

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

5 **IN THE COMPETITION**
6 **APPEAL TRIBUNAL**

7
8 Case 1304/7/7/19

9
10 Salisbury Square House
11 8 Salisbury Square
12 London EC4Y 8AP

13 Monday 29th April 2024

14
15 Before:

16
17 Hodge Malek KC
18 Eamonn Doran
19 Hugh Kelly

20
21 (Sitting as a Tribunal in England and Wales)

22
23
24 BETWEEN:

25
26 **JUSTIN GUTMANN**

27 **Class Representative**

28
29 v

30
31 **(1) FIRST MTR SOUTH WESTERN TRAINS LIMITED**
32 **(2) STAGECOACH SOUTH WESTERN TRAINS LIMITED**

33 **Defendants**

34
35
36 **A P P E A R A N C E S**

37
38 Philip Moser KC, Stefan Kuppen & Alexandra Littlewood (instructed by Charles Lyndon
39 Limited) on behalf of Justin Gutmann.

40
41 Sarah Abram KC & Hannah Bernstein (instructed by Dentons UK & Middle East LLP) on
42 behalf of Stagecoach South Western Trains Limited.

43
44 James Bourke (instructed by Slaughter and May) on behalf of First MTR

45
46
47 Digital Transcription by Epiq Europe Ltd
48 Lower Ground, 46 Chancery Lane, London, WC2A 1JE

49 Tel No: 020 7404 1400

50 Email:

51 ukclient@epiqglobal.co.uk

Proceedings

THE CHAIRMAN: This hearing is going to be live streamed, so it must not be recorded by anyone. There will be a transcript at the end of the day which will be available on the Tribunal website. There will be a written decision as well. I am sitting with Mr Doran and Mr Kelly and this is an application for an approval of the collective settlement.

Yes.

Submissions by MR MOSER, KC

MR MOSER: Thank you, sir. I am Philip Moser, I appear for the class representative, Mr Gutmann, with Mr Kuppen and Ms Alexandra Littlewood.

THE CHAIRMAN: Yes.

MR MOSER: My learned friends Ms Sarah Abram KC and Hannah Bernstein appear for SSWT, or Stagecoach. My learned friend, Mr James Bourke, appears for First MTR, the non-settling defendant.

THE CHAIRMAN: Okay.

MR MOSER: You may hear from my voice that I am struggling slightly to be heard. I hope it will hold up. If it doesn't, we will have to --

THE CHAIRMAN: Don't worry. Look, we have read all the submissions and the two bundles. Let's start off with the facts and figures.

MR MOSER: Yes.

THE CHAIRMAN: So the claim period is 1 October 2015 to 20 August 2017. The class size is 1,431,306, according to Mr Holt though it may be less. The estimated total claim is 38.99 million without interest, it is 49.5 million with interest, that takes us to 20 March 2024. Average claim is £27.90 per person. The estimated take-up is

1 really not known, but based on North American experience, it is said it may be between
2 10 and 20 per cent of the class members. That gives a range of 140 to 280,000.

3 On those figures, the estimated figures are on 10 per cent it is 5,593,598. On
4 20 per cent, it is 11,187,158. A mid-point is 8,390,358.

5 On those figures, please tell me whether or not that factors in the pot system, ie if, for
6 example, you get 2 million claims which are properly backed up with bank statements
7 and all that sort of stuff into pot one of 19 million, and you get 10 million of claims in
8 pot three which has a limit of 10 million, so you can have claims for 12 million but you
9 will only have a pay out of 4 million. So does that calculation, the 8.39 million mid-point
10 calculation, therein take account of the limits of the pots? That is the first question.

11 MR MOSER: It certainly takes into account the fact that there will be potentially
12 a mid-point of 8 million of whom we expect a reasonable number are going to be able
13 to evidence their claims.

14 THE CHAIRMAN: Whether or not they are going to be able is a completely different
15 question. If people are presented with three claim forms and the average is £27.90,
16 so the average person is not going to have more than 30 quid. He is going to say:
17 well, look, I am going to go for pot three, because I don't need to go to the bank or
18 anything, I don't need to get all these details, I go for pot three. If a lot of people go
19 for pot three, you will have massive claims in pot three and not that many claims in pot
20 one.

21 When I look at the forms that people have to fill in in North America, they are very
22 different from the forms in this case. In this case, they are meant to be giving the date
23 of travel, the time -- you know, the date of travel from where to where and all of that.
24 You are talking about a period of 2015 to 2017. What we should be doing is putting
25 the class members at the front and try and be as generous as possible, within reason,
26 and to get as many people as compensated.

1 If you have a system that does not fully compensate as many people as possible, you
2 are going to have problems. As I see it, you are coming to me today where it does not
3 seem as though there has been any empirical research in relation to class members.
4 None of them seem to have been consulted on these forms; the likely take up. You
5 have 656 people who are registered with the site. It does not seem as though they
6 have been asked with any sort of survey as to what pot are they going to claim.
7 So you are putting the Tribunal in a difficult position because you have to give me the
8 facts so we are satisfied that this settlement is in the best interests of the members.
9 We are here to protect the members and I am sure you accept you have a duty of full
10 and frank disclosure, just as when the trustee applies to the court under the re Cooper
11 jurisdiction, asking the court to bless some sort of transaction. You have to give all
12 the points for and against and give us the information to make the right decision.
13 There are three possible ways, at the end of today. The first possible way is we just
14 reject this application, you go to trial and we'll see. You may win, you may lose, but
15 that's a consequence of where we are.
16 The second possibility is we say: yes, at the end of the day, we have heard all of you,
17 we are satisfied this is the right thing to do. The interests of everyone are being
18 protected. It goes ahead.
19 The third possibility is we outline what we think are the problems and we try and work
20 them out. The parties go away and think whether or not they can address them within
21 a reasonable period of time after today. If they can't, then obviously it just goes to trial.
22 But those are the three possible outcomes at the end of the day. It is better that I tell
23 you now what the concerns are -- and they have been already expressed in writing, to
24 give you the chance to address them -- but as at the position today, there are real
25 concerns about what is being put before the Tribunal. All right?
26 MR MOSER: Well, I will try and address that.

1 THE CHAIRMAN: Of course you can. But let's just figure out, because just carrying
2 on with where we are, because we are just trying to look at the figures. But the trial
3 outcome, full damages and interest is 55,928,897. At pages 464 to 467, you include
4 the three pots and what evidence is required under each pot. Quite frankly, no one in
5 this room has a real feel for what is the likely amount to be paid out to class members
6 on this structure.

7 If this was a different structure, it would be so easy. You know, if we had a structure
8 whereby you say: this is 25 million, can you approve a settlement for 25 million, we
9 will have a distribution plan. When it comes to the distribution plan, it will be for you
10 to be happy with it and we go through all the issues and we try and make sure that we
11 can make all the people fill out the forms, we will see at the end of the six month period
12 what claims have come in and what claims have come out and we can balance
13 between all the different pots. If that was on the table, it is a no-brainer: you would get
14 this approved without any problem.

15 But the problem we have is that you are asking us upfront to approve a mechanism
16 where we really don't know what the outcome is going to be. That is the problem. The
17 problem is largely driven by the fact that it is not a £25 million figure which is
18 66 per cent or 64 per cent of the potential claims. It is an up to figure.

19 Every collective settlement is going to have an issue. This is a new jurisdiction: we
20 are trying to find our way and we are trying to find what is the best for the class
21 members. But the way it is currently structured and the information we have got, it is
22 difficult.

23 That is where we are now. You know, you have been before the Tribunal long enough
24 to know that I always put the cards on the table at the very beginning. I will always
25 listen to what people say and we will come to what is the best result at the end of the
26 day, if we can.

1 I am not keen just to send you away and say this is all rejected and that's the end of
2 it. I appreciate you have time constraints, you have this trial coming up on 17 June.
3 Something needs to be done, if we can, to come to a solution that works. But at the
4 moment, I am not impressed and I don't think this works. Of course you have your
5 chance to speak, but in the tribunal most of the advocacy is what you put in writing.
6 We look at that, we assess it, we discuss it amongst ourselves. We try and look at it
7 in the most generous possible way, but we are where we are, as of now. Okay?

8 MR MOSER: We are where we are, as you say. Can I just address some of those
9 points?

10 THE CHAIRMAN: Of course you can. I just start off with where we are, to begin with.

11 MR MOSER: Obviously this is a settlement that the parties have been thinking about
12 very carefully.

13 THE CHAIRMAN: Yes.

14 MR MOSER: We have all the information we have and we have presented all the
15 information we have to the Tribunal. So as far as full and frank is concerned --

16 THE CHAIRMAN: Well, no, let's start off on that one. On full and frank, the information
17 that was requested in that letter of -- I can't remember if it was 24 April, whenever we
18 wrote that letter saying we want further information. The data on the anticipated
19 take-up and the flows depending on what sums are being claimed, we should have
20 had that in the original application. I am saying it is all before the Tribunal now, but I
21 do not agree with you if you are saying everything that I needed to make an informed
22 decision was presented with the original application.

23 MR MOSER: I apologise if that was incomplete. Certainly we felt we had given
24 enough for the level of information that was required under the rules and guidance in
25 this emerging jurisdiction.

26 THE CHAIRMAN: Of course you felt that. Yes. Of course you felt that.

1 MR MOSER: We would not have withheld it if we thought that this was something you
2 needed.

3 THE CHAIRMAN: No. No. You are all regulars. You are all regulars. I am not
4 criticising anyone. I'm just saying if you are going to make a positive assertion, I have
5 to respond to that.

6 MR MOSER: I know. The Tribunal has helpfully pointed out the cases of Tamlin and
7 Brown, which are examples of trustees applying, which is where the full and frank
8 comes from.

9 THE CHAIRMAN: Yes.

10 MR MOSER: There is a difference, of course, between that which is trustees doing
11 something of their own motion and a settlement which is not only bounded by the rules
12 and guidance of the Tribunal, but also a matter of negotiation between the parties. So
13 there would be things that are simply not achievable in the context of a settlement that
14 would be very easily done if you were a trustee.

15 THE CHAIRMAN: Oh, I accept that. I think the point on the trustee case is that if you
16 are asking the court to approve something, you have to give the court all the
17 information, all the pros and cons, in order for the court to be in the best position to
18 make the right decision.

19 MR MOSER: I completely accept that. I suppose we are also -- and I am going to
20 push back a little, because it is important -- we are also caught on the spectrum of
21 being somewhere between the court is absolutely not a rubber stamp when it is doing
22 this --

23 THE CHAIRMAN: We are not.

24 MR MOSER: -- but also what we have to show is that there is a reasonable settlement
25 before the court. That may not be the exact settlement that the court itself might have
26 wished for or could imagine, but it is one that reasonable parties could --

1 THE CHAIRMAN: I agree. There is going to be a range, isn't there? Two different
2 people may take different views as to what is the ideal and we don't live in a world
3 where you are necessarily going to get the ideal result. I fully accept that point. You
4 know, there is a range and there is something that is outside the range and we have
5 to decide whether what we have is outside the range, rather than inside the range.
6 But I fully accept there is a range and different people could come to different
7 conclusions and in part, we are guided by what Mr Lawrence has said and he has
8 done a very good report, as one would expect.

9 But we are also a specialist tribunal. We do a lot of reading of our own. We look at
10 what you can find about settlements in North America, we follow through the
11 references in the reports and we can see that it is pretty critical how people can make
12 claims. Because when you have relatively small payouts, most people will not claim
13 and we have to be really aware of that matter when we decide what is right and what
14 is wrong.

