handful of stations. But that's not Mr Gutmann's class, his class is every
26 single transaction in which a boundary fare on his case could have been bought

1 for six years and ongoing. He relies upon a handful of days in 2010 for the first
2 part of that link.

3 My first point is it's simply not fit for purpose, it doesn't even aim at the right thing, but
4 it gets worse because it's completely flawed, even on its face, for what it does
5 aim at. I say none of these other points are necessary, because if you are
6 aiming at the wrong thing then it's hopeless.

7 Let's just have a look briefly at this CLRT, Central London Rail Termini, report, which
8 is the first of the two key documents upon which he relies for this double proxy.
9 It's at bundle 6, tab 3, page 60. I am going to, if I may -- this is almost
10 a miscellany of further flaws in the mis-targeted proxy. I simply do not have
11 time, I would require a day to tell you about all of the flaws. There is flaw after
12 flaw after flaw, I am just going to identify a handful.

13 The first one is identified at page 60, tab 3, which is what's the purpose of this report
14 upon which Mr Holt relies? The purpose, as is expressed in the executive
15 summary purpose, is to talk about people travelling into and through the Central
16 London Rail Termini at the peak hours. It's for accessing central London during
17 peak periods and it's talking about people travelling through the Central London
18 Rail Termini. It's analysing people who alight at central London and travel into
19 central London and what are the modes that they use when they get off and
20 travel further into central London. Do they use Tube, do they use walking, do
21 they use cycling, do they use buses, taxis. It only does so by handing out
22 surveys on a handful of weekdays in either the spring or the autumn of 2010,
23 this is between the two hole punches, only at rush hour.

24 That's all I need to illustrate the inaptness of this document. Because it's mostly about
25 people travelling in and people who are travelling in as commuters and what do
26 they then do? This is common ground. Mr Moser more or less said the same

1 thing in his submissions. I do accept that there is a chapter that I don't need to
2 turn up, it's chapter 5, that talks about their means of travelling around at the
3 other end of the journey, so the one that's not in central London. So it does
4 include some analysis of that too, but the principal thrust of the report is people
5 coming in to London at rush hour, what do they then do? And why, why is that
6 the central purpose? It is because it's a TfL document and TfL wants to know,
7 "Crikey, in a world in which there is an increase in the capacity for rail transport
8 passengers coming into London, what should I best do with the crush and the
9 pinch points that result?" I TfL, what do I, TfL, do?

10 **THE PRESIDENT:** Can you help me, was the survey only of people coming into
11 central London --

12 **MR HARRIS:** Yes --

13 **THE PRESIDENT:** -- or was it also people leaving central London, as to how they
14 reached to their point of departure station?

15 **MR HARRIS:** There was a handful of surveyors who were wandering the around the
16 concourse at 13 central London stations, which is a point I will come back to,
17 and when they got off the train in central London they were handed a survey to
18 take away and fill in at their own leisure and send back. It's mostly about what
19 I just said, what happens at the central London end. But it is fair to say that
20 they were also asked some questions about how did they get to their departure
21 station as well.

22 **THE PRESIDENT:** They didn't give forms to people who were getting on a train?

23 **MR HARRIS:** No, they weren't interested in that.

24 **THE PRESIDENT:** They might be, because they might want to know how they got to
25 the station in London from which they were departing, so TfL might want to
26 know that. Did you get to Paddington by Tube, bus or taxi? But you say they

1 didn't ask that?

2 **MR HARRIS:** No, they did ask about how did you get to say -- not Blackfriars, because
3 that one had some problem that day, but say St Pancras.

4 **THE PRESIDENT:** To take your train out of London?

5 **MR HARRIS:** No, to make an onward journey from that station. Because TfL is
6 obviously a central London body principally, and it's worried about pinch points,
7 so what it's trying to do is find out mostly about what happens when a massive
8 rush of people come in at rush hour in, and then what you then do with
9 a massive rush of people going back to the same stations in order to egress
10 London at the end of the day.

11 My point is a very simply point: they are not the right train passengers. It's as simple
12 as that.

13 Mr Moser's claim relates to only outbound in-scope fares. Only. He expressly
14 excludes inbound and he expressly excludes commuters, and yet those are the
15 people who are mostly the focus of this report. It's fundamentally inapt.

16 Professor Mason, I am ever so sorry, were you making a point and I interrupted you?

17 **PROFESSOR MASON:** Yes and yes, but it's fine, it's been addressed in the
18 subsequent points.

19 **MR HARRIS:** I am very grateful.

20 I am just going to rattle off a list of other big inadequacies.

21 I alluded to this earlier, the CLRT is a snapshot of a handful of days in 2010, so
22 11 years ago.

23 It only was on, obviously, since it was a snapshot of days, certain weather. Some
24 were in spring some were in the autumn, but it goes without saying that it makes
25 a massive difference to how you travel to or from a station, whether at the
26 central London end or at the other London end, if it's pouring with rain or not.

1 Mr Moser takes no account of that at all. It makes a massive difference if it's five
2 degrees below zero or 25 degrees above zero. No account is taken of that.

3 Next point, the survey only relates to 13 stations, but my client has 160 stations. In
4 fact, slightly over. The claim relates to the supposed propensity to travel by
5 way of boundary fare or in the counterfactual world some other fare, from all of
6 those stations, because he takes every single possible relevant journey from
7 all of my client's stations. But he doesn't deal with 156 plus of them at all. They
8 are just simply not even mentioned.

