Neutral citation [2024] CAT 32

Case No: 1304/7/7/19

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

10 May 2024

Before:

HODGE MALEK KC
(Chair)
HUGH KELLY
EAMONN DORAN

Sitting as a Tribunal in England and Wales

BETWEEN:

JUSTIN GUTMANN

Joint Applicant and Class Representative

- v –

(1) FIRST MTR SOUTH WESTERN TRAINS LIMITED

Non-Settling Defendant

(2) STAGECOACH SOUTH WESTERN TRAINS LIMITED

Joint Applicant and Defendant

Heard at Salisbury Square House on 29 and 30 April 2024

JUDGMENT (SSWT COLLECTIVE SETTLEMENT)
(NON-CONFIDENTIAL VERSION)

APPEARANCES

Mr Philip Moser KC, Mr Stefan Kuppen, and Ms Alexandra Littlewood (instructed by Charles Lyndon Limited) appeared on behalf of Mr Gutmann.

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

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

Note: Excisions in this Judgment (marked "[✂]") relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

A. INTRODUCTION

1. This is a joint application for a collective settlement approval order ("**CSAO**"), pursuant to rule 94 of the Competition Appeal Tribunal Rules 2015 No. 1648 (the "**Tribunal Rules**") (the "**CSAO Application**"), which is made by the Class Representative ("**CR**") and the Second Defendant, Stagecoach South Western Trains Limited ("**SSWT**"), regarding the proposed settlement between them (the "**Proposed Settlement**").

2. The CSAO Application is made in the context of collective proceedings combining standalone claims under section 47A of the Competition Act 1998 (the "**CA 1998**") for damages for alleged losses caused by the Defendants' alleged abuse of an alleged dominant position in the relevant passenger rail service market in breach of section 18 of the CA 1998. It is claimed that SSWT (along with the other Defendant) did not make so-called 'boundary fares' or 'extension tickets' sufficiently available for purchase for travel on its services and/or failed to use its best endeavours to ensure that there was a general awareness among its customers of boundary fares, so as to enable customers to buy an appropriate fare in order to avoid being charged twice for part of a journey. This is alleged to have resulted in Class Members being double-charged for part of the service provided to them. SSWT disputes each and every element of the alleged wrongdoing.

B. THE COLLECTIVE PROCEEDINGS

3. The claims in these proceedings relate to travel on routes that formed part of the South Western franchise. They were filed on 27 February 2019 together with similar claims relating to the Southeastern franchise (respectively, the "**SW Proceedings**" and "**SE Proceedings**"). Further claims in relation to travel on Thameslink, Southern, Great Northern, and Gatwick Express routes were filed on 24 November 2021 (the "**GTR Proceedings**").

4. The Collective Proceedings Order ("**CPO**") application hearing in the SW and SE Proceedings took place on 9 to 12 March 2021. On 19 October 2021, both the SW and SE Proceedings were certified, and the claims were held to raise

common issues and be suitable to be brought in collective proceedings. All appeals against certification were dismissed by the Court of Appeal on 28 July 2022: [2022] EWCA Civ 1077 ("***Gutmann CA***").

5. The claims in the GTR Proceedings have also been approved as suitable to be brought in collective proceedings, following a CPO application hearing on 22 March 2023. The Tribunal subsequently ordered that the SW, SE and GTR Proceedings be case-managed and heard together.

6. Further to the above, the Tribunal ordered on 7 July 2023 that the SW, SE and GTR Proceedings be tried together at three separate hearings:

   (1) on the issue of abuse, with a trial listed for 3-4 weeks starting on 17 June 2024 ("**Trial 1**");

   (2) on causation and quantum, with a trial listed for 2-3 weeks starting in June 2025; and

   (3) lastly, on market definition and dominance, with a trial date yet to be fixed, but likely to take place in 2026.

   A pre-trial review for Trial 1 was held on 9 May 2024.

C. THE CSAO APPLICATION

7. The CSAO application is supported by a great deal of evidence. It consists of:

   (1) The fifth witness statement of Mr Justin Gutmann, the CR, together with a copy of the agreed settlement agreement between the CR and SSWT.

   (2) The fourth expert report of Mr Derek Holt, of AlixPartners UK LLP, the CR's economic expert, setting out his calculations of figures relevant to the assessment of whether the proposed settlement is just and reasonable, including addressing, *inter alia* (i) the total number of Represented Persons (as defined in the Settlement Agreement) entitled to a share of the settlement; (ii) how the Represented Persons' loss has

been calculated; and (iii) the range of possible recoveries in the individual claims against SSWT.

(3) The first expert report of Mr Robin Noble, of Oxera Consulting LLP, SSWT's economic expert, setting out his analysis of the methodology and assumptions used in Mr Holt's expert report. Unlike Mr Holt, Mr Noble has had the benefit of access to data held by SSWT.

(4) The first witness statement of Mr Rodger Burnett, the Director at Charles Lyndon Limited with conduct of these proceedings for the CR.

(5) The first witness statement of Ms Sarah Bradley, the Head of Legal of Stagecoach.

(6) The first witness statement of Ms Catriona Munro, the consultant at Dentons with conduct of these proceedings for SSWT.

(7) The first expert report of Mr Jon Lawrence, an independent expert with over 20 years' experience in litigating and settling competition damages claims.

8. The CR and SSWT (together, the "**Settling Parties**") applied for a stay of the collective proceedings against SSWT. By the Reasoned Order of the Tribunal dated 28 March 2024, the Settling Parties' application was refused.

9. The claims to be settled by the Proposed Settlement relate to SSWT's alleged share of liability in respect of the CR's claims for standalone damages in the SW Proceedings. The SW Proceedings will continue in respect of the potential liability attributable to the "**Non-Settling Defendant**", First MTR South Western Trains Limited. Any liability SSWT may have and any liability of the Non-Settling SW Defendant relate to separate periods of time during which each operated the South Western franchise, and there is no overlap in their respective potential liabilities.

10. At the time of filing the CPO application in the SW Proceedings, the CR's economic expert, Mr Holt, estimated the overall quantum of the claims, pre-interest, against both of the defendants to the SW Proceedings to be around £57 million in aggregate (excluding interest), in relation to (i) UK domiciled class members only; and (ii) the period from 1 October 2015 to 31 January 2019 only (of which only 1 October 2015 to 20 August 2017 relates to the claim against SSWT). The figure of £38.99 million represents the CR's estimate of SSWT's alleged share of liability.