15 But I would like to have a situation where as many people as possible who have
16 genuine claims are encouraged to make claims and that they do, in fact, make claims
17 in a pot where they are going to get enough money. You can see that one of the major
18 concerns is the reverse waterfall, rather than the waterfall. So you have the biggest
19 pot, 19 million in pot one, requiring all the evidence and stuff and to the extent that
20 people are going to be bothering for £30 trying to get records over seven years old.
21 And you have pot three, where people basically self-certify, but it is still evidence
22 because they still have to give a certification, which is evidence, and they have to give
23 the date of travel and the journey.

24 So they still have to give something and that one has only got 2 million. So if we had
25 a structure where one could be satisfied that it is as easy as possible to make a claim,
26 and that there is going to be enough money to pay people who make those claims

1 then, of course, it is a different kettle of fish to what we have.

2 I don't understand what the real resistance is to have a waterfall. I know it is said, well,

3 there is a fear of fraudulent claims. But the class representative represents the

4 members. I can't believe that Mr Gutmann presumes that the people he represents

5 are largely fraudsters who are going to make false claims. Of course he doesn't think

6 like that. Most people in this society are honest. You can have lots of mechanisms

7 where you can check claims, you can pick out claims and look at them properly. You

8 can see if you have multiple applications; that is pretty easy to see. You have -- I'm

9 not sure if I want to read it out in open court -- what you have in the Epiq report about

10 all the fraud prevention measures, which you don't necessarily want the public to know.

11 But there are mechanisms and it seems to me that this so-called fear of fraudulent

12 claims is driving the structure. If I could just be quite frank, what would be much easier

13 to accept is I understand and I appreciate that those who have got full evidence backed

14 up by bank statements and they can be bothered to do it, they should get the full

15 amount. Indeed, given the amount of fat in this whole thing and the low take-up, they

16 should get not just the amount they paid for their ticket, they should also get their

17 interest.

18 I also accept that the people in the third category, in order to have some sort of check

19 on fraudulent claims, they should not get the interest and they should be capped at

20 the amount that they can claim, even though that does discriminate to a certain extent

21 against people who paid in cash: the 14 per cent. We may have to try and adjust what

22 they have to put on the form to make it look more like quite often what is done in

23 North America, which encourages claims.

24 That would probably work and that would be acceptable to the Tribunal. But we don't

25 want that 2 million cap. You know, if you want to keep your 19 million on pot one and

26 you use up whatever you are going to use up -- probably a few million -- on those

1 claims, there should be an element of that 19 million that comes back to feed pots two
2 and three. We can debate what that figure should be. It does not have to be the full
3 19 million, but it can be a realistic figure.

4 That is what we are looking for. You know, it is up to you. You can push back and
5 you can try and go down a different route. Of course you can.

6 Apparently there is a problem with live stream, so we are going to have to take a break.

7 I am really sorry about that. We are halfway through just having an initial discussion
8 as to where we are.

9 But, look, you will all have time to think about what Malek has said and if there is any
10 flexibility along the lines of the things we have been discussing amongst ourselves, it
11 would be very much appreciated. Hopefully, all the relevant decision makers are here
12 to be able to say: you know, we are not going to move, we are just going to stick with
13 what we have, even if it means it is going to be rejected. Or they are going to say:
14 actually, let's think about it, let's try and be a bit more flexible, let's come up with
15 something the Tribunal might accept.

16 Given that we are off live stream, please do not answer now, because it is not on live
17 stream.

18 MS ABRAM: I was not seeking to answer substantively, sir. Could we have
19 15 minutes, please?

20 THE CHAIRMAN: Yes, of course. Have 15 minutes and then hopefully live stream
21 will be working. But if it is not working, the break might be longer. Okay. Thank you
22 very much.

23 (A short adjournment)

24 THE CHAIRMAN: Yes.

25 MR MOSER: The parties have been talking. Partly to save my voice, I am going to
26 handover to Ms Abram for a bit.

1 THE CHAIRMAN: Of course. I understand your voice difficulties. That's fine.
2 Absolutely.

3 MR MOSER: Thank you.

4 THE CHAIRMAN: Ms Abram. Yes.

5

6 Submissions by MS ABRAM KC

7 MS ABRAM: Sir, as Mr Moser says, the parties are happy talking to each other and
8 will keep doing that.

9 THE CHAIRMAN: Okay. Good.

10 MS ABRAM: But I think it is really important that I should make three points of principle
11 that will frame anything that we are able to say to the Tribunal. The first is on pot three,
12 which is the unevidenced pot. The second is on pot one.

13 THE CHAIRMAN: But when you say "not evidenced", technically that is not right, is
14 it? It is evidenced, because you are requiring them to give the date of travel, you are
15 requiring them to certify that they have done that journey. So let's say this was the
16 County Court and someone made a claim on a follow-on action. They came to me
17 and said, "Look I took this journey, I haven't got my receipt, I paid by cash" and I
18 believe them, that evidence might be accepted. I look at the person: yes, I accept that.
19 That's a valid claim and that is a properly evidenced claim, because it is the word of
20 the person who has made the claim.

21 So when you say pot three is not evidenced, it is evidenced. It is not documentary
22 evidenced.

23 MS ABRAM: Not evidenced by contemporaneous documents. Sorry, I don't want to
24 set hares running with that word.

25 THE CHAIRMAN: Yes. But it is repeatedly said that pot three is not evidenced. It's
26 not: that is not the case. It is the class members who Mr Gutmann represents who are

1 being asked effectively to self-certify. I do not accept that you are going to get
2 an overwhelming number of fraudulent claims for £30 by Mr Gutmann's class
3 members. You will get some; of course you will. You will have your own checks,
4 which I don't want to go into, for obvious reasons. But I do not accept that this whole
5 structure should be driven by a fear that you are going to get a mass of fraudulent
6 claims.

7 When you look at the North American experience, you look at all the evidence on how
8 that worked, it gives a very different picture.

9 MS ABRAM: Sir, again, I would really like to make my points and I don't want to go
10 off down blind alleys. Before I do, just on the risk of fraudulent claims. People making
11 fraudulent claims are not class members: Mr Gutmann is not representing them.
12 Actually, the risk of fraudulent claims in relation to pot one is not the risk of people
13 claiming 30 quid. It is the risk of people saying, "I travelled on this basis every single
14 day for two years and I took the longest possible route and, look, the delta between
15 the fare I bought and a boundary fare would have been tens of pounds a day for
16 multiple journeys over a two year period." There is potential for tens of thousands of
17 pounds in individual fraudulent claims.

18 THE CHAIRMAN: I fully accept that, but that is why I have said for £30. You know, I
19 fully accept that there is a lot of logic in having a pot system whereby you ensure that
20 those who give documentary evidence are in a position to be able to and provide it to
21 you should be paid in full, perhaps with interest as well. Those who are only
22 self-certifying because they are only asking for £30 each, they get their £30. But they
23 are not necessarily going to get their £30 if they get too many claims under pot three
24 and you have a cap of 2 million.

25 You will understand where the problems lie. You know me well enough that I would
26 have read these bundles at least twice. I would have gone through your submissions

1 really carefully and that I always start these hearings where I say where I am and
2 sometimes I will move, sometimes I don't move. But it is always really important to
3 get the best out of you and I wouldn't dream of doing this approach if I didn't have
4 advocates of the calibre I have before me today. Because I know Mr Moser can take
5 whatever goes to him fine: that is the same with you.

6 But this is why we do it this way. All I really care about at the end of the day is getting
7 the right decision. How we reach that and I am as keen as everyone else. If we can
8 get this case settled today in a way that I am comfortable, and the rest of the Tribunal
9 are comfortable, that is what we want to do. Clearly that is what we want to do. I don't
10 come in today saying, "I am going to reject this, my whole plan is just to kick it out and
11 give them a beating." I don't work like that and you know that. I have come here today
12 because I do want it to be resolved and there is a public interest in getting this
13 resolved, because there is so much money that can be spent on this case and
14 everyone wants certainty.

15 South West Trains want to have certainty because if it goes to trial and they lose,
16 potentially they are going to go down for 55 million, their costs, your costs. It is
17 a meltdown. For you, you want certainty for -- yes, that is what you want. Mr Gutmann
18 wants to get the best possible recovery for his class members.

19 We have all these. Everyone wants it to go over the line. If the parties are able to
20 come together on something that we as a panel are happy with then, of course, you
21 will leave today and everyone will know it is all sorted, you don't need to worry about
22 trial three.

23 MS ABRAM: I hear that, sir. Let me try and persuade you.

24 THE CHAIRMAN: Yes. Try and deal with it.

25 MS ABRAM: Can I start by showing you some numbers?

26 THE CHAIRMAN: I love numbers. Okay. Give me the numbers.

1 MS ABRAM: Great. Fantastic. All right. So the number on the door is £39 million.

2 THE CHAIRMAN: Correct.

3 MS ABRAM: But that number is not even alleged by the class representative to be
4 the actual value of their claim. It is a theoretical maximum.

5 THE CHAIRMAN: Absolutely. It could end up being significantly less. I have read all
6 the papers and what you say: I fully accept that. But, on the other hand, when you
7 add interest it could be well over 50 million. But, you know, we know that that
8 calculation is a real rough and ready exercise done by Mr Holt. We have read it and
9 we can understand how he has got there, but we also understand from your expert it
10 could be significantly less. Yes. Understand.

11 MS ABRAM: [Overspeaking] Humour me by letting me show you how much less it
12 could be and how that affects the 8 million figure that I know the Tribunal had in mind
13 as a medium take-up level; a 15 per cent take-up level. So it may be helpful just to
14 give you some illustrations.

15 THE CHAIRMAN: I don't accept that on the basis of the information given to me that
16 the take-up level is necessarily going to be 8 million. I think, for what it's worth -- and
17 I think the rest of the panel think -- it is going to be significantly less. You look at the
18 FTC report. You look at this form. You look at the three pots. I think it is going to be
19 less than that.

20 Look at it from my point of view. You are saying, "Malek, you approved this." I
21 approved this on these assumptions. Then six months down the line, you say,
22 "Actually, we have done this exercise, we have got [as I said] only 2 million in pot one,
23 we have 10 million in pot three." So you have 12 million in claims, but you are only
24 going to pay out 4 million because of the structure. How stupid am I going to look, you
25 know?

26 Just look at it from my point of view: I am here to protect the consumers and I am not

1 here to protect other interests. Of course, I respect the need of the lawyers to be paid
2 and the funders to get a reasonable rate of return bearing in mind there is a portfolio
3 of claims. Of course I respect all that. But you have to look at what the possible
4 scenarios are and the risk of that nightmare scenario, what can we do to mitigate that
5 risk. That is what I am trying to do today.

6 MS ABRAM: It may very well be, sir, that by the time there are claims on this pot, Mr
7 Justice Roth will have come back to say the claim fails in full and then no one will --

8 THE CHAIRMAN: Of course he might. Of course.

9 MS ABRAM: -- be cleverer than the Tribunal who has approved a settlement.

10 THE CHAIRMAN: Of course. We will never know. That is why there is a good reason
11 for having a settlement. Look, no one is saying, Ms Abram, that we should not have
12 a settlement. No one is saying that. What we are saying is it has to be on terms which
13 are acceptable to the Tribunal, bearing in mind there is a whole range of possible ways
14 of packaging it. I have indicated what I think is a reasonable way of doing it to protect
15 against what I think is quite a likely scenario. Yes.

