Neutral citation [2021] CAT 31

IN THE COMPETITION APPEAL TRIBUNAL

1304/7/7/19
1305/7/7/19

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

19 October 2021

Before:

THE HONOURABLE MR JUSTICE ROTH
(President)
SIMON HOLMES
PROFESSOR ROBIN MASON

Sitting as a Tribunal in England and Wales

BETWEEN

JUSTIN GUTMANN

Applicant / Proposed Class Representative

-and-

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

Respondents / Proposed Defendants

AND BETWEEN

JUSTIN GUTMANN

Applicant / Proposed Class Representative

-and-

LONDON & SOUTH EASTERN RAILWAY LIMITED

Respondent / Proposed Defendant

Heard remotely on 9-12 March 2021

JUDGMENT
(APPLICATION FOR A COLLECTIVE PROCEEDINGS ORDER)

APPEARANCES

Mr Philip Moser QC, Mr Stefan Kuppen and Ms Alexandra Littlewood (instructed by Hausfeld & Co. LLP and Charles Lyndon Ltd) appeared on behalf of Mr Gutmann.

Mr Tim Ward QC and Mr James Bourke (instructed by Slaughter and May) appeared on behalf of First MTR South Western Trains Limited.

Ms Sarah Abram (instructed by Dentons UK and Middle East LLP) appeared on behalf of Stagecoach South Western Trains Limited.

Mr Paul Harris QC, Ms Anneliese Blackwood and Mr Michael Armitage (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of London & South Eastern Railway Limited.

A. INTRODUCTION

1. This judgment concerns two applications for a collective proceedings order ("CPO") pursuant to s. 47B(4) of the Competition Act 1998 (the "CA")[1]. The Applicant in both cases is Mr Justin Gutmann. One case concerns the practice of the train operating companies ("TOCs") on the south-western rail franchise ("the SW franchise" or "SWF") and the other concerns the practice of the TOC on the south-eastern rail franchise ("the SE franchise" or "SEF"), in both cases during the period 1 October 2015 to the date of final judgment or earlier settlement of the claims. The issues raised in both proceedings are almost identical and by order of 9 April 2019, with the consent of all the parties, the Tribunal directed that the two applications be heard together and that the evidence in the one would stand as evidence in the other so far as relevant. The first set of proceedings will be referred to as the "SW case" and the second as the "SE case".

2. Since there was a change in the TOC operating the SW franchise in the relevant period, there are two respondents to the first application: First MTR South Western Trains Ltd ("First MTR"), which has held the franchise since 20 August 2017, and Stagecoach South Western Trains Ltd ("Stagecoach"), which held the franchise from 4 February 1996 to 20 August 2017. The SE franchise has been held since the start of the relevant period until the date of the application by London & South Eastern Railway Ltd ("LSER") and it is accordingly the sole respondent to the second application.[2] Each of the Respondents is separately represented but, as requested by the Tribunal, for the purpose of both skeleton arguments and their oral submissions, their counsel helpfully shared out between them the various arguments in opposition to the CPOs, which enabled the hearing to be conducted efficiently.

3. The essence of the allegation in both cases is that the Respondents abused a dominant position, contrary to the Chapter II prohibition under the CA, by failing to make so-called Boundary Fares sufficiently available and/or to use

[1] All statutory references in this judgment are to the CA unless otherwise stated.
[2] The Government's Operator of Last Resort took over the running of LSER's services as of 17 October 2021.

their best endeavours to ensure general awareness among their customers of Boundary Fares, so that customers who held Transport for London ("TfL") Travelcards and took journeys beyond the outer zone covered by their Travelcard would not purchase a fare covering the totality of their journey (i.e. from point of origin to point of destination, referred to as a "full journey" fare), but only a Boundary Fare to supplement their Travelcard. A Boundary Fare is a form of extension ticket for use in conjunction with the Travelcard for travel from the outer boundary covered by the Travelcard to the destination. The claims cover only journeys out of, not into, London: Mr Moser QC for the Applicant said this was done for the sake of simplicity.

4. The proposed definition of the class on whose behalf the proceedings are brought is set out in the claim forms as follows:

> "All persons who, at any point during the period between 1 October 2015 and the date of final judgment or earlier settlement of the Claims (the "Relevant Period") purchased or paid for, for themselves and/or another person, a rail fare which was not a Boundary Fare, where:
>
> > a. the person for whom the fare was purchased held a Travelcard valid for travel within one or several of TfL's fare zones (the "Zones"); and
> >
> > b. the rail fare was for travel in whole or in part on the services of the Proposed Defendants from a station within (but not on the outer boundary of) those Zones to a destination beyond the outer boundary of those Zones (including fares for return journeys)."

5. The Applicant seeks to bring the proceedings on an opt-out basis, as defined in s. 47B(11), so that all persons within the class definition who are domiciled in the UK on the domicile date (to be determined by the Tribunal in the CPO) would be included unless they opt-out, and those not so domiciled may opt-in. On that basis, the class sizes are estimated by the Applicant's expert as follows:

(1) in the SW case: between 1,061,536 and 10,325,370 – with a central estimate of 2,076,038;

(2) in the SE case: between 472,362 and 5,834,449 – with a central estimate of 885,012.

6. The claim forms explain that the problem in estimating the class sizes, and correspondingly wide range, is due to the difficulty in estimating how many journeys on average a class member made during the relevant period. However, although the estimate of average journeys per class member determines the class size, it does not affect the estimated aggregate losses since those are based on the total number of relevant journeys. The Applicant is seeking aggregate damages pursuant to s. 47C(2). On the assumption that customers "would not have knowingly paid twice" for their travel, the loss is calculated on the basis of the difference between the full journey fare and the corresponding Boundary Fare for all relevant journeys. The proposed method of calculation is discussed further below.

7. The three Respondents all object to the grant of CPOs, arguing on various grounds that the claims are not eligible for inclusion in collective proceedings. Further or alternatively, they seek summary judgment or orders striking out the claims on the basis that the claims have no arguable prospect of success.

B. COLLECTIVE PROCEEDINGS

8. The statutory regime for collective proceedings based on infringements of competition law was a significant reform introduced by the Consumer Rights Act 2015, which amended the CA, and by the related Part 5 of the Competition Appeal Tribunal Rules 2015 (the "CAT Rules").[3] The regime came into effect on 1 October 2015, which explains the start date of the claims period in the present actions.

9. The background to the regime was explained by the Supreme Court in *Merricks v Mastercard Inc* [2020] UKSC 51 ("*Merricks SC*"), in the judgment for the majority given by Lord Briggs, at [1]:

> "…Where the harmful impact of such conduct affects consumers, it may typically cause damage to very large classes of claimants. Proof of breach, causation and loss is likely to involve very difficult and expensive forensic work, both in terms of the assembly of evidence and the analysis of its economic effect. Viewed from the perspective of an individual consumer, the likely disparity between the cost and effort involved in bringing such a claim

[3] All references to rules in this judgment are to the CAT Rules.

> and the monetary amount of the consumer's individual loss, coupled with the much greater litigation resources likely to be available to the alleged wrongdoer, means that it will rarely, if ever, be a wise or proportionate use of limited resources for the consumer to litigate alone."

10. The regime notably enables such proceedings to be brought on an opt-out basis (s. 47B(11)), and permits the Tribunal to award aggregate damages to the class as a whole, without undertaking an assessment of the damages suffered by individual members of the class of represented persons (s. 47C(2)).

11. The UK collective proceedings regime is similar to the class action regimes adopted in many of the Canadian provinces and territories (although there are some differences) and, as Lord Briggs observed, the UK Government in proposing the new regime to Parliament regarded the Canadian regime as the best model. As he stated, at [37]:

> "… Both may be said to serve broadly the same statutory purpose of providing effective access to justice for claimants for whom the pursuit of individual claims would be impracticable or disproportionate. In *Hollick v Toronto (City)* 2001 SCC 68; [2001] 3 SCR 158, Chief Justice McLachlin described the beneficial purposes of class action procedure in these terms, at para 15, speaking of the Ontario Class Proceedings Act 1992:
>
> > "The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool … class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public. In proposing that Ontario adopt class action legislation, the Ontario Law Reform Commission identified each of these advantages … In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.""

12. However, Lord Briggs also pointed out, at [4], that:

> "The [Tribunal] is given an important screening or gatekeeping role over the pursuit of collective proceedings."

See also per Lords Sales and Leggatt (dissenting on other grounds) at [86]. Notably, collective proceedings cannot be pursued beyond the issue of a claim

form without the permission of the Tribunal, in the form of a CPO. The Tribunal has to be satisfied both as to the person proposing to act as representative of the class and that the claims meet the requirements for inclusion in collective proceedings. See *Merricks v Mastercard Inc* [2021] CAT 28 where, on remittal from the Supreme Court, the Tribunal granted a CPO but excluded one issue.

13. We set out the detailed legislative provisions, insofar as relevant to the present applications, in section E below.

C. FACTUAL BACKGROUND

14. Travelcards are TfL zonal tickets which allow unlimited travel on London's public transport network. Most relevantly to the present cases, that includes not only TfL's own services but also National Rail services within their zone of validity (but not Heathrow Express or LSER's high-speed HS1 line). They can be issued for variable time periods and for a range of zonal combinations.

15. There are in total nine TfL travel zones, but zones 1-6 are the main zones and it is estimated that only about 1% of all Travelcards have validity beyond zone 6: see the TfL map attached as an Appendix to this judgment. None of the stations covered by the SW franchise are in zones 7-9, and within the SE franchise no stations are in zone 7 or 9 and only two are in zone 8. Therefore, for practical purposes, it is zones 1-6 that are relevant. The proceedings concern in-boundary Travelcards which are available for combinations within those main zones, as follows:

    (1) Peak Travelcards are valid for travel at any time of day and available in two combinations: either for zones 1-4 or for zones 1-6;

    (2) Off-peak Travelcards are valid for travel at any time after 9.30 am on weekdays and at any time on weekends and public holidays; they are available for zones 1-6 only;

    (3) 7-day or longer Travelcards are valid for travel at any time and are available in any combination of two or more adjoining zones.

16. The validity of Travelcards for travel on rail services is governed by the Travelcard Agreement entered into between all TOCs, including therefore the Respondents, and a subsidiary of TfL. Under the Travelcard Agreement, the TOCs receive a share of the revenue resulting from the sale of Travelcards.

17. Point-to-point fares on the rail networks are fares for journeys between a specific origin station and a specific destination station. There is at least one point-to-point fare available for the journey between every origin and destination station in Great Britain. There is a variety of ticket types (and fares) for such point-to-point travel. Those include off-peak fares, child fares, student fares and Advance fares offered by many TOCs for purchase up to 12 weeks ahead of travel on certain routes, whereby the purchaser gets a discounted price in return for reduced flexibility.

18. Boundary Fares are a type of extension or add-on fare sold for use with a Travelcard. On the basis that a valid Travelcard will cover travel on the part of the journey to which it applies, the Boundary Fare is a charge for the journey from the outer edge of the zone to which the Travelcard applies to the customer's destination. All three Respondents sell (or have sold) such Boundary Fares for almost all journeys originating in each TfL zone to destinations on their network.[4] Boundary Fares are sold as single or return, peak or off-peak fares. However, they are not available for certain discounted tickets, of which the most significant are Advance fares.

19. First MTR states that its policy is to set the price of a Boundary Fare with reference to the last station in the relevant TfL travel zone. Stagecoach says that its policy has been effectively the same, so that in the large majority of cases the price of a Boundary Fare of a given type will be the same as the price of a point-to-point fare of the same type from the outermost station of the relevant zone.

[4] Boundary Fares have never been available for 12 stations west of Salisbury (from either First MTR or Stagecoach).

20. Since the claims relate to journeys out of London originating in a TfL travel zone on the SWF or SEF networks, those are referred to as "in-scope journeys". The original claim forms were filed in February 2019, and the number of in-scope journeys in the claims period to 31 January 2019 were estimated by the Applicant's expert, Mr Holt, as follows:[5]

Relevant journeys – SW franchise & SE franchise, 2015/16 – 2018/19

TOC	Oct 15 – Mar 16	2016/17	2017/18	Oct 18 – Jan 19	Total
SWF journeys (m)	14.40	29.92	30.37	25.62	100.31
SEF journeys (m)	9.34	19.23	20.87	18.04	67.47

The Boundary Fares sold for SW and SE franchise journeys over the same period, both in total and as a percentage of total in-scope journeys, were as follows:

SW franchise

	15/16	16/17	17/18	18/19	Average
Boundary Fares (BFs) sold by TOCs (as disclosed)	220,863	420,731	366,884	354,758	340,809
Proportion of in-scope journeys with BFs	**1.5%**	**1.4%**	**1.2%**	**1.4%**	**1.4%**

SE franchise

	15/16	16/17	17/18	18/19	Average
Boundary Fares (BFs) sold by TOCs (as disclosed)	81,606	168,175	155,145	146,973	137,975
Proportion of in-scope journeys with BFs	**0.9%**	**0.9%**	**0.7%**	**0.8%**	**0.8%**

21. Accordingly, Boundary Fares were purchased for a very small proportion of in-scope journeys. Each Respondent, like all TOCs, makes its tickets available for sale from a variety of outlets, including station ticket counters, station ticket vending machines ("TVMs") operated by the Respondent, TVMs operated by third parties (e.g. other TOCs), the Respondent's telephone call centres, the Respondent's online sales, TfL controlled outlets and third party (i.e. non-TOC) vendors (e.g. travel agents and Trainline.com) which hold a licence allowing

[5] Holt 1st, Table 1.3.

them to sell National Rail fares. The Boundary Fares of all the Respondents are available at their station ticket counters. The availability of Boundary Fares from the Respondents' other outlets varies:

(1) First MTR sells Boundary Fares from about 84% of its own TVMs; a limited number of TVMs operated by third parties; and its own call centre. The position as regards online sales from First MTR's website is not altogether clear, although the Decidedly survey (see para 26 below) indicates that First MTR does not sell Boundary Fares online.

(2) Stagecoach sold Boundary Fares from most of its own TVMs from about April 2017 until 20 August 2017 (when it lost the franchise); previously, after 2016 its TVMs had stickers stating that not all tickets were available from the TVM and that the customer should telephone its call centre if they wanted a ticket which was not there available (in which event a Boundary Fare could be purchased). Boundary Fares were not available online from Stagecoach's website.

(3) LSER does not sell Boundary Fares at its own TVMs or online.

As regards third party outlets, there is no restriction on third parties selling Boundary Fares but the extent to which they do so appears to vary. For example, Trainline.com does not sell Boundary Fares.

22. The claim forms refer to the Association of Train Operating Companies ("ATOC")'s response to an Office of Rail Regulation ("ORR") consultation in 2014, which stated that, in 2013/14, c. 50% of tickets sold for travel on the network in Great Britain were sold at the station (ticket office or TVM), c. 30% by TfL, c. 10% online and the remainder either on the train, over the phone or via travel agents. Presumably the proportion of online sales has risen since then. LSER states that sales by non-LSER retailers, including other TOCs and TfL, account for 35% of the journeys on its network during the claims period.

23. We think it is obvious that many passengers who took in-scope journeys, particularly over a period of this length, will have purchased their tickets from several different kinds of outlet.

D. THE CPO APPLICATIONS

24. The Applicant alleges that First MTR and previously Stagecoach as regards the SW franchise, and LSER as regards the SE franchise, have held a dominant position in the supply of passenger rail services on point-to-point journeys. Each Respondent is alleged to have abused that dominant position in breach of s. 18 and the Chapter II prohibition. The core allegation of abuse is expressed in the claim forms as follows, at para 42:[6]

> "The Infringement consists in a breach by the Proposed Defendants of the Chapter II prohibition. In summary, the Proposed Class Representative's case on … abuse is as follows:
>
> …
>
> Abuse: The abuse, which is continuing, consists in the Proposed Defendants' neglecting of their special responsibility as dominant undertakings through failing to take any or sufficient steps to prevent Class Members from being double-charged for part of the service provided to them. In practice, the abuse consists in failing to make Boundary Fares sufficiently available for sale, and/or failing to ensure, for example through better staff training, amended sales procedures, or increased customer-facing information, that customers are aware of the existence of Boundary Fares and buy an appropriate fare which avoids them being charged twice for part of their journeys."

25. The claim forms note that where Boundary Fares exist, they may be sold by TOCs and other ticket retailers whereas for some origin/destination/ticket-type combinations there are no Boundary Fares. But they assert, at para 37:

> "In addition, however, even where Boundary Fares exist in the Fares Data:
>
> a. Their availability in reality varies by sales channel and is limited compared to fares for ordinary point-to-point journeys which are universally available; and
>
> b. Even where in theory available for sale, such as at station ticket counters, Boundary Fares are typically only sold to 'passengers in the know' on specific request."