9 Of course, what the travel -- if you were ever to turn to chapter 5 for your edification,
10 what it shows, unsurprisingly, is that when you are at a station further out of
11 London your travel habits completely change, not least of all because your
12 options completely change. It might be more pleasant to walk, there might be
13 a nicer walk, there might be better cycling because you have left your cycle
14 there. It might be that you have to use your car because there are no buses.
15 It might be that there is no Tube station, because the Tube doesn't go ... the list
16 of variables is endless, he doesn't account for any of those.

17 What's more, the CLRT does not relate to any behaviour for any specific transaction.
18 It only relates to generic types of behaviour, the survey is about generic types
19 of behaviour, but Mr Moser's case simply must relate to specific transactions.

20 It's not good enough to say, "Oh, well, based upon some generic data about behaviour,
21 therefore this would have had happened in a specific transaction". That's wrong
22 in principle and certainly unfair to the defendants.

23 Then on top, what he then says -- I am now moving on from the CLRT -- is the next
24 bit, so the multiplier is grossly inapposite, I am calling the multiplier the figure
25 that he arrives at from the CLRT. Then the multiplicand is what he multiplies it
26 by, and that's the people who use Travelcards. Bearing in mind of course that

1 that's fundamentally not what he should be aiming at, and I have already made
2 that point.

3 How does he get to his figure of people who are using Travelcards? I beg your pardon.

4 He aims now for people who use Travelcards, right, but Mr Holt himself freely
5 acknowledges -- I will give you the reference: core bundle 6, 3.13 and
6 3.15 -- that he shouldn't actually be aiming for people who use a Travelcard, he
7 should be aiming for people who hold a Travelcard. Indeed I would add to that
8 not just hold in the sense of own, but hold in the sense of physically possesses.

9 Mr Holt then aims at people who use Travelcards, but then admits that that's the wrong
10 thing to aim for. Of course he aims for the wrong thing because he can never
11 tell what he actually wants, there is no data that allow him to do that.

12 So he guesstimates with -- then he does this by reference to generic figures for people
13 who use Travelcards, either on the Tube or on buses. They are not the right
14 people, because the people he should be aiming for are the people who actually
15 held a Travelcard and for an in-scope journey heading out of London, not
16 generally people who have Travelcards.

17 He also needs to have people who have a -- you have heard these points -- valid point
18 and held it in their physical possession, but he's not even aiming for that.

19 The problems are, leaving aside that use is not the right thing to aim for, that the figures
20 come from different time periods. The bus survey is from a handful of days in
21 2014. Okay, but that's not the people who are in Mr Gutmann's class. So that
22 one doesn't work.

23 Then, incidentally, Mr Holt expressly agrees -- this is at core bundle, tab 6, 3.25 -- that
24 using the wrong time period could lead to inaccuracy. So he agrees with me
25 on that one.

26 Then we of course criticise the fact that both the bus survey -- because this is people

1 who are said to have got on the bus after they left the station having arrived in
2 central London, as derived from the CLRT. We said, "Hang on a minute, your
3 own claim excludes commuters but nearly all of these people are commuters,
4 so we don't understand it, what's going on?"

5 Let me show you a passage where Mr Holt attempts to deal with this criticism, one of
6 the several hundred criticisms about this methodology. Can I invite your
7 attention to core bundle, tab 6, paragraph 3.2.13.

8 **PROFESSOR MASON:** Sorry, Mr Harris, could you repeat the reference?

9 **MR HARRIS:** It's tab 6 of the core bundle, it's in bundle-page 243, it's
10 paragraph 3.2.13. We criticised the fact that the focus of this misdirected
11 double proxy was on commuters. Mr Holt attempts to respond to this in the
12 report -- this is the reply report of the second expert report, but it's notable what
13 the response is. Let me just show you 3.2.13, so he says:

14 "... it is true that journeys made using a Travelcard are out of scope of the claim ..."

15 Right, so he acknowledges that he will be getting this wrong, but then what we see is
16 a whole list of frankly speculation and assertion and excuse. I mean that in the
17 kindest possible way, I have the greatest respect for Mr Holt, but what does he
18 say:

19 "..., commuters holding Travelcards may also be making other journeys in addition to
20 their commute ..."

21 Speculation number 1. Well who knows? Maybe they do, maybe they don't. No
22 evidence, just assertion. Next one:

23 "Therefore, removing commuters would risk underestimating Travelcard holding as
24 many in-scope journeys will be made by commuters not on their regular
25 commute."

26 Again, assertion number 2 or speculation number 2, no evidence, might be true, might

1 not be true, might be true on a certain day in a certain proportion and on a
2 different day in a different proportion. We have no idea and nor does Mr Holt:
3 "Indeed, I would expect [here is Mr Holt giving his personal view about matters of
4 factual evidence] a material proportion of in-scope journeys to be made by
5 commuters ..."

6 That's very interesting, but it's pure speculation or assertion and not a jot of evidence:
7 "(many of whom may reside within the London travel zones)."

8 Maybe so, but maybe not. So that's assertion or speculation number 4. In any event,
9 even if it were in a certain proportion on a certain day, or in a certain borough
10 of London, or by reference to certain in-scope journeys, it says absolutely
11 nothing about any other day or any other borough or any other type of
12 commuter. I mean it really is an extraordinary way to deal with the facts that
13 the two documents chosen upon which to base the double mis-targeted proxy
14 relate to the facts of this case.

15 With great respect, totally unsatisfactory but, again, I understand Mr Holt's difficulty.
16 He's been asked to do something that is totally impossible.

17 Mr Moser has an interjection, so I will pause.

18 **MR MOSER:** I am very grateful to my learned friend for giving way. It's just while we
19 are on this page, and then I need not come back in my reply.