16 For you, it does not really matter, because in one way you have already decided that
17 you are going to pay out an absolute minimum of 9.85 million. You have already
18 decided that. Having decided that, if you have a structure that leads to whether it is
19 1 million or 9.85 million makes absolutely no difference to you. So for you, you should
20 be quite happy if there is a waterfall, because it does not matter to you because I don't
21 think you are going to get claims above that limit. That is it.

22 It is up to you. If you give me the ammunition to approve a settlement, we will approve
23 it.

24 MS ABRAM: Certainly. That is a point that is very well heard on my side, sir.

25 THE CHAIRMAN: Yes. Of course.

26 MS ABRAM: Just to be clear, just to be clear on the figures, the actual amount of

1 money that my client envisages paying out under the settlement is 4.75 in ring fenced
2 costs.

3 THE CHAIRMAN: I understand that, of course.

4 MS ABRAM: 750 on the distribution costs.

5 THE CHAIRMAN: Yes.

6 MS ABRAM: And then up to 9.85 million on the damages sum, which may be
7 a combination of the amount claimed by the class and any further costs.

8 THE CHAIRMAN: Yes. And look, if we look at what the likely risks are, okay? You
9 are putting 25 million on the table. I think, for what it is worth, it is very unlikely that
10 you are going to have valid claims that go above 9.85 million. Just look at the
11 American experience: you read the FTC report which gives even lower percentages
12 than the percentages given by other data. Even where people are directly contacted
13 in America by email, the response rate is extremely low. We are not even
14 contemplating that.

15 When you look at that, if the structure leads to 4 million -- which is Malek's nightmare
16 scenario -- or it leads to 8 million, it makes no difference at all to you. So you could
17 be quite happy with an arrangement whereby there is a reverse waterfall up to
18 a certain amount of money, whereby out of that 19, a certain amount of money can go
19 right down without any problem. You will be in exactly the same financial position.

20 MS ABRAM: I hear what you say, sir.

21 The second point I wanted to make was on interest and I do want to make a point on
22 that in relation to pot one, which are the claimants that have got full evidence, as we
23 say it.

24 THE CHAIRMAN: Yes.

25 MS ABRAM: Now, what is being offered on pot one is full principal value of the alleged
26 claim and we would say -- and certainly it is a point felt extremely strongly by my

1 client -- that in circumstances where there is a totally novel claim of abuse of
2 dominance, which is untried in respect of which liability has not been established,
3 where the value of the claim may -- with the greatest of respect to Mr Holt and those
4 who have done the careful work on the CR side -- be very greatly overstated. Where
5 interest rates have been at historically low levels, for most of the time, since 2015 until
6 2022.

7 Then from my client's perspective, if it is required to pay interest to compensate the
8 class for being out of money when we say it has not been out of its money at all, it
9 really might as well go to trial, sir.

10 THE CHAIRMAN: It might have to. But the thing is that we have to see -- there is
11 a whole host of things that in an ideal world we would like to see. Okay? We are
12 realistic enough to know that not all those things are going to be provided. The point
13 about the interest was because of the current structure that you have got and that if
14 the structure has a waterfall as opposed to a reverse waterfall, I don't think we are
15 going to insist on that. But with a reverse waterfall, then clearly that is the big thing
16 that is the sticking point at the moment.

17 MS ABRAM: Yes. I hear what you say, sir. I am grateful for that.

18 The third point that I wanted to make, which is a stepping back point and looking at
19 where the parties are in this case and where parties might be in other cases.

20 THE CHAIRMAN: Yes.

21 MS ABRAM: Is to submit to the Tribunal that it is really important that applications for
22 collective settlements in opt-out proceedings don't become, as I put in the note that I
23 lodged last night, a quest for unobtainable perfection.

24 THE CHAIRMAN: You never get that from me. Everything is rough and ready. You
25 don't need to worry about unobtainable perfection from me.

26 MS ABRAM: But what one has seen is that this regime has been going for, what, eight

1 and a half years now. I was in front of you on the first application for a collective
2 settlement --

3 THE CHAIRMAN: And you got the order.

4 MS ABRAM: We got there.

5 THE CHAIRMAN: Yes.

6 MS ABRAM: This is only the second. There are tens and tens of opt-out collective
7 claims. There will be people watching these proceedings and thinking, you know, is it
8 realistic to try and settle with the CR, or PCR, in my case. The question that the
9 Tribunal has to ask is whether the settlement on the table is just and reasonable.

10 What we are deeply concerned, my clients, sir, would be if the Tribunal approached
11 that question on the basis that the settling defendant has to pay out as if liability is
12 established already. As if you need perfect compensation to the class for, as in this
13 case -- which is not a follow on, there is no Commission Decision or equivalent -- as if
14 the client has to accept that they have done something wrong and they have to pay
15 full compensation. In my submission, sir, that would not be a reasonable target.

16 THE CHAIRMAN: I understand that, but you have to realise that there is no one size
17 fits all type of case that appears before the Tribunal. Because you may have some
18 class claims where the class is pretty well defined, they are pretty well engaged, the
19 sums are significantly higher than here and they are likely to make their claims,
20 et cetera. But on the other hand, you have the sort of bottom end, which is here, where
21 there is an average of £27.90. It is a different world.

22 We have to fashion solutions that suit the individual case and, you know, we are
23 confronted with a situation where the empirical evidence -- ie going back to the class
24 members and seeing what would work for them and the likely claims and how they are
25 going to do it and are they able to fill out forms, will they fill out forms, all of that -- that
26 has not been done. If we had more time, I would have come up with a different

1 solution. I would just say: let's adjourn this for a month, this is all the things that we
2 need, this is what needs to be done.

3 That does not work because I understand the practicalities of the situation you are in.
4 You know, I want to help everyone, but I have to be honest with you as to what the
5 difficulties are. If you are able to resolve those difficulties, absolutely fine. If you are
6 not able to resolve them, we know where we are. But it is a question of everyone
7 trying to be flexible and you have the decision makers here who can hear what the
8 Tribunal has said and you can decide to be flexible and try and resolve those issues,
9 which is fine, or you can try and say: no, okay, let's just hit the wall and then just try
10 and push it through.

11 The likelihood, if we are in the game of trying to do predictions as to where this may
12 go, is you may not get very far. But it is up to you. You know, I can't force you.

13 MS ABRAM: May I just finish just by showing you those numbers that I wanted to --

14 THE CHAIRMAN: Yes, let's have a look at the numbers.

15 MS ABRAM: Just so that they can form a counterpoint to the figures that I know the
16 Tribunal currently have in mind.

17 THE CHAIRMAN: I have read your figures. I know what their figures are, at the
18 highest. I know your figures are probably like 40 per cent lower than that, on the best
19 case basis that you are trying to give. The figures, there is a big range: I know that.

20 MS ABRAM: Yes. Of course, the best case range for us is zero all together.

21 THE CHAIRMAN: Yes. Of course.

22 MS ABRAM: So in that case, let me just give you the numbers.

23 THE CHAIRMAN: Give me the numbers.

24 MS ABRAM: [Overspeaking]. So using Mr Noble's analysis instead of Mr Holt's
25 analysis, and bearing in mind that Mr Noble has just taken two example points that
26 could lead to a reduction in the value of the claim, instead of a comprehensive analysis

1 | which he can't do at this stage. But the range of take-up based on those figures would
2 | be between 3.13 million, so a little over 3 million, at 10 per cent uptake at the bottom
3 | of Noble's range.

4 | THE CHAIRMAN: Yes.

5 | MS ABRAM: The top of his range at 20 per cent uptake would be just 8 million. So
6 | the 15 per cent equivalent figure that you were focusing on, sir, ranges between
7 | approximate numbers, a whisker over 4 and a whisker over 6.

8 | THE CHAIRMAN: Yes. What they are saying, their estimated take-up on 20 per cent
9 | is 11.2 million and on 10 per cent it is 5 million.

10 | MS ABRAM: That's it.

11 | THE CHAIRMAN: My estimated take-up on the current structure is significantly less,
12 | certainly less than the 20 per cent take-up. I think in the real world, on the current
13 | structure, you would be lucky to get 4 million. I may be right; I may be wrong. But
14 | given that is what my concern is and no one is going to say you are barking mad
15 | having that concern, having read everything, that is why the waterfall is something that
16 | I am trying to encourage the parties to go down with perhaps more flexible
17 | requirements for pot three that Mr Kelly wants to ask some questions about.

18 | But that is where I am. You know, I don't really think that on any revised structure,
19 | your likely exposure is going to be more than the 9.85 million which is the figure that
20 | you put in the settlement.

21 | MS ABRAM: I hear that, sir. I know the process is not really meant to work this way,
22 | but it would be really helpful if we could hear Mr Kelly's points at this stage, so that
23 | everything is out here. That would really help.

24 | THE CHAIRMAN: Yes. On the form requirement. So if we get the bundle out then,
25 | let's look at what those requirements are. It is in bundle A, isn't it? If we look at
26 | page 464 to 468 and Mr Kelly can take you through that.

1 MS ABRAM: I don't know if that is the right reference, sir. It does not seem likely to
2 be.

3 THE CHAIRMAN: 469? No. We start off with 464, which deals with the pot one
4 evidence point. Then you have pot two is 466. Have you got different numbering?

5 MS ABRAM: Yes.

6 THE CHAIRMAN: Okay. Okay. My numbering is different. Let me use the
7 replacement bundle I was given. I will find it. (Pause)

8 It is paragraph 6.2 of the --

9 MS ABRAM: Of the notice and administration plan? 471.

10 THE CHAIRMAN: We have rival numbering. Yes. 471.

11 Okay.

12 MR KELLY: So I think the point we are interested in talking about is that in a lot of the
13 cases from the US where the claim rate of 10 per cent is taken from, many of those
14 cases for the lower claim amount, the claimant is just required to sign an affidavit that
15 he made a purchase. No additional information is required.

16 The average in the FTC report for those cases -- and even most of those required are
17 as a result of direct emails to consumers -- is 4 per cent, the weighted average. So
18 you already, save 10 per cent, an average of 4 per cent. Those include cases where,
19 you know, you don't have to provide any evidence.

20 So the fact that are requiring all claimants to list each journey will automatically reduce
21 the take-up compared to the counterfactual where you just have to say, "Yes I was
22 a passenger on South West Trains at that time."

23 MS ABRAM: Again, I am sorry. Again, I realise that usually it is you asking me
24 questions rather than the other way around. But if I may just probe further as to how
25 it is envisaged that might work in this case where there is per claim maximum of £5 up
26 to 6, of £30 in pot three. I don't understand that objection is taken to that aspect.

1 THE CHAIRMAN: What I think the point is, that pot three is going to have the cap of
2 £30. We are now discussing what do you have to put on the claim form to get up to
3 that £30. Is it just going to be a mechanical thing saying, "I made two journeys" and
4 then you get £10, or you say, "I made six journeys" and you get £30. Is it as simple
5 as that or do you have to say, "I took a journey on this day, going from A to B." It may
6 well be you will get a fairly low take-up, looking at the American experience. If you
7 look at the FTC report, I am sure you have done, you will find that even with the effect
8 of just saying, "I bought this product in the claim period and I bought one of them",
9 even when that is the form, that is the take-up. They don't even have to say what
10 store, they don't even have to say on what day they bought it, they just have to say: I
11 bought this product.

12 The reason why they have that sort of process is these are just really small claims and
13 anything greater than that, not many people are going to reply. I think that is what
14 Mr Kelly is discussing.