[6] The two claim forms are identical in this respect, save that the SW claim refers to two Proposed Defendants and the SE claim to only one. The quotations are from the SW claim form.

26. The Applicant refers to a 'mystery shopper' survey that he commissioned from the consumer research consultancy Decidedly (now Yonder) that was conducted in December 2018[7] whereby a team of researchers made over 400 enquiries at ticket counters during different operating hours at a selection of stations served by First MTR, and similarly at a selection of stations served by LSER, and explored other available sales channels including the Respondents' and third party websites, mobile phone apps and telephone-based services. The Decidedly survey report found that:

(1) at the TOC ticket counters, where a Travelcard was not initially mentioned, for First MTR 89.4% of enquiries and for LSER 83.5% of enquiries led to the clerk quoting a full journey price without asking about ownership of a Travelcard; and that where a Travelcard/Boundary Fare was mentioned by the customer, for First MTR in only 71.7% of cases and for LSER in only 58.2% of cases was the Travelcard incorporated into the ticket price quoted.

(2) at the First MTR in-station TVMs, although Boundary Fares are available, the purchase option was complicated and the 'mystery shoppers' were not always able to locate it without assistance. As noted above, Boundary Fares are not available from LSER's TVMs;

(3) Boundary Fares were not available through any of the surveyed online sales outlets (including mobile phone apps) whether operated by First MTR, LSER or third parties, including Trainline.com;

(4) of the selected third-party telephone-based sellers (Trainline and TrainGenius), there was low staff awareness of Boundary Fares and in the case of TrainGenius they were not able to sell them.

27. The Applicant further contends that:

> "These limitations to the availability of Boundary Fares are in practice compounded by an almost complete absence of any consumer-facing information regarding the existence or use of those fares, which the Proposed

[7] The date of December 2017 in the claim forms is an error.

> Class Representative suspects translates to a general lack of customer awareness. A brief web search for 'extension ticket', 'boundary zone fare' or similar wording yielded no obvious hits pointing to information on National Rail on TOC websites."

28. The Respondents made various criticisms of the Decidedly survey and report, and Stagecoach argued that the report had no relevance to its position since the survey post-dated the cessation of its franchise. However, Mr Moser made clear that it was relied on by way of illustration of the position and he pointed out that the degree to which Boundary Fares were sold on the SW franchise did not appear to be any higher when that was operated by Stagecoach compared to the position since it has been operated by First MTR.

29. At the heart of the Applicant's case in each action is that only a very small number of Boundary Fares are sold for journeys on the Respondents' networks compared to the much larger number of journeys that were made by Travelcard holders. A total of some 54.7 million Travelcards were sold over the period 2015/16 to 2017/18 (39% of them for zones 1-2). The Applicant relies on the very low number of Boundary Fares sold (see table at para 20 above by comparison). Further, Mr Holt's preliminary estimates of the number of Travelcard holders taking in-scope journeys on the SW and SE franchises over the claims period are as follows (table 6.24):

	15/16	16/17	17/18	18/19
SWF Travelcard journeys (m)	2.63	4.87	4.20	3.16
SEF Travelcard journeys (m)	1.70	3.13	2.88	2.22

TfL, which accounts for a significant proportion of rail fares sold within London, sold fewer than 30,000 Boundary Fares in total in 2015, for all routes (i.e. not just those on the SW and SE networks). Taking all this into account, the Applicant contends that only a small proportion of passengers holding a Travelcard who took journeys on the Respondents' networks for which a Boundary Fare would have been the appropriate fare in fact bought such a fare. Most paid the full journey fare.

30. The Applicant points to the ORR's 2012 publication, *Fares and ticketing – information and complexity*, reporting on the problems experienced by rail

passengers. That report notes the response of ATOC to the ORR research, stating at para 4.2:

> "ATOC has accepted that the information provided to passengers during and after the sales process can be inadequate, particularly so in relation to those fares with more restrictions and at TVMs."

As regards TVMs specifically, one of the initiatives which it is said that ATOC would undertake is:

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

31. The Applicant also referred to the *Code of practice on retail information for rail tickets and services,* issued in March 2015 on the recommendation of the Department for Transport, to provide guidance to TOCs and third party retailers. The Code states that it is based on four principles, of which the first is that:

> "…retailers should provide passengers with the information they need to make informed decisions."

32. The nature of the abuse alleged was the subject of much argument. We have set out above the summary of the Applicant's case pleaded at para 42 of the claim forms. At the outset of the claim forms, at para 3, the Applicant asserts:

> "Specifically, the Claims relate to so-called 'boundary zone' fares or 'extension tickets', which are fares valid for travel to or from the outer boundaries of TfL's fare zones, intended to be combined with a Travelcard whose validity stretches to the relevant zone boundary ("Boundary Fares"). By not making Boundary Fares sufficiently available for sale, and/or by failing to ensure that customers are aware of the existence of Boundary Fares and/or buy an appropriate fare in order to avoid being charged twice for part of a journey, the Proposed Defendants have abused their positions of dominance on the relevant markets in breach of the prohibition in section 18 of the Act (the "Chapter II Prohibition") (the "Infringement")."

The alleged abuse is further pleaded at paras 66 and 70, as follows:

> "66. In the current case, the abuse consists in the first place in the Proposed Defendants charging a customer (whether directly or via an agent) for a fare relating to an element of a journey for which that customer has already purchased a fare (in the form of a Travelcard) and which the customer therefore does not require; in particular in a situation where, via the mechanism of the Travelcard Agreement, the Proposed Defendants has already received compensation (in the form of a revenue share from the sale of Travelcards) for

> providing the service to the customer in relation to that element of the journey covered by the Travelcard.
>
> …
>
> 70. In the present case, one aspect of the abuse as aforesaid, is the dominant TOC not making Boundary Fares sufficiently available for sale, including by failing to ensure that customers are aware of the existence of Boundary Fares. This is – at least – an indirect imposition of a double-charge (i.e. a price for something already paid for) for the relevant services and/or a direct or indirect imposition of unfair trading conditions…"

33. The Respondents argued that the Applicant's case amounted to a strict liability obligation such that whenever a passenger who had a valid Travelcard was sold a full journey fare and not a Boundary Fare that constituted an abuse. However, the Applicant made clear by its Replies that this was not the case being advanced. The word "ensure" is used in the sense of making sure to the best of their ability or by exercising best endeavours that there was a general awareness of Boundary Fares so as to enable customers to buy an appropriate fare, which is part of the duty of making those fares "sufficiently available in any meaningful sense." We approach the applications on that basis.

34. The damages sought are calculated on the basis of the estimated number of relevant journeys undertaken by the class members as a whole, and the estimated difference between the full journey fare and corresponding Boundary Fare. This depends on the number of in-scope journeys and the estimated proportion of those journeys taken by holders of a valid Travelcard. This was referred to as the 'overlap' and, as the Applicant recognises, estimation of the overlap is challenging. The method advanced for such estimation is discussed in section I below.

35. As a preliminary calculation, the aggregate losses are estimated in the respective claim forms at around £57 million in the SW claim and around £36 million in the SE claim. Since the damages are calculated on the basis of the number of journeys not the number of individual passengers, an accurate assessment of the class sizes (see para 5 above) does not affect the quantification of the claims.

E. LEGAL FRAMEWORK

36. Pursuant to s. 47B(5) CA, there are two conditions for the grant of a CPO:

(1) the person proposing to be the class representative must be authorised to act as such ("the authorisation condition"); and

(2) the claims must be eligible for inclusion in collective proceedings ("the eligibility condition").

37. The authorisation condition is set out in s. 47B(8) and rule 78. Section 47B(8) states:

> "(8) The Tribunal may authorise a person to act as the representative in collective proceedings—
>
> (a) whether or not that person is a person falling within the class of persons described in the collective proceedings order for those proceedings (a "class member"), but
>
> (b) only if the Tribunal considers that it is just and reasonable for that person to act as a representative in those proceedings."

Rule 78 provides, insofar as relevant:

> "**Authorisation of the class representative**
>
> 78.— …
>
> (2) In determining whether it is just and reasonable for the applicant to act as the class representative, the Tribunal shall consider whether that person—
>
> (a) would fairly and adequately act in the interests of the class members;
>
> (b) does not have, in relation to the common issues for the class members, a material interest that is in conflict with the interests of class members;
>
> …
>
> (d) will be able to pay the defendant's recoverable costs if ordered to do so; and
>
> …
>
> (3) In determining whether the proposed class representative would act fairly and adequately in the interests of the class members for the purposes of

paragraph (2)(a), the Tribunal shall take into account all the circumstances, including—

…

(c) whether the proposed class representative has prepared a plan for the collective proceedings that satisfactorily includes—

(i) a method for bringing the proceedings on behalf of represented persons and for notifying represented persons of the progress of the proceedings; and

(ii) a procedure for governance and consultation which takes into account the size and nature of the class; and

(iii) any estimate of and details of arrangements as to costs, fees or disbursements which the Tribunal orders that the proposed class representative shall provide."

38. The eligibility condition is set out in s. 47B(6) and rule 79. S. 47B(6) states:

> "Claims are eligible for inclusion in collective proceedings only if the Tribunal considers that they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings."

39. "The same, similar or related issues of fact or law" are referred to as "common issues": rule 73(2).

40. The eligibility condition accordingly incorporates two related requirements:

(1) the claims must raise common issues; and

(2) the claims must be suitable to be brought in collective proceedings.

41. Rule 79 provides, insofar as relevant:

> **"Certification of the claims as eligible for inclusion in collective proceedings**
>
> 79.—(1) The Tribunal may certify claims as eligible for inclusion in collective proceedings where, having regard to all the circumstances, it is satisfied by the proposed class representative that the claims sought to be included in the collective proceedings—
>
> (a) are brought on behalf of an identifiable class of persons;
>
> (b) raise common issues; and
>
> (c) are suitable to be brought in collective proceedings.

(2) In determining whether the claims are suitable to be brought in collective proceedings for the purposes of paragraph (1)(c), the Tribunal shall take into account all matters it thinks fit, including—

(a) whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues;

(b) the costs and the benefits of continuing the collective proceedings;

(c) whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class;

(d) the size and the nature of the class;

(e) whether it is possible to determine in respect of any person whether that person is or is not a member of the class;

(f) whether the claims are suitable for an aggregate award of damages; and

(g) the availability of alternative dispute resolution and any other means of resolving the dispute, including the availability of redress through voluntary schemes whether approved by the CMA under section 49C of the 1998 Act(a) or otherwise.

(3) In determining whether collective proceedings should be opt-in or opt-out proceedings, the Tribunal may take into account all matters it thinks fit, including the following matters additional to those set out in paragraph (2)—

(a) the strength of the claims; and

(b) whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover."

42. In *Merricks SC* at [56], the Supreme Court held that "suitable" for the purpose of s. 47B and rule 79(2)(f) means suitable in a relative sense, i.e. compared to individual proceedings or individual damages. Further, Lord Briggs stated, at [61], that the listing of a number of potentially relevant factors in rule 79(2) within the general rubric "all matters it thinks fit" shows that the Tribunal:

> "is expected to conduct a value judgment about suitability in which the listed and other factors are weighed in the balance. The listed factors are not separate suitability hurdles, each of which the applicant for a CPO must surmount."

43. An important provision concerning aggregate damages is in s. 47C(2):

> "(2) The Tribunal may make an award of damages in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person."

44. Guidance regarding the application of the rules on collective proceedings is to be found in the Tribunal's *Guide to Proceedings* (2015) (the "*Guide*") which has the status of a practice direction.

F. CLASS REPRESENTATIVE

45. In his evidence in support of his application for authorisation as the class representative, the Applicant states that a large part of his professional life has been dedicated to public policy, market research and consumer welfare. Prior to his retirement, he was Head of Research & Insight at Consumer Focus (later renamed Consumer Futures), a statutory body established by the merger of the National Consumer Council, energywatch and Postwatch, and he continued in that role when Citizens Advice assumed the functions of Consumer Focus/Consumer Futures. Those organisations were concerned with representing consumers' interests at a national level, and the Applicant was specifically involved in examining situations where consumers suffered harm by reasons of the way a market functioned, often working closely with the UK competition authority. Previously, in 1994-2002, the Applicant had been Market Planning Manager at London Underground, where his role involved looking at ways in which consumers responded to London Underground's offers and services, a function that involved extensive market research. He has also been an active member of the Market Research Society and was its Chairman in 1999-2001.

46. The Applicant has also put together a 'consultative group' of three individuals from whom he can take advice regarding decisions involved in these proceedings. They are individuals with expertise and experience in the transport industry and consumer rights matters.

47. The Applicant is not himself a member of the proposed class, but he has in the past been a Travelcard holder and says that he is familiar with the experience of class members "in the broadest sense".

48. The Applicant has exhibited with his applications a litigation plan covering the two actions which we have considered. With his solicitors, he has arranged third-party litigation funding with Woodsford Litigation Funding Ltd ("Woodsford"), which is an English company. This provides for adverse costs cover of up to £10 million and Woodsford has entered into an adverse costs deed of indemnity with the Applicant undertaking to indemnify him against costs liability up to that amount. The litigation plan includes a costs budget showing estimated costs of a little over £11 million, including some £1.3 million as the projected costs of processing claims and making payments following an award. However, both solicitors and counsel are working under conditional fee agreements whereby a significant proportion of the fees are deferred and due only in the event that the claims succeed, and the figures in the costs budget include the element of fees that are deferred. On that basis, we are satisfied that the Applicant appears to have sufficient financing in place, in addition to the adverse costs cover, to fund the cases through trial to judgment on the basis of the costs budget.

49. The Respondents do not raise any issues regarding the level of adverse costs cover. They do not object to the authorisation of the Applicant as class representative, save that they reserve their position in the event that the Supreme Court should grant permission to appeal and then reverse the judgment of the Divisional Court holding that a litigation funding agreement of a similar nature to that between the Applicant and Woodsford does not constitute a "damages-based agreement" and is therefore not subject to the legislation governing such agreements which might render it unenforceable: *Paccar Inc v Road Haulage Assocn Ltd* [2021] ECWA Civ 299. Nonetheless, it is for the Tribunal to be satisfied that the Applicant fulfils the authorisation condition, having regard to the interests of the class members whom he seeks to represent. In that respect, we have considered the terms of the litigation funding agreement with Woodsford and we are satisfied that, while necessarily protecting Woodsford's commercial interests, they do not prevent the Applicant from conducting the proceedings in the interests of the class members.

50. Altogether, having regard to the considerations set out in rule 78, we are satisfied that it is just and reasonable for the Applicant to act as the class

representative in the two actions. He accordingly satisfies the authorisation condition.

G. SUMMARY JUDGMENT / STRIKE OUT

51. Because the eligibility condition does not in general involve a merits test, the Respondents have applied for reverse summary judgment or alternatively to strike out the claims. However, some of the arguments on summary judgment overlap with their arguments on eligibility and so can be considered together. Moreover, the Applicant is seeking CPOs on an opt-out basis and pursuant to rule 79(3)(a), where the Tribunal is considering whether proceedings should be opt-out or opt-in, it may take into account the strength of the claims. We think Ms Abram is probably correct in her submission that this consideration applies even when no opt-in alternative is put forward by the Applicant, since it is for the Tribunal to decide whether a CPO on an opt-out basis is justified. That accords with the view expressed in the *Guide* at para 6.39. But as the *Guide* makes clear, that assessment is conducted at a high level and does not involve a full merits assessment. In light of the Respondents' applications for summary judgment/strike out, rule 79(3)(a) does not in practice add to the assessment requirement in the present cases.

52. Summary judgment and strike out under the CAT Rules are to be approached on the same basis as in the High Court under the Civil Procedure Rules: *Wolseley UK Ltd v Fiat Chrysler Automobiles NV and ors* [2019] CAT 12 at [15]. The principles applicable to a summary judgment application were not in dispute. They are set out in the oft-quoted passage from the judgment of Lewison J (as he then was) in *Easy Air Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]:

> "The correct approach on applications by defendants is, in my judgment, as follows:
>
> i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All ER 91;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];

iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman;*

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

53. Further, it is well-established that if a defect in a claim can be cured by amendment, then it is inappropriate to strike it out, or give summary judgment, if the claimant is prepared to make an appropriate amendment. In that regard, it should be born in mind that the present proceedings are only at the very initial stage.

54. The Respondents' argument that the Applicant's case on abuse was unsustainable as a matter of law was advanced at the hearing by Ms Abram.