11. The CR and SSWT seek the Tribunal's approval to settle the CR's claim against SSWT in the SW Proceedings.

12. The CR and SSWT have agreed to settle the part of the SW Proceedings brought against SSWT specifically, as set out in the Re-Amended Claim Form in the SW Proceedings (the "**SSWT Claim**"). No agreement on settlement has been reached with the other Defendant in these proceedings, or the Defendants in the SE or GTR proceedings.

(1) The Original Proposed Settlement

13. This CSAO application is made to the Tribunal on the basis of an agreement between the Settling Parties that, subject to the Tribunal making a CSAO, in full and final settlement of the collective proceedings against SSWT and without any admission of liability, SSWT will:

    (1) Allocate a total settlement sum of up to £25 million (the "**Damages Sum**") to three "**Pots**", each of which has different evidential thresholds, to provide redress to Represented Persons in accordance with the Notice and Administration plan for the settlement scheme (the "**N&A Plan**") prepared by claim administrators, "**Epiq**".

    (2) Pay to the CR £4.75 million in respect the CR's costs, fees and disbursements prior to distribution (the "**Ringfenced Costs**"), to be paid within 21 days of notice being given under Rule 94(13) of the Tribunal Rules. The starting point of the negotiations was that one-third of the

CR's costs, fees and disbursements incurred up to 31 July 2023 would be in principle recoverable, either from SSWT or the CR, minus the costs awards already made in the SW Proceedings and SE Proceedings. Given the uncertainty of the litigation and recoverability of costs, the Settling Parties agreed on £4.75 million.

(3) Pay to the CR £750,000 (including VAT) by way of contribution to the CR's costs of notifying and distributing the Damages Sum to Represented Persons (the "**Notification and Distribution Costs**"), to be paid within 21 days of notice being given under Rule 94(13) of the Tribunal Rules.

(4) Pay, in respect of the CR's costs, fees and disbursements in relation to the proceedings against SSWT and so far as actually and properly incurred up until the date of the Stakeholder Hearing (and after taking account of the Ringfenced Costs already paid), up to a maximum of £9,850,000 (the "**Non-Ringfenced Costs**"). Non-Ringfenced Costs will be payable upon the completion of the distribution of the Damages Sum to Represented Persons, and upon application by the CR to the Tribunal for an order to allocate any undistributed damages sum (up to a maximum of £9.85m) towards such costs, fees and disbursements. The sum of £9.85m will reduce pound for pound to Class Members who, in accordance with Rule 82 of the Tribunal Rules: (i) have not opted out of the proceedings against SSWT; or (ii) if not domiciled in the United Kingdom at the domicile date in the proceedings against SSWT (i.e. 19 October 2021) have opted into the proceedings ("**Represented Persons**").

14. The Damages Sum will be allocated to the three different Pots, each with a different evidential threshold required for eligible Represented Persons to be able to make a valid claim for payment from the Damages Sum. The Pots operate as follows:

(1) Pot 1: £19,000,000 will be allocated to Pot 1. Of this Pot, £15,390,000 shall be allocated to Represented Persons who purchased their fares

directly from SSWT for use on its services; the remaining £3,610,000 shall be allocated to Represented Persons who purchased their fares from third party retailers for use on SSWT's services. The amount payable to each Represented Person under Pot 1 will be the actual difference in price between the fare paid for by Represented Persons and the appropriate boundary fare. There will be no limit on the number of claims a Represented Person can make in relation to Pot 1.

(2) Pot 2: £4,000,000 will be allocated to Pot 2. Of this Pot, £3,240,000 shall be allocated to Represented Persons who purchased their fares directly from SSWT for use on its services; the remaining £760,000 shall be allocated to Represented Persons who purchased their fares from third party retailers for use on SSWT's services. The maximum that will be paid out per claim is £5 and there will be a maximum of 20 claims per Represented Person (with a limit of £100 in total payable per Represented Person).

(3) Pot 3: £2,000,000 will be allocated to Pot 3. Of this Pot, £1,620,000 shall be allocated to Represented Persons who purchased their fares directly from SSWT for use on its services; the remaining £380,000 shall be allocated to Represented Persons who purchased their fares from third party retailers for use on SSWT's services. The maximum that will be paid out per claim is £5 and there will be a maximum of six claims per Represented Person (with a limit of £30 in total payable per Represented Person). If there are remaining funds in Pots 2 or 3 (requiring less evidence), the amount unclaimed will be transferred to the pot requiring more evidence, i.e. Pot 1 or Pot 2, and recovered by Represented Persons on the basis of the requirements applicable to that Pot.

(4) In order to make a claim, each claimant was required to complete a claim form with specified information as to each journey taken, including date and starting and end points for travel. For Pot 1 a higher level of proof of purchase of train ticket and Transport for London ("**TfL**") travelcard was required. It was said that among other sources of evidence, many claimants would be able to get bank and credit card statements going

back to 2015 to 2017 to provide proof of payment for journeys and if they did so, would then be able to claim under Pot 1 or Pot 2.

15. The restrictions on the sum payable per claim and per Represented Person in Pots 2 and 3 are designed to balance the need to ensure that the Pots are accessible to a large number of Represented Persons, even where those Represented Persons have limited or no evidence of the relevant purchases, against the likely value of each Represented Person's claims. In particular, Mr Holt estimates that the average journey saving per Represented Person (had they purchased a Boundary Fare) is between £3.85-£5.11 and the average total loss per Represented Person is £27.90. Accordingly, the caps on claim value on Pot 2 and Pot 3 (i.e. £5) and the caps per Represented Person in Pot 2 (i.e. £100) and Pot 3 (i.e. £30) provide for an over-allowance relative to Mr Holt's estimates. The removal of these caps in Pot 1 enables those with fuller evidence to support their claims to recover the full value of any claim (subject to the overall limit of the Pot size).

16. Additionally, a smaller proportion of the Damages Sum has been allocated within each of the Pots in relation to claims from Represented Persons who purchased tickets for journeys on SSWT's services from third parties because (i) ticket sales by third parties for journeys on SSWT's services represent only c.38% of the total sales relevant to the CR's claim, and (ii) that figure has been discounted by 50% on the basis that, SSWT's position is that it is not liable for such sales, the CR's position is that ticket sales by third parties raise certain evidential challenges within the context of the proposed settlement, and SSWT have accounted for the inherent uncertainty of the litigation. On that basis, the Settling Parties have allocated a sum of £4.75 million to such claims. This sum has been allocated on a *pro rata* basis, and accordingly, 76% has been allocated to Pot 1, 16% to Pot 2 and 8% to Pot 3.