15 MR KELLY: Yes. So in a world where you are trying to quantify the likely take-up with
16 a requirement to list the journeys made, your starting point would be much, much lower
17 than 10 per cent. I think that's the point.

18 THE CHAIRMAN: If you look at the 14 per cent of people who paid cash. If you asked
19 me, "Look, Malek, give us the details of your train journeys seven to nine years ago" I
20 would not even open my diary for 30 quid. You would say it is just not worth it; I just
21 can't give you the detail that you want. I can't give you those dates.

22 To me, it does not seem very fair that certainly the people who pay cash, they have
23 no realistic way of claiming because how are they going to come up with these dates
24 and stuff. It is really difficult.

25 MS ABRAM: So just to make totally sure I have understood, so that I can take
26 instructions on it.

1 THE CHAIRMAN: Yes.

2 MS ABRAM: I think what you are suggesting, you are envisaging, is a form that would
3 require someone to put in a sworn affidavit, perhaps with a statement of truth, saying,
4 "I travelled on this franchise during this period on..." Then they would have to say on
5 the number of occasions they did so.

6 THE CHAIRMAN: Correct.

7 MS ABRAM: But with a cap at six journeys. So it wouldn't matter if it was six or ten
8 or a hundred.

9 THE CHAIRMAN: Yes. Presumably, they would have to put on the form their address
10 and stuff like that.

11 MS ABRAM: Yes, they would.

12 THE CHAIRMAN: So if they lived in Aberdeen and it comes out and you get lots of
13 claims from Aberdeen, you may be a bit sceptical then you may look into some of
14 them. Because you can still probe. You can still warn them that you have to tell the
15 truth, but we reserve the right to ask you additional questions to satisfy ourselves as
16 to the genuineness of the claim.

17 MS ABRAM: I am grateful, sir. You are proposing changes in both directions, in
18 a way --

19 THE CHAIRMAN: No. No. I don't want to go into the way that organisations prevent
20 fraud, for obvious reasons. But there are numerous checks and balances that you can
21 do, even on the basis of what Mr Kelly is saying. I don't want to say it in open court.
22 But the thing is, there are ways you can deal with this to pick out claims which are not
23 honest and, you know, have ways of deterring people from making fraudulent claims,
24 which is the way I have suggested that you have on the forms. To say although you
25 are self-certifying, we reserve the right to ask further questions and look into the validity
26 of this claim. Most people will think: I better be careful, I live in Aberdeen, I am not

1 going to put in a claim. Or they say: well, look, these guys, they may have all the credit
2 card details and they will be able to see I have never been on a train in my life, and all
3 that sort of stuff.

4 There are so ways that you can protect yourself against fraud and the banks in
5 particular have a huge amount of experience in dealing with these types of problems
6 with payments and stuff.

7 MS ABRAM: I am very grateful. That is everything from me. Thanks.

8 THE CHAIRMAN: Do you want to take another break while people have a further
9 discussion?

10 MR MOSER: Not yet. I would like to take another break while people have a further
11 discussion, but I would like to say just a couple of things first.

12 THE CHAIRMAN: Of course. As long as your voice holds up.

13

14 Submissions by MR MOSER, KC

15 MR MOSER: In an effort to be helpful, you have said very generous words about what
16 you think we are capable of.

17 THE CHAIRMAN: Yes. You are, don't worry.

18 MR MOSER: But I want to say something about Mr Gutmann and I want to say
19 something about the 8 million. Then we will see where we go with it.

20 THE CHAIRMAN: Yes.

21 MR MOSER: I want to be absolutely clear that Mr Gutmann is listening with alacrity
22 of enthusiasm to what the chair is saying and is in no way, of course, interested in
23 underproviding for his class. The key, as he points out in his witness statement, for
24 him about this settlement is that they will get paid now.

25 THE CHAIRMAN: Mr Moser, can I just make it clear?

26 MR MOSER: Yes.

1 THE CHAIRMAN: I don't see your clients as the stumbling block to having what I think
2 is the right solution. You don't need to tell me that. I understand the position where
3 you are.

4 MR MOSER: Okay. I will draw the line there. But this, of course, comes back to what
5 I said earlier about the difference between a trust settlement and this kind of
6 settlement, rather a trust pay out and this kind of settlement. The trustees generally
7 just have themselves. We have to deal with my learned friend and her clients and that
8 is, of course, in most respects a delight. But in one important respect, it is a difficulty.
9 I mean, for instance, let's look at the individual pay-out in relation to interest. I was not
10 necessarily going to go there, but it strikes me that it is quite a good example. So the
11 Tribunal says to me, or says to my learned friend more properly: well, come on, the
12 people who have all of the evidence, you might as well give them interest, because
13 after all there will only be a take-up of, whatever, 10 to 20 per cent.

14 THE CHAIRMAN: In the context of no waterfall.

15 MR MOSER: Yes, no waterfall. You understand.

16 THE CHAIRMAN: I understand.

17 MR MOSER: My learned friend says: hang on, why do we have to --

18 THE CHAIRMAN: Yes.

19 MR MOSER: If we imagine for a moment that we are not in the world of class action
20 and the reason there is a class action is only because each of these individual pay-outs
21 is so small it would not be worth it. But imagine that I am representing one person.
22 Now, that person, even if they are a pot one-er, is going to have all of the risks that we
23 bear for him or her collectively and may well settle at 60 per cent or at 50 per cent. So
24 viewed through that lens, just speaking generally, I don't want to --

25 THE CHAIRMAN: Yes.

26 MR MOSER: But speaking generally, when considering a class action settlement,

1 | there is that aspect to it. Yes, one is looking at the big numbers and saying, well, there
2 | is a whole pot and it has all of this money in it and millions are going to claim so and
3 | so much. But as far as the reasonableness of settlement is concerned and we are
4 | considering the interests of the class members, it is also the reasonableness for each
5 | individual class member who would settle for far less than, in fact, they are getting.

6 | THE CHAIRMAN: The problem you have though is if you look at the meltdown
7 | scenario, the one I gave, is that they are only going to get one fifth -- they will only get
8 | £6 or something -- if you get too many claims in pot three with a cap of 2 million. They
9 | won't even know that at the time they fill out the application form. You get your thing,
10 | you say, well, you have these three choices and you will get up to £30. They will think:
11 | oh, that is £30, I will get my £30. They are going to be in no position at all to assess
12 | the likely number of claims on pot three, so they won't have a clue whether they are
13 | going to get a cheque for 30 -- not a cheque but, you know, a bank transfer of £30 -- or
14 | £6. They just don't know. These are the people that it is our job to protect to make
15 | sure they can make a proper informed choice as to go to pot one and pot three.
16 | Without knowing the number of claims coming in pot three, how are they going to
17 | know?

18 | MR MOSER: The truth, frankly, is we don't know either. It would be absurd if --

19 | THE CHAIRMAN: That is why it needs to change to make sure that we cover those
20 | possibilities.

21 | MR MOSER: But we can make certain calculations and take certain views and, of
22 | course, we have done that. Without waiving privilege and going into how sausages
23 | are made, I think I can in fact give a little bit more comfort to the Tribunal and to
24 | everybody about our figures. Because you have very fairly taken the figure from
25 | Mr Holt's report.

26 | THE CHAIRMAN: I have. Of course I have.

1 MR MOSER: It is my own report: I am not going to attack it. But even though this
2 case is a case where the trial is six weeks away, that is not the whole trial. The trial
3 that is happening, you know this --

4 THE CHAIRMAN: I do.

5 MR MOSER: -- in six weeks' time is the abuse trial. The quantum and all of that is
6 not for some time.

7 Mr Holt's figures in his report are based on the estimates that he made pre-disclosure.
8 We are still not at a point in the litigation as far as quantum is concerned where we
9 have an analysis of the disclosure on those aspects. What he says in the report is:
10 this is my guess, but it might be less, because I have not seen the figures.

11 The important difference between these two experts is that Mr Noble has seen the
12 figures. Now, as we stand here today, we have Mr Holt who has not seen the figures,
13 we have Mr Noble who has seen the figures. Mr Holt could not go in the witness box
14 today and say anything about why Mr Noble is wrong on that point, because he has
15 not got that knowledge.

16 So whilst our expert is, of course, in all respects vastly superior and all of that -- with
17 all due respect to Mr Noble, all of the experts are wonderful -- but for the purposes of
18 today, we are not in fact six weeks away from trial and disclosure and all the rest of it.
19 For the purposes of today, we are still in the foothills of the litigation as far as this figure
20 is concerned and everyone is making a stab.

21 THE CHAIRMAN: But, Mr Moser --

22 MR MOSER: It would be absurd for me to insist that only Mr Holt's figures should be
23 taken.

24 THE CHAIRMAN: No. But the problem -- I haven't in my own mind taken Mr Holt's
25 figures as gospel. I have seen in my own mind they are a ceiling. But if Mr Noble is
26 right and the figures are much less, then the amount of claims coming in could be even

1 smaller and so that is why it does not make any sense to me that we only have
2 a reverse waterfall. Because, as I said to you, I don't think they are going to have to
3 pay out more than 9.85 million. It just seems such a remote possibility, even on their
4 own figures.

5 On your figures, it does not seem to be that likely either, because I think your
6 figures -- even your mid-point -- is higher than what I think it is going to end up being.
7 I think it is going to be significantly lower and Ms Abram thinks that as well, on the
8 basis of her own research.

9 Let's not be too fixated about having something that if the Tribunal is not happy, not
10 trying to remedy it and coming up with something. Because it costs Ms Abram
11 absolutely nothing. You will want to get as much as possible for your class members
12 and, as I said, I don't think the problem is coming from your direction on this whole
13 structure.

14 You talk, we come back and if you can come back with something that fits in with what
15 we have been discussing -- and I think you probably can -- then we are going to resolve
16 it today. That is what I want. I don't want us to not resolve it. I just put things at the
17 beginning of the hearing, I say what I think. You two very experienced advocates, you
18 can sit down with your clients and come back with something and I would be really
19 surprised if I come back and you say: no, actually, we are just going to stick with what
20 we have got.

21 MR MOSER: Let's give that a go. That is heard and appreciated. Like Ms Abram,
22 I am going to do the unusual thing and ask a question of the Tribunal. In essence,
23 having heard about the amounts, the reverse waterfall or what other adjustments and
24 the forms --

25 THE CHAIRMAN: Yes.

26 MR MOSER: -- those are the variables we are talking about. Just so that we don't

1 go away and then say, "Ah, there is another thing."

2 THE CHAIRMAN: No. No. Whatever I said in opening is the only concerns I have
3 got. Because when it comes to the cost, no one is asking me to approve any cost
4 pay-out at this stage. That is a separate hearing and we will deal with that. So that is
5 the scope of it. Yes.

6 MR MOSER: When we are talking about forms -- this is my fault for probably not
7 having listened closely enough -- are we talking only about pot three at the moment or
8 also about pot two?

9 THE CHAIRMAN: I think the main concern is pot three.

10 MR MOSER: Understood.

11 THE CHAIRMAN: It is the pot three form.

12 MR MOSER: Well, perhaps at that point would be a convenient moment.

13 THE CHAIRMAN: Yes. We will take a break and see where we are. But I think
14 everyone has the message.

15 Thank you very much. We will rise until after lunch. We will come back at 12.45, if
16 that is all right, just for an update to see where we are.