She submitted that the allegations that the Respondents' conduct amounted to an abuse went well beyond the existing law and were unsustainable. She noted that the Applicant had clarified that it was not suggesting that competition law required the TOCs to ensure that virtually all eligible passengers bought a Boundary Fare: that would amount to a form of strict liability and was clearly unarguable. However, the case advanced, i.e. that the Respondents had a duty to make Boundary Fares sufficiently available and use their best efforts or best endeavours to make customers aware of Boundary Fares, did not reflect the law on abuse of dominance and, in any event, was vague and unparticularised. She stressed that competition law was not a general consumer protection law, and that the 'special responsibility' which the law imposed on a dominant company did not amount to a fiduciary duty to protect the interests of its customers.

55. The Applicant relied in particular on the judgments of the Court of Justice of the European Union (as it is now known) ("CJEU") in Cases C-147 & 148/97 *Deutsche Post,* EU:C:2000:74 and Case C-385/07 P *Duales System Deutschland ("DSD")*, EU:C:2009:456.

56. In *Deutsche Post,* the Court ruled on a reference from the German court concerning charges levied by the German postal operator. Pursuant to an international agreement, where mail was posted in another European country for delivery in Germany, the German operator would recover from the operator in the country of posting so-called "terminal dues". However, those dues did not cover the full cost of delivery of mail. An international bank whose billing operation was based in Germany arranged to send its regular communications to customers in Germany (as well as other European countries) from Holland, paying the Dutch international postal charges. Deutsche Post claimed postage charges from the international bank at the full internal rate for domestic postage, on the basis that the communications, although posted in Holland, originated in Germany. The CJEU held that this infringed what is now Art 106 of the Treaty on the Functioning of the European Union ("TFEU") (then Art 90 of the EC Treaty), as an abuse of dominance contrary to what is now Art 102 TFEU (then Art 86 of the EC Treaty). The CJEU stated (emphasis added):

> "57. It is to be remembered that a body such as Deutsche Post which has a statutory monopoly over a substantial part of the common market may be regarded as holding a dominant position within the meaning of Article 86 of the Treaty.
>
> 58. Thus, the exercise by such a body of the right to demand the full amount of the internal postage, where the costs relating to the forwarding and delivery of mail posted in large quantities with the postal services of a Member State other than the State in which both the senders and the addressees of that mail are resident are not offset by the terminal dues paid by those services, may be regarded as an abuse of a dominant position within the meaning of Article 86 of the Treaty.
>
> 59. In order to prevent a body such as Deutsche Post from exercising its right, provided for by Article 25(3) of the [Universal Postal Convention] to return items of mail to origin, the senders of those items have no choice but to pay the full amount of the internal postage.
>
> …
>
> 61. It follows from all the foregoing considerations that, in the absence of an agreement between the postal services of the Member States concerned fixing terminal dues in relation to *the actual costs* of processing and delivering incoming trans-border mail, it is not contrary to Article 90 of the Treaty, read in conjunction with Articles 86 and 59 thereof, for a body such as Deutsche Post to exercise the right provided for by Article 25(3) of the UPC, in the version adopted on 14 December 1989, to charge, in the cases referred to in the second sentence of Article 25(1) and Article 25(2) thereof, internal postage on items of mail posted in large quantities with the postal services of a Member State other than the Member State to which that body belongs. *On the other hand, the exercise of such a right is contrary to Article 90(1) of the Treaty, read in conjunction with Article 86 thereof, in so far as the result is that such a body may demand the entire internal postage applicable in the Member State to which it belongs without deducting the terminal dues corresponding to those items of mail paid by the abovementioned postal services.*"
>
> [our emphasis]

Put shortly, since Deutsche Post would recover the terminal dues for this mail from the Dutch operator, it was an abuse for it nonetheless to demand the full internal postal rate from the bank.

57. In *DSD*, the Grand Chamber of the CJEU upheld the decision of the Court of First Instance (now the General Court), which in turn dismissed the application to annul the Commission's decision holding that DSD, a company operating a system for collecting waste packaging on behalf of manufacturers and distributors, had abused its dominant position by reason of its charging arrangements. Under German environmental protection legislation, manufacturers and distributors of packaged goods are required to have

arrangements for taking back the sales packaging from final consumers free of charge; but they are exempt from that obligation if they participate in a third party system which guarantees the regular collection throughout their sales territory of used sales packaging. DSD was the only operator of such a system throughout Germany, although there were alternative operators at more regional levels. Subscribers to DSD's system would affix its "DGP" (Green Dot) logo to their packaging, and DSD would ensure that such packaging would be collected. However, the fees charged by DSD were based on *all* packaging bearing the DGP logo, irrespective of whether that packaging was actually collected by DSD as opposed to the manufacturer collecting it themselves or using another third party. The Commission rejected DSD's argument that manufacturers could choose not to affix the logo to packaging that was not to be collected by DSD. That was not economically realistic or practical since it would require selective labelling of packages and require manufacturers and distributors using mixed systems to ensure that packages bearing the logo were disposed of at different outlets from packages without the logo that were to be collected by another system (judgment at para 31).

58. Noting that an abuse of dominance under the Treaty may be constituted by directly or indirectly imposing unfair prices or other unfair trading conditions, the CJEU stated:

> "141. As the Court of First Instance stated at paragraph 121 of the judgment under appeal, it is apparent from point (a) of the second paragraph of Article 82 EC that the abuse of a dominant position may consist, inter alia, in directly or indirectly imposing unfair prices or other unfair trading conditions.
>
> 142. In the same paragraph of the judgment under appeal, the Court of First Instance noted the settled case-law, according to which an undertaking abuses its dominant position where it charges for its services fees which are disproportionate to the economic value of the service provided (see, inter alia, Case 226/84 *British Leyland* v *Commission* [1986] ECR 3263, paragraph 27, and Case C-340/99 *TNT Traco* [2001] ECR I-4109, paragraph 46).
>
> 143. As the Court of First Instance held at paragraph 164 of the judgment under appeal, …, the conduct of DSD which is objected to in Article 1 of the decision at issue and which consists in requiring payment of a fee for all packaging bearing the DGP logo and put into circulation in Germany, even where customers of the company show that they do not use the DGP system for some or all of that packaging, must be considered to constitute an abuse of a dominant position within the meaning of the provision and the case-law referred to above. …"

59. We note that both *Deutsche Post* and *DSD* involved the imposition of unfair prices or trading terms where the users of the service had no alternative to paying the charges. As Ms Abram pointed out, that is not the same as finding that a dominant company should make greater efforts to promote a cheaper alternative, or put in place selling arrangements which enable the customer to buy a cheaper product.

60. However, it is well recognised that the definition under s. 18(2)/Art 102 TFEU is not exhaustive and that the categories of abuse are not closed. Moreover, s. 18(2)(a), corresponding to Art 102(a), states that conduct may constitute an abuse where it consists in "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions." The reference to "unfair" prices is significant. The law on what constitutes unfair trading conditions, in particular, is in a state of development. In *Preventx Ltd v Royal Mail Group Ltd* [2020] EWHC 2276 (Ch), on an application for an interim injunction, the High Court held that the introduction by the Post Office of a requirement that for pre-paid returns of medical testing kits, its Tracked service must be used instead of its cheaper Freepost Standard service, although Preventx had no requirement for a tracked service, was arguably an exploitative abuse of dominance. And the Court observed, at [95]:

> "… despite over half a century of EU jurisprudence, there have been very few cases considering the meaning of "unfair trading conditions" within Art 102(a)."

61. The Court there also referred to the recent decision of the German Federal Supreme Court in *Facebook* (23 June 2020), where it reversed the lower court's judgment and held that there should be no suspension pending appeal of the decision of the German Federal Cartel Office that Facebook had abused a dominant position by not giving its consumer users a genuine choice over whether Facebook could engage in unlimited collection of their personal data from non-Facebook accounts. That decision was challenged as an extension of the boundaries of the law on abuse of dominance. Although the main appeal is

pending, the Supreme Court indicated that the legal approach in the decision was well supported.[8]

62. In *Intel Corp v Via Technologies Inc* [2002] EWCA Civ 1905, where a contention of abuse of a dominant position was raised by way of defence, the Court of Appeal allowed the appeal against the grant of summary judgment where the court below had held that there was no arguable case of abuse. The Vice-Chancellor (with whose judgment Mummery and Tuckey LJJ agreed) stated, at [32]:

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

63. Obviously, the question of legal development depends on the area of law and the nature of the development envisaged. In that regard, we did not derive any assistance from the case of *Hudson v HM Treasury* [2003] EWCA Civ 1612, relied on by Ms Abram. There, the submissions of the appellants against a decision striking out their claim were described by the Court of Appeal as "absurd" and Jonathan Parker LJ notably said in his judgment (with which Judge and Simon Brown LJJ agreed) at [75] that:

> "it would require something akin to an earthquake in the law of restitution to enable the appellants to succeed at trial on the restitutionary claim."

64. We regard that as far removed from the position in the present case. If the charging of unfair and excessive prices, or the use of unfair trading terms, by a dominant company can constitute an abuse, we do not regard it as an extraordinary or fanciful proposition to say that for a dominant company to operate an unfair selling system, where the availability of cheaper alternative prices for the same service is not transparent or effectively communicated to customers, may also constitute an abuse.

65. Further, since abuse of dominance encompasses exploitative abuse, which it is the "special responsibility" of dominant companies to avoid, we think it is

[8] Although a decision under German competition law, like UK competition law the domestic provision mirrors Art 102 TFEU.

relevant that the customers charged in the present cases are end consumers (and predominately individuals), as opposed to commercial undertakings as in *Deutsche Post* and *DSD*. We of course recognise that competition law is not a law of fair dealing or to be equated with simple consumer protection. However, a significant part of the argument of the Applicant is that Boundary Fares were not available at all from certain outlets that were much used by customers buying tickets, and that even when they were formally available the TOCs did not make this readily apparent to their customers. In its seminal judgment on abuse of dominance in Case 27/76 *United Brands v Commission* EU:C:1978:22, the CJEU stated:

> "248 The imposition by an undertaking in a dominant position directly or indirectly of unfair purchase or selling prices is an abuse to which exception can be taken under Article 86 of the Treaty.
>
> 249 It is advisable therefore to ascertain whether the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition."

In short, since it is axiomatic that competition law looks to the substance rather than the form, we do not regard the Applicant's case as such a dramatic extension of the existing law.

66. In addition, insofar as there are a number of promotional fares, in particular Advance Fares, for which no Boundary Fares are available at all, consumers indeed have no choice but to pay the full, albeit promotional or discounted, fare and cannot use the Travelcard for which they have already paid. Ms Abram submitted that this category accounted for only a tiny proportion of the claim. However, it is illustrative of an approach whereby the TOCs collected fares covering the full journey although by their Travelcard the customer had already paid for part of it.

67. The Respondents also criticised the claims as too vague and lacking in particularisation. They submitted that allegations in the form of using "best endeavours" or making Boundary Fares "sufficiently available" are inappropriate since they do not make clear precisely what the TOCs should have done. However, the Applicant states in his Reply:

> "In the counterfactual, Boundary Fares would be available for purchase through all sales channels, offered both to inquiring customers and generally, easy to locate/clearly-labelled, and there would be consumer-facing information regarding their existence or use."

68. Insofar as the Respondents did not sell Boundary Fares at all from certain outlets or indeed for certain kinds of fare, the Applicant's contention as to what the Respondents should have done is clear, as Ms Abram accepted in her skeleton argument. More generally, to establish that conduct is an abuse does not require the identification of a counterfactual in specific detail. For example, a claimant can establish that a long-term exclusive dealing arrangement is an abuse without having to state precisely what length of term would avoid infringement. Similarly, in an unfair pricing case, an excessive price can be shown to constitute an abuse without specifying precisely what would be the non-excessive price. Here, the alleged abuse is partly based on an objective outcome (lack of customer awareness) and the Applicant is understandably not in a position to specify precisely the manner in which the Respondents should have organised their businesses to achieve a different outcome. Nonetheless, the claim forms refer as examples to the possibility of better staff training and amended sales procedures, and the Applicant said that in general terms Boundary Fares should have been made available in the same way as off-peak fares.

69. The Respondents refer to the observations of the President, there sitting in the High Court, in *SEL-Imperial Ltd v British Standards Institution* [2010] EWHC 854 (Ch) at [17], about the importance of competition allegations being pleaded clearly so that the defendant can understand what conduct is complained of. However, those remarks were made in a case where what was meant by one of the allegations in the claimant's pleading required considerable clarification and, notably, once clarified it was held that the allegation should not be struck out: see at [32]; and the claimant sought to advance in argument another allegation that did not appear in its pleading at all: see at [50]. We do not consider that *SEL-Imperial* has any relevance to the present cases.

70. A distinct objection was raised to the SE claim by LSER insofar as it concerns sales by third party suppliers of rail tickets. LSER submitted that it could not

possibly be liable for any failure by such third parties (e.g. Trainline.com) to inform customers about the possibility of a Boundary Fare, or to respond adequately to inquiries, since it is in no position to set the terms on which such independent entities sell their tickets. Mr Backway of LSER explains that such third party retailers are licensed by all the TOCs acting together through the Rail Delivery Group and LSER has no individual contract with those sellers. Further, Mr Harris QC submitted that the third party sellers are in various ways competing with the TOCs as regards the sale to customers of train tickets.

71. We recognise that although such third parties act as agents for the TOCs in some respects, like travel agents they are probably not agents as a matter of law of the transport provider for all purposes. Mr Moser argued that the nature of the TOC relationship with such third party outlets was a factual matter to be explored at trial. However, we do not consider it is necessary at this stage to explore the nature or boundaries of any agency relationship. It is striking, for example, that one of the best-known third party sellers, Trainline.com, does not offer Boundary Fares at all. In our view, without needing to decide the point at this stage, the position would seem to be broadly analogous to the liability of cartelists for 'umbrella pricing.' Where cartelists unlawfully agree to raise prices, they will be liable not only to purchasers of their own, cartelised products but, insofar as that has led to an increase in prices across the market, also to purchasers from producers outside the cartel: see Case C-557/12 *Kone v ÖBB-Infrastruktur,* EU:C:2014:1317. If Boundary Fares had been widely available and offered from the Respondents' own outlets, it seems to us well arguable that this would have influenced the behaviour of competing third party sellers, and that customer demand would have led those third parties similarly to make these fares readily available from them.

72. We should add that First MTR and Stagecoach, unlike LSER, expressly did not seek to strike out the claims in respect of third party sellers. Ms Abram for Stagecoach sought to argue that as the class includes eligible customers who purchased from third party sellers, the Applicant's economic evidence should have addressed the way the conduct of the Respondents is likely to have influenced those third parties. As we understood it, that argument was not advanced in support of a strike out/summary judgment application and, in any

event, it is misconceived. An applicant for a CPO is not expected as part of the application to put forward its full economic evidence. This point is a matter of likely causation of loss, which will no doubt be explored further if a CPO is granted.

73. LSER also seeks summary dismissal or striking out of the allegation that a Boundary Fare should have been available in conjunction with all ticket types, including in particular Advance Fares. LSER points out that it has a number of promotional fares, such as weekender fares and super off-peak fares, which are already heavily discounted. They are designed to encourage travel on certain routes at times when the network is relatively quiet. The skeleton argument for LSER submitted that:

> "There is simply no reason why LSER ought to be obliged at law, particularly in price-regulated environment, to allow customers to *combine* one type of discount, given for specific reasons, often for specific journeys/flows and at specific times, with some *other* discount(s), thereby allowing double discounting."

74. In our view, a Boundary Fare should not properly be regarded as a discount. It is more appropriately viewed as the fare for the part of a journey not already paid for and covered by a Travelcard. But the thrust of this aspect of the claim appears to be that the Applicant contends that where a discounted fare is offered, a similarly discounted Boundary Fare should be made available: it is generally open to the customer to purchase an ordinary Boundary Fare in conjunction with his or her Travelcard, but that would in many instances cost more than the promotional fare for the entirety of the journey. The Applicant recognises that some promotional fares may be so discounted that having a special Boundary Fare in those instances may not be proportionate, e.g. LSER's £1 "Kids for a Quid" fare. In practice, as Ms Abram pointed out in a different context, these promotional fares account for a minimal part of the claims: see para 66 above. The only one which appears to be of any significance is the Advance Fare. Whether it could be an abuse for the Respondents not to offer an Advance Boundary Fare does not seem to us straightforward, especially if Advance Fares are available for most types of journey. Although we can see some force in Mr Harris' submissions on this point, we think that if there is to be evidence and investigation of other aspects of the alleged abuse, it is preferable for this matter

to be addressed in the context of the abuse as a whole and not singled out at this stage for distinct treatment. We note that in *TFL Management Services Ltd v Lloyds Banks Plc* [2013] EWCA Civ 1415, after citing and approving the summary judgment principles set out in *Easy Air,* Floyd LJ, giving the judgment of the Court of Appeal, said at [27]:

> "I would add that the court should still consider very carefully before accepting an invitation to deal with single issues in cases where there will need to be a full trial on liability involving evidence and cross examination in any event…."