17. If, after the end of the "**Claim Period**" (i.e. the six month period from the end of the "**Preparation Period**", which is a two month period from the date on which notice is given in the form and manner approved by the Tribunal pursuant to Rule 94(13) of the Tribunal Rules), the amount claimed from any Pot (or sub-

part) exceeds or is less than the sum available in that Pot (or sub-part), the sums shall be re-allocated between Pots as follows:

(1) If the total claim value on any Pot exceeds the allocated funds for the relevant part of the pot, the amounts claimed within the Claim Period would be proportionally reduced in that part of the pot on a *pari passu* basis. For example, if claims in relation to sales by third party retailers on Pot 2 total £950,000 (that is, a 25% over subscription), each claim shall be reduced by 20%, and accordingly a maximum of £4 shall be payable per claim.

(2) If there are remaining funds in Pots 2 or 3 (requiring less evidence), the amount unclaimed in the relevant Pot will be transferred to the Pot requiring more evidence, i.e. Pot 1 or Pot 2, and recovered by Represented Persons on the basis of the requirements applicable to that Pot.

(3) If there are remaining funds in the part of a Pot allocated to those who purchased tickets from third party retailers, that amount will be added to the part of the same Pot allocated to those who purchased their tickets directly from SSWT. If such sums remain unclaimed at the end of the Claim Period, such sums will be transferred to a Pot requiring more evidence. This is designed to ensure that, regardless of the quantum of claims on the parts of Pots 2 and 3 that are allocated to claims in respect of purchases from third party retailers, the total amount allocated to these Pots (respectively £2,000,000 and £4,000,000) will be available on the same evidential basis before any sum is transferred to a Pot with a higher evidential threshold.

18. To the extent that any of the Damages Sum remains after distribution, the parties have agreed that undistributed damages will be paid towards the Non-Ringfenced Costs, such payment to be reduced pound for pound with any damages distributed. Therefore, for example, if Represented Persons receive £6,000,000 in damages, £3,850,000 will be paid from the remaining Damages Sum towards the Non-Ringfenced Costs. This is said to be a proportionate

mechanism of allowing the CR to recover costs incurred without reducing the sum available to Represented Persons. Further, the CR will be required to make an application to the Tribunal for payment of Non-Ringfenced Costs, at a separate hearing, before any such entitlement can be enforced.

19. Since the Damages Sum is not to be paid on account or in escrow, but rather held by SSWT until it is notified of the total amount claimed by Represented Persons, the Settling Parties do not propose a reversion of the Damages Sum by way of the process envisaged in paragraph 6.125 of the Competition Appeal Tribunal Guide to Proceedings 2015 (the "**Guide**"). If, following distribution to Represented Persons and after payment of Non-Ringfenced Costs, any of the Damages Sum remains, SSWT will retain the remainder of the Damages Sum. Such circumstances are said to reflect the fact that all Represented Persons who wished to claim would have had a fair opportunity to do so, recovering the full value of the claim where they can evidence it and a significant sum even where they lack evidence. Further, this mechanism will ensure that SSWT offers fair and generous compensation to all Represented Persons and avoids overcompensation.

(2) The Modified Proposed Settlement

20. In advance of[1] and during the hearing of the CSAO Application, the Tribunal expressed concerns about the Proposed Settlement and whether its terms were just and reasonable.

21. In light of the Tribunal's concerns, the Settling Parties decided to modify the Proposed Settlement (the "**Modified Proposed Settlement**") as follows:

    (1) If there are, after the Claim Period, remaining funds not subject to a valid claim in Pot 2 or Pot 3 then:

[1] On 2 April and 23 April 2024, the Tribunal wrote to the Settling Parties with a number of observations and requests. The Settling Parties responded by way of joint letters dated 12 April and 26 April 2024.

(a) any amount unclaimed from Pot 2 will, if Pot 3 is oversubscribed, be transferred to Pot 3 and will be available to be recovered by Represented Persons on the basis applicable to Pot 3; or

(b) alternatively, any amount unclaimed from Pot 3 will, if Pot 2 is oversubscribed, be transferred to Pot 2 and will be available to be recovered by Represented Persons on the basis applicable to Pot 2; and

(c) following a transfer of any unclaimed amount from Pot 2 to Pot 3, or from Pot 3 to Pot 2, as applicable and set out in (a) and (b) above, any amount that remains unclaimed in Pot 2 or Pot 3 will be transferred to Pot 1 and will be available to be recovered by Represented Persons on the basis applicable to Pot 1. For the avoidance of doubt, there will be no transfer from Pot 1 to Pots 2 and 3.

(2) The allocation of funds in Pots 2 and 3 to direct and indirect purchasers was removed.

(3) In relation to the Non-Ringfenced Costs, the Parties agreed that, to the extent that the Notified Damages Sum is less than the Non-Ringfenced Costs Limit, and always subject to the Tribunal's order determining the Non-Ringfenced Costs following a Stakeholder Hearing, a sum (up to the difference between the Non-Ringfenced Costs Limit and the Notified Damages Sum) shall be paid by SSWT to the CR towards the Non-Ringfenced Costs up to a maximum of £10,200,000, provided that the total of the Ringfenced and Non-Ringfenced Costs to be paid by SSWT to the CR will not be more than the CR's Costs actually and properly incurred by the CR and attributable to SSWT as at the date of the Stakeholder Hearing (minus any costs awards already made in the SW and SE proceedings). Recovery of the CR's Non-Ringfenced Costs shall always be subject to the Non-Ringfenced Cost Limit of £10,200,000 (after deduction of the Notified Damages Sum). For example, if the Notified Damages Sum amounts to

£6,000,000, then no more than £4,200,000 will be paid towards the Non-Ringfenced Costs. If the Notified Damages Sum exceeds £10,200,000, the Non-Ringfenced Costs payable shall be £0.

(4) To the extent that the sum of the Notified Damages Sum and the Non-Ringfenced Costs, as determined by order of the Tribunal, is lower than the Damages Sum, the Parties agree that SSWT will retain the remainder of the Damages Sum.

(5) In relation to undocumented claims by Represented Persons, each shall include, an affidavit from a Represented Person (with a statement of truth, as set out further below) confirming: (i) the number of relevant journeys taken by the Represented Person, in whole or in part on the services of SSWT, during the Relevant Period; and (ii) that a valid Travelcard was held at the time of the relevant journey(s). Those who used season tickets and can provide evidence of such purchases would not be required to provide the dates of each journey. The requirement to provide details of each journey for those claiming under Pot 3 was removed. Instead, such claimants would simply certify the number of journeys taken in the relevant period (up to a maximum of 6) and would be paid £5 for each journey, thus providing a maximum claim amount of £30.