20 Sir, the President, asked a question about the CLRT. If one looks at the top of
21 page 243 it's noted there that the CLRT focused not only on inbound but also
22 on outbound passengers. There's the citation and also footnote 62. That's all
23 I want to point out while we are there.

24 **MR HARRIS:** Thank you, Mr Moser. I accept that, as I submitted to the learned
25 chairman. Of course, chapter 5 if he wants any more detail or any of the other
26 Tribunal members, that goes into some fascinating detail about walking

1 propensities at Dorking.

2 I am going to skip over a couple more points and then deal with the major point, the
3 customer survey, and then I will move to the next topic in the interests of time.

4 A prime example of the error that I drew the Tribunal's attention to in opening, about
5 how somehow we have to provide data at the CPO stage, which respectfully
6 gets it the wrong way around. The example to which I draw your attention is
7 tab 6, so the reply report if you still have it, and it's just near where we were
8 a minute ago. 3.2.20 on page 245.

9 This is a paragraph that is again multiple speculation and assertion upon multiple
10 speculation and assertion, but in the second sentence it says:

11 "..., but the Proposed Defendants cite no data on Travelcard holding patterns at these
12 stations."

13 As if that's an answer. It's not my job to do that, it's Mr Gutmann's job to present either
14 data on the actual overlap, which he simply cannot do, or at least, if it weren't
15 a case where there were all these terrible bespoke causation problems that
16 already holes him below the waterline, you would at the very least have to have
17 a proper proxy. He cannot turn to us at the CPO stage and say, "I am going to
18 make this assumption", this, with respect, we say, unsubstantiated assumption
19 and assertion, "... and then it's for you to turn round and say no, no, no, no, no,
20 here is some data that shows that's not right".

21 **THE PRESIDENT:** I think all he is saying, Mr Harris, is he's assuming that data
22 doesn't exist and therefore this is the best proxy that he can do.

23 And recognising there's the possibility that it could be different at the non-central
24 stations.

25 **MR HARRIS:** I respectfully contend that that's a charitable reading of it, but it's still
26 the same point --

1 **THE PRESIDENT:** At this stage, I mean pre-disclosure. That he's doing what he can
2 at this stage and it may be that after disclosure more data will come and then
3 the method can be improved.

4 But he is saying this is the method which I have come up with, with the data that's
5 currently been available.

6 **MR HARRIS:** But there is no suggestion that we have this data.

7 **THE PRESIDENT:** No, so he's having to guesstimate or estimate.

8 **MR HARRIS:** That is my point, it's an inapt case. There is no data that we hold of
9 Travelcard holding patterns at these stations.

10 Anyway, I am just going to move on.

11 As I say, multiple problems but having multiplied the multiplier by the multiplicand they
12 are both fatally flawed, unsurprisingly you get a hideously unsupportable and
13 flawed result, that's a non-workable or flawed methodology. I put it this way: it
14 is not realistic, it's not grounded in the facts, it cannot begin to show what he
15 needs to show. Not only because it aims at the wrong thing, but in aiming at
16 the wrong thing he then goes about it in the wrong way.

17 Then that leaves only the survey. Mr Moser's submissions placed -- I was quite
18 surprised actually -- considerable reliance as the panacea upon this survey,
19 "Don't worry effectively [their submission was being made] because I know this
20 is all, you know, a proxy", but then there was the submission, "... but, you know,
21 I want to do it in an aggregate manner, so forget all the problems", but, more
22 importantly, "But don't worry as well, because I will be able to fix some of this
23 with a customer survey". That was the gist of the submission, both in writing
24 and orally.

25 With great respect, it's hopeless.

26 A survey couldn't begin to recall with anything resembling accuracy what happened in

1 any given transaction, let alone every single transaction, which is the scope of
2 Mr Moser's claim. It is your point, Mr President, Mr Holmes, about the Epiq
3 distribution stage, but magnified.

4 You rightly said, "Come on, realistically, are people ever going to be able to tell what
5 they did a few years ago with any particular journey and produce the ticket and
6 the Travelcard and the rest of it?"

7 Obviously not. I will let my learned friends Ms Abram and Mr Ward develop that point.

8 My point is that a survey, it's with great respect nonsense to suggest that a survey,
9 handed out on a concourse, is then going to get anybody, let alone everybody,
10 to be able to say:

11 "Oh, yes, I can tell you about this specific transaction, and I can tell you that I had this
12 type of Travelcard and I bought it before the in-scope fare, and I physically held
13 it and it was valid for these zones and then I bought this type of particular going
14 out in-scope journey."

15 It's hopeless.

16 **THE PRESIDENT:** That's not the survey, is it?

17 **MR HARRIS:** The survey is intended to fill in the gaps from the misdirected double
18 proxy. It's supposed to augment and improve --

19 **THE PRESIDENT:** Yes, but it's a survey. You may say it doesn't help, but the actual
20 survey is of what they are doing at the time they are surveyed.

21 **MR HARRIS:** No, with respect, sir, that's not. What the survey is intended to do is go
22 ask about historic "commuting patterns", it is expressly intended to get people
23 to explain what they used to do. Mr Moser's submission this morning was --

24 **THE PRESIDENT:** Was that right, because I am looking at 3.6.12.

25 **MR HARRIS:** It's absolutely -- and not only is it right, but it's what Mr Moser submitted
26 this morning. Mr Moser said, "There's no problem, people will be able to

1 remember this". He said -- it's utterly, utterly implausible, but that was his
2 submission.

3 **THE PRESIDENT:** I see.

4 I am just looking at what Mr Holt says in 3.6.12.

5 **MR HARRIS:** Are you in the reply report, my Lord?