17 MR MOSER: All right. An update.

18 THE CHAIRMAN: You don't need to have resolved it by then, but an update at 12.45.
19 Thank you very much.

20 (A short adjournment)

21 MR MOSER: (Beginning of audio file cut off) -- oh, what, an outline of the parameters
22 that the parties are thinking about?

23 THE CHAIRMAN: Yes.

24 MR MOSER: We are considering your --

25 THE CHAIRMAN: Okay. That's fine.

26 MR MOSER: -- proposals. So we are not at the moment saying do something

1 completely different. We are looking at what has been suggested. But also, of course,
2 at the knock-on consequences. So one might think: well, you know, this is all cost
3 neutral and why not just do it slightly differently. This has been negotiated quite
4 carefully for a long time.

5 THE CHAIRMAN: Of course it has been. Yes.

6 MR MOSER: And it affects all of the stakeholders in some way how the money is
7 distributed. It is not a case of a zero sum gain where you say, well, it does not matter,
8 they are committed to paying 9.85 million and we are committed to distributing as
9 much as we can. So all of the stakeholders are thinking about it.

10 THE CHAIRMAN: Of course. But on your side of the table, obviously, there is what
11 the Court of Appeal have pointed out. There is always that inherent conflict of interest:
12 that is part of the reason why we have this situation. I don't mean it in a derogatory
13 sense, because I know you will do what is best for the class members, irrespective of
14 how much is paid out to you or the funders.

15 But we can't lose sight of the fact that these proceedings have been brought on behalf
16 of the members that Mr Gutmann represents and one of the good things about the Bar
17 is that we always put our clients above ourselves. The number of cases I have done
18 for nothing because clients have run out of money is just -- that is what happens in our
19 job. I don't need to tell you what it is like. It is perhaps not the Bar. That's the issue.
20 But there we are.

21 MR MOSER: Yes.

22 THE CHAIRMAN: But you know what it is like. We all know.

23 MR MOSER: Yes.

24 THE CHAIRMAN: Okay. So we will come back and 2.00 and we will see where we
25 are then.

26 (The short adjournment)

1 THE CHAIRMAN: Mr Moser, is your throat better or is it still just as bad as this
2 morning?

3 MR MOSER: Getting worse, if anything, but...

4 THE CHAIRMAN: Getting worse? Okay.

5 MR MOSER: Let that be the least of our problems.

6 THE CHAIRMAN: Okay. Thank you.

7

8 Submissions by MS ABRAM, KC

9 MS ABRAM: Sir, regrettably we are not there yet.

10 THE CHAIRMAN: Okay.

11 MS ABRAM: But what I would like, if I may, is to set out to the Tribunal a proposal
12 that Stagecoach would be content to offer for the class representative to consider.

13 THE CHAIRMAN: Yes.

14 MS ABRAM: And our view, our submission, is that this meets the points that the
15 Tribunal has raised and the purpose of setting it out openly is so that we gauge the
16 mood of the Tribunal as to whether it does what we think it does.

17 THE CHAIRMAN: Yes. Let me just get my pen ready. And are you appearing before
18 me tomorrow?

19 MS ABRAM: I'm not.

20 THE CHAIRMAN: You are not? Okay. Because if we need to come back tomorrow,
21 I would have thought McLaren hopefully will be finished by lunchtime, so we could deal
22 with this one way or another tomorrow at 2.00 if the parties think that they need more
23 time to be constructive. If no new proposal comes out, then I have all your
24 submissions. I can give a ruling, there and then, unless people want to make further
25 submissions -- which they are fully entitled to make -- to try and persuade me to go
26 a different route.

1 MS ABRAM: I'm very grateful for that indication. Really the ball is very much in the
2 class representative's court about waiving privilege over the negotiations.

3 THE CHAIRMAN: Yes. That's fine.

4 MS ABRAM: If the class representative considers that would be helpful, doubtless
5 they will say so.

6 THE CHAIRMAN: Okay.

7 MS ABRAM: So the proposal has four elements of which the first is by the far the
8 most important change to this structure we come with, which is to get rid of pot two.
9 So instead of having pot three of £2 million and pot two of £4 million, as in the
10 proposed structure, you would have one pot three -- let's call it, for simplicity -- which
11 would be £6 million and get rid of pot two.
12 You would still have pot one, which would be the full evidence pot, but you would have
13 £6 million available for those class members who lack contemporaneous documentary
14 evidence of their claim.

15 THE CHAIRMAN: But would they be capped at £30?

16 MS ABRAM: They will. Yes.

17 THE CHAIRMAN: Because the thing is, it may well be that people who have got travel
18 cards, it is going to be easy for them to get into pot two. That is the thing. Yes. Okay.
19 Well, that is your proposal. Yes. That's one.

20 MS ABRAM: We are just meeting the concerns that were addressed this morning.

21 THE CHAIRMAN: Yes.

22 MS ABRAM: So that's the first bit of it and I want to come back to the figures and
23 show you why we think 6 million is a really good deal for the class, because I want to
24 make sure I have satisfied --

25 THE CHAIRMAN: So what you are saying is that you conflate two and three and the
26 advantage of that is that the full 6 million is for people who have got no documents to

1 support it. The disadvantage of that is that persons who can evidence their TFL side,
2 but not their SSWT side, will not be able to get £100 which is under the current
3 arrangement.

4 MS ABRAM: Yes.

5 THE CHAIRMAN: Yes.

6 MS ABRAM: Just on that, you have seen what Munro says about where the evidence
7 is likely to be. Actually on pot two, even on pot two, the evidence is likely to be in
8 people's bank statements. So actually one might ask how much pot two really adds
9 to pot three and pot one.

10 THE CHAIRMAN: That is your point one.

11 MS ABRAM: Point one. Point two is to meet Mr Kelly's point and to confirm we would
12 be content with that. I mean, it is hard to draft on the hoof, but we would be content
13 under pot three, the £6 million pot three, to have a self-certification approach involving
14 an affidavit with a statement of truth saying, "I travelled on the south-western franchise
15 during this period X times."

16 So I hope that meets that point.

17 THE CHAIRMAN: And they get £5 per travel?

18 MS ABRAM: £5 per travel, yes. That's it. Up to £30. So I think that meets that point.

19 THE CHAIRMAN: Yes.

20 MS ABRAM: The third point which is for the benefit of the class representative is that,
21 as you will recollect was part of the structure --

22 THE CHAIRMAN: Just going back on the pot three. You only have one pot three and
23 in that pot three, it does not matter whether it is a direct purchase or a purchase
24 through someone else. You just say "I purchased". It must be right. It must flow from
25 what you are saying.

26 MS ABRAM: We would have a single pot three.

1 THE CHAIRMAN: Yes. I would have thought so. Yes. Okay.

2 MS ABRAM: The third point for the class representative's benefit is that you will
3 recollect in McLaren there was quite a lot of discussion about who should be involved
4 in the stakeholder hearing on costs and funding.

5 THE CHAIRMAN: Yes.

6 MS ABRAM: I'm not a part of the stakeholder hearing --

7 THE CHAIRMAN: [Overspeaking] No, no.

8 MS ABRAM: Similarly, we would be content if this structure were accepted to be
9 neutral at the stakeholder hearing as to whether or to what extent the class rep, the
10 funder and so on should be able to recover further costs up to the 9.85 million figure,
11 which would stay.

12 THE CHAIRMAN: So you will be neutral on the 9.85 million?

13 MS ABRAM: Yes. On the basis of the proposed scheme.

14 THE CHAIRMAN: Yes. You should be, because it makes no difference to you.

15 MS ABRAM: Well --

16 THE CHAIRMAN: And the people whose job is to, sort of, test it, whether or not it is
17 appropriate, is us rather than you. That's fine. Yes.

18 MS ABRAM: I take that.

19 THE CHAIRMAN: Don't worry: it will be tested.

20 MS ABRAM: I am very grateful. I am sure it will.

21 The fourth point is that if and when there were to be an approval in principle of
22 a settlement scheme, my client would ask for the proceedings against it to be stayed
23 because, as the Tribunal knows, the proceedings against my client have not been
24 stayed over the past month. My client has incurred huge costs over the past month of
25 doing basically a twin track -- with apologies for the rail pun -- of preparation for this
26 case.

1 THE CHAIRMAN: But when you say stayed, but surely if it is agreed then you will
2 have finality tomorrow, won't you? So we don't need a stay.

3 The problem I have got is that I understand that there is an application for a stay before
4 Mr Justice Roth and he said no. I have not seen the papers on that. It may be he will
5 think it is his job to decide whether or not there should be a stay rather than my job,
6 because it relates to his hearing that is coming up on 17 June.

7 MS ABRAM: My client's position would be if there had been approval in principle of
8 a settlement, there would be no reason to carry on preparations for that hearing.

9 THE CHAIRMAN: I am sure. I am just worried about me stepping on someone else's
10 toes and I think I can say that in principle I can see that there may be some merit in
11 having it stayed, because there is no point in incurring further costs if, in fact, you have
12 agreed everything in principle.

13 But if we get to the position tomorrow that a structure is agreed and that the distribution
14 plan has been revised, if they are able to do it in time, then you don't need it. But it is
15 likely that any approval would be subject to me seeing the distribution plan as revised,
16 because otherwise there can be misunderstandings.

17 MS ABRAM: I hear that. The difficulty from my client's perspective is that reply
18 evidence is due on Friday, skeletons for the PTR are due on Friday, the PTR is 9 May.
19 The penultimate tranche of my brief fee is due in two days. I mean, my client is
20 burning money. Mainly not on my briefing.

21 THE CHAIRMAN: No. But hopefully -- look, hopefully within a day or so, I will have
22 a piece of paper that says this is the revised distribution plan and it does not have to
23 be that sophisticated. We know what is required and one would hope that by
24 tomorrow -- at the very, very latest on Wednesday -- there will be the revised
25 distribution plan. But obviously it requires a bit of work, but I can see so many people
26 here, there must be someone who has time to draft it.

1 MS ABRAM: We would so much share that hope. But you can see, sir, from the fact
2 that I am standing up before you, that any delay is not on my side.

3 THE CHAIRMAN: I understand. Look, I can see that. I would obviously have to hear
4 from Mr Moser before I make any comments on this fourth point. Apart from the only
5 general comment I have on your fourth point is that it may be for Mr Justice Roth to
6 decide on the stay with or without a steer from me as to what I think is appropriate. If
7 it looks very, very likely that everything is going to be fine and there is clear
8 parameters, then hopefully by tomorrow at 2.00 there will be something in writing.

9 If it is all done then, I can make a ruling then and it is all sorted. If it is not all done and
10 there is a tie up point, we will have to see how much time it is going to take and make
11 a decision on any stay application, whether or not I can say what I think should happen
12 and then you can take that to Mr Justice Roth. Or I may feel I can't say anything, in
13 which case you are still going to have to ask him. But I would feel uncomfortable
14 deciding a stay on someone else's case.

15 MS ABRAM: Very well.

16 THE CHAIRMAN: I am not uncomfortable in expressing a view that he may want to
17 consider certain things.

18 MS ABRAM: I hear that, sir.

19 So, sir, the main point that really matters on this proposal is the 6 million in pot three.
20 So if it would be useful, I would like to make some submissions on why 6 million is
21 an appropriate figure to go into pot three because I know different figures have been
22 spoken about this morning.

23 THE CHAIRMAN: But you are going to have 19 million in pot one. Let's say you get
24 1 million or 2 million at worst claims coming in pot one and then the rest will come into
25 what will be the new pot two and there is no distinction between direct or indirect sales.
26 You say: well, that makes sense, because it is up to the £30. Yes: it makes sense.