22. The Tribunal announced its decision at the CSAO Application hearing that it would approve the Modified Settlement Proposal and provided its reasons orally. This written judgment records the reasons for that decision.

D. THE LEGAL FRAMEWORK

23. In dealing with the CSAO application the Tribunal has to bear in mind the provisions of section 49A of the CA 1998:

> "**49A Collective settlements: where a collective proceedings order has been made**

(1) The Tribunal may, in accordance with this section and Tribunal rules, make an order approving the settlement of claims in collective proceedings (a "collective settlement") where—

(a) a collective proceedings order has been made in respect of the claims, and

(b) the Tribunal has specified that the proceedings are opt-out collective proceedings.

(2) An application for approval of a proposed collective settlement must be made to the Tribunal by the representative and the defendant in the collective proceedings.

(3) The representative and the defendant must provide agreed details of the claims to be settled by the proposed collective settlement and the proposed terms of that settlement.

(4) Where there is more than one defendant in the collective proceedings, "defendant" in subsections (2) and (3) means such of the defendants as wish to be bound by the proposed collective settlement.

(5) The Tribunal may make an order approving a proposed collective settlement only if satisfied that its terms are just and reasonable.

(6) On the date on which the Tribunal approves a collective settlement—

(a) if the period within which persons may opt out of or (in the case of persons not domiciled in the United Kingdom) opt in to the collective proceedings has expired, subsections (8) and (10) apply so as to determine the persons bound by the settlement;

(b) if that period has not yet expired, subsections (9) and (10) apply so as to determine the persons bound by the settlement.

(7) If the period within which persons may opt out of the collective proceedings expires on a different date from the period within which persons not domiciled in the United Kingdom may opt in to the collective proceedings, the references in subsection (6) to the expiry of a period are to the expiry of whichever of those periods expires later.

(8) Where this subsection applies, a collective settlement approved by the Tribunal is binding on all persons falling within the class of persons described in the collective proceedings order who—

(a) were domiciled in the United Kingdom at the time specified for the purposes of determining domicile in relation to the collective proceedings (see section 47B(11)(b)(i)) and did not opt out of those proceedings, or

(b) opted in to the collective proceedings.

(9) Where this subsection applies, a collective settlement approved by the Tribunal is binding on all persons falling within the class of persons described in the collective proceedings order.

(10) But a collective settlement is not binding on a person who—

(a) opts out by notifying the representative, in a manner and by a time specified, that the claim should not be included in the collective settlement, or

(b) is not domiciled in the United Kingdom at a time specified, and does not, in a manner and by a time specified, opt in by notifying the representative that the claim should be included in the collective settlement.

(11) This section does not affect a person's right to offer to settle opt-in collective proceedings.

(12) In this section and in section 49B, "specified" means specified in a direction made by the Tribunal."

24. The Tribunal Rules deal with this aspect in more detail, particularly in Rule 94(1) to (10):

"**Collective settlement where a collective proceedings order has been made: opt-out collective proceedings**

94.—(1) Where a collective proceedings order has been made and the Tribunal has specified that the proceedings are opt-out collective proceedings, the claims which are the subject of the collective proceedings, may not be settled other than by a collective settlement approval order issued in accordance with this rule.

(2) Any offer to settle by a defendant in the collective proceedings shall be made to the class representative.

(3) An application for a collective settlement approval order shall be made to the Tribunal by—

(a) the class representative; and

(b) the defendant in the collective proceedings, or if there is more than one defendant, such of them as wish to be bound by the proposed collective settlement.

(4) The application referred to in paragraph (3) shall—

(a) provide details of the claims to be settled by the proposed collective settlement;

(b) set out the terms of the proposed collective settlement, including any related provisions as to the payment of costs, fees and disbursements;

(c) contain a statement that the applicants believe that the terms of the proposed settlement are just and reasonable, supported by evidence which may include any report by an independent expert or any opinion of the applicants' legal representatives as to the merits of the collective settlement;

(d) specify how any sums received under the collective settlement are to be paid and distributed;

(e) have annexed to it a draft collective settlement approval order; and

(f) set out the form and manner by which the class representative proposes to give notice of the application to—

(i) represented persons, in a case where it is expected that paragraph (11) will apply; or

(ii) class members, in a case where it is expected that paragraph (12) will apply.

(5) Unless the Tribunal otherwise directs, the signed original of the application for a collective settlement approval order shall be accompanied by five copies of the application and its annexes certified by the class representative or its legal representative as conforming to the original.

(6) On receiving an application for a collective settlement approval order, the Tribunal may give any directions it thinks fit, including—

(a) for the confidential treatment of any part of an application for a collective settlement approval order;

(b) for the giving of or dispensing with the notice referred to in paragraph (4)(f);

(c) for further evidence to be filed on the merits of the proposed collective settlement;

(d) for the hearing of the application.

(7) Any represented person or, in a case where paragraph (12) applies, any class member may apply to make submissions either in writing or orally at the hearing of the application for a collective settlement approval order.

(8) At the hearing of the application, the Tribunal may make a collective settlement approval order where it is satisfied that the terms of the collective settlement are just and reasonable.

(9) In determining whether the terms are just and reasonable, the Tribunal shall take account of all relevant circumstances, including—

(a) the amount and terms of the settlement, including any related provisions as to the payment of costs, fees and disbursements;

(b) the number or estimated number of persons likely to be entitled to a share of the settlement;

(c) the likelihood of judgment being obtained in the collective proceedings for an amount significantly in excess of the amount of the settlement;

(d) the likely duration and cost of the collective proceedings if they proceeded to trial;

(e) any opinion by an independent expert and any legal representative of the applicants;

(f) the views of any represented person in a case to which paragraph (11) applies, or of any class member in a case to which paragraph (12) applies; and

(g) the provisions regarding the disposition of any unclaimed balance of the settlement, but a provision that any unclaimed balance of the settlement amount reverts to the defendants shall not of itself be considered unreasonable.

(10) A collective settlement approval order may specify the time and manner by which—

(a) a represented person or class member, as the case may be, who is domiciled in the United Kingdom on the domicile date may opt out of the collective settlement; and

(b) a represented person or class member, as the case may be, who is not domiciled in the United Kingdom on the domicile date may opt in to the collective settlement.