6 **THE PRESIDENT:** Where he talks about the survey, I think --

7 **MR HARRIS:** He does it a little in his first report and then more so in his second report.

8 **THE PRESIDENT:** Yes, he goes into it in some detail.

9 **MR HARRIS:** Yes.

10 **THE PRESIDENT:** I thought.

11 **MR HARRIS:** 3.6.14 -- no, that's a slightly --

12 **THE PRESIDENT:** He makes adjustments to get the historical:

13 "... the survey will only provide evidence relating to Travelcard holding for in-scope
14 journeys at the time the survey is carried out."

15 That's what they are going to be asked. Then he will use that, you may say it's
16 illegitimate, but it's not a survey asking people: what did you do in 2017?

17 **MR HARRIS:** My Lord, this is a --

18 **THE PRESIDENT:** That's my reading of it, maybe I have misunderstood it, but that's --

19 **MR HARRIS:** I had a clearly different understanding, but for me this is a win-win
20 submission, because --

21 **THE PRESIDENT:** Then he explains, as I understand it, how he is going to make the
22 adjustments you make to get to the historical, because he recognises it's not
23 going to tell him what would have happened historically, directly, so one has to
24 then interpret it.

25 You may say it's a bad method, but just to be clear what the method he's proposing
26 is, that is certainly my understanding of it, but it's certainly something we can

1 clarify tomorrow.

2 **MR HARRIS:** As I say, it's a win-win situation for me, because if Mr --

3 **MR MOSER:** Sorry to interrupt just before tomorrow, the questions are on page 253,
4 so 254 is interpreting the results.

5 **THE PRESIDENT:** Yes. Exactly. That's why, as I understand it, it's about the journey
6 they are taking at the time they get the question.

7 **PROFESSOR MASON:** Just to clarify, paragraph 3.6.10 on page 28 -- I think I am
8 looking at the right ... has the actual questions as Mr Moser has said. It isn't
9 absolutely explicit, but it's pretty clear to me from reading those that it refers to
10 current journeys rather than something in 2016, for example.

11 **MR HARRIS:** As I say, I had understood it to be at least a hybrid but I am delighted if
12 you, sir, Professor, and Mr President, are correct. Because it even strengthens
13 my point. Because what you will be surveying is not the relevant journeys. You
14 will be surveying some later journeys that are not the relevant transaction, save
15 for one that happens to have happened on that day, and that's subject to
16 Mr Moser even being able to pursue these continuing claims in this claim.

17 Then there's, Mr President, your point from yesterday, which is the survey won't even
18 be capable of being carried out for at least another year or so because of the
19 coronavirus pandemic, so it will be even further out of date.

20 My point is you cannot, especially where it's totally common ground that there have
21 been fundamental changes in consumer travelling patterns by reference to
22 CPAY, that's contactless pay, and Oyster over the relevant period hope to get
23 anything resembling reliable data from a survey now, let alone one that takes
24 place in a year's time, regarding actual transactional behaviour in 2015. It is,
25 with respect, hopeless.

26 In any event, those questions are focusing, as they say in terms, on commuting

1 patterns, that's what he says. They're irrelevant, commuters are not in his
2 claim.

3 Then, on top of that, my final point because I simply have to deal with topics 3, 4 and
4 5, of which 3 is the only sizeable one. He says even on his own case it would
5 have to be fundamentally adjusted to get back into the right time period and
6 that is replete with assumptions that are flawed. The most important point is he
7 is expressly recognising by having to go fundamentally adjust -- his problem is
8 if he uses the survey and relies upon it, he knows he will get a number that is
9 nowhere near high enough for his claim. So he then has to increase the
10 number. So the so-called historical adjustment is expressly designed to just
11 bump up the number.

12 Well that kind of proves my point, it's not an apt method to begin with.

13 Then, just lastly, Mr Moser referred this morning to the travel settlement agreement
14 and took to you the survey that is therein set out, you remember the schedule
15 4 that was said to be confidential. I don't need to turn it up or say anything
16 confidential, my three points are.

17 (1) that was for a totally different purpose, revenue allocation. That has nothing to do
18 with Mr Moser's claim.

19 (2) it uses a totally different metric, namely kilometres travelled. It has nothing to do
20 with Mr Moser's claim.

21 (3) as you will have seen, because I was grateful that you went to paragraphs, for
22 example, 2.9, 10 and 14 of the schedule, it has 101 different complicated
23 adjustments and deviations. It even had a specialist adjustment body or panel.
24 So the methodology of that survey has nothing to do with Mr Holt's proposed
25 survey methodology.

26 In other words, it's irrelevant.

1 Then that takes me, in the time available, topic 3, inability to show loss, and then the
2 other three are piffling, in fact number 6 I don't need to say more about, that
3 was the dominance point.

4 Number 3, our submission, this is Mr Moser cannot escape the fact that he will never
5 be able to show which portion of his class is uninjured and yet that's
6 a fundamental requirement.

7 Our submission is very simple. It's in a case that doesn't suffer from these massive
8 causation assumptions, so some other case than this one, it would be
9 acceptable to proceed where there's only a de minimis number of possibly
10 uninjured claimants. I'm prepared to accept that, because that's how it's done
11 in the US and Canada.

12 But where it appears that there will be more than a de minimis number of class
13 members who will or may not have suffered any loss, which is this case, there
14 simply must be a way of winnowing out the injured from the uninjured as part
15 of the methodology. As I say, that is because otherwise you are countenancing
16 and expressly endorsing a situation in which the defendant will end up paying
17 for a more than de minimis amount of damages, where they haven't even
18 broken the law and/or they haven't caused any loss.