1 I would have to discuss it with my other members as to whether they are happy with
2 that, because what you lose on that is pot two, where people have the ability to claim
3 more. But you will say: well, the people who have actually lost more maybe have
4 a greater incentive -- let's say, someone who had been doing it for months or
5 whatever -- to get to their bank statements or credit card statements and they will be
6 in a better position. They will be more incentivised to come back with the actual data
7 from their bank or credit card company.

8 MS ABRAM: That's right, and two additional points. The first is that, of course, the
9 average loss according to Mr Holt is £27 odd per class member. So it may well be
10 there are not that many with very high claims.

11 The second point I would make is in relation to evidence in pot two, I mean, if you have
12 bank statement evidence of your travel card, for example, you are going to have bank
13 statement evidence of your SSWT purchases or train --

14 THE CHAIRMAN: I think so. Yes. That is the likelihood. I am saying I am not against
15 what you are proposing, but I do have to discuss it with other people.

16 MS ABRAM: Of course. I am very grateful.

17 So that is the proposal and that is on the table and what we would be really grateful
18 for is an indication from the Tribunal, if that were acceptable to the class
19 representative, if that would be acceptable to the Tribunal.

20 THE CHAIRMAN: Yes. We are going to need to talk that through amongst ourselves
21 for a few minutes.

22 Mr Moser, do you want to say anything at this stage, before I discuss it with my
23 colleagues?

24

25 Submissions by MR MOSER, KC

26 MR MOSER: Well, I do, on the basis that it is worth your colleagues and you, sir,

1 hearing what we have to say. Again, without waiving any prejudice.

2 THE CHAIRMAN: Yes. That's all right.

3 MR MOSER: But I have given a, sort of, preview of what I am about to say, just before
4 the short adjournment. Because it may be that the Tribunal is quite properly under the
5 impression that it is putting a bit of pressure on the paying party to see whether they
6 can get a better outcome for the class.

7 THE CHAIRMAN: No, pressure on both sides. I can see that. Because it is not
8 pressure on Mr Gutmann himself, it is not real pressure on the lawyers. I understand
9 that. It is not pressure on Ms Abram's client. I think, at the end of the day, it may be
10 coming down to the funder saying they want a bigger slice of the cake and that it may
11 not be that case. But I can see that the current structure is unsatisfactory. There is
12 a possibility of having a structure that satisfies us and that one can just hope that we
13 get there, that's all. I know you will be working for it because, you know, we all want
14 the same thing.

15 MR MOSER: We are working towards it but I do want to pushback on the idea that
16 there is no pressure on the class representative. Obviously, I have been talking to
17 Mr Gutmann; he has been giving me instructions. We have tried to answer the
18 Tribunal's questions that came in advance.

19 THE CHAIRMAN: And you did. We have not criticised the answers, not at all.

20 MR MOSER: No, indeed. This was a specific one that we didn't have pre-advertised,
21 so we have been trying to work on it today.

22 THE CHAIRMAN: Yes.

23 MR MOSER: The class representative finds himself in a situation where, yes, he has
24 a primary duty to the class.

25 THE CHAIRMAN: Of course he has. Yes.

26 MR MOSER: He does also in the structure of these arrangements have a contractual

1 duty to his lawyers and the funders. We know from the Court of Appeal that that is
2 a completely proper arrangement. Without the funders, this case would not exist.
3 Without the funders and without the lawyers being prepared to act on a \times CFA that,
4 as matters progress and funds deplete, becomes \times .
5 Without the lawyers or the funders acting in parts for nothing, or on high risk in the
6 case of the funders, the settlement wouldn't exist. The case wouldn't exist; the
7 settlement wouldn't exist.
8 So a class representative in this scenario finds himself torn now between his duty to
9 the class, but it is not a one way duty. There is also the justification to the stakeholders
10 and a significant interest particularly in a case like the present where the class
11 representative has an interest in his action continuing to be funded in relation to the
12 rest of the defendants.
13 One of the obligations of the class rep is that he will act not only fairly and justly in the
14 interests of the class members, but also act with the utmost good faith in all his
15 dealings with the funder. That is in the bundle at pages 214/215 of bundle A.
16 Now, the full terms of the CFA are not public and I am not going to go into them.
17 THE CHAIRMAN: No. Of course not.
18 MR MOSER: But what I have said today is essentially what I have already said a long
19 time ago to Mr Justice Roth when he asked me a similar question he found to be
20 appropriate and he and his colleagues certified on that basis.
21 So I don't want the impression to be gained that somehow the Tribunal is putting all
22 the pressure only on that side. We keep talking about both sides, quite rightly, about
23 the 18 months of negotiation and the very finely balanced calculations that have gone
24 into this. Clearly, the pots have aspects to them such as the protection against fraud
25 and similar that are dear to both sides' hearts, but particularly perhaps Stagecoach's
26 heart. We have agreed to that structure.

1 We have also agreed to the payment structure that is in and of itself, I sense, not
2 offensive. But, of course, that is the bit that is being put under particular strain and I
3 am simply making the point that this is not a one-way street where somehow if enough
4 pressure can be put on Stagecoach, the class representative is obliged to agree
5 because of his duty to the class. The class representative has a more complicated
6 duty in these situations and that is the strain that the Tribunal is placing upon
7 Mr Gutmann in seeking to have the changes to one side, which is the pot, but no
8 changes to where the costs are.

9 Now, I appreciate the costs in the end are going to be in the hands of the Tribunal.
10 But that only relates to the non-ringfenced costs and if the non-ringfenced costs
11 change then whatever the discretion --

12 THE CHAIRMAN: Just go back one second. The ringfenced costs, do they have to
13 be approved by the Tribunal?

14 MR MOSER: Only in the course of the settlement.

15 THE CHAIRMAN: Exactly. So we have to take a view as to whether it is appropriate
16 for those ringfenced costs to be paid, don't we, now?

17 MR MOSER: Absolutely.

18 THE CHAIRMAN: Yes. Okay. That's fine.

19 MR MOSER: We see, of course, what the figures are in the documents.

20 THE CHAIRMAN: I have seen those figures. I am not complaining about the ring
21 fenced costs, don't worry.

22 MR MOSER: Indeed. But part of the quid pro quo of this sort of settlement is the
23 parties have asked themselves very carefully what can we live with. I suppose I do
24 say rhetorically: is it really unjust and unreasonable what was agreed in the papers
25 that were before the Tribunal this morning? Because that is completely acceptable to
26 Mr Gutmann and Mr Gutmann is perfectly happy, of course, with the form situation.

1 Mr Kelly's suggestion about the forms. We have no problem with that and never would
2 have had. But the totality of the arrangement as now being proposed by the settling
3 defendant is one that upsets that fine balance of risk.

4 THE CHAIRMAN: But you knew when you agreed the structure that -- and you were
5 prepared -- that the full amount in pots two and three would be taken up, ie 6 million.
6 You always knew that and all that is being proposed now is to collapse pot two into
7 pot three, change the evidential requirement which you say is acceptable and in
8 accordance with Mr Kelly's suggestion. But I fully accept that you have, let's say,
9 conflicting duties and that is why, at the end of the day, you have the Tribunal to decide
10 what is good.

11 I am not going to find something just and reasonable because I appreciate that
12 Mr Gutmann is under a difficult situation. But if what is presented is, in our view, fair
13 and just and reasonable, we will accept it. But if it isn't, we are not going to accept it.
14 So really the problem you fairly paint, I fully understand that and I sympathise it. But
15 at the end of the day, we are going to say what we think is appropriate whilst, of course,
16 acknowledging it is no one's fault that you were not able to come up with something
17 that is acceptable. I am not going to criticise anyone on a personal level and say, "It
18 is because you said this" or, "You have got this entrenched position and it is not going
19 to work." The fact is, that is the consequence of what will happen.

20 I think none of us want to have a situation where the settlement does not go ahead
21 and that one would hope that a structure that is acceptable will work for everyone. I
22 know that you have got trials one to three, you have the other claims against the other
23 defendants, but there is some advantage to you to have at least one in the bag and
24 sorted out with the successful going into your three hearings. Because you can say:
25 look, judge, we have cut down the size of this case, we have a good result for our
26 class members and that has an element of momentum.

1 MR MOSER: It is very difficult and we are in novel territory.

2 THE CHAIRMAN: We are. Of course we are.

3 MR MOSER: It is very difficult to know how to walk the line between revealing without
4 prejudice stuff.

5 THE CHAIRMAN: I know it is difficult.

6 MR MOSER: I am being told to say things that I am just not going to say.

7 THE CHAIRMAN: Look, you don't want to get into WP and tell me something that is
8 WP and then I can't hear the rest because I have heard something.

9 MR MOSER: But I can say this much, because it has become evident: it does seem
10 like we are very close to a settlement. Is it really going to turn on the question of
11 whether we collapse pots two and three into one or whether we adopt Mr Kelly's
12 solution for pot three and go with that?

13 THE CHAIRMAN: If we look at it, there are different ways of doing it, okay? You have
14 the current structure. We would want a full waterfall so you have pot one, two parts to
15 it, so if part of pot one has already been eaten up the other part of pot one will go and
16 fill that. Whatever is left out of pot one goes into pot two, you have the same exercise:
17 it dribbles in and fills out the gaps. Then whatever is left goes down into pot three.
18 At the end of the day, we are all talking about probably the same amount of money. It
19 is not going to make a huge amount of money, certainly not a material difference,
20 which way you structure it. But you understand where it is.

21 Now, what Sarah Abram has come up with may give them a better result than a pure
22 waterfall on the current structure. I don't need to explain to you why, but you can see
23 that if, in fact, the amounts in pot one claims are less than 3.85 million, then they can
24 get an advantage by their version of the structure. But I need to speak to my
25 colleagues about whether or not just in principle her variation is acceptable or should
26 there be an additional element of waterfall from pot one to go into pot two, ie so pot

1 two is 6 million and that is eaten up. Should we have a provision for a bit more to
2 come in from pot one. That is the only slight qualification we are talking about.
3 I just need to speak to my colleagues. I can't speak without having -- because they
4 may say to me, "Malek, it is fine" or they may say, "No, it is not fine." I just need to
5 speak to them.

6 MR MOSER: I would only say this, stepping slightly outside my point of principle.

7 THE CHAIRMAN: Yes.

8 MR MOSER: If Mr Kelly is right -- and why shouldn't he be right -- the percentage of
9 take-up is going to be such that it does not matter anyway. But that is by the by.

10 THE CHAIRMAN: Yes. I appreciate that. My view is that the take-up is probably
11 going to be lower than the least optimistic forecast of the figures that you have given
12 me. I may be wrong about that; we just don't know.

13 MR MOSER: I mean, as you go away to discuss the Abram variation, can I just put to
14 you our admittedly less extreme variation.

15 THE CHAIRMAN: Yes. Of course. I need to hear both variations. I would love to
16 hear your variation.

17 MR MOSER: At the moment, my variation is very simply that Mr Kelly's point is agreed
18 on pot three.

19 THE CHAIRMAN: So you agree claim requirement?

20 MR MOSER: Yes.

21 THE CHAIRMAN: So on pot three, all you have to do is say, "I had six journeys." You
22 don't need to say direct or indirect purchase. You self-certify. There is a warning that
23 it may be audited and further inquiries may be made and declaration of truth and
24 obviously they can be in trouble if they lie.