…"

25. The Guide provides even further detail, and at paragraph 6.125 sets out the factors to be taken into account in considering whether a collective settlement is just and reasonable:

"In considering whether a collective settlement is just and reasonable, the Tribunal will take into account all relevant circumstances, including the specific factors listed in Rules 94(9) and 97(7). While Rule 94(9) applies to settlements of collective proceedings and Rule 97(7) applies to direct collective settlements, the factors are broadly the same in both scenarios. These factors are as follows:

- *The amount and terms of the settlement*

  The Tribunal's consideration of the amount and terms of the settlement will include the monetary and non-monetary benefits offered by the settling defendant, as well as any related provisions as to the payment of costs, fees and disbursements. In particular, the Tribunal may consider the amount allocated to costs, fees and disbursements as a proportion of the overall settlement. Where legal costs make up a significant proportion of the settlement funds, the Tribunal will scrutinise whether this allocation is appropriate and will be alert to any potential conflict of interest between the class (or settlement) representative and its lawyers on the one hand and the class members on the other hand.

  The Tribunal will also consider carefully the terms of any waiver or release contained in the proposed settlement agreement.

- *The number or estimated number of persons likely to be entitled to a share of the settlement*

  The number of persons who may be able to claim a share of the settlement will influence the Tribunal's overall assessment of the settlement amount and terms. A settlement may incorporate a provision whereby either party has a right to cancel the settlement in the event that a specified opt-out threshold is exceeded.

The Tribunal may also consider how class members will be required to claim their entitlement in order to ensure that the applicable conditions or procedures are not overly onerous or complicated so as to discourage or hinder legitimate claims.

- *The likelihood of judgment being obtained in collective proceedings for an amount significantly in excess of the amount of the settlement*

  When considering the likelihood of judgment being obtained in collective proceedings for more than the amount of the settlement, the Tribunal need not conduct a detailed analysis of the claims to determine what it would have awarded in damages (if anything) following a trial. Rather, the Tribunal will adopt a broad brush assessment of the position, having regard to the prospect of success and estimated quantum of damages.

- *The likely duration and costs of the collective proceedings if they proceeded to trial*

  This factor is intended to reflect the often costly and time consuming nature of legal proceedings. In light of the additional time and cost of taking a case to trial, it may be preferable to approve a settlement even though a somewhat higher damages award might be granted after trial.

- *Any opinion by an independent expert and any legal representative of the applicants*

  As well as considering the written opinion of an independent expert and/or the lawyers advising the class (or settlement) representative and the settling defendant(s), the Tribunal may require that person to attend the settlement approval hearing and be questioned in relation to their opinion (in a closed hearing if necessary). In giving their opinion to the Tribunal, experts and legal representatives are reminded of their professional duties to the Tribunal. Their role is of particular importance where a CSAO is sought for a direct collective settlement: when there are no collective proceedings, the difficulty for the Tribunal is all the greater in assessing whether the proposed terms are just and reasonable.

- *The views of any represented person / class member / settlement class member (as appropriate)*

  As the principal parties to the collective settlement approval application are agreed on the settlement, class objectors provide the closest thing to an adversarial testing of the settlement terms. Therefore, the Tribunal will consider carefully what any objectors have to say about the settlement to ensure that the class members' interests are served by the settlement. The Tribunal will not, however, infer from a lack of objectors that the settlement is likely to be just and reasonable.

- *The provisions relating to the disposition of any unclaimed balance*

  The Tribunal will consider what will happen to any unclaimed settlement sums. Unlike damages awards in collective proceedings, unclaimed sums may revert to the defendant: Rules 94(9)(g) and 97(7)(g). Reversion to the defendant will not of itself be considered unreasonable, but where a settlement includes provision for reversion, the Tribunal may be concerned to see whether this is conditional upon a threshold of take-up of the

settlement fund. For example, a settlement that could result in substantial fees being paid to the lawyers of the class (or settlement) representative and a significant part of the settlement sums being paid back to the defendants, while future claims by class members are barred, is unlikely to be viewed as just and reasonable. A settlement may include provision for all or part of the unclaimed balance be paid to the Access to Justice Foundation, as in the case of a judgment in opt-out collective proceedings: paragraph 6.89 above."

26. The Guide also refers to the possibility of barring orders where there is a settlement with one but not other defendants, and that is dealt with at paragraphs 6.130 and 6.131:

> "**Collective settlement with one or more, but not all, defendants**
>
> 6.130 The class (or settlement) representative may reach a collective partial settlement, i.e. agree terms with only one, or several, of a larger number of defendants (or would-be defendants), and that collective partial settlement may be the subject of an application for a CSAO.
>
> 6.131 If the defendants are subject to joint and several liability, for example where they were participants in a cartel, achieving such a partial settlement may present difficulties if the settling defendant(s) are concerned about their potential liability to the non-settling defendant(s) in subsequent contribution proceedings. In those circumstances, the Tribunal may consider incorporating in the approval order a barring provision that prevents the non-settling defendant(s) from claiming contribution from the settling defendant(s), on the basis that if it were subsequently determined that there was such a right of contribution, the class (or settlement) representative will be limited to recover from the non-settling defendant(s) only damages for which those defendants would be proportionally liable. If the settling parties apply for such a provision to be included in the Tribunal's order, the Tribunal will permit any non-settling defendant (or potential defendant) to make submissions as to whether an order on those terms should be made."

27. In its judgment certifying the SW and SE Proceeding dated 19 October 2021: [2021] CAT 31, the Tribunal held that the cost/benefit analysis came out slightly against the grant of a CPO. The Tribunal stated:

> "171. We would be concerned if it appeared that collective proceedings would be likely to benefit principally the lawyers and funder as opposed to the members of the class. Such proceedings are hugely expensive for the parties and also demanding on the resources of the Tribunal.
>
> …
>
> 175. We see force in the Respondents' point that even recalling specific journeys and Travelcard details going back up to eight years for the purpose of a formal declaration of claim may be onerous and deter many from claiming, if that is ultimately the basis for distribution… Altogether, we find it difficult

to speculate in the present actions as to what the likely uptake would be and recognise the appreciable risk that it might be very low."