19 That's obviously unacceptable in any civilised system of justice. What they say in the
20 US is well the answer is what you have to be able to do at the certification stage,
21 so today, the class representative has to come along and demonstrate to the
22 certifying Tribunal how his methodology will -- will -- winnow out the injured from
23 the uninjured. He doesn't have to do it, but he has to show that his methodology
24 is capable of doing it. If he can't do that he doesn't get certified, because it's
25 a fundamentally inapt process. That's our case, Mr Moser simply can never
26 show which ones are injured and which ones are uninjured and he doesn't even

1 try. He simply says:

2 "I don't have to worry about that, because I'm proceeding in an aggregate top-down
3 manner."

4 But that is not how it works, even in aggregate damage cases in the US and Canada.

5 There are three cases, I am going to have to, I am afraid, rattle through them but they
6 are important and I would invite your further attention to them. They are In re
7 Nexium, which is volume 6 of authorities, and it's at tab 17.

8 I am afraid in the time available, I am simply going to read out the bits of the headnote
9 and then give you some paragraph numbers. Fortunately, the points also come
10 out of the next US case.

11 This was a case with which we are familiar, pay for delay drugs type cases, the
12 question amongst others was even if the generic had been introduced at
13 an earlier time, would people have even bought it at the cheaper price and/or
14 how many and/or what would the saving have been? That's the context.

15 If you turn up page 3119 of the bundle, please, under headnote 8, between the two
16 hole punches on the left-hand side:

17 "Class action is improper, unless theory of liability is limited to injury caused by
18 defendants, ie defendants cannot be held liable for damages beyond injury they
19 caused."

20 Headnote 10:

21 "Where individual claims process is conducted at liability and damages stage of
22 litigation, pay out of amount for which defendants were held liable must be
23 limited to injured parties and at class certification stage [this is the key point]
24 the court must be satisfied that prior to judgment it will be possible to establish
25 mechanism for distinguishing injured from uninjured. The court may proceed
26 with certification so long as this mechanism will be administratively feasible and

1 protective of defendants' seventh amendment and due process rights."

2 Exactly the submission I have been making all along.

3 Then at 114, for sake of good order and in Mr Moser's favour, but I have already
4 accepted this:

5 "Certified class may include a de minimis number of potentially uninjured class
6 parties."

7 Of course that's subject to the winnowing-out point.

8 Then there's a similar point at headnote 20, that you must be able to winnow out.

9 I would invite your attention, please, in particular to paragraphs 10 on page 3127 and
10 through to 12. What you will see there is that the controversy from In re Nexium,
11 as we are about to see in In re Asacol, is that sua sponte, the First Circuit Court
12 of Appeals, said, "Oh, well, if there are some individualised issues about
13 counterfactual behaviour, maybe you can just put them all in an affidavit from
14 the class members". As we see in In re Asacol, that is essentially exploded.

15 The point here is that Mr Moser -- on behalf of Mr Gutmann -- doesn't even say that.

16 There is absolutely no proposal at all in this case that the class members will
17 come along when I want to quiz and test causation and provide even
18 an affidavit. Absolutely none. To the contrary. I am told I will never get
19 anywhere near any class member, who will never even be identified to me, and
20 causation will simply be assumed in aggregate, and then there will be a little bit
21 of toing and froing with some of these people at the distribution stage, "But, by
22 the way, Mr Harris, and his clients will be long gone, it's none of their business
23 at that point". That's the submission.

24 In In re Nexium that was only in the basis of the sua sponte suggestion of an affidavit,
25 but critically that is not our case. So I will never get the chance to exercise -- it's
26 not my seventh amendment, but it's my equivalent due process rights.

1 Then the passage which talks about the need to winnow out and what happens when
2 you cannot identify such a mechanism is at paragraph 20.

3 Then, just so you know how --

4 **THE PRESIDENT:** Excuse me, paragraph 20 is on ...

5 **MR HARRIS:** Page 3140.

6 **THE PRESIDENT:** Yes, they don't ...

7 **MR HARRIS:** It's the last two sentences.

8 **THE PRESIDENT:** Yes, I see.

9 **MR HARRIS:** Three.

10 **THE PRESIDENT:** I think they don't number every paragraph, do they?

11 **MR HARRIS:** No. Numbered paragraph 20. Then just so you know how these cases
12 fit together, there is then a dissenting judgment, in this case, In re Nexium, by
13 Kayatta, Judge Kayatta; you see that beginning on 3140.

14 That's relevant because he then says, "Even the affidavits would be totally
15 unsatisfactory". But it's most relevant, because if we then turn over to the next
16 tab, In re Asacol, this is again the same circuits of the Court of Appeals, First,
17 and the leading --

18 **THE PRESIDENT:** Sorry, wait a minute. My next tab is --

19 **MR HARRIS:** I beg your pardon, it's tab 19, two more tabs.

20 **THE PRESIDENT:** Tab 19, yes.

21 **MR HARRIS:** You will see this is several years later, I think five but that can be
22 checked -- or three maybe -- three years. The leading judge in the same Court
23 of Appeals First Circuit is Kayatta. What this case establishes is that there has
24 to be -- I am reading here from 3189, on the left hand column, the middle
25 paragraph:

26 "... considering the propriety of class certification in this case, we again deal with an

1 issue that strikes at the heart of the competing considerations raised by some
2 class actions, the proper treatment of uninjured class members at the class
3 certification stage."

4 So it's exactly our issue, exactly our issue. What they go on to do -- and I am just
5 going to give you some pages, if I may, to look at, because this is absolutely on
6 point.