Moreover, Mr Holt explained that if the Tribunal was at a later stage to decide that journeys on promotional fares should be excluded from the claims, it should not be difficult to adjust the aggregate damages accordingly.

75. Accordingly, in our judgment, the Applicant's case on abuse is reasonably arguable. It cannot be dismissed summarily at this stage or be struck out.

76. The summary judgment/strike out applications were also advanced on the separate basis that the method of calculating aggregate damages used by the Applicant's expert assumed that in the counterfactual *all* eligible customers (i.e. holders of a valid Travelcard) would have purchased Boundary Fares for in-scope journeys. Insofar as it is alleged that the Respondents' obligation was to make Boundary Fares "sufficiently available", they argued that there will inevitably have been eligible customers who would not have bought a Boundary Fare in any event and that the basis on which the Applicant put forward his case was fundamentally flawed. This issue arises equally as regards the eligibility condition and we address it below.

H. ELIGIBILITY: DOMINANCE AND CAUSATION

(1) Respondents' submissions

77. The Respondents submitted that the eligibility condition is not satisfied in these cases. They contended that:

(1) there are no, or at most very limited, common issues; and

(2) the need for individual factual assessment to establish whether any claim was valid meant that the claims are not suitable for collective proceedings.

Further, they argued that it was in any event impossible fairly to calculate aggregate damages, which is the only way the Applicant proposed to quantify the claims.

78. All the Respondents argued strongly that while what they called the "strict liability" contention was not formally pursued, it has effectively remained or resurfaced through the combination of the class definition and the presumption of causation. The case is advanced on the basis that the Respondents are liable to all members of the class: i.e. that all members of the class suffered loss; and that is the foundation of the method by which aggregate damages will be calculated. However, the Respondents submitted that this is clearly unsustainable. On the contrary, some class members will have suffered no loss at all, and the situation of the class members generally is hugely diverse and cannot be bundled into collective proceedings. Therefore, the claims of all members of the class, as defined, do not enable the establishment of liability and loss on a collective basis; or alternatively the class definition is over-inclusive.

79. Hence counsel for LSER submitted in their skeleton argument that the Tribunal cannot be satisfied that there is:

> "a realistic prospect that all the proposed class members, or at least all of an identifiable subclass of them, have an individual cause of action in which (in a tort claim) they each suffered at least some loss from an arguable alleged breach of duty."

80. That submission is advanced in support of the summary judgment application but, as LSER emphasises, applies also on the issue of satisfying the eligibility condition. And counsel for First MTR argue on a similar basis that there is an absence of commonality as regards both breach and causation:

> "The question as to whether tickets were made "*sufficiently available*" or even whether "*best endeavours*" were used in respect of each Class Member will depend on a myriad of different circumstances – as a matter of breach and causation.… It is common ground that Class Members will have travelled to numerous destinations outside London based on several different ticket types,

> during different operating hours and for different purposes. They purchased tickets using a range of different channels and had very different interactions with the Respondents….
>
> In establishing *whether* there was a breach, there needs to be a fact-specific assessment for each of the individuals in order to assess whether Boundary Fares were "*sufficiently available*" and whether each Respondent used "*best efforts*". The Applicant cannot side-step this by emphasising a singular theory of harm.
>
> …
>
> For essentially the same reasons, the issue of causation lacks commonality. It necessarily requires consideration of each Class Member's individual circumstances."

Underlying this issue is the question of what is required in terms of commonality to satisfy the eligibility condition.

(2) Canadian authorities

81. In *Merricks SC*, Lord Briggs referred to the Canadian jurisprudence as persuasive for the UK regime because of the greater experience of their courts with class actions and the substantial similarity of purpose underlying the Canadian and UK legislation. All parties before us cited a number of Canadian cases.

82. The Respondents in particular referred to *Dennis v Ontario Lottery and Gaming Corporation,* 2013 ONCA 501, *Mouhteros v DeVry Canada Inc. et al*, 41 O.R. (3d) 63, [1998] OJ No. 2786, and *Kett v Mitsubishi Materials Corp,* 2020 BCSC 1879.

83. In *Dennis*, the claimant was a problem gambler who signed a "self-exclusion form" with the defendant ("OLG") whereby it undertook to use its "best efforts" to deny him entry to their gambling facilities, but the claimant was nonetheless able to return to those facilities to gamble on a regular basis and lost significant sums of money. He sought certification for a class action under the Ontario class proceedings statute for a class defined as "all residents of Ontario and the United States, or their estates, who signed a self-exclusion form between December 1, 1999 and February 10, 2005", claiming against OLG for breach of contract,

negligence and occupier's liability. In the Ontario Court of Appeal, Sharpe JA referred to the central issue as follows:

> "is this a case in which the need for individualised inquiry is so pervasive that it overwhelms the appellants' attempt to treat it as a case of systemic wrong?"

Upholding the refusal of certification by the lower courts, Sharpe JA explained:

> "53. There are certainly cases in which a class action will be an appropriate procedure to deal with a "systemic wrong", a wrong that is said to have caused widespread harm to a large number of individuals. When a systematic wrong causes harm to an undifferentiated class of individuals, it can be entirely proper to use a class proceeding that focuses on the alleged wrong. The determination of significant elements of the claims of individual class members can be decided on a class-wide basis, and individual issues relating to issues such as causation and damages can be dealt with later on an individual basis, especially when the assessment of damages can be accomplished by application of a simple formula.
>
> 54. The case law offers many examples in which a class action has provided an appropriate procedural tool to resolve claims when all class members are exposed to the same risk on account of the defendant's conduct. [Examples cited] In these cases, liability essentially turns on the unilateral actions of the defendant, is not dependent to any significant degree on the individual circumstances of class members, and the only remaining issues requiring individualized determination are whether and to what degree that conduct harmed the class members.
>
> 55. The claim at issue does not fit into that category. The central problem is that the alleged fault of OLG does not turn solely on the execution of the contract. It is inextricably bound up with the vulnerability of the individual class members. The complaint against OLG is that it failed to prevent them from harming themselves…
>
> …
>
> 57. The issue of OLG's alleged fault cannot usefully or fairly be considered in the abstract and without reference to the circumstances of each individual class member. As the motion judge observed, assessment of each Class … Member's claim will necessarily involve careful, individualised consideration of legal and factual issues relating to his or her personal autonomy and responsibility. Without answers to those specific and individualised questions, it would be impossible to assess whether OLG was at fault or whether OLG bears any legal responsibility to protect them from their own actions….
>
> 58. I recognize that certification may be appropriate in cases in which individualized inquiries will be required after resolution of the common issues, so long as resolution of the common issues would "significantly advance the action"…. I am persuaded, however, that the claims advanced in this case and the allegations of fault against OLG are so heavily infused with the issues of individual vulnerability that resolution of those allegations in terms of a generalised systemic wrong would not significantly advance the claims of the individual class members".

84. The Ontario Court of Appeal also held, for similar reasons, that the class definition was "fatally over-inclusive":

> "62. It is conceded that some individuals who signed the form did not return to gamble. Plainly, they have no claim. Nor do those who attempted re-entry but were excluded. Further, it cannot be the case that an individual who signed the form but returned to lose money is thereby automatically entitled to claim those losses from OLG. An OLG patron cannot immunize himself or herself from gambling losses by signing a self-exclusion form. It follows that to make out a claim, a class member would have to establish, on an individual basis, that he or she returned to an OLG facility, lost money and suffers from vulnerability produced by the affliction of pathological gambling, and that OLG could and should have prevented the particular harm from having occurred.
>
> 63. I cannot agree with the appellants' contention that, assuming it can be established that OLG committed an actionable failure to use its "best efforts" to exclude those who signed the self-exclusion form, everyone who signed the form has a "tenable" claim for breach of contract, negligence, occupiers' liability and waiver of tort. The gap between a finding that OLG failed to use best efforts to exclude and an actionable claim in law is unacceptably wide. That gap could only be filled with detailed inquiries into the individual circumstances of each and every class member, revealing the fatally over-inclusive nature of the proposed class definition."

85. *Mouhteros* was also an Ontario case. The defendant ("DeVry") operated private educational colleges in Canada. The plaintiff was a former student who sought certification of a class action claiming that DeVry misrepresented the quality of its programmes and facilities and the marketability of its graduates, and that students who enrolled relied on those representations to their detriment. The proposed class comprised all persons who attended DeVry's Ontario and Alberta campuses at any time over a period of six academic years. Winkler J (as he then was) refused certification on several grounds. He said:

> "In the present case, … the class definition is over-inclusive. The proposed class encompasses all students of DeVry in the relevant period; however, many of these students may have no claim, let alone a claim which raises a common issue. The defendant has submitted statistics which indicate that of the 17,227 potential class members, 4,309 graduated or transferred to a United States campus, 3,433 are currently attending a Canadian campus, 1,362 have completed adult education courses only, and 8,123 have discontinued their studies. The essence of the claim is that members of the proposed class relied to their detriment on misrepresentations of the defendant as to the quality of a DeVry education and its marketability to prospective employers. However, the class, as presently defined, includes all students of DeVry, including those who successfully completed their programs, were satisfied with the education they received, and went on to obtain employment related to their field of study. As well, the proposed class includes all students who enrolled, regardless of whether they heard or relied upon any of the alleged misrepresentations. Such

> persons might well have no claim against DeVry for any of the relief pleaded, let alone a claim which raises a common issue."

86. Further, the court held that the alleged misrepresentations were not common issues since they were made by a large variety of media and admissions officers over a six year period, and questions whether they were false or misleading and made negligently or fraudulently, will vary greatly. But even if they were common issues, a class action in that case would not be a preferable procedure to promote the claims:

> "Assuming that the misrepresentation issues identified above were capable of a common resolution, such would be but the beginning, and not the end of the litigation. With respect to the claim for misrepresentation in tort, the plaintiff must prove reasonable reliance on a misrepresentation negligently made. Reliance is an essential element of the tort. The question of reliance must be determined based on the experience of the individual student, and will involve such evidentiary issues as how the student heard about DeVry, whether the student saw any of the advertisements and if so, which ones, what written representations were made to the student prior to enrolment, whether the student met with an admissions officer, and whether the student relied on some or all of these in deciding to enrol in DeVry. The inquiry will not end there, however. If the class members are able to demonstrate reliance, they must show that they relied to their detriment. Damages will require individual assessment. In that regard, the court must consider the program of study entered into, the student's performance in the program, the field in which employment was sought, the length of the job search, any assistance in the search provided by DeVry, the class member's prior education and employment history, and the nature of the employment, if any, obtained by the class member. These issues are in addition to the numerous questions surrounding the nature of the representations and whether they were negligently and fraudulently made, as enunciated above.
>
> The presence of individual issues will not be fatal to certification. Indeed, virtually every class action contains individual issues to some extent. In the instant case, however, what common issues there may be are completely subsumed by the plethora of individual issues, which would necessitate individual trials for virtually each class member. Each student's experience is idiosyncratic, and liability would be subject to numerous variables for each class member. Such a class action would be completely unmanageable."

87. *Kett* is a recent decision of the British Columbia court. The plaintiff sought certification of a class action on behalf of:

> "All persons in Canada who purchased a new vehicle or motorcycle manufactured by Toyota (including Lexus), Honda (including Acura), Subaru, Suzuki, Mazda, Mitsubishi, Isuzu, Hino or Yamaha between 2002 and 2018."

88. The defendants were part of the Mitsubishi group who were suppliers from Japan of automotive parts to these vehicle manufacturers ("OEMs"). The basis

of the claim was the discovery that some products delivered by the defendants to their OEM customers had wrongfully deviated from the customer specifications because some inspection tests had not been properly carried out and/or inspection results falsified, leading to the defendants' conviction for violation of the Japanese Unfair Competition Prevention Act. The judge noted that the automotive supply chain is complex, that there were at least 1,774 different models of vehicle sold in Canada by the OEMs during the relevant period and that it was not known what proportion of all those vehicles sold contained the defendants' parts or materials. The claim alleged that the defendants had over-charged OEMs as a result of their failure to carry out proper parts testing and that the prices of vehicles bought by class members were correspondingly inflated.

89. Considering the criteria for certification, the judge first held that the class definition was not in itself a reason to refuse certification. He said, at [117]:

> "117. It is clear that the class definition is over-inclusive, as not all vehicles are covered by the class will have contained the defendants' parts. Further, it is clear that not all of the defendants' products in each vehicle were non-conforming. However, given the nature of the case and the evidentiary challenges faced by the plaintiff at this early stage of the proceeding, I accept that the definition is no more over-inclusive than necessary on the presently available evidence."

90. Turning to the requirement for common issues, the judge found that the question whether the defendants fraudulently altered quality control certifications for their automotive products could not be regarded as a common issue:

> "[125] Notably, the plaintiff concedes that there could not be a single answer for all components manufactured by all defendants. The analysis would, at best, have to be performed on a product-by-product basis. Hence, at a minimum, this first question would have to be reformulated as follows:
>
> (a) Did the defendants fraudulently alter quality control certifications for some of their automotive products? If so, which ones and for what period?
>
> [126] However, the problems with this question run deeper than reflected by this potential amendment.
>
> [127] While it is true that nuanced answers can be given to a common question, the difficulty in this case is that there is little unifying the pursuit of the answer from product to product, or shipment to shipment.
>
> [128] The plaintiff does not plead that there was overarching systemic wrongdoing in relation to all products across all defendants. Although the

> plaintiff pleads that the defendants operated as a joint enterprise, he does not allege that a boardroom-level decision was taken by the parent company to start falsifying test results across all subsidiaries. There is no single conspiracy alleged across the defendants. Rather, on the evidence, it appears that any fraud was made levels down from the parent company's board room.
>
> [129] This lack of allegation of overarching systemic wrongdoing sets this case apart from the systemic negligence sexual abuse cases certified in *Rumley v. B.C.*, 2001 SCC, and others.
>
> [130] It also sets the case apart from the price-fixing cases where plaintiffs allege a single overarching conspiracy across all defendants.
>
> …
>
> [134] A common issue should be one in which all class members at least have an interest. The problem here is that, for example, Class Member #24,567, with a vehicle containing Part #357 from Shipment #106,454, has no real legal interest in whether Class member #264,568, with Part #957 from Shipment #23,456, succeeds in establishing fraud in relation to the testing protocol used for the latter shipment. As such, it cannot reasonably be said that answering the question for the first class member "is necessary to the resolution of each class member's claim."
>
> [135] This distinguishes the present situation from cases such as *Reid v. Ford Motor Company*, 2003 BCSC 1632, where a single and universal alleged design defect applied across multiple vehicle models, and "all proposed class members [had] an interest in determining whether [the TFI module] placement was defective or negligent": paras. 2, 43-44 and 51."

91. For the same reason the other allegations concerning misconduct by the defendants were held not to constitute common issues. Turning to the issue of whether questions of fact or law common to the class members predominate over questions affecting only individual members, which was a mandatory consideration in the determination whether class proceedings were a preferable procedure, required by the British Columbia Class Proceedings Act ("CPA"), the judge noted the extreme heterogeneity of circumstances at every level of the supply chain. He said:

> "182. Based on my review of the evidence, I expect the required analysis would come very close to a vehicle-by-vehicle evaluation, in a case involving millions of vehicles – a daunting prospect to be sure.
>
> 183. In my view, this case really seeks to tie together many potential class actions. The CPA is not designed to stitch together a case with so many dangling threads. It is designed for cases with a strong factual and legal bond."

And the judge quoted from the judgment of Winkler J in another case:

> "The legal principles underlying the claims asserted require inquiry into the circumstances of each individual class member in order to ascertain liability,

> let alone damages. This would be necessary on a procedural basis to ensure that defendants are treated fairly but would also be necessary from the perspective of the members of the class so that each would receive fair compensation…"

92. These decisions illustrate the wide variety of circumstances in which claimants seek to bring class proceedings in Canada and how the court's scrutiny at the certification stage will be heavily dependent on the facts of the case and the allegations made. Before addressing the application of Canadian authorities to the present cases, it is appropriate to step back and put the Canadian jurisprudence in context by reference to the decisions of the Canadian Supreme Court.

93. There are now class action statutes in almost all the Canadian provinces. Various issues arising in class proceedings have been considered by the Canadian Supreme Court in a number of significant judgments. On 13 June 2001, the Supreme Court issued its judgments in *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46, and *Hollick v Toronto City*, 2001 SCC 68, and announced its decision in a third case, *Rumley v British Columbia*, 2001 SCC 69 (for which the reasons were issued later). All three judgments for the Court were given by McLachlin CJ, and it was in *Dutton* that she set out the policy benefits of class actions in a passage repeated in *Hollick* and quoted by Lord Briggs in *Merricks SC*. Moreover, in *Dutton* the Chief Justice explained at paras 39-40 the requirements for common issues, which were conveniently summarised by Rothstein J in the *Microsoft* case as follows:

> "(1) The commonality question should be approached purposively.
>
> (2) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.
>
> (3) It is not essential that the class members be identically situated vis-à-vis the opposing party.
>
> (4) It is not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.
>
> (5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent."