28. The Court of Appeal in *Gutmann CA* made some observations on the cost/benefit analysis. It stated:

> "83. By way of preface to our conclusions we acknowledge that it is important for the CAT to exercise close control over costs. There are conflicting considerations at play. On the one hand to enable mass consumer actions to be viable at all will invariably necessitate the assistance of third-party funders (see the discussion in *Le Patourel* (ibid) at paragraphs [75] – [80]) and the CAT must therefore recognise that litigation funding is a business and funders will, legitimately, seek a return upon their investment. On the other hand there is a risk that the system perversely incentivises the incurring or claiming of disproportionately high costs. And there is also the risk, highlighted in Canadian literature, that third-party funders have an incentive to sue and settle quickly, for sums materially less than the likely aggregate award. This, if true, risks undermining important policy objectives behind the legislation which include properly rewarding the class and creating *ex ante* incentives upon undertakings to comply with the law.
>
> …
>
> 86. Secondly, in any event, the answer to concerns such as those expressed lies in the close supervision of costs by the CAT to ensure that they are proportionate: see *Le Patourel* (ibid) paragraph [78]. The proffering of an exorbitant costs budget does not mean that those costs will be ordered to be paid if the class prevails at trial; and the mere fact that at the certification stage costs seem high does not mean that the CAT will simply accept that figure as appropriate for the purposes of a cost/benefit analysis. We cannot see that the CAT would therefore necessarily have taken any materially different view of suitability had it known of the most up to date costs figures.
>
> 87. Thirdly, as to the appellants' pessimistic prognosis that an award will not be claimed, this is an untested premise. It assumes that the CAT lacks the ability to find creative ways of ensuring that the award is distributed so as to maximise the benefit to relevant consumers. Once an award has been made the choice of distribution is binary and lies between distribution to the class and distribution to the selected charity. Whilst we express no decided position upon the issue it certainly seems arguable that it is open to the CAT, if it accepts the appellants' gloomy forecast, to consider whether there are appropriate proxies to distribution to individual claimants such as ordering a prospective reduction in certain fares upon the basis that if it is impossible from a practical perspective to cure the past then a forward-looking remedy might suffice. This might be because it would capture a substantial portion of the consumers who had sustained a past loss but who, for whatever reason, would not come forward to make a claim, perhaps because, as the appellants argue, they no longer possessed proof of travel. Given the legally binary nature of the choice of distribution – class or charity – then a method of distribution which, albeit in a relatively rough and ready way, goes to future travellers might be a far better fulfilment of the purposes of the collective redress scheme than payment to the nominated charity."

E. THE TRIBUNAL'S ANALYSIS

(1) Introductory observations of the Tribunal

29. The pre-trial review for Trial 1 is fixed for 9 May 2024 and Trial 1 is due to start on 17 June 2024. It is important that a decision is made as soon as possible so that everyone knows where they are, particularly given that brief fees may be incurred in a matter of a couple of days and that, if it is not going to settle, then a lot of work is going to have to be done.

30. It was appropriate to give our decision at the CSAO Application hearing with the written reasons to follow: the Tribunal has the material that it needs to make a decision on the criteria set out in Rule 94 of the Tribunal Rules. Had there been more time, we may well have directed further research be conducted into the likely take-up in terms of claims, claimants, and the amounts of each claim and which claims would fit into which pot, by class members. But that said, we are satisfied that, whichever way it turns out, it is most likely that there will be sufficient compensation for class members who make valid claims.

31. Those class members with substantial claims are able to go to Pot 1 if they can furnish evidence. Those with little documentary evidence may claim under Pot 3 for up to 6 journeys, giving them up to £30, which is slightly more than the estimated average claim of £27.90. Those with the larger claims such as season ticket holders will have a greater incentive to obtain and provide evidence in support of their claims.

32. This is the second settlement that has been brought before the Tribunal for approval in the context of collective proceedings. The first was *McLaren v MOL (Europe Africa) Limited* [2023] CAT 75 ("***McLaren***"). Each settlement has to be scrutinised closely and carefully by the Tribunal and this application raises different considerations to that of *McLaren*, not least because the circumstances in that case were very different.

33. In *McLaren*, the Tribunal was asked to approve a settlement in ongoing proceedings involving multiple defendants and the settlement was with the

twelfth defendant alone. Further, the offer was for a fixed sum in damages and two specific sums in respect of costs. The Tribunal was not being asked to approve any distribution plan in that case.

34. In the present case, the Tribunal is being asked to approve the distribution plan and the settlement has been structured in a way that the settlement amount to be paid by the defendant is an 'up to' figure, i.e. up to £25 million plus the relevant other figures for costs.

35. So, the amount that is actually paid in settlement to members of the class (up to that figure of £25 million) will be determined by the amounts of valid claims by class members.

36. The present application clearly raises the conflicting interests between class members, the legal team and the funders, hence the distribution plan is of central importance. That the Tribunal has a duty, in the public interest and that of class members, to scrutinise carefully such applications - as well as the costs and the claims of lawyers and funders - is self-evident.

37. The observations of the Court of Appeal in *Gutmann CA* (see paragraph 28 above) are important. In the context of the settlements approved by the courts in personal injury cases, and steps to be taken by trustees where approval or guidance is being sought, such as in the *Public Trustee v Cooper* [2001] WTLR 901 context, there is a lot of learning as to what the court expects the party to provide the court in order for the court to be in the best possible position to make a properly informed decision.

38. Two relevant cases are to be borne in mind. The first is *Tamlin v Edgar* [2011] EWHC 3949 (Ch). That was an application for the approval by the court for the trustees to exercise their powers of advancement, an application of capital, in such a manner as would terminate both of the trusts and would invest the capital in the beneficiary. The Chancellor stated (at [25]) that the trustees on such an application must:

" satisfy the court that they considered and properly considered their proposals to be for the benefit of the advancees or appointees. All this requires the full and frank disclosure to the court of all relevant facts and documents. The court is not a rubber stamp and parties and their advisors must be astute not to treat them as such. The further evidence adduced since the hearing of this application satisfies me on all those points but without it it is likely that I would have rejected this application."

This Tribunal was in the same position in relation to the current application. Without the further material filed in response to the requests of the Tribunal and the substantial revision of the proposal, making more funds available to Pot 3 and changing the requirements as what needed to be submitted for Pot 3 claims, this application too probably would have been rejected.

39. In *Brown v New Quadrant Trust Corporation Limited* [2021] EWHC 1731 (Ch), there was a dispute where there were opposing applications. One application was seeking an injunction or preservation order restraining the trustee from selling or otherwise dealing with the shares in the company. The trustee, in turn, sought an order from the court approving his provisional decision to sell those shares and that was a *Public Trustee v Cooper* application. In that case, the duty of full and frank disclosure was stressed by the court and the court was prepared to look at the matter with a critical eye.

40. The Tribunal appreciates that settlements are to be encouraged. Plainly there is a strong public interest that the courts are not overburdened with cases that could otherwise be settled. Settlements provide the parties with finality and the risks for both sides are ended. Everyone knows where they stand. Litigation is inherently uncertain and expensive, and so this Tribunal, whilst scrutinising the application for the order, starts off with the premise that there is a public interest in encouraging settlements.