7 What this case goes on to say is that: if you come to the certification court and you
8 cannot show, at the certification stage, that you will be able to winnow out those
9 people who do not have a claim, then you cannot proceed because that
10 tramples on the rights of the defence.

11 They go on to say, given what happened in *In re Nexium* and given Kayatta's dissent
12 in *In re Nexium*, that even a suggestion of affidavits is basically hopeless. But
13 that isn't even a suggestion in our case.

14 So I would commend to you, and I am afraid I am going to have to move on --

15 **THE PRESIDENT:** Sorry, which pages is that?

16 **MR HARRIS:** I would invite, please, the Tribunal to read the whole of 3189, 3190 and
17 3191 and then 3193 and 3195, and those points you can see in terms.

18 But, as I say, I have to deal with *Pioneer v Godfrey* and then finish off the other points.

19 **THE PRESIDENT:** So it's pretty much the whole of section 3 of the judgment, isn't it?

20 **MR HARRIS:** It is, but it's so on-point --

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

22 **MR HARRIS:** It's truly fascinating.

23 **THE PRESIDENT:** I just want to make sure I've got the right ... yes, it's section 3
24 really.

25 **MR HARRIS:** Yes, I am grateful. Then that takes me on to *Pioneer*, which, far from
26 assisting my learned friend -- this is the recent Supreme Court of Canada

1 case -- actually sinks him. So I will not do them all, but the passages that
2 I would invite you to re-read at your leisure are 95 to 119, and Mr Moser focused
3 on --

4 **MR HOLMES:** Sorry, where is this again?

5 **MR HARRIS:** So sorry, bundle 6 of authorities, right at the very end, it may be a new
6 tab 10, but it certainly begins on 3316.

7 I don't have a tab number. I think it's been put behind a new tab E, I am told, in the
8 bundle.

9 **THE PRESIDENT:** Yes, it's E1, yes.

10 **MR HARRIS:** What I invite here -- again, I am afraid quickly -- is that at 102, so that's
11 on page 3389, you can see that this was another case, just like Pro-Sys, where
12 the relevant question was about what you have to show where it's an indirect
13 purchaser level claim.

14 A distinction is drawn as to -- in this case between what you have to show at
15 a certification stage, and for the purposes of certification, and what you have to
16 do at a later stage. That's why, if you read the whole of those paragraphs, you
17 will see what --

18 **THE PRESIDENT:** 95 to 119, you say?

19 **MR HARRIS:** Yes. I am just going to pick on the most relevant for today's purposes.
20 At paragraph 113 on 3395, you will see, Mr President, the point that you raised
21 with Mr Moser in argument, that this case expressly talks about two things: the
22 certification stage and then the "common issues trial". At 113 is where you see
23 a reference to that.

24 I'm reading between the two hole punches halfway down 113:

25 "Irrespective, then, of whether aggregate damages are certified as a common issue, it
26 is for the Trial Judge to determine, following the common issues trial, whether

1 the statutory criteria are met, such that the aggregate damages provisions can
2 be applied to award damages."

3 But that's not what's going to happen in this case. Mr Moser's proposed methodology
4 is entirely composite at which there will never be a splitting off into individual
5 trials of quantum. Indeed, his entire methodology is not set up in that way.

6 Then at 115 -- this will obviously become a lot clearer when you sit and just read it in
7 one go; I am sorry I am taking this so quickly.

8 At 115, you will see that Toshiba did not appeal the certification of the issues as
9 common issues. So it saw what had happened in Pro-Sys and it thought, "I am
10 not going to win on certification", but what it nevertheless said was: I take
11 issue -- rather, it takes issues, with the certification in the judge's statement that
12 when discussing certification of the loss related to common issues that:

13 "The aggregate damage provisions allow for an aggregate award, even where some
14 class members have suffered no financial loss."

15 So that's the point that this Supreme Court then goes on to deal with. It does it in
16 a way that's four-square in my favour. What it says in 116 is it's purely
17 a procedural act, just like Lord Briggs said in paragraph 45 of Merricks, purely
18 procedural, does not confer substantive rights.

19 Then at 117, it says that the reliance below on the courts in aggregate damages, to
20 signify an element of a cause of action, is wrong. Just wrong.

21 What it can do is establish the extent of individual loss without individual -- well, that's
22 section 47C(2), that's paragraph 118.

23 Then at the end of 118, bottom of 3398:

24 "Therefore, ultimately, to use the aggregate damages provisions, the Trial Judge must
25 be satisfied, following the common issues trial, either that all class members
26 suffered loss or that he or she can distinguish those that have not suffered loss

1 from those that have."

2 Well, exactly my point. We can never do that in this case, and Mr Moser's
3 methodology does not allow us to even try.

4 Then last but not least, 119: so at this stage it therefore remains possible. So in that
5 case, because they were going to go on and have this common issues trial, at
6 which point they might say, "No, no, no, aggregate damages are not right", it
7 did remain possible to determine -- once it is determined that loss reached the
8 indirect purchaser level that effect individual class members' claim. But in our
9 case, it's not possible. Mr Moser's methodology sweeps away with all of that.

10 This is the emphasis in the Supreme Court's own judgment, not my emphasis:

11 "In other words, while it was sufficient for the purposes of certifying loss as a common
12 issue for Dr Reutter's methodology to show merely that loss reached the
13 indirect purchaser level, whether this methodology is sufficient for the purposes
14 of establishing Toshiba's liability to all class members will depend on the
15 findings of the Trial Judge."