94. In *Hollick*, McLachlin CJ further emphasised that certification did not involve a merits test and that the requirements for certification, in that case under the Ontario statute, should be interpreted generously. However, she also set out, at para 20, the requirement that there be "some rational relationship between the class and the common issues." The judgment continued, at para 21:

> "The requirement is not an onerous one. The representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not unnecessarily broad — that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended"

95. In *Hollick*, the Court also articulated the "some basis in fact" test as the appropriate evidentiary standard, which was subsequently developed in *Microsoft.* Finally, the judgment addressed the "preferability" requirement under s. 5(1)(d) of the Ontario statute that "a class proceeding would be the preferable procedure for the resolution of the common issues". This involved looking at the importance of the common issues in relation to the claims as a whole, and consideration of alternative means of resolving the class members' claims.

96. In *Rumley*, the Court essentially applied the approach of *Dutton* and *Hollick* to the issues in that case, noting (at para 32) that a question can remain common for all cases although the answer may have to be nuanced to reflect the different circumstances of different class members.

97. In 2013, there was a further trilogy of cases on class proceedings decided by the Canadian Supreme Court on the same day: *Pro-Sys Consultants Ltd v Microsoft Corpn* [2013] SCC 57 ("*Microsoft*"); *Sun-Rype Products Ltd v Archer Daniel Midlands Co,* 2013 SCC 58; and *Infineon Technologies AG v Option consommateurs*, 2013 SCC 59.

98. *Microsoft* was a competition claim based on the allegation that Microsoft had overcharged electronics manufacturers for Intel-compatible PC operating systems and software, which the class members had purchased from retailers. A

major issue was whether Canadian law allowed such claims by indirect purchasers. Having resolved that issue in the claimant's favour, the Supreme Court turned to the question of certification. The Court confirmed that the standard of proof for all the certification requirements was the "some basis in fact" test set out in *Hollick*. Addressing the requirement for common issues, the judgment summarises the submissions of Microsoft as follows:

> "[109] Microsoft argues that the differences among the proposed class members are too great to satisfy the common issues requirement. It argues that the plaintiffs allege they were injured by multiple separate instances of wrongdoing, that these acts occurred over a period of 24 years and had to do with 19 different products, and that various co-conspirators and countless licences are implicated. Microsoft also argues that the fact that the overcharge has been passed on to the class members through the chain of distribution makes it unfeasible to prove loss to each of the class members for the purposes of establishing common issues."

99. The Court rejected these arguments. Rothstein J stated, at para 112:

> "The differences cited by Microsoft are, in my view, insufficient to defeat a finding of commonality. *Dutton* confirms that even a significant level of difference among the class members does not preclude a finding of commonality. In any event, as McLachlin C.J. stated, "[i]f material differences emerge, the court can deal with them when the time comes" (*Dutton*, at para. 54)."

100. As regards the question whether damages could be addressed as a common issue on an aggregate basis, the Court noted that this depended on the expert evidence. In that context, Rothstein J articulated the requirement for the expert methodology, which was quoted and adopted in *Merricks SC*:

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

The Court declined to interfere with the finding of the judge who heard the application that this standard was satisfied. However, the Court proceeded to state that the aggregate damages provisions in the British Columbia CPA were purely procedural and could not be used to establish liability, relying on s.

29(1)(b) of the statute. This is the part of the judgment referred to by Lords Sales and Leggatt in their judgment in *Merricks SC* at [96].

101. *Sun-Rype v ADM* and *Infineon* were also competition cases. However, the first was essentially concerned with the question whether there was an identifiable class and the second involved discussion of aspects of the Quebec class proceedings statute which differed from the legislation in the common law provinces (e.g. the "sufficient basis in fact test" does not apply). These judgments were not relied on by any of the four parties to the present applications.

102. The following year, the Canadian Supreme Court issued its judgment in *Vivendi Canada Inc v Dell'Aniello*, 2014 SCC 1. Although this was also an appeal from Quebec, it concerned the commonality requirement and the Court considered the principles derived from its earlier judgments. The judgment states:

> "[45] Having regard to the clarifications provided in *Rumley*, it should be noted that the common success requirement identified in *Dutton* must not be applied inflexibly. A common question can exist even if the answer given to the question might vary from one member of the class to another. Thus, for a question to be common, success for one member of the class does not necessarily have to lead to success for all the members. However, success for one member must not result in failure for another.
>
> [46] *Dutton* and *Rumley* therefore establish the principle that a question will be considered common if it can serve to advance the resolution of every class member's claim. As a result, the common question may require nuanced and varied answers based on the situations of individual members. The commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting interests among the members."

103. Finally, in 2019 the Canadian Supreme Court issued its judgment in *Pioneer Corp. v Godfrey*, 2019 SCC 42. That was a claim concerning a price-fixing cartel among producers of Optical Disc Drives ("ODDs") and ODD products. The proposed representative plaintiff sought to bring a class action under the British Columbia CPA on behalf of direct purchasers, indirect purchasers and umbrella purchasers of ODDs and ODD products. One aspect of the appeal

concerned certification of loss as a common issue. As Brown J explained, giving the judgment of the majority of the Court:[9]

> "[91] Godfrey sought to certify several loss-related questions as common issues, principally whether the class members suffered economic loss…. These questions were stated broadly enough that they could be taken as asking whether *all* class members suffered economic loss or whether *any* class members suffered economic loss. And, because they could be taken in two different ways they might, following the common issues trial, be answered in different ways.
>
> [92] The certification judge certified the common issues relating to loss on the basis that the standard outlined in *Microsoft* requires that a plaintiff's expert methodology need only establish loss at the indirect-purchaser level…. The questions, therefore, of whether *any* class members suffered loss and of whether *all* class members suffered loss, fulfil the requirements of a common question. Toshiba says that he erred, and argues that *Microsoft* requires, for loss to be certified as a common issue, that a plaintiff's expert's methodology be capable either of showing loss to *each and every class member*, or of distinguishing between those class members who suffered loss from those who did not…. Dr. Reutter [the plaintiff's expert]'s methodology, Toshiba says, does not meet this standard….."

104. After citing from *Vivendi* and *Microsoft*, Brown J continued:

> "[107] … *Microsoft*, therefore, directs that, for a court to certify loss-related questions as common issues in a price-fixing class proceeding, it must be satisfied that the plaintiff has shown a plausible methodology to establish that loss reached one or more purchasers — that is, claimants at the "purchaser level". For indirect purchasers, this would involve demonstrating that the direct purchasers passed on the overcharge.
>
> [108] Additionally, showing that loss reached the indirect purchaser level satisfies the criteria for certifying a common issue, since it will significantly advance the litigation, is a prerequisite to imposing liability upon Toshiba and will result in "common success" as explained in *Vivendi*, given that success for one class member will not result in failure for another. Showing loss reached the requisite purchaser level will advance the claims of all the purchasers at that level.
>
> [109] When thinking about whether a proposed common question would "advance the litigation", it is the perspective of the litigation, not the plaintiff, that matters. A common issues trial has the potential to either determine liability or terminate the litigation …. Either scenario "advances" the litigation toward resolution."

105. The Court therefore held that there was no basis to interfere with the certification judge's determination that loss was a common issue. However, applying the analysis of Rothstein J in *Microsoft*, the Court found that the judge had erred in

[9] The decision was by a 8-1 majority: Côté J dissented in part.

finding that the aggregate damages provision of the British Columbia statute enabled an aggregate award of damages even where some class members had suffered no loss. He emphasised that the advantages conferred by the class proceedings legislation are "purely procedural" and stated:

> [118] … Therefore, ultimately, to use the aggregate damages provisions, the trial judge must be satisfied, following the common issues trial, either that *all* class members suffered loss, or that he or she can distinguish those who have not suffered loss from those who have."

(3) Discussion: the Canadian class action and UK collective proceedings regimes

106. As Lord Briggs noted in *Merricks SC* at [37], the Canadian regimes for class proceedings have broadly the same statutory purpose as the UK regime. Aspects of the approach articulated in Canada have already been adopted in application of the UK statute, notably the *Microsoft* test for the evaluation of expert evidence at the certification stage. However, as both judgments in *Merricks SC* also observe, there are some differences between the Canadian and UK statutory structures. Those differences also have significant implications.

107. As regards the common issues, the Canadian Supreme Court has set out the following principles which we think can appropriately be applied under the UK regime:

(1) the common issues requirement should be interpreted purposively, having regard to the object of the collective proceedings regime: *Dutton*, *Microsoft*;

(2) it is not necessary for common issues to predominate over non-common issues, but if several significant issues are common issues, that will favour certification: *Dutton*, *Microsoft,* and see *Merricks SC* at [65]-[66];

(3) a common issue does not require that all members of the class have the same interest in its resolution. The commonality refers to the question not the answer, and there can be a significant level of difference between

the position of class members. Therefore the question may receive varied and nuanced answers depending on the situation of different class members, so long as the issue advances the litigation as a whole: *Vivendi, Godfrey*; and

(4) the standard to be applied in assessing expert evidence designed to show a common issue is that it must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement and that it is not purely theoretical but grounded in the facts of the particular case in question, with some evidence of the availability of the data to which the methodology is to be applied, i.e. the *Microsoft* test; but this is not an onerous evidential test: see *Merricks SC* at [40]-[42].

108. However, there are also important distinctions between the Canadian regimes and that of the UK:

(1) "Common issue" is the statutory term used in the legislation of the Canadian common law provinces. That expression does not appear in the UK statute which refers to the requirement for "the same, similar or related issues of fact or law" and "common issue" is used in the CAT Rules only as a shorthand for the statutory term: rule 73(2). The UK statutory wording corresponds to the formulation used in the Quebec class proceedings statute ("identical, similar or related questions of law or fact"), and in *Vivendi* the Supreme Court of Canada pointed out that this is a broader and more flexible concept than "common issues" as used in e.g. the Ontario and British Columbia CPAs. The judgment states, at para 53:

> "… It would be difficult to argue that a question that is merely "related" or "similar" could always meet the "common issue" requirement of the common law provinces. The test that applies in Quebec law therefore seems to be less stringent."

(2) The approach of the Canadian courts has frequently been to segment the proceedings between a "common issues trial" to be followed by trials of the individual issues. Although that is certainly possible for collective proceedings in the UK pursuant to rule 74(6) – see the *Guide* at para

6.37 – it is not expected to be the approach where the class representative puts forward a tenable claim for aggregate damages.

(3) Related to (2) above, the statutory framework for aggregate damages in these cases is very different between the Canadian common law provinces and the UK. For example, s 29(1)-(2) of the British Columbia CPA provide:

> "29(1) The court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members and may give judgment accordingly if
>
> (a) monetary relief is claimed on behalf of some or all class members,
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability, and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.
>
> (2) Before making an order under subsection (1), the court must provide the defendant with an opportunity to make submissions to the court in respect of any matter touching on the proposed order including, without limitation,
>
> (a) submissions that contest the merits or amount of an award under that subsection, and
>
> (b) submissions that individual proof of monetary relief is required due to the individual nature of the relief."

Material parts of that provision, and in particular s. 29(1)(b) and (2)(b), are in sharp contrast to s. 47C(2) CA: see para 43 above.

109. The last point at para 108(3) is significant. As Prof Rachael Mulheron observed in an academic article discussing the Court of Appeal's judgment in *Merricks*, "Revisiting the Class Action Certification Matrix in *Merricks v Mastercard Inc*" (2019) 30 King's LJ 396, at pp. 413-414:

> "… whether an aggregate damages provision in a class actions statute is used for the purpose of proving the class-wide loss (the '*liability approach*'), or merely to assess the measure of the class-wide loss (the '*quantum approach*'), these are two very different concepts. If an aggregate award is used to prove the very *fact* of the loss across the class, without any need to show that harm to each and every class member occurred, then an aggregate award is being employed *to establish liability* to the class as a whole, without the need to prove

> that loss was sustained by each class member as a result of the defendant's tort."

110. In *Merricks SC*, Lords Sales and Leggatt refer to this article and state, at [97], that in contrast to s. 29 of the British Columbia CPA, the UK statute takes the broader approach:

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

See also at [120].

111. These passages are obiter, as Mr Ward QC for the Respondents pointed out. He went on to submit that they are linked to the minority judgment's interpretation of "suitability", on which the minority disagreed with the majority; or that if he was wrong in that regard, then they should not be followed. However, we do not see that Lords Sales and Leggatt's explanation of the effect of s. 47C(2) depends on construction of the very different "suitability" criterion in s. 47B(6) and rule 79(2)(f). While the majority in *Merricks SC* held that "suitable" is to be construed in a relative sense, they expressly approved the *Microsoft* test as applicable to determine whether the proposed expert methodology offered a realistic prospect of establishing loss on a class-wide basis. Thus a plausible and well-founded method of estimating aggregate damages is required under the approach of both judgments. The issue of how liability, and hence causation, may be approached when aggregate damages are claimed is a different one. On that issue, which Lord Briggs did not address, we consider, with obvious respect, that the explanation of the effect of s. 47C(2) set out by Lords Sales and Leggatt is correct and that it is not inconsistent with the majority judgment.

112. Moreover, this interpretation underlies the finding of the Court of Appeal in *Merricks* that the question of pass-through from merchants to consumers was a common issue: [2019] EWCA Civ 674 ("*Merricks CA*"). The Tribunal had held that it was not, since it was accepted that there was likely to be significant variation as regards pass-through as between different kinds of goods and

services and different kinds of merchant. It follows that in the vast class in *Merricks*, the question of pass-through would be answered very differently as between, say, a 16 year old school child living with their parents and an individual with several children who owned a car and paid for family holidays. The claim of a claimant in the former category would not involve consideration of the rate of pass-through in, for example, the automotive and petrol retailing sector. Moreover, there may well be members of the class who suffered no or only minimal loss, because in the sectors and locations in which they made purchases there was no or minimal merchant pass-through, at least for certain parts of the class period. But loss is a necessary ingredient to a cause of action for a competition damages claim since that is in law a claim for breach of statutory duty. Reversing the Tribunal, the Court of Appeal stated, at [45]-[47]:

> "A critical issue in deciding whether the proposed methodology is a suitable and effective means of calculating loss to the class is to determine whether it is necessary to prove at trial that each member of the proposed class has in fact suffered some loss due to the alleged infringement. Although the expert evidence must obviously provide a means of calculating the level of pass-on of the MIFs from merchants to consumers via price, there is some controversy as to whether that is sufficient to make the global loss suffered by consumers a common issue absent being able to show that each member of the class was in some way adversely affected in their own purchases during the infringement period.
>
> …..
>
> To require each individual claimant to establish loss in relation to his or her own spending and therefore to base eligibility under Rule 79 on a comparison of each individual claim would, as I have said, run counter to the provisions of s.47C(2) and require an analysis of the pass-on to individual consumers at a detailed individual level which is unnecessary when what is claimed is an aggregate award. Pass-on to consumers generally satisfies the test of commonality of issue necessary for certification."

113. Although this point was not subject to appeal, in *Merricks SC* the majority as well as the minority judgments held that this was correct: see Lord Briggs at [64(a)] and [66]; Lords Sales and Leggatt at [170]. The only qualification, as Prof Mulheron pointed out explicitly and Lords Sales and Leggatt implicitly, is that this differs from the interpretation of the British Columbia statute applied by the Canadian Supreme Court in *Microsoft* and, now, in *Godfrey*, which reflects the different statutory approach discussed above.

114. Turning to the Canadian cases on which the Respondents sought to rely, by contrast with *Dennis* (the problem gambler case), the present claims are advanced on the basis of a systemic failure by the Respondents. The claims focus on the manner and extent of the availability of Boundary Fares, both as regards outlets from which and types of fare (in particular Advance Fares) for which they were not available at all, and the lack of information for customers where they were available. The basic contention of the Applicant is that the overwhelming majority of passengers who were entitled to purchase a Boundary Fare (which circumscribes the class) would not knowingly pay more for their journey than necessary. We do not regard that as a far-fetched or implausible contention and whether that is accepted in whole or in part does not depend on individualised consideration of every customer.

115. The distinction is even starker with *Mouhteros* (claim for all college graduates) and *Kett* (vehicle purchasers and certification of automotive parts). *Mouhteros* was a misrepresentation case, where many of the class members may not have seen or heard the alleged misrepresentations or relied on them, which are fundamental elements of a misrepresentation claim, and many class members appeared to have suffered no loss. In *Kett*, it was impossible to determine whether any class member had suffered loss at all without a detailed and complex inquiry. In both, the class was manifestly and substantially over-inclusive and the proposed common issues bore little relationship to the claims. By contrast, in the present cases, where the claims are for systemic breaches, what we regard as the common issues, as set out below, appear much more significant than individual issues.