25 MR MOSER: Yes.

26 THE CHAIRMAN: Yes. That's fine.

1 MR MOSER: Obviously I accept, if it is still part of that deal, I would accept neutrality
2 at the cost stage. But, as you say, sir, it is really what they say at the cost stage is
3 neither here nor there, to some extent.

4 THE CHAIRMAN: Each journey is fixed at £5, so if you have six journeys, £30.

5 MR MOSER: Exactly. We would keep pot two with the £100 for people who can
6 evidence with a travel card. Because it is not just bank statements. You might have
7 your travel card; that is the sort of thing people keep. If you have the travel card, you
8 don't need a statement and you get three times as much. More than three times as
9 much.

10 THE CHAIRMAN: But then if you keep pot two, are we going to have a full waterfall
11 or what? How is that going to work?

12 MR MOSER: The reason for that is the explanation that both my learned friend and I
13 have given in relation to the figures. On the assumption that we are anywhere near
14 Mr Noble's figures or a median figure based on Mr Noble's information, even
15 a 20 per cent uptick is 200,000. 10 per cent is 100,000 and so on. You are within the
16 6 million of pots two and three --

17 THE CHAIRMAN: Wait. Let's go back to the waterfall.

18 MR MOSER: -- without a need for [overspeaking].

19 THE CHAIRMAN: When you say on pot three, okay?

20 MR MOSER: Yes.

21 THE CHAIRMAN: You agree -- and I think we all now agree -- the claim requirements.
22 At the moment, it is capped at 2 million.

23 MR MOSER: Yes.

24 THE CHAIRMAN: Are you saying you agree a waterfall from pots two to three, so if
25 in pot two there is 2 million of claims and in pot three there is 4 million of claims,
26 2 million will flow down from pot two to pot three.

1 MR MOSER: No. Because that will just be a different version of their collapsed pots
2 two and three that we have not agreed to.

3 THE CHAIRMAN: But if the risk is -- and the biggest risk I see is that pot three, no
4 one is going to know whether they are going to be discounted and most people go into
5 pot three. You are still saying there should be a limit of 2 million on pot three, because
6 that is not going to be acceptable. That is the most unacceptable feature of the whole
7 thing, which is pot three capped at 2 million.

8 MR MOSER: I am saying there has been certainly no agreement otherwise.

9 THE CHAIRMAN: Okay. Well, if you are going to leave pot three at 2 million, the
10 likelihood is that this settlement is going to be rejected. I am not saying it will or not,
11 because you still have the ability to argue.

12 If what you are saying is that you keep pot two and the excess on pot two can go from
13 pot two to pot three, we may have something to talk about. But, you know, there is
14 a number of permutations. But anything that leaves what is pot three, or a collapsed
15 pot two and three, anything that leaves pot three, what is currently pot three, 2 million
16 is not going to work.

17 Ms Abram, what do you want to say?

18 MS ABRAM: It is just a bit of help on that point that you just made, sir. The alternative
19 option where you have waterfall only between pots two and three.

20 THE CHAIRMAN: Yes. That is the alternative.

21 MS ABRAM: We actually thought that our proposal was more generous than that, but
22 I do take your point about the £100 per class member in pot two. So I can confirm that
23 we would be happy with that variation, with that waterfall, between pots two and three.
24 If pot three was oversubscribed and pot two was undersubscribed, the excess money
25 to flow from two to three.

26 THE CHAIRMAN: Yes. Because at the end of the day, it means that effectively for

1 pot three the likelihood it is not going to be limited to 2 million. Yes. So that is two
2 alternatives which are possibly acceptable. I think I need to speak to my colleagues
3 about what is acceptable and what is not acceptable.

4 MR MOSER: I will let you do that. I am just going to send you out with this thought
5 and I am sorry to end --

6 THE CHAIRMAN: You are giving me many thoughts, don't worry.

7 MR MOSER: I'm going to end on a bit of a challenge.

8 THE CHAIRMAN: Okay. Yes.

9 MR MOSER: Which is the Tribunal also has to ask itself -- forgive me for telling it what
10 to do -- but the Tribunal also has to ask itself in its discussion: now that we have
11 reached this very slight difference, can the Tribunal under the powers of settlement
12 that it has really say that their version is just and reasonable and our version isn't?

13 THE CHAIRMAN: Yes, we can.

14 MR MOSER: It is a settlement the class accepts, Mr Gutmann accepts, Mr Lawrence
15 accepts.

16 THE CHAIRMAN: Yes. Don't worry; it is our decision. Don't worry. I have no problem
17 in making a decision, whether it is good or bad for you. I have no problem doing it.
18 That is my job.

19 Yes, Ms Abram?

20 MS ABRAM: If I may, I would just like to make one final point as well, which is a new
21 point. It is just to explain that there is an alternative lever that could be pulled if -- and
22 we really hope this won't happen -- but if proposed settlement terms were considered
23 reasonable by the Tribunal, reasonable by my client, but were not acceptable to the
24 class representative because of issues relating to funding and costs, the Tribunal is
25 aware that one of the questions that goes to suitability for certification, which is
26 an ongoing question, is the availability of alternative redress.

1 Now, it could be possible that the Tribunal might consider that if adequate recompense
2 were available to the class by means of a proposed settlement structure that my client
3 is prepared to put into place, then that should be done. If that were done by my client,
4 the claim would no longer be suitable for certification. If the points standing between
5 the class and the receipt of the award was issues related to the funder's return.

6 THE CHAIRMAN: Okay. Well, let's hope we never go down there. You don't need to
7 worry about that, at this stage.

8 MR MOSER: That is an interesting gauntlet. I think jurisdictionally, I would say that
9 is not --

10 THE CHAIRMAN: Whether it is right or wrong, we have better things --

11 MR MOSER: [Overspeaking] take into account.

12 THE CHAIRMAN: She was perfectly entitled to say what she wanted to say. But, at
13 the end of the day, just be pragmatic. If we can get it over the line, we are going to
14 get it over the line. We are all friends here. We don't need to have jury points with
15 me. Don't worry.

16 Okay. Let's rise. Let me speak to my colleagues and we are just going to discuss
17 between ourselves the, sort of, three possible scenarios that have been just floated
18 now. We will indicate which ones, if any, are acceptable. I have to speak to them first.
19 Then you will have an idea that can help focus the discussions.

20 But, you know, no one is being forced to make a decision today. You will need to
21 make a decision by 2 o'clock tomorrow if we need to come back. If decisions are made
22 today, then I can give a decision today. But if they are not made today, then we can
23 do it tomorrow. But I do have other cases and as from next Monday, I am not in the
24 jurisdiction because I have a number of other cases abroad that I have to deal with
25 and I won't be back until June. So we do have to finish this, one way or another, this
26 week.

1 MR MOSER: We do anyway, of course, because in reality this is the last chance
2 saloon.

3 THE CHAIRMAN: Yes. This is the last chance saloon. Okay. Thank you.

4 (A short adjournment)

5

6 RULING (extracted)

7

8 Submissions by MR MOSER, KC

9 MR MOSER: I can. Then I would like to say something about certain non-ringfenced
10 costs --

11 THE CHAIRMAN: But it is a bit difficult for us to deal with that, because we are meant
12 to deal with that at a later stage. But I do want to be in a position tomorrow to deal
13 with the ringfenced costs, because I can see it is necessary for you to know where you
14 are, rather than pushing it off in the normal way to some other further hearing.

15 MR MOSER: Well, what is certainly the case is that the ringfenced costs and the figure
16 are part of a settlement agreement.

17 THE CHAIRMAN: I understand that. Of course.

18 MR MOSER: So, yes, that is for tomorrow.

19 THE CHAIRMAN: It is for tomorrow. Yes.

20 MR MOSER: The non-ringfenced costs are not for tomorrow.

21 THE CHAIRMAN: Correct.

22 MR MOSER: The cap on the non-ringfenced costs is for tomorrow. So there is a cap
23 of 9.85 million.

24 THE CHAIRMAN: We can discuss that today. Yes. That's fine.

25 MR MOSER: And that reduces pound by pound, depending on the take-up.

26 THE CHAIRMAN: Correct.

1 MR MOSER: One aspect of this, and this is the difficulty in discussions, you have
2 mentioned five alternatives. I am going to put a sixth alternative, because everyone
3 is putting all their cards on the table.

4 THE CHAIRMAN: Of course you can put another alternative. It is just then I would
5 not have had an opportunity to discuss it with my colleagues.

6 MR MOSER: We still have a little time here.

7 THE CHAIRMAN: Yes. I can add it on to the list, don't worry.

8 MR MOSER: So that would be, if it were possible, to adjust the non-ringfenced cost
9 cap to, say, 11 million. That is, from our internal discussion, something that would
10 allow the class representative to accept either alternative to --

11 THE CHAIRMAN: What you are saying is the ringfenced costs stay at the same.

12 MR MOSER: Yes.

13 THE CHAIRMAN: And that the non-ringfenced costs, you are saying, if we move that,
14 what, from 9.85 million to 11 million, is that what you are suggesting?

15 MR MOSER: Yes. It is only an upper figure. I mean, to some extent, illusory. But if
16 the money is there, it is an upper figure up to which costs could be recovered in the
17 discretion of the Tribunal.

18 THE CHAIRMAN: Let me just look that up. But the problem with that is that at the
19 moment, the proposal for the defendant is looking at it, any of the probabilities we have
20 looked at for the moment, the likelihood in my view -- and I may be wrong -- is they
21 are never going to have to pay more than 9.85 million. That's the likelihood.

22 MR MOSER: Indeed. Yes.

23 THE CHAIRMAN: What you are saying is that actually they should come up with a bit
24 more on the table so that would be more acceptable to you. I am just saying it. I think
25 that's what you are saying.

26 MR MOSER: Yes.

1 THE CHAIRMAN: But that is something we can't actually impose on them, because it
2 is actually a requirement. That is something, of course, you can discuss in your
3 negotiations. But we would --

4 MR MOSER: I mean, I can't see it would be objectionable to the Tribunal, so perhaps
5 you don't need time. I just mention it to illustrate the sort of tension that the Tribunal --

6 THE CHAIRMAN: Mr Moser, I can say from my point of view that whether the cap is
7 at 9.85 million or 11 million, both figures are acceptable to the Tribunal, for obvious
8 reasons. The obvious reason is that, in my view, rightly or wrongly, the valid claims
9 coming in will fall well short of the figure of 9.85 million.

10 In my view, looking at the experience in the States, looking at the forms and looking
11 at where we are, I think that the figure is likely to be very substantially less than
12 9.85 million. I may be wrong on that, but that is my assessment, having read all the
13 stuff and the literature and the experience in America and all the stuff you have given
14 me. I do not see this as a case where there is any significant likelihood of the valid
15 claims coming in anywhere near the figures of 9.85 million. But I may be wrong on
16 that.

17 But it is good that you outline another possibility. All I can say is that whether it is
18 11 million or 9.85 million, that is in principle not objectionable to the Tribunal.

19 Then can we now deal with the 4.75 million?

20 MR MOSER: Yes. So, the short story of the 4.75 million is that they are substantially
21 short of the costs that will in fact have been incurred by now and --

22 THE CHAIRMAN: They are substantially short of the costs incurred to date by pro
23 rata-ing the costs between the three claims.