41. But that does not mean, if there is a settlement that we consider is not just and reasonable, that we should approve it. This Tribunal has no difficulty at all in rejecting a proposal which it does not consider to be appropriate, even if the parties' representatives have negotiated what they consider to be a reasonable

settlement. As we indicated at the first day of the CSAO Application hearing, we would have refused the Original Proposed Settlement, had it not been revised by the parties. We are most grateful for the parties, their lawyers and the funders coming together to come up with something that is acceptable in the interests of the class members. We appreciate there has been an element of give and take.

42. So why do we have this settlement approval process? Well, it is largely because we have these apparent conflicts of interest. The CR here, Mr Gutmann, is the champion of the class. He has an overriding obligation and interest to ensure that the class is properly represented, and good claims are pursued for the benefit of the class. He has to enter into arrangements with lawyers, experts and funders – as a result of which he judges there is the best chance for them to obtain damages so that class members are compensated as fully as possible, taking into account the inherent risks in litigation.

43. The lawyers have, in reality, the same duties, and one of the good things about the Bar is that, when making submissions to the court, one puts aside one's own personal interest in earning fees. Often, a legal representative may have a financial interest in the case not settling, with one's brief fees not yet having been incurred, however the barrister will, even so, still push for a settlement if it is in the client's best interest. Solicitors have the same duties to act in the best interests of their clients, and not to allow their personal financial interests to cloud their judgment. Here, the parties are all represented by very capable and experienced lawyers. There is no question in our mind that, whilst there is a conflict, they have done their best to serve the interests of the class over and above their own interests.

44. Here the conflict is more acute, given the existence of a partial conditional fee agreement ("**CFA**"), under which the lawyers are being paid [✂] per cent of their usual rates on an ongoing basis but, if they are successful, they get paid more usual rates. This type of arrangement is not unusual.

45. But the ethical obligations as counsel and solicitors, as officers of the court, mean that they must promote the interests of the class members. The Tribunal appreciates that lawyers can be remunerated in different ways, be it a flat rate,

a full CFA, or a partial CFA. There are other possibilities. It is not just a question of the lawyers, there are the funders: they put their capital at risk, they fund the case and without the funders, many of the cases for collective settlement proceeding cases will not be able to get off the ground. Lawyers will not take on cases like the present without some form of payment, and funders are central to providing the capital for this (see, for example, *Gutmann CA* at [83]).

46. Funders generally operate on a portfolio basis and will only fund cases if they expect to make a reasonable return over that whole portfolio. The fact that they may want a higher return than would seem justified on an individual case is to be explained by the fact they have a book of claims, of which some will bear fruit and others will not bear fruit. The ones that do not bear fruit will make a loss and funders need to be able to make up for that loss in other cases that are successful.

47. The Tribunal recognises that funders and funding are integral to the viability of the three claims being brought by the CR, as recognised by the Court of Appeal in *Evans v Barclays Bank* [2023] EWCA Civ 876 at [130].

48. The other aspect which makes this approval process important is distribution. That is why it was important to deal with the distribution plan upfront. It is particularly important in this case because the deal has been structured as an 'up to' £25 million settlement, rather than a fixed sum. If it was a fixed sum, we may not necessarily have needed to look at the details of the distribution plan to the same extent as we have done in this case. But our detailed assessment in this case arises in particular because the amount to be paid is limited to the amount of claims. If valid claims payable to class members are £10.2 million or more, there are no Non-Ringfenced Costs being paid out. If total payable claims are lower than £10.2 million, the Non-Ringfenced Costs will be paid out of the difference between the claims payable to class members and the £10.2 million limit subject to the Tribunal's order determining the Non-Ringfenced Costs following a Stakeholder Hearing.

49. It is important to ensure that the distribution plan properly publicises the ability of class members to make claims. All the members of the class, at least, should be told that they have got this possibility and there is some very useful detail in the Epiq report as to how advertisements are going to be made. We are satisfied that the vast majority of class members will, at least, be aware of the possibility of making claims.

50. But these are relatively small amounts and when one is talking about a ticket here or a ticket there, many people may just not bother to claim because the claim period relates to dates between 2015 and 2017. It may be tedious for class members to search for records and make enquiries of their banks and credit card issuers to get the statements showing the payments made for relevant journeys. With average losses estimated to be £27.90, many will simply not want to spend the time and effort, especially for Pot 3 which, under the original distribution plan, required each journey to be identified. If the quality of evidence and information required is too high, then that will lead to fewer claims being made.

51. It was initially submitted that the cap of £2 million in Pot 3, with a maximum of £30 per class member, was justified in order to avoid fraudulent claims. This was unsatisfactory given the likelihood that most claims were to fall within this Pot. The Tribunal does not accept fraud risk as a justification for limiting Pot 3 to £2 million as in the original proposal. Any fraud risk can be mitigated: see paragraph 82 below.

52. The Tribunal can, however, see that having a pots system makes a great deal of sense, which we look at in more detail below. It enables those who have evidence of the purchase of train tickets and TfL travelcards to obtain the full amount of the alleged overcharge, and their claims should take priority.

53. Because of the conflicts we have identified, it is all the more important that we have full and frank disclosure of all the material before the Tribunal, so the Tribunal is in the best possible position to ensure that any settlements and distribution plans are fair and reasonable for the class members. Not just fair and reasonable for the class representatives themselves and for the defendants, but we will not ignore the interests of others such as the lawyers, the experts and

the funders, because we have an interest not just in this case but in future cases. If the lawyers and the funders are not going to get a return in this case, then they may be deterred from acting in further cases.

54. As part of this process, the Tribunal has been assisted by the parties, their lawyers and the independent expert, Mr Lawrence. Mr Lawrence has over 20 years' experience of litigating and settling competition damages and other complex commercial claims, formerly as a partner at Freshfields Bruckhaus Deringer LLP and now as a barrister at Brick Court Chambers.

55. We have been assisted by the additional material provided, since the original application, by the parties on estimated take-up by class members, as well as by the CR's expert on the distribution plan, Epiq. The parties should appreciate that the Tribunal is not a rubber stamp. The Tribunal can and will call for further information and explanations: on receipt of the Original Proposed Settlement, we went through it as a Tribunal and we identified what further information we required in order to come to a determination. That information was provided.

(2) The requirements of section 49A CA 1998

56. Looking to the requirements of section 49A, we are satisfied that requirements (1) to (4) are met. But it is section 49A(5) which is at the heart of the application:

> "The Tribunal may make an order approving a proposed collective settlement only if satisfied that its terms are just and reasonable."

57. The test for fair and reasonable is dealt with in Rule 94 of the Tribunal Rules, sub rules 1 to 10, and in particular sub rules 8 and 9.