(4) US authorities

116. Mr Harris for LSER also referred to some US authorities. He relied in particular on *In re Asacol Antitrust Litigation*, 907 F.3d 42 (1st Cir 2018). That was a judgment of the Court of Appeals for the 1st Circuit, reversing the decision of the lower court to grant class certification. The proposed class comprised consumers who had purchased the defendants' relevant pharmaceutical products in 25 states and the District of Columbia, and it was alleged that the defendants had engaged in anticompetitive maintenance of a monopoly position

by conduct designed to preclude the entry of cheaper generic competitors. The Court explained the issue arising as follows (at 51):

> "In considering the propriety of class certification in this case, we again deal with an issue that strikes at the heart of the competing considerations raised by some class actions: the proper treatment of uninjured class members at the class certification stage. Proof of injury, also called "injury-in-fact," is a required element of a plaintiff's case in an action such as this one …. Plaintiffs' class nevertheless includes consumers who would have continued to purchase a brand drug for various reasons, even if a cheaper, generic version has been available."

Noting that the lower court had found that about 10 per cent of the class was uninjured as they would not have switched to generic drugs in any event, the Court continued:

> "So, the question thus becomes: Can a class be certified in this case even though injury-in-fact will be an individual issue, the resolution of which will vary among class members?
>
> To answer this question, the parties agree that we must direct our attention to the requirement of Rule 23(b)(3) that common issues must predominate over individual issues in order to certify a class…."

117. Turning to the issue of aggregate damages, the judgment states (at 55):

> "In many other instances, as here, the aggregate damage amount is the sum of damages suffered by a number of individuals, such that proving that the defendant is not liable to a particular individual because that individual suffered no injury reduces the amount of the possible total damage. Furthermore, here the district court has reasonably presumed that determining whether any given individual was injured (and therefore has a claim) turns on an assessment of the individual facts concerning that person. In such a case, the defendant must be offered the opportunity to challenge each class member's proof that the defendant is liable to that class member [citing authority]. Whether that opportunity precludes class certification turns on whether such challenges are reasonably plausible in a given case and whether the plaintiff cannot demonstrate that allowing for such challenges in a manner that protects the defendant's rights will be manageable and superior to the alternatives. See Fed R Civ P 23(b)(3)."

And the Court expressly rejected the use of percentages to reduce the overall damages quantification.

118. However, the requirements for class certification under rule 23(b) of the US Federal Rules of Civil Procedure are different from the UK (and Canadian) regime: in particular, they include the requirement of predominance of common

issues in rule 23(b)(3) on which the Court in *Asacol* relied as the foundation of its analysis. The Court of Appeals also noted that there were other means under the US rules and procedures which enable resolution of mass small claims, including the pressure of settlement that results from the "American rule" of one-way costs shifting.

119. We do not consider that *In re Asacol* represents the law under the UK statutory regime. Moreover, Mr Moser told us that it has generated some critical comment in the United States.[10] And he contrasted that decision with a judgment of the 9th Circuit Court of Appeals, *Torres v Mercer Canyons Inc.* 835 F.3d 1125 (9th Cir. 2016), which takes a different approach. *Torres* concerned a proposed class action for domestic farm workers who claimed aggregate damages alleging, inter alia, that the defendant farm operator ("Mercer") failed (i) to inform its domestic workers of the hourly rate which it was paying foreign workers hired under a special Federal program, and (ii) to pay them the same rate, in violation of Federal and State statutes. The District Court certified both a class as regards the inaccurate information claim and a sub-class as regards the equal pay claim. On appeal, Mercer challenged both those decisions, arguing that a class cannot be certified "if it contains both injured and non-injured parties" and that defending the underpayment claims will require it to raise individual defences to the effect that particular class members were paid proper wages. The Court of Appeals rejected these arguments, dismissing the appeal. As to the first, the Court stated, at 1136:

> "Mercer's claim that the presence of certain "non-injured" individuals within the Inaccurate Information class defeats pre-dominance is also mistaken. Empirically, Mercer contends that the class is too broad because it includes a subset of people exposed to - yet ultimately not harmed by - a policy of non-disclosure. This merely highlights the possibility that an injurious course of conduct may sometimes fail to cause injury to certain class members. However, it fails to reveal a flaw that may defeat predominance, such as the existence of large numbers of class members who were never exposed to challenged conduct to begin with. [Citations omitted] Mercer's remaining challenges concern the overbreadth of the class definition. Yet the class definition is reasonably co-extensive with Plaintiffs' chosen theory of liability. Ultimately, Mercer's argument reflects a merits dispute about the scope of that liability,

[10] We also note that in his concurring judgment in *In re Asacol*, Judge Barron states (at 59): "Not surprisingly, appellate courts throughout the country have struggled to find a uniform way of analyzing such cases."

> and is not appropriate for resolution at the class certification stage of this proceeding."

And as to the second, the Court significantly referred to the way a claim for aggregate damages can obviate the need to establish liability to all class members, stating at 1140-1141:

> "Here, proof is not a matter of probability – it is a matter of logic that an aggregate underpayment means that Mercer underpaid some, possibly all, subclass members. In this context, Plaintiffs' method of establishing liability for underpayment in the aggregate is a permissible means of proceeding. *See Newberg on Class Actions* ("There is no absolute requirement in Rule 23 that aggregate damages be calculable, but where they are, they may be all that plaintiffs need to prove"). Particularly where Mercer has allegedly failed to keep adequate accounting records specific to each employee, class members may be compelled to resort to an aggregate method of proving wage underpayment.
>
> …
>
> Of course, the partitioning of damages among class members may lead to individual calculations. yet those calculations would not impact a defendant's liability for the total amount of damages. *Cf. Hilao v Estate of Marcos*, 103 F.3d 767, 786 (9th Cir, 1996) (class-action defendant's interest was "only in the total amount of damages for which it will be liable," not "the identities of those receiving damage awards")."

120. Accordingly, we derive little assistance here from the US authorities.

(5) Common issues

121. Against that background, we proceed to consider what are the "same, similar or related issues of fact or law" which arise in the claims sought to be brought in these collective proceedings.

(a) Dominance

122. LSER contended in its Response that dominance is not a common issue. It argued that the market definition will vary as between (i) business passengers and commuters compared to leisure passengers, (ii) passengers on different days or times of day or night, and (iii) passengers starting their journeys in different parts of London.

123. The issues of market definition and dominance are analysed in detail in the first expert's report of Mr Derek Holt, an experienced competition economist. He notes that he was able to draw on general studies of the rail industry, the CMA's 2018 guidance on rail franchise mergers, and three specific CMA decisions on railway mergers and acquisitions. He states that there is a consensus among competition/regulatory authorities and academics that the geographic market definition is typically defined as point-to-point or specific journey 'flows'. As regards the product market, he fully acknowledges the many factors that influence demand for rail travel (paras 4.5.3-4.5.4):

> "… including fare level, types of fares, magnitude or direction of fare changes, types of traveller, and distance travelled. Additionally, demand can vary depending on the quality of the service offered (eg. access time, frequency, waiting time and interchange, reliability, information provision, marketing/promotion, and rolling stock characteristics). Other journey features that affect the relative benefits/disbenefits of a journey (such as stress associated with congestion and the benefits of in-journey time that can be spent on work/reading) could also be relevant to substitutability (though difficult to measure).
>
> These preferences, as well as the feasibility of switching between modes, may also vary according to the characteristics of a journey or flows in a local area. In this regard, the journey purpose (commuting/leisure/business) and the time of day of travel may have important consequences for the passengers' preferences and the characteristics of journeys on different modes. This is because those passengers may place different weight on aspects of journey characteristics (such as fares versus time costs). All this suggests that even if a journey could in principle be made using two different modes, they may not be close substitutes."

124. The relevant product market is defined in terms of substitutability. Mr Holt assesses this using the so-called "Generalised Journey Cost" model set out in the CMA *Guidance on Rail franchise mergers* (2018), which takes account of various comparative factors, including the 'value of time', employing a metric that allows for changes in a journey's purpose, including commuting versus leisure, and changes in fare type and journey length, with adjustment to reflect the most common cost of shopping/leisure trips. Further, Mr Holt considers specifically the constraint offered by coach services, noting that the Department for Transport 2016 study found low price cross-elasticities between rail and bus, including for different ticket types (paras 4.3.17-4.3.18) and he conducts a detailed analysis of individual overlapping journey flows with National Express coach services for both the SE and SW franchises (section 5.5). This leads him

to the conclusion that the data do not suggest that coach services are a sufficiently close constraint to negate any finding of dominance.

125. We emphasise that we are not for present purposes deciding whether Mr Holt's finding of dominance is correct, and we note that he himself indicates that further information may be available for this purpose from the Respondents (para 4.5.13). But we consider that his analysis amply justifies a finding that dominance is a common issue, even without allowing for the fact that a common issue does not require the same answer for all claims. LSER also referred to the competitive constraints placed on TOCs by the franchise renewal process but we think that is manifestly a common matter across the class. We should add that while maintaining LSER's contention on dominance, Mr Harris did not seek to advance it further in his oral submissions and neither of the other Respondents sought to submit that dominance is not a common issue.

(b) Causation

126. As we understood it, the Respondents rely on their submissions regarding causation as a ground for summary judgment and further to contend that certain issues were not common and to assert that the claims are not suitable to be brought in collective proceedings. For example, in their skeleton argument, counsel for LSER suggested a range of examples where a passenger who was entitled to and aware of the option of a Boundary Fare might nonetheless not have purchased one or suffered any loss:

> "(i) another ticket for the full journey may have been cheaper than a Boundary Fare, for instance a discounted, advance ticket;
>
> (ii) the passenger may have been able to achieve some other preferable, alternative discount, for instance a group discount;
>
> (iii) another point-to-point ticket from somewhere in the outer zone of the validity of the passenger's Travelcard to the destination may have been cheaper than (or the same price as) the equivalent Boundary Fare;
>
> (iv) the passenger may not have had his/her Travelcard available at the moment of purchase and/or at the time of travel;
>
> (v) the passenger may have had a Travelcard that was not valid for the requisite period (for instance, the passenger had a 7-day Travelcard, but wanted to return in a fortnight's time, or was not sure when s/he was planning to return);

> (vi) the passenger may not have had the time or inclination (for a very small absolute saving) to devote any extra effort to choosing and buying a Boundary Fare e.g. because s/he was in a hurry and/or was going to be reimbursed anyway (bearing in mind that the proposed class includes business purchases);
>
> (vii) more widely, the passenger may not have cared about price-optimisation to begin with, especially for a small absolute amount and/or if being reimbursed."

127. Examples (i)-(ii) relate to the question whether it was an abuse not to make a Boundary Fare available for discounted tickets. The fact that this question may not have a binary answer, and that the conclusion may be different for particular kinds of ticket, does not prevent it being a common issue. If necessary, the class definition could later be amended to exclude the purchase of certain kinds of fare from the scope of the journeys covered, provided that the method of calculation of damages can take this exclusion into account. The effect of such exclusion on individual class members is a matter for the subsequent, distribution stage.

128. As for example (iv), if there was a requirement that a passenger must have a Travelcard with them at the time of *purchase* as opposed to a valid Travelcard at the time of *travel*, we think it arguable that this in itself might be an abusive constraint on the availability of Boundary Fares. As regards the latter, it is of course the case that some passengers will forget to bring their Travelcard but if Boundary Fares were widely offered, the consequent increase in customer awareness suggests to us that this would not occur so frequently.

129. As for example (v), if a passenger did not hold a valid Travelcard at the time of their journey, that journey is not in-scope of the claim. The residual possibility that the passenger might not know when purchasing a ticket in advance whether they would have a Travelcard by the time of travel is, in our judgment, minimal. Moreover, subject only to (iii), we consider that the various examples do not preclude the issues we have identified from being common issues as the term is explained above. Almost any class action will include some claimants who suffered no loss: e.g. see para 112 above regarding *Merricks*. We think it would create an unfortunate obstacle to an effective regime for collective proceedings if potential defendants could sustain objections to the eligibility condition based on speculative examples. Where appropriate, the interests of the defendant can

be protected by making some reduction in the aggregate damages award, based on reasonable estimation or assumption.

130. As for example (vi), we think that the numbers involved are likely to reflect the degree to which buying a Boundary Fare involves an "extra effort", and that in itself relates to the alleged abuse. Thus if Boundary Fares are not available online, this may indeed be a disincentive, but that lack of availability is part of the conduct which the Applicant seeks to challenge. Accordingly, we do not consider that this aspect undermines causation of loss.

131. As for example (vii), we recognise that possibility but suspect that the numbers involved are unlikely to be significant. However, that is a matter which can be established subsequently by the customer survey which Mr Holt proposes to have carried out: see para 160 below.

132. However, we do see that there is a significant issue regarding so-called point-to-point fares: example (iii). Passengers who bought a point-to-point fare for the portion of their journey between the last station covered by their Travelcard and their destination substantially mitigated their loss and/or may have avoided loss altogether: see para 19 above. In particular, they avoided "paying twice" for part of their journey, which is the complaint underlying the claims. Accordingly, we think that Travelcard holders who purchased such point-to-point tickets are in a materially different position from other members of the proposed class.

133. We suspect that this is unlikely to be a large category. We note that until the National Conditions of Carriage were amended with effect from 1 October 2016, a point-to-point fare could be used in combination with a Travelcard only if the train stopped at the origin station of the point-to-point fare. Moreover, a passenger could not avail themselves of this option unless they knew the identity of the last station of their journey covered by their Travelcard.

134. Nonetheless, because the position of such passengers was in substance very different, we think it is appropriate to exclude them. Mr Moser accepted that the class definition can readily be amended accordingly. That does not, of

course, preclude the Respondents from advancing their argument that the class members, so adjusted, failed to mitigate their loss by not purchasing a point-to-point fare. Whether that argument is a good one is a matter for trial. We consider that an analogous consideration applies to season ticket fares, which we address at paras 187-188 below.

(c) Conclusion on common issues

135. Accordingly, in our judgment, applying the analysis of what constitutes a common issue for the purpose of s. 47B(6) set out above, at least the following common issues arise in the claims of the proposed class members against each Respondent:

(1) whether the Respondent held a dominant position at the relevant time;

(2) if it held a dominant position, whether it abused that position:

(i) to the extent that Boundary Fares were not available from the Respondent outlets; and

(ii) to the extent that Boundary Fares were not available for all discounted fares, in particular Advance Fares; and

(iii) to the extent that where Boundary Fares were available, there was a widespread failure to mention or explain this to customers;

(3) whether if Boundary Fares were available for all the Respondent's outlets and/or made known more widely, independent third party sellers would themselves have offered Boundary Fares and/or made them known to customers;

(4) whether a customer who was aware of a Boundary Fare and had the opportunity to purchase it, would have done so;

(5) whether a customer failed reasonably to mitigate their loss by not purchasing a point-to-point fare from the last station covered by their Travelcard to their destination.

136. We recognise, as is indeed obvious, that these issues do not arise equally in the claims of all class members and they indeed may not arise in the same way as regards every purchase of an in-scope journey ticket by the same class member. For example, some class members may have purchased all their tickets online or at a station TVM and never bought a discounted fare. But in our judgment, the way these questions arise for each class member are sufficiently similar or related to constitute common issues, like the questions of merchant pass-through for very different sectors in *Merricks.*

137. As seen above, in Canada the courts will certify class actions on the basis of common issues without a requirement to show that all class members suffered injury. It is true, as we have also noted, that the Canadian courts will not proceed to award aggregate damages without such a showing, but that results from the approach of the relevant Canadian legislation, which is framed in a different way to s. 47C(2). We therefore do not accept Mr Harris' submission that the eligibility condition is not satisfied if more than a minimal number of class members suffered no loss, notwithstanding that this can be taken into account in the computation of aggregate damages.

138. In our judgment, if there is a realistic and plausible method of estimating aggregate damages, that overcomes the individual aspects of causation and the claims are suitable to be brought together by way of collective proceedings. For the same reason, we do not see that the claims by way of collective proceedings can be struck out or that the Respondents are now entitled to summary judgment.

139. We therefore turn to consider the question of aggregate damages.

I. AGGREGATE DAMAGES

140. The *Microsoft* test, as set out above, requires the Applicant to set out a workable or credible methodology for calculating damages with a realistic chance of

being applied. The Respondents all submit that he has failed to do so in this case.

141. It is fundamental to competition damages cases that a precise quantification of loss is not required. In such cases, as in others, damages can be estimated using a "broad axe". As the Supreme Court stated in *Sainsbury's Supermarkets Ltd v Mastercard Inc* [2020] UKSC 24 at [217]:

> "The common law takes a pragmatic view of the degree of certainty with which damages must be pleaded and proved."