24 MR MOSER: Exactly.

25 THE CHAIRMAN: Do we know what the cost to date is?

26 MR MOSER: Well, the updated statement of costs is dealt with in Mr Gutmann's fourth

1 witness statement, which is bundle A --

2 THE CHAIRMAN: Well, just give me the figure. I trust that you are not going to
3 misrepresent.

4 MR MOSER: No. The exact figure for -- I'm just going to --

5 THE CHAIRMAN: Just use that figure. That's fine.

6 MR MOSER: I remembered it was slightly complex. So given a range of around 10
7 to around 12-point something. We have taken a mid-point of 11.4 million. The reason
8 for that is that it depends on whether -- it is rather recondite -- whether the funder's fee
9 comes out of ringfenced or non-ringfenced monies. So it is in the region of a mid-point
10 of, say, 11 million.

11 THE CHAIRMAN: Around let's say 11 million. Does that include any CFA uplifts or
12 not? No CFA uplifts?

13 MR MOSER: That does include the CFA uplift. You will find that in Mr Burnett's
14 witness statement at paragraph --

15 THE CHAIRMAN: Well, it includes the CFA uplift of \times --

16 MR MOSER: Paragraph 22 of Burnett 1, sir.

17 THE CHAIRMAN: Don't worry. It includes the CFA uplift of \times on legal fees.

18 MR MOSER: It is more complicated than \times , but I am giving --

19 THE CHAIRMAN: Yes. It is a rough thing.

20 MR MOSER: -- a rough indication. The price that is being paid, as it were, for that
21 figure is that there is the opportunity for some recovery out of non-ring fenced costs, if
22 there are any.

23 THE CHAIRMAN: The way I am at, at the moment, is that the ring fenced costs of
24 4.75 to me seems perfectly acceptable. I just wanted you just to take me through it,
25 at least so I can say you have taken me through it and I am satisfied.

26 MR MOSER: I am grateful.

1 THE CHAIRMAN: You have done that, so you don't need to worry. So we have
2 approved the non-ring fenced costs, subject to everything else. We are satisfied that
3 the basic requirements in section 49A are met, subject to this one. The only real
4 outstanding issue is the fair and reasonable point. That is 49A, subsection 5. That is
5 all that is really left; everything else is fine.

6 We have got the options that you are going to discuss amongst yourselves and you
7 have a clear indication that where we are on the various possibilities and the three
8 possibilities which are acceptable are collapse pots two and three, 6 million, but we
9 would prefer an extra million going in, just to make sure we have enough buffer on
10 that. So ideally, we would want 7 million.

11 The other option is allow the waterfall between pots two and three, 6 million, that
12 seems to work. The waterfall from pot one of up to 9.85 million, that also works. But
13 you will know what the parameters are and what works and what won't work and I'm
14 sure you will all do your best to try and get there by 2 o'clock tomorrow.

15 MR MOSER: Thank you. My learned friend rises, no doubt to agree with me.

16 THE CHAIRMAN: I don't know. Normally she is quite disagreeable today, I don't
17 mean in a pejorative way.

18 MS ABRAM: I am glad I no longer have to rely on judicial reference.

19 Thank you, sir. I wanted to say something about the 9.85 million and the 11 million
20 and the damages sum. Sir, that proposal puts us in an extraordinary position where
21 a class representative is saying that a proposed settlement structure is no longer
22 acceptable, because too much money would go to the class and too little money would
23 go to the funder under it. The only driver of the change, the proposed change from
24 9.85 million to 11 million--

25 THE CHAIRMAN: I understand that. Ms Abram, what I have said about that option is
26 that as a Tribunal if the parties agree that, we are neutral. Okay? But what really

1 matters is whether or not you come up with something that fulfils option two, preferably
2 as amended to make it 7 million rather than 6 million. Option three, which is waterfall
3 from pots two to three and it is 6 million. And option four, which is waterfall from pot
4 one up to whatever, 9.85 million.

5 If you come up with any one of those three, you know that it will be acceptable. But
6 on option six, which is something else, we are completely neutral because that does
7 not really affect the options that are acceptable to the Tribunal.

8 You don't need to agree. You don't need not to agree. It is not really something that
9 will factor in the decision that we have to make.

10 MS ABRAM: I think, if I may say so, sir, I think you might have misunderstood the
11 scope of Mr Moser's proposal. I think what he is actually saying is that even under
12 options two or three -- so you have a combined 6 million, 7 million pot waterfall
13 between two and three -- the damages sum should also go up from 9.85 million to 11
14 million under one of those. So it is not just a proposal directed to option six, as I
15 understand it.

16 If I am wrong about that, then I will stop complaining, because we are happy with
17 option three, certainly, with the waterfall or option two with £6 million. But my
18 understanding was that the 9.85 million to 11 million was intended to apply to all
19 options.

20 MR MOSER: Well, I mean, option six is that option. So option six, I suppose, stands
21 on its own. I agree it is not for the Tribunal. It is really just to illustrate the tension that
22 exists and where the problems may lie.

23 THE CHAIRMAN: Yes. Look, I understand that. It is not for us to take a view on
24 option six, but we have taken a view on options two, three and four as being
25 acceptable. But if we are going to go for option two, we would prefer it to have 7 million
26 rather than 6 for reasons I can explain, but I don't think I need to.

1 But you are saying from your point of view options three and four -- which options are
2 you accepting?

3 MS ABRAM: So we are content with -- I thought it was option three, the one with the
4 waterfall from pot two to three with £6 million in two and three together. The version
5 of option two with £6 million in pot three, which I proposed, where you have said you
6 would like ideally 7 million --

7 THE CHAIRMAN: Correct, for reasons I can explain. But I think if you are saying you
8 will allow waterfall between pots two and three, you probably would want to go for that
9 rather than 7 million in option two.

10 MS ABRAM: Yes.

11 THE CHAIRMAN: That is rational. I'm not saying you should or you shouldn't. All I'm
12 saying is what is acceptable and what isn't.

13 MS ABRAM: Yes. And for the avoidance of doubt, all of those apply on the basis of
14 9.85 million damages sum. So if that is the relevant damages sum for options two or
15 three --

16 THE CHAIRMAN: Yes, of course. That is fully understood. If someone could come
17 up with a pot three wording overnight that if everything falls into place, we can actually
18 make an order and you don't need to worry about stay. I can see the clock is ticking
19 and that, you know, you have work to do amongst yourselves and maybe further
20 discussions need to be had.

21 Unless anyone wants to say anything? Yes. Sorry.

22 MR BOURKE: James Bourke for First MTR.

23 THE CHAIRMAN: Yes, okay.

24 MR BOURKE: I am sorry to disturb the Tribunal with this point now. It seems
25 a relatively minor procedural point. But we, of course, look at things differently
26 because we are heading straight towards trial.

1 THE CHAIRMAN: You are, yes.

2 MR BOURKE: I want to just raise one specific procedural issue with respect to
3 Mr Lawrence's report. We have made an application that the report be limited to use
4 in the settlement proceedings and not released to any third parties. We would be
5 grateful if the Tribunal would issue that order and I can explain why.

6 THE CHAIRMAN: The thing is what we have is, as you know, to look at open justice
7 and there are stringent requirements as to what restrictions we can impose. But if I
8 can put it this way, I am content for the full report of Mr Lawrence not being made
9 publicly available, even though it has been referred to in open court. But that we will
10 want to make available -- and probably, now you have said it, I will put it in the
11 judgment -- the conclusions at paragraph 4.1 to, I think, 4.5. That, I think, should be
12 in the public domain because they summarise his conclusions.

13 If you look at that, is that acceptable to you? 4.1 to 4.5. You may need to look at it
14 now. Let's get this resolved. Let me get my copy.

15 Can you give me the bundle page reference to it? I think it is 282.

16 MR BOURKE: 299.

17 THE CHAIRMAN: 299 is the relevant page. So let's look at that.

18 MR BOURKE: Of course, our concern -- and we know the Tribunal will be sensitive
19 to this -- that we are heading towards trial. We just want to make sure that anything
20 said publicly, whether in a hearing or in a ruling, would not potentially impact on the
21 merits of the case against us.

22 THE CHAIRMAN: I think when you look at the conclusions, I don't think it does.

23 MR BOURKE: No, except perhaps 4.2, if read in isolation, it might be misunderstood.
24 I mean, when it is taken in the context of the entire report --

25 THE CHAIRMAN: But you can't have your cake and eat it. The thing is we have to
26 have open justice. If we approve this settlement, the public needs to know the reasons

1 | why and one of the reasons is Mr Lawrence has provided this report and it is one of
2 | the criteria that the Tribunal take into account in deciding whether or not to prove. I
3 | would want to have in the public domain the whole of paragraph 4, for that reason.
4 | Now, of course, it is in the context of a full report and I don't think any judge is likely to
5 | read anything into it at trial. I would be really surprised if the class representative at
6 | trial says, or anyone says at trial, that this should bind a court that hears all the
7 | evidence and the submissions of the parties. I think it is fine.

8 | MR BOURKE: Understood and we are fine with that. Our concern was not what the
9 | class representative would try to do and I have been told that they won't try and use
10 | this report at trial.

11 | THE CHAIRMAN: Of course they wouldn't.

12 | MR BOURKE: My concern was more that obviously there is a high level of public
13 | interest in this hearing, because it's the first settlement hearing in an abuse of
14 | dominance case, and there is interest in all aspects of that amongst the profession.
15 | We just want to try and avoid any, kind of, publications or people commenting on the
16 | report widely before the hearing. We just thought that could be potentially adverse.
17 | But we are fine with what you are proposing. I am very grateful.

18 | THE CHAIRMAN: That's fine. You are entirely right to point it out. This is more
19 | complicated given that there are pending proceedings. Quite often you approve
20 | a settlement and that is the end of it and there is no one that has any interest to use
21 | what is said in the future. Whereas there is an interest here.

22 | MR BOURKE: Yes. That's right. It is different from normal open justice cases.

23 | THE CHAIRMAN: But you have to realise that the Chairman is a very experienced
24 | judge. When he comes to look at this, he is not going to be influenced at all what has
25 | been posted on Facebook or something like that. He is just going to decide the
26 | evidence that he hears.

1 MR BOURKE: Understood. I am grateful.

2 THE CHAIRMAN: That is absolutely fine. So let me note that down. (Pause)

3 So the report of Mr Lawrence is not to be made publicly available and if anyone makes
4 a request for a copy of the report from the Tribunal, any such request be on seven
5 days' notice to each of the parties and then each of the parties will be entitled to be
6 heard on whether or not the full report should be made available to anyone requesting
7 it. On that basis, someone is going to have to draft an order that deals with that and
8 with the carve out in relation to paragraphs 4.1 to 4.5.

9 We will need a proper order for that so if you can bring that tomorrow, we will make
10 that. Thank you very much.

11 MR BOURKE: [Overspeaking] shall draft that order, I think. Thank you.

12 THE CHAIRMAN: That's brilliant. Thank you very much.

13 Okay. So I will see everyone tomorrow at 2.00. If you have any progress in advance
14 of that, tell us what the parameters are because I am intending, if I can, to give
15 judgment at 2.00. I need to get my mind round if it is going to be something different
16 from what we have had, I am going to have to factor that in. Thank you very much.

17 MR MOSER: Before you rise, I take it you won't need all the witnesses to attend again
18 tomorrow?

19 THE CHAIRMAN: No. I think I don't need any witnesses tomorrow because it has
20 turned out in a way that hopefully we are going into the right view and that I would
21 have probably wanted to hear Mr Lawrence if there was going to be anything that was
22 going to be difficult. Because I would want to hear his views on certain things. But if
23 we are going to go down this route, then I don't need to hear from him.

24 MR MOSER: Right. Thank you.

25 THE CHAIRMAN: Okay. Thank you very much.

26 (The hearing adjourned)