16 Exactly. You have to have that ability, otherwise your due process rights are, bingo,
17 they disappear in the flick of a switch. And yet Mr Moser's case doesn't allow
18 it.

19 I have to end there because I have five minutes only on the remaining more minor
20 points.

21 Topic 4 was third-party retail vendors.

22 With respect, that claim is hopeless on the facts because, as I said in opening, the
23 suggestion is that we are somehow responsible for the sales by third-party retail
24 vendors of the ways and manner in which they go about selling their tickets.

25 But Mr Backway for LSER simply says, and flatly says, that's wrong, on the facts. The
26 reference to that is core bundle, tab 15, paragraph, first, 6B and then 32 and

1 then 55D, together with footnote 15, which by the way also gives you the
2 reference to the actual licence agreement, pursuant to which the third parties
3 do this activity.

4 The critical point is really this -- and I will then give you some page references. The
5 critical point, why it's a hopelessly flawed allegation, is that when it comes to
6 the sales of tickets and the manner of the sales of tickets, far from being our
7 agents, that we direct and control them what to do, they are our competitors.
8 The very raison d'etre and business model of a third-party retail vendor, as
9 indeed we heard from Mr Moser, none other, was to try to sell more of our
10 tickets because they're better at doing it. They have a better way of selling.
11 They have a better and more innovative sales model. They have better
12 websites. They have more consumer-friendly advertising.

13 Whose tickets are they selling? Ours. If they sell one of our tickets, it means one of
14 two things. It means either we don't sell it at all, so we have lost out to them
15 and we have to pay them a commission where we otherwise wouldn't have
16 done. Or, I accept, the reason we are not too upset with having these
17 competitors in existence, leaving aside that the ORR demands them --

18 **THE PRESIDENT:** You have no choice.

19 **MR HARRIS:** Yes. Is that, if they do a good job, we hope and we expect that they
20 will overall increase the overall number of ticket sales, which is also good for
21 us, obviously.

22 But my point is there are three uncontroverted pieces of evidence that make good the
23 point that: as regards the manner of sales of these tickets, they are not our
24 agents but our competitors. I would like to show them to you in the remaining
25 minutes.

26 First of all, there's the exhibit to Mr Backway, which is to be found in bundle 5 at tab 3,

1 page 313. It's bundle-tab-page 313. This is an exhibit to Mr Backway's
2 statement. The second paragraph down is a Trainline -- Trainline being the
3 archetypal example of a third-party retail vendor, the one we have probably all
4 heard of or used. The second paragraph, three lines down -- well, this is
5 Trainline's response, I will just read this sentence:

6 "Whilst we acknowledge the role of TOCs in a growing industry, we believe things can
7 be even better for passengers and we welcomed and agreed with the view
8 expressed in the report [I am going to take you to that in a minute] that 'third-
9 party retailers play an important role in expanding the market [these are the
10 keywords] and putting competitive pressure on TOCs to improve their offering,
11 including by innovating'."

12 The rest of the report makes a similar -- as I said, because the raison d'etre and the
13 business model is to do exactly that, unsurprisingly there are lots of references.
14 I just want to show you one more, which is in a bundle that in my pile of
15 bundles --

16 **THE PRESIDENT:** They are quoting from the ORR's report. Is that right?

17 **MR HARRIS:** They are, and I am about to show you one other extract from that exact
18 document, and it's in this so-called supplemental bundle.

19 No, sorry, they are quoting from the Retail Market Review, which is an ORR report,
20 yes, you're right.

21 The page reference is supplemental bundle, tab 19 --

22 **THE PRESIDENT:** Sorry, supplemental bundle?

23 **MR HARRIS:** Yes. Which is also bundle 11.

24 **THE PRESIDENT:** I am not sure I've got that one. Bundle 11. Yes, sorry, so sorry,
25 Mr Harris.

26 **MR HARRIS:** I hope you have a tab 19 at the back.

1 **PROFESSOR MASON:** This is the updated one, is it?

2 **MR HARRIS:** Yes.

3 **THE PRESIDENT:** Yes, I have that, 19, yes. This is the document from which
4 that -- no, this is a later document.

5 **MR HARRIS:** No, this is that document.

6 **THE PRESIDENT:** Well, the document you just showed us is dated 12
7 September 2015, so it can't be quoting from an October 2016 document, can
8 it?

9 **MR HARRIS:** That means, it must have had another iteration, because what I just
10 quoted to you -- if you will see it, it's the final sentence of paragraph 9 on
11 page 268.

12 I see that that's --

13 **THE PRESIDENT:** I see, that was probably an interim.

14 **MR HARRIS:** It's identical in substance but slightly different words. I also draw your
15 attention, please, to the first sentence:

16 "Third-party retailers play a key role in improving ticketing for passengers. They offer
17 different ways to access information about rail fares and journeys and provide
18 more choice in where and how to buy tickets."

19 That's the point. They compete with us in that regard. Mr Backway's uncontroverted
20 evidence is that we cannot tell them what to do, and it's little surprise that we
21 cannot tell them what to do because that would be a real competition concern,
22 telling your competitor how to go about competing. We don't do that and we
23 can't do that and I for one, as competition counsel to LSER, am delighted about
24 that.

25 **THE PRESIDENT:** You have a contract with Trainline, presumably?

26 **MR HARRIS:** It is and it's referred to -- the footnote -- the ATOC licence for LSER is

1 referred to in footnote 15 of Mr Backway's report, and I can send you an email
2 with the reference; I don't have it at my fingertip.

3 **THE PRESIDENT:** It's in the bundle somewhere?