142. It is necessary to explain in outline the method which the Applicant proposes to use here. It is developed and explained by Mr Holt in his two reports ("Holt 1st" and "Holt 2nd"). Fundamental to Mr Holt's method is that it is based on the number of passenger *journeys* not the number of passengers. Thus the size of the class is irrelevant to the means by which he seeks to estimate the aggregate loss suffered by the class as a whole. Mr Holt's methodology is complex and it is neither necessary nor appropriate to set it out in detail. We therefore describe it in outline, without all the details and qualifications included in his reports. Moreover, the estimates at which Mr Holt arrives at this stage are only preliminary: he would expect to gain more relevant data and carry out more analysis if the claims proceed to trial.

143. We should also point out that the calculations in Mr Holt's reports cover the period from the start of the claim period (1 October 2015) to 31 January 2019, reflecting the fact that Mr Holt produced his first report in late February 2019. As noted above, the claims are ongoing, and the figures would therefore need to be brought up to date, albeit that rail travel obviously declined significantly in 2020-2021 due to the Covid-19 pandemic.

144. Mr Holt proposes to estimate the aggregate loss using four steps, each of which would be applied on an annual basis through the claim period:

(1) The number of in-scope journeys

145. Those are effectively rail journeys on the SE and SW networks originating in a TfL travel zone and ending either outside the TfL travel zones or in a more distant TfL travel zone. Mr Holt notes that significant information is likely to be available from ticket sales data on disclosure from the Respondents that will enable more accurate calculation. However, he arrives at provisional estimates based, inter alia, on ORR estimates of the number of passengers travelling from or to each station in the relevant franchise network split by fare type (along with ORR estimates of rail passenger growth to cover the latest year of his analysis) along with various assumptions to allocate the passenger numbers to in-scope journey flows. He notes that he has excluded entries related to season fares on the basis that the majority will be for commuter journeys into Central London; but as a season ticket holder travelling the other way could be within the class, this exclusion is a conservative assumption for the purpose of making a practical computation with the data available at this stage.

146. On that basis, Mr Holt estimates, in aggregate for the period 1 October 2015 – 31 January 2019, that there were about 100 million in-scope journeys for the SW franchise and about 67 million journeys on the SE franchise. He gives the breakdown by year or part year (Tables 6.4 and 6.5 of Holt 1st), which are the figures used in the subsequent steps.

(2) Savings from cheaper Boundary Fares

147. Although relatively straightforward in the case of a particular individual making a particular journey, this is a complex calculation to make on an aggregate basis because of the different Travelcards (i.e. with different zonal coverage) and the different fares. The calculation requires a split by fare type and assumed Boundary Fare that could have been purchased. To arrive at his estimates, Mr Holt uses the overall proportions of different Travelcards held (e.g. 39% were for zones 1-2) and assumptions as to the proportions of such different Travelcards held by passengers beginning journeys in the various zones. As regards the different fare types, he uses the data derived from the ORR aggregate passenger journey data and the National Passenger Survey. However,

disclosure in due course may provide data on the actual numbers of different fare types sold by the Respondents. Mr Holt further uses the proportional saving where Boundary Fares exist to estimate the weighted average saving which he then applies to those fare types for which there is no Boundary Fare.

(3) Travelcards

148. The third step is to determine the proportion of passengers taking in-scope journeys who held a valid Travelcard, and thus the number of journeys on which a claim could be based: i.e. the overlap. This is the most challenging part of the methodology since Mr Holt acknowledges that it is not possible to match directly Travelcard holding to specific rail journeys. For present purposes, he therefore uses, as a proxy, a weighted average of passengers who arrive at London terminus railway stations and continue their journey on the Underground or by bus using Travelcards. He estimates the latter using a combination of the share of onward journeys made by bus and Underground from London terminus rail stations and the share of journeys on London bus and Underground made using Travelcards. The necessary data for that calculation are derived from TfL's 2011 report, *Central London Rail Termini: Analysing passengers' onward travel patterns* (the "TfL Termini Report"), a TfL Bus User Survey from 2014, and further data from TfL obtained in response to a FOI request. Mr Holt calculates his estimates on an annual basis, thereby taking account of the decline in Travelcard usage due to the increase in contactless "pay-as-you-go". The resulting estimates are as follows (derived from Table 6.23 of Holt 1st):

Year	2015/16	2016/17	2017/18	2018/19
Travelcard holding assumption	18.3%	16.3%	13.8%	12.3%

149. Applying those estimates to the total number of in-scope journeys calculated separately for the SE franchise and the SW franchise at step 1, accordingly produces an estimate for the total number of in-scope journeys on each of those networks made by passengers presumed to hold a valid Travelcard. However, Mr Holt indicates in Holt 1st that these estimates could potentially be refined

using further information, including by a suitably designed survey of passengers on the SE and SW networks.

(4) Boundary Fares sold

150. Mr Holt says that he expects to obtain actual information on this from the Respondents on disclosure.[11] In the meantime, in order to put forward a preliminary calculation he has arrived at estimates by using the proportion of Boundary Fares compared to total journey fares for railway travel sold by TfL, adjusted to take account of the effect of closure of TfL ticket offices.

151. These four successive steps enable Mr Holt to estimate the aggregate savings, year-by-year, on each of the two networks, which could have been made by passengers holding a valid Travelcard who did not buy a Boundary Fare for in-scope journeys. However, pursuant to s. 47B(11), the opt-out classes will be confined to persons domiciled in the UK at the date specified in a CPO. Therefore Mr Holt further estimates for each network the proportion of the claim which would relate to class members who are not domiciled in the UK. He does so on the basis of publicly available data on the number of overseas visitors to London and their average length of stay, applying an assumption that international visitors would travel on the National Rail network to the same extent as London residents. After deducting the aggregate claim value thus attributed to persons not domiciled in the UK, Mr Holt arrives at aggregate claims for the opt-out classes (to 31 January 2019) of almost £57 million for the SW franchise and a little over £36 million for the SE franchise.

152. The Respondents made a large number of criticisms of the methodology in Holt 1st. In response, Mr Holt filed Holt 2nd in which he sought to answer those criticisms.

153. Holt 2nd also included a 'sense check' on his step 3 estimation in Holt 1st by estimating the propensity of London daytime residents to hold a Travelcard over the three-year period 2015/16-2017/18. This sense check therefore looks at

[11] Some relevant information has since been disclosed by the Respondents: see para 20 above.

Travelcard holding patterns rather than Travelcard usage, but does not take account of whether such residents were likely to travel frequently on the rail network. The resulting percentage is 11.3% (para 3.5.15) and given what he considers is the higher propensity of those using National Rail frequently to travel out of London to hold Travelcards, Mr Holt explains that this is consistent with the range of 12-18% calculated in Holt 1st: para 148 above. Moreover, he expands on the value of using a customer survey of passengers on the SW and SE franchises making in-scope journeys to refine his estimates of the proportion of in-scope journeys made by customers holding a valid Travelcard.

154. In order to clarify certain aspects of Mr Holt's methodology and explore its sensitivity, we decided that it was appropriate in this case for Mr Holt to answer questions from the Tribunal. None of the parties' counsel sought to ask Mr Holt any supplementary questions. Accordingly, Mr Holt's oral testimony was nothing like the full evidence and cross-examination that would occur in a trial. We found his evidence and answers very helpful in understanding and assessing his methodology.

155. It should be apparent even from the simplified description set out above that Mr Holt has put forward a detailed and sophisticated methodology for estimating aggregate damages and paid close attention to the data and information that are, or may become, available. We should emphasise that a CPO application is not an occasion for a full evaluation of the merit and robustness of an expert methodology. In *Microsoft*, the Canadian Supreme Court rejected the defendant's submission that the court should assess the expert method by weighing the evidence of both parties at the certification stage. Moreover, *Merricks SC* makes clear that even at trial, estimations and assumptions are not only acceptable but may be indispensable in the quantification of damages in a competition case. Lord Briggs states, at [48]:

> "A resort to informed guesswork rather than (or in aid of) scientific calculation is of particular importance when (as here) the court has to proceed by reference to a hypothetical or counterfactual state of affairs. The loss may have to be measured by reference to what the court thinks a claimant would have done if the defendant had not committed the wrong complained of."

156. Accordingly, we do not discuss all the detailed points on which the various Respondents sought to challenge Mr Holt's approach. We concentrate on two major criticisms which go to the heart of his methodology.

157. First, the Respondents argued strongly that Mr Holt's method addresses quantification on the basis that every passenger making an in-scope journey who held a valid Travelcard but did not buy a Boundary Fare has a claim. It therefore effectively brings back a 'strict liability' approach which the Applicant had disavowed or, put another way, it assumes that all failures to buy a Boundary Fare give rise to damages. Secondly, they submitted that Mr Holt's method for step 3, as expanded in his oral evidence, did not provide a realistic or plausible means of estimating the overlap between in-scope journeys and Travelcard holding, which is fundamental to the claims.

158. As regards the first objection, we do not consider that Mr Holt's method rests on an assumption of strict liability, i.e. that the Respondents were obliged to sell a Boundary Fare for every eligible journey. The Respondents' argument essentially concerns causation. Mr Holt has approached quantification on the basis that in the counterfactual, where Boundary Fares were widely available and offered, passengers would have bought them for eligible journeys. That is not a matter for expert evidence, although Mr Holt's survey may assist in testing it. It reflects the way the Applicant puts forward his case, contending that the overwhelming majority of passengers would not choose to pay more for a train journey if offered the opportunity to buy a cheaper ticket. The Respondents are of course free to contest that assumption but we consider that the Applicant is entitled to advance it. It falls squarely within Lord Briggs' observation quoted above that sometimes the court has to make an informed guess as to what a claimant is likely to have done in the absence of an infringement.

159. Turning to step 3, Mr Harris challenged the relevance and applicability of the TfL Termini Report to the present cases, arguing that it concerns a very different category of train passengers and stressing that it was based on a survey carried out only at termini stations and over a handful of days in 2010. However, Holt 2nd analyses additional data from TfL showing that the usage of underground and bus travel in London had not changed significantly between 2010 and 2017

(noting that such changes as had occurred would not materially affect his aggregate estimates). Mr Holt also responded to the criticism that the TfL Termini Report covered journeys by commuters which as made on season tickets, are excluded from his provisional computation of loss. We accept as very credible Mr Holt's explanation why this should not lead to bias in his estimation. And as Mr Holt makes clear, he derived the share of Travelcard holding from data obtained by FOI requests to TfL which are on an annual basis and indeed reflect the significant decline in Travelcard usage over the claim period. We accordingly reject Mr Harris' submissions that Mr Holt's step 3, and thus his methodology, should be dismissed as not properly grounded in the facts or, as Mr Harris argued, "not fit for purpose". As noted above, it is not appropriate to go further at this stage and determine the robustness of the method.

160. As regards the proposed survey, Mr Holt explained that he would expect it to be of a substantially sized sample and to be carried out across different types of station on the respective networks, weighted according to the most relevant stations from which in-scope journeys are likely to be made. He explained that although passengers surveyed would be asked about their Travelcard holding pattern going back several years, he would expect that many should recall the purpose for which they held a Travelcard previously, which will assist in gathering information on their pattern of Travelcard usage and making historical adjustments to current data.

161. Mr Holt also said that if passengers who purchased a point-to-point fare for use in conjunction with their Travelcard were excluded from the claim, the model used to quantify damages could be adjusted by using the survey to estimate the extent to which this occurred. It would otherwise be difficult to distinguish between tickets purchased for travel between stations by way of such a point-to-point extension fare as opposed to a full journey fare. However, he explained that because he measures (at step 1) in-scope journeys on the basis of the ticket purchased not the journey actually travelled, and because any such point-to-

point ticket will by definition start at the outermost station of a travel zone, the effect on the aggregate damages calculation is likely to be small.[12]

162. We recognise, as both Mr Ward and Mr Harris emphasised, that the proposed survey will play a significant role in the quantification of damage. The effective conduct of such a survey may be challenging. But we do not accept Mr Ward's submission that Mr Holt should have designed, at least on a provisional basis, a survey for the purpose of the CPO applications. Expert evidence at this stage should explain the methodology proposed and indicate the available sources of data to which it will be applied, but it does not have to provide detailed elaboration of the way the analysis or analyses will be conducted. As Mr Holt explained, the design of such a survey will be made by those with particular skill in that field, which we consider is entirely reasonable. It would be wholly disproportionate to expect a CPO applicant to engage survey consultants and produce their evidence at the certification stage.

163. Mr Harris further submitted that for the survey to be representative it would have to be carried out, "as a bare minimum", at every origin station within the two networks; and probably also at all stations on routes where a passenger can transfer from the tube, DLR or other train service without returning to the station entry-hall or concourse. We regard those submissions as wholly misconceived. Properly constructed and conducted surveys of relatively small samples are widely used to gain representative evidence, including in the field of public transport. As Mr Holt states in Holt 2nd, at para 3.6.2:

> "Customer surveys are commonly used to understand customers' behaviour and preferences. It is important to note at the outset that surveys are widely used in the rail industry, and more generally to inform the assessment of competition issues. For example, the National Rail Passenger Survey consults more than 50,000 passengers a year to understand passengers' satisfaction with rail travel. In addition, the Rail Delivery Group (RDG) uses customer surveys to apportion Travelcard revenue to TOCs from outbound travel from London.

[12] E.g., the journey of a passenger travelling from London Waterloo to Guildford who bought a point-to-point ticket from Clapham Junction to use in conjunction with a zone 1-2 Travelcard (which covered the Waterloo-Clapham Junction leg of the journey), would be included in Mr Holt's existing calculation as a Clapham Junction to Guildford journey. But he assumes that of those passengers whose journey started at Clapham Junction and held a Travelcard, in 80% of cases this would be a zone 1-2 Travelcard, so the saving currently calculated at step 2 will relate to only the balance of 20%, for which he assumes that the Travelcard holding is split between zones 1-3 (10%), zones 1-4 (4%), zones 1-5 (2%) and zones 1-6 (4%): see Holt 1st, paras 6.2.35-6.2.36.

> More generally, the Competition and Markets Authority also routinely use customer surveys in UK merger control, noting that "*We believe that the use of statistically robust customer survey research can be very important in reaching informed decisions, and we very much welcome this type of evidence"…*"

We see no reason to doubt Mr Holt's expert view that a survey of a suitable size is a practical proposition in these cases.

164. Accordingly, we find that Mr Holt has put forward a plausible and credible method of calculating aggregate damages and that the award of aggregate damages is appropriate for these cases. However, we note that Mr Holt's method expressly does not seek to estimate loss by season ticket holders, although journeys originating in London covered by a season ticket would constitute in-scope journeys: Holt 1st, Table 3.4 and para 6.2.16.

J. COST BENEFIT ASSESSMENT

165. Mr Holt's preliminary estimate of the average claim per journey is £5.09 for the SW network and £4.84 for the SE network, and the aggregate claims for members of the opt-out class (i.e. UK domiciled persons) are estimated at £56.90 million for the SW network and £36.24 million for the SE network. As these figures are calculated on the basis of the number of journeys not passengers, the recovery for each class member in the opt-out class over the claim period will depend on the number of individuals who made those journeys. That number is very uncertain: Mr Holt sets out high, central and low estimates based on various assumptions: para 5 above. But by way of a guide, his central estimates for the total claims (for the period to 31 January 2019), assuming that all non-resident passengers opt-in, are £29 per claimant on the SW network and £43 per claimant on the SE network: Holt 1st, Table 7.15. Restricting his estimates to members of the opt-out class increases those figures to £33 for the SW network and £55 for the SE network.[13] Those estimates will obviously increase when the claims are brought up to date, but the fall-off in rail

[13] Calculated by applying the number of UK resident claimants in Tables 7.7 and 7.14 to the aggregate resident claim estimates in Tables 6.35 and 6.44, respectively.

travel over the period of the pandemic means that the increase will be much less than would otherwise have been the case.[14]

166. The cost of the collective proceedings will be very substantial: as noted above, the Applicant's costs budget is for a little over £11 million for the two actions (including an element of fees deferred under CFAs).

167. The Applicant has retained the services of two very experienced administrators of class actions in North America, Epiq and Hilsoft Notifications ("Epiq/Hilsoft"), who have provided a joint Notice & Administration Plan setting out a proposed distribution method for damages among the class members. This states, at para 10.6:

> "Claim forms will request that the claimant provide information such as contact details and Travelcard and rail journey details, along with supporting documentation (i.e. receipts, bank account histories, etc.) necessary to validate, process, and calculate payments. The processing of claims shall be conducted manually (or, where possible, programatically), and the calculation of payments will factor in aspects such as: (1) amount(s) paid for fare(s); (2) quantity of fare(s); (3) type of fare(s); and, (4) sufficiency of supporting documentation."