4 **MR HARRIS:** Yes, the ATOC licence is. And I didn't take you to it; it's an exercise in
5 showing you something that isn't there. It doesn't say anywhere, "Oh, these
6 guys have the ability to tell Trainline how to go about selling tickets", but I will
7 send you the reference, sir.

8 That leaves only the final two matters -- in fact one, because the dominance point
9 I have already met.

10 The final matter is simply why it is unarguably bad to suggest that we have a legal duty
11 to make available advance boundary fares and promotional boundary fares or,
12 I don't know, presumably some kind of point to point boundary fare. It was
13 unclear to me at the end how far and extensive this allegation was. This is
14 really two short points.

15 Nowhere will you see this pleaded out so as to explain why an allegation that is not
16 double charging, or even overcharging, is illegal. This is a completely different
17 genre of allegation. It is, "You should have made some more products available
18 and you didn't". That's got nothing to do with the case theory Mr Moser
19 developed in opening.

20 We are thoroughly confused by it and it's not pleaded. There's no justification --

21 **THE PRESIDENT:** Can I just understand: suppose you offered no boundary fares at
22 all and no point to point tickets. So someone has paid for a Travelcard to travel
23 in zones 1 to 5, they want to start an outward journey from central London,
24 although you have a mechanism of getting reimbursement from TfL by
25 agreement, you say you've got a Travelcard that covers part of your journey,
26 we are not interested in that, you have to pay for the full journey. The fact you

1 have already paid for part of it, we couldn't care less. Could that be an abuse?

2 Arguably?

3 **MR HARRIS:** I am not sure it could, but can I think about that one overnight?

4 **THE PRESIDENT:** Isn't that very close to Deutsche Post?

5 **MR HARRIS:** Ms Abram is going to deal with that.

6 **THE PRESIDENT:** You say, "We have no duty to make something available if we
7 haven't made it, if we are not supplying it".

8 **MR HARRIS:** The reason, sir, it's critical, and this is my very last point of the whole
9 day, you will be delighted to hear: the reason is absolutely critical.

10 So what is being said is that, unpleaded and therefore -- we don't know quite how it's
11 being put. But the gist of it is: you must make available one type of discounted
12 fare, namely an advance or a promotional fare, to be combined with another
13 type of discounted fare, namely a Travelcard.

14 A Travelcard is a discounted fare. An advance fare is also discounted, and
15 a promotional fare by definition is also discounted. The allegation here, which
16 may be unlike the point that you just put to me, and that's why I sought to
17 sidestep it -- unlike that one -- is that we had a legal duty to make available
18 double discounting.

19 So it's the opposite of my learned friend's case where he says we've been double
20 charging. Here he now says we have a duty to make available a double
21 discount.

22 We say that's, with respect, unsubstantiated and unarguable. No justification or
23 reason is put forward for this, no evidence is advanced in support and, to the
24 contrary, the evidence that you do have explains in very clear terms in
25 Mr Backway, and for that matter in my learned friend's evidence for the other
26 TOCs, that the discounts for advance fares and for promotional fares are made

1 available for very specific reasons that have nothing to do with boundary fares.
2 It's obvious. An advance fare is made available so that it can get advance notice for
3 planning purposes of people travelling on particular trains and you get
4 a discount in return. Promotional fares are made for, again, obvious reasons.
5 You want people to go to Whitstable on a Saturday in the winter when the trains
6 are not very busy, et cetera, et cetera.

7 We give discounts for those bona fide reasons. Our case is simple: no basis
8 whatsoever has been pleaded or put forward or evidenced for saying that we
9 should be legally obliged, notwithstanding we have done it on those routes for
10 those purposes at those times, made available a discount, we have to make
11 available an additional discount --

12 **THE PRESIDENT:** Only not for off-peak tickets either presumably therefore, because
13 an off-peak ticket is a form of promotional fare to get people to
14 travel -- encourage use when trains are not so crowded.

15 **MR HARRIS:** Even Mr Moser hasn't made that allegation.

16 **THE PRESIDENT:** I think off-peak -- I thought you can use boundary fares off-peak.

17 **MR HARRIS:** What I am saying is -- you have the point, and I will end. You have the
18 point that no basis has been put forward for why we should be legally obliged
19 to do that in all cases.

20 **THE PRESIDENT:** I think we have the point, yes. You say you are already getting
21 a hefty discount, yes.

22 **MR HARRIS:** Absolutely. So in one sentence -- I beg the Tribunal's indulgence for
23 taking up so much time -- for the two major reasons the claim is unarguably bad
24 or obviously unsuitable. They are to be allied with the third reason, which is
25 you cannot identify who is uninjured and you do not have the methodology for
26 winnowing out.

1 If you are not with me on any or all of those points, then in any event the third-party
2 sales should be denied.

3 Then you have the more minor points about no coherent or allegation on advance
4 boundary fares or advance promotional fares, and that we take the point about
5 dominance.

6 Unless I can assist further, those are our submissions.

7 **THE PRESIDENT:** Who goes first tomorrow?

8 **MS ABRAM:** It will be me, sir.

9 **THE PRESIDENT:** Thank you, Ms Abram. You have divided the morning between
10 you and Mr Ward?

11 **MS ABRAM:** Yes, that's right. We have liaised and we are confident that we will finish
12 by lunchtime.

13 **THE PRESIDENT:** We will try not to interrupt you too much.

14 **MS ABRAM:** I am very grateful, thank you.

15 **THE PRESIDENT:** We will say 10.30 tomorrow.

16 **(4.35 pm)**

17 **(The hearing adjourned until 10.30 am on**

18 **Thursday 11 March 2021)**

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Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
...	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?