168. The Respondents argued that it was highly unlikely that many people would have such documentation, going back what could well be as much as eight years. Mr Ward pointed out that copy bank statements alone would not suffice since they would not show the kind of tickets purchased or Travelcard held. Moreover, the Respondents submitted that it was very doubtful that many individuals would be incentivised to gather all the information required given the small amount they would recover. Mr Holt's figures are averages, so many would have lower claims than the average whereas even for larger claims they are made up of a succession of individual journeys: class members would be asked to provide information for each journey whereas the recovery per journey was very small. On that basis, Mr Ward submitted that, in all likelihood, "very few of the millions of supposed class members will ever claim."

[14] Mr Holt's assumptions do not take account of the fact that there may well be some commercial members of the class who may have purchased a larger number of tickets on behalf of others.

169. Ms Abram drew attention to the LFA with Woodsford and the substantial amounts which the funder would seek to have paid out of undistributed damages: e.g., if Woodsford had provided £4 million or more in funding, it will be entitled to ask for the higher of £21 million or 34.5% of the total damages. And Mr Ward expressed the overarching submission of the Respondents that the costs of the proceedings would be exceptionally high whereas the actions "would be of little benefit other than for funders and their lawyers."

170. In *Merricks SC*, the Supreme Court emphasised that s. 47C radically alters the compensatory principle by removing the requirement to assess individual loss in an aggregate damages case. Addressing the method of distribution of aggregate damages, Lord Briggs stated, at [77]:

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

Although the Tribunal can have regard to the proposed method of distribution at the certification stage (per Lord Briggs at [64(g)] and [80]) it must do so in light of this governing principle.

171. We would be concerned if it appeared that collective proceedings would be likely to benefit principally the lawyers and funder as opposed to the members of the class. Such proceedings are hugely expensive for the parties and also demanding on the resources of the Tribunal.

172. However, as regards the method of distribution here put forward by Epiq, it should be borne in mind that this was prepared in the light of the Tribunal's judgment in *Merricks*, which held that the compensatory principle applied and that a method at least broadly reflecting individual loss was required. That has been held to be the wrong approach. The Applicant should therefore be able to reconsider his distribution proposals in the light of the guidance given by *Merricks SC.* We do not accept the Respondents' contention that the only just

basis on which the Tribunal can proceed is that the distribution arrangements are those set out in the Epiq Notice & Administration Plan.

173. Moreover, a helpful note submitted on behalf of the Applicant after the hearing showed that Canadian and US courts, in particular where the distribution will involve relatively small amounts, have approved distribution methods whereby potential claimants set out and verify the facts of their claim in a formal declaration, with limited or no supporting documentation. The proposals in the Notice & Administration Plan are not set in stone and can be revisited when the amount of any award is known. As Lord Briggs observed, the matter will come before the Tribunal at that stage, when it can give appropriate directions: see rules 92 and 93.

174. At the Tribunal's request, the Applicant's note addresses the take-up of class action awards in North America and the Respondents submitted a joint note in reply, each note with extensive supporting materials. Although the evidence is that take-up is often very low, there nonetheless are cases where even small individual entitlement attracts significant participation by class members. But the limited examples discussed in those notes suggest that these tend to be cases where class members are written to directly and virtually no verification was required: e.g. *State v Levi Strauss & Co* (1986 41 Cal 3d 460 (maximum recovery of $2 per pair of jeans purchased; 14%-33% of class members applied for refunds of overcharges, many claiming for multiple purchases, but only those claiming to have purchased more than 35 pairs over five years were required to submit a notarised confirmation of their claim).

175. We see force in the Respondents' point that even recalling specific journeys and Travelcard details going back up to eight years for the purpose of a formal declaration of claim may be onerous and deter many from claiming, if that is ultimately the basis for distribution. We do not think that there is a meaningful parallel in the "Delay Repay" scheme operated by the TOCs for late or cancelled train services, as Mr Moser sought to suggest. Altogether, we find it difficult to speculate in the present actions as to what the likely uptake would be and recognise the appreciable risk that it might be very low.

176. As regards the financial reward for the funder, it is generally acknowledged that third-party funding is a necessary feature of many collective proceedings. As the Court of Appeal observed in *Merricks CA* at [60]:

> "… the power to bring collective proceedings … was obviously intended to facilitate a means of redress which could attract and be facilitated by litigation funding."

A commercial funder will not take the significant financial risk involved unless there is the potential for significant profit. As the Applicant pointed out, there are a variety of possible scenarios which may greatly affect the level of payment to Woodsford, including the position on settlement where provision may be made for a part of the undistributed damages to be returned to the Respondents with the funder agreeing to accept less in return for early resolution of the claims. Moreover, any settlement will require the approval of the Tribunal which must be satisfied that the terms are fair and reasonable pursuant to s. 49A(5).

177. Finally, we note that even if only a small percentage of the class members take up a damages award, that is not the only measure of benefit. As McLachlin CJ noted in the Canadian Supreme Court, in a passage quoted and adopted by Lord Briggs, such proceedings also promote efficiency and justice "by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public": see para 11 above.

178. Having regard to all these considerations, and notwithstanding the benefit of behaviour modification, in our view the cost-benefit analysis comes out slightly against the grant of a CPO.

K. SUITABILITY

179. We have held above that the claims in these proceedings satisfy the common issues requirement of the eligibility condition under s. 47B(6) in that they raise a significant number of "the same, similar or related issues of law or fact." The second limb of the condition is that the claims must be "suitable to be brought in collective proceedings". The majority judgment in *Merricks SC* held that suitability is to be interpreted in relative terms, meaning more suitable than in

individual proceedings: see at [56]. Starting with that general consideration, we think it is clear that there is no realistic prospect of a class member pursuing an individual claim. The costs and time involved relative to the very low level of claim value make an individual procedure wholly disproportionate and this is accordingly a case where, in the words of Lord Briggs, an individual claim would be "unsuitable for obtaining redress at the individual consumer level for unlawful anti-competitive behaviour."

180. However, it is necessary also to take into account the various factors set out under rule 79(2): see para 41 above. Our assessment of those factors applies equally to both sets of proceedings:

(a) For all the reasons set out above, we consider that collective proceedings are an appropriate means for the fair and efficient resolution of the common issues that we have set out.

(b) As regards the costs and benefits of the collective proceedings, as explained above, we here find that weighs slightly against the grant of a CPO.

(c) No separate claims have been brought by members of the class nor, we would add, is there any prospect that they will be.

(d) The size of the class is large but manageable, and the class comprises largely private consumers.

(e) We think it should be possible to determine whether any person is a member of the class. The class is defined in objective terms and is not dependent on the outcome of the claims.

(f) As regards the suitability of the claims for an aggregate damages award, this also is to be construed in relative terms: *Merricks SC* at [57]. Lord Briggs there explained this factor as follows:

> "The pursuit of a multitude of individually assessed claims for damages … is both burdensome for the court and usually disproportionate for the parties. Individually assessed damages may also be pursued in collective proceedings, but the alternative aggregate basis radically dissolves those disadvantages, both

> for the court and for all the parties. In general, although there may be exceptions, defendants are only interested in the quantification of their overall (i.e. aggregate) liability."

However, claims cannot be suitable for aggregate damages if there is no credible methodology for calculating those damages or basis on which such a methodology could fairly be applied, i.e. the *Microsoft* test. Although we acknowledge that the exercise here is challenging and involves making assumptions, for the reasons set out above we find that the test is satisfied.

(g) Alternative means of resolving the dispute: as stated in the claim forms, the Respondents' replies to the letters before claim show that this is not an option and no Respondent has suggested otherwise.

181. Lord Briggs explained that under the head of suitability the Tribunal should conduct a value judgment, in which the listed and other factors are weighed in the balance: *Merricks SC* at [61]. Accordingly, taking account of all the various factors set out above and the significant number of common issues, we consider that the balance comes down clearly in favour of a finding of suitability.

L. OPT-OUT PROCEEDINGS

182. Since the Applicant seeks to bring opt-out proceedings, rule 79(3) is engaged and it is for the Tribunal to consider whether instead opt-in proceedings should be ordered.

183. We have no doubt that it is not practicable for opt-in proceedings to be brought here. The small amount of estimated individual recovery means that very few persons would seek to opt-in, and the large size of the class in each action would make opt-in proceedings very difficult to manage. We should add that we were not impressed by the Respondents' argument that if few class members would choose to opt-in that demonstrates that few would submit a claim after an award of aggregate damages. Participating in potentially lengthy and uncertain litigation from the outset is a very different proposition from claiming even a modest payment, for which the claimant is eligible to apply, from an existing fund.

184. As regards the strength of the claims as we observed above that requires the Tribunal to take a high-level view. We have found that the claims, have a realistic prospect of success in the context of the Respondents' summary judgment applications. On the basis of that analysis, we see no ground here to find that the Applicant should be allowed to pursue only opt-in collective proceedings.

M. CONCLUSION

185. For the reasons set out above:

(1) we authorise the Applicant to act as the class representative in both these proceedings; and

(2) we find that the claims in each action raise common issues and are suitable to be brought in collective proceedings.

186. As regards the additional hurdle under rule 79(1), that claims are brought on behalf of an identifiable class of persons, we think that overlaps substantially with the consideration under rule 79(2)(e): see para 180(e) above. Accordingly, this requirement is satisfied.

187. We have observed above that Mr Holt acknowledges that his method does not seek to include journeys relating to season ticket fares. We heard almost nothing by way of submission, whether written or oral, from any of the parties concerning season ticket fares although passengers purchasing such tickets for journeys out of London originating within a TfL travel zone would be within the scope of the class (as Mr Holt pointed out). We will therefore hear further submissions (but no further evidence) before finalising the CPO as to whether such fares should be excluded from the scope of the class definition.

188. Subject to the question of passengers purchasing season tickets, we do not consider that the class is defined too broadly save for one qualification. Since the class is defined in terms of rail fares purchased, it should exclude point-to-point fares purchased for use in conjunction with a Travelcard: see para 134

above; and similarly, if passengers who purchased season tickets for journeys originating in London are to be within the class, it should exclude season tickets purchased for travel from the outer station of the relevant TfL travel zone for use in conjunction with a Travelcard.

189. We will therefore grant the applications for a CPO in both the SW case and the SE case on the basis that the specific terms of the CPOs will be finalised following a further hearing. That hearing is to include submissions as to the appropriate domicile date for the CPOs.

190. We should add that in the event that the decision of the Divisional Court regarding litigation funding agreements is reversed by the Supreme Court (see para 49 above), it will be open to the Respondents to apply to revoke the CPO pursuant to rule 85(1) and/or for the Applicant to substitute alternative funding arrangements.

191. This judgment is unanimous.

The Hon. Mr Justice Roth
President

Simon Holmes

Prof. Robin Mason

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

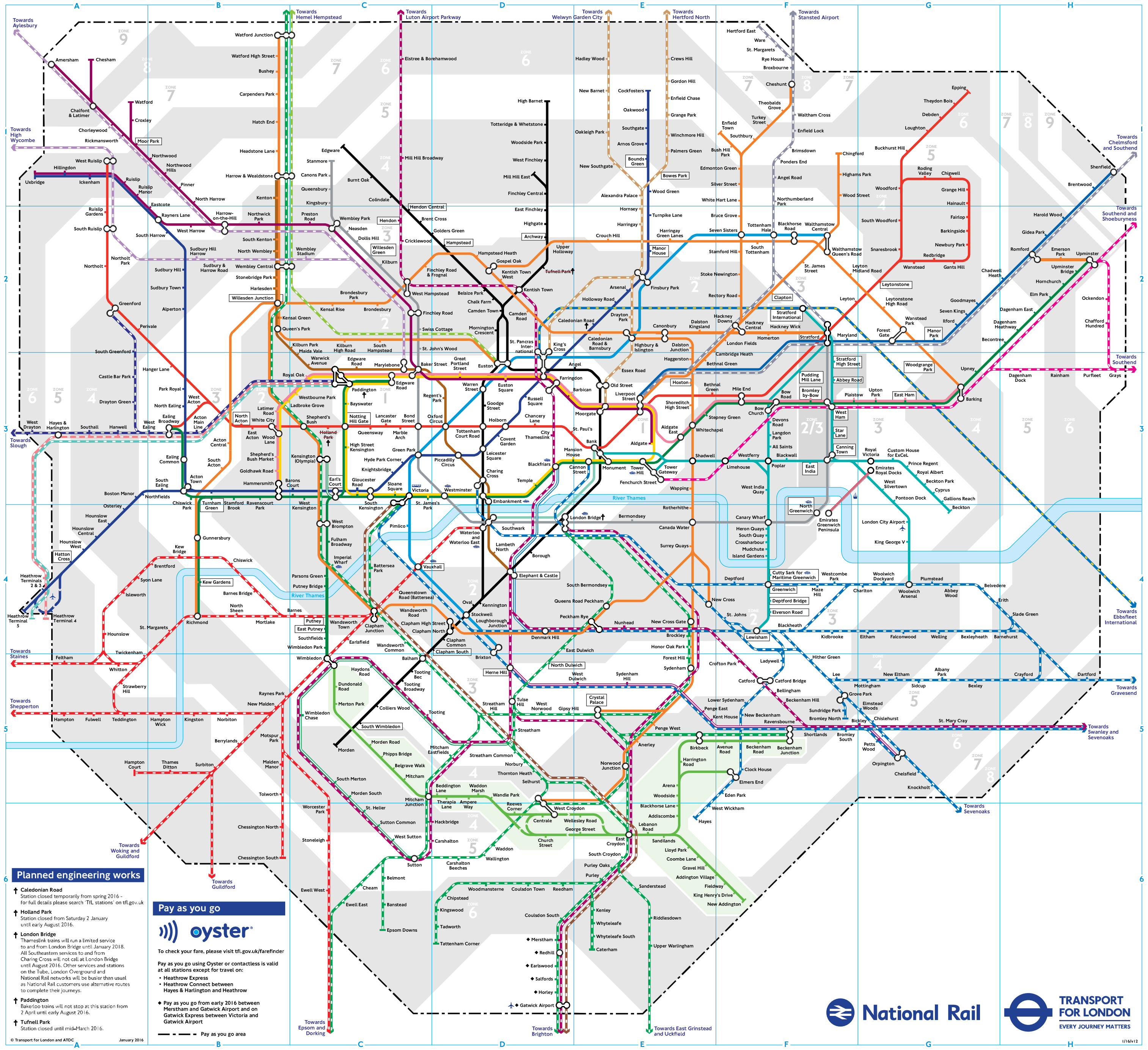
Date: 19 October 2021

APPENDIX 1

TfL Map of London's Rail and Tube Services

London's Rail & Tube services

tfl.gov.uk   nationalrail.co.uk



Planned engineering works

Caledonian Road
Station closed temporarily from spring 2016 – for full details please search 'TfL stations' on tfl.gov.uk

Holland Park
Station closed from Saturday 2 January until early August 2016.

London Bridge
Thameslink trains will run a limited service to and from London Bridge until January 2018. All Southeastern services to and from Charing Cross will not call at London Bridge until August 2016. Other services and stations on the Tube, London Overground and National Rail networks will be busier than usual as National Rail customers use alternative routes to complete their journeys.

Paddington
Bakerloo trains will not stop at this station from 2 April until early August 2016.

Tufnell Park
Station closed until mid-March 2016.

 January 2016

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oyster

To check your fare, please visit tfl.gov.uk/farefinder

Pay as you go using Oyster or contactless is valid at all stations except for travel on:

- **Heathrow Express**
- **Heathrow Connect between Hayes & Harlington and Heathrow**

◆ **Pay as you go from early 2016 between Merstham and Gatwick Airport and on Gatwick Express between Victoria and Gatwick Airport**

Pay as you go area

Key to lines and symbols

- Bakerloo
- Central
- Circle
- District (limited service)
- Hammersmith & City
- Jubilee
- Metropolitan
- Northern
- Piccadilly
- Victoria
- Waterloo & City
- Docklands Light Railway
- London Overground
- London Trams
- TfL Rail
- Emirates Air Line
- London Trams fare zone
- Stratford — Station in both fare Zones
- Abellio Greater Anglia
- Chiltern Railways
- c2c
- Gatwick Express
- Great Northern
- Great Western Railway
- Heathrow Connect
- Heathrow Express
- London Midland
- Southern (limited service)
- Southeastern (limited service)
- Southeastern high speed
- South West Trains
- Thameslink (limited service)
- Interchange stations
- Airport
- Riverboat services
- Victoria Coach Station

Find your station

Station Name	Grid Square

National Rail

TRANSPORT FOR LONDON
EVERY JOURNEY MATTERS