58. There is further guidance in the Guide at paragraph 6.125 but, at the end of the day, it may be that it is a question of going through these criteria and stepping back and saying: looking at everything overall, whilst the settlement may not be perfect or ideal, this is a settlement that is fair and reasonable. There may be a range of settlements that are fair and reasonable and not necessarily the ideal settlement that the Tribunal would otherwise be seeking to get.

59. Standing back, this is a settlement under which all those members of the class who are likely to make claims will be fully compensated if they provide sufficient evidence. Those who do not provide evidence, beyond stating the number of journeys up to a maximum of 6, are going to be compensated up to £30 which is just above the estimated average amount of the claim. This does appear to be fair and reasonable in the context of a case where the merits of the claim are not manifestly and strongly in favour of the CR. In a case where the merits are strong, it may well be that the Tribunal will not be satisfied if the defendant only pays a sum representing the amount actually claimed by class members under a distribution plan in which, as in this case, the take up is likely to be a low proportion of the total loss to class members. In a case where the merits are evidently stronger than in this case, it may be more appropriate, if an 'up to' settlement figure and potentially low take up is all that is on offer, to let the matter to go to trial. If, then, the claim succeeds the defendant will be required to pay a sum representing the full loss of the class and, to the extent that the full sum is not claimed, the balance after payment of costs approved by the Tribunal would go to charity.

60. The headline figure of £25 million is to be made available to meet claims by class members, which on Mr Holt's analysis - who is the expert for the claimants - represents 64 per cent of the value of claims estimated. However, what that actually means in terms of amounts to be paid out, depends on what claims, for what amounts, are likely to be made and into which Pot each of them falls.

61. The CR will separately get £750,000 costs of the distribution, which we consider to be a reasonable figure and that is now approved.

62. As regards the £4.75 million sum for Ringfenced Costs, we consider that to be a reasonable figure and that is also now approved, on the basis that the actual costs are substantially more. The reasonable costs are probably well in excess of £10 million, taking into account the uplifts or part of the uplifts on the CFAs. But certainly £4.75million is within a reasonable figure.

63. On the structure of the proposed settlement, the CR's lawyers, the funders and SSWT all have an interest in there being as few valid claims as possible. The lower the sum in terms of valid claims, the greater the sums made available for the lawyers and funders of the CR, up to the maximum payment of £10.2 million to be made by SSWT. If valid claims do not exceed £10.2 million, SSWT does not need to pay any more of the £25 million maximum figure to meet claims.

64. The Tribunal is here to deal with those conflicts of interest and to satisfy itself that, despite those conflicts of interest, the proposed settlement is appropriate. But, it does mean that it is all the more important that the settlement is properly and carefully scrutinised by the Tribunal, and that the settling parties, the CR in particular, put all relevant facts and considerations before the Tribunal.

65. In terms of this and future applications, the Tribunal will expect to be given, so far as possible from the outset, the type of information requested by the Tribunal after the receipt of this application. This entails providing not just an estimate of the total number of class members, their total loss and an average for each claim, as was provided with the present application. Where the amount of damages to be paid is to be limited by the number and total amount of valid claims, as in this case, the Tribunal should be provided with a properly reasoned and researched estimate of the likely take up by class members, so the Tribunal will be able to assess the likely range for the total amount claimed by class members. In addition, where there are various incentives for, and interests of, the CR's lawyers and the funders, the Tribunal should be given a clear picture of the actual sums likely to be ultimately made available to the lawyers and the funders (subject to the approval and control by the Tribunal at a later stage) on various scenarios, depending on the level of take-up by class members.

66. In response to the Tribunal's letter of 2 April 2024, the CR explained that he has undertaken research on the uptake of damages in collective proceedings in North America, which showed that uptake in that region is generally below 10%. The CR has also considered data on the uptake of "delay repay" schemes offered by TOCs in the UK, which reported that 37% of eligible passengers claimed compensation through the scheme, with the figure rising to 44% on claims valued between £20 and £40 and 50% on claims valued over £40.

67. Based on that research, the Settling Parties estimate that total uptake of the proposed settlement will fall somewhere between 10-20%. On the CR's estimate, that there are 1.4m Represented Persons in total (which is disputed by SSWT), that equates to take-up by between 140,000 and 280,000 Represented Persons.

68. Had this application not been made so close to trial, with the threat of escalating costs if there was any delay in the approval process, and in an ideal world, the Tribunal would have required empirical research based on class members as to the likelihood of them making claims, whether they would make claims in Pot 1, Pot 2 and/ or Pot 3 and, importantly, whether they would be bothered to satisfy the evidence requirements. But we appreciate that probably there was insufficient time to do that, hence in the time available since the submission of the Original Proposed Settlement the CR had to fall back on general research - particularly in North America - as to the likely take-up.

69. The other information we would expect, based on likely take-up on a range of scenarios, is to know how much would likely go to the CR for the legal expenses and the funders, in respect of return on advances and funders' fees. We would want a full breakdown of that in the future to be filed with the application rather than necessitating a request from the Tribunal.

70. It has now been provided. We appreciate this is an emerging jurisdiction and that, to a certain extent, the lawyers and those whom they represent are finding their feet as to what the Tribunal actually requires, the exact scope of which will be very much case specific and thus likely to be influenced by the structure of the settlement and its terms.

71. As to what happens with this £25 million offered in settlement by SSWT it is helpful at this stage to give some facts and figures.

72. The claim period is 1 October 2015 to 20 August 2017. The significance of those dates is that the period is now some time ago, so people's recollections would likely be very much diminished. The availability of records may also now

be low and whether or not people can be bothered to claim may likewise be affected by the passage of time.

73. The class size was estimated by Mr Holt at 1,431,316. But one must bear in mind, that was calculated at the certification stage, without access to disclosure. Mr Noble, the expert for SSWT, has done his own exercise and he has looked at the class size figure. His report indicates the actual class size may be less (paragraph 3.5 of his report).

74. The more important figure is the estimated total claim. The total claim without interest, as estimated prior to disclosure by Mr Holt is £38.99 million. With interest, up to 20 March 2024, it is £49.5 million. However, we are acutely aware that this figure is likely to be an overestimate. Mr Noble, in his report, says that the actual figure, just looking at two aspects of how that calculation was done, may be between 20 and 44 per cent less. Mr Holt has estimated the average claim to be £27.90 per person and the estimated overcharge in respect of each journey to be £5. There will be those who regularly made relevant journeys, such as season ticket holders, and their claims will be significantly higher than the average, potentially in terms of hundreds of pounds or even above £1,000.

75. There would probably be far more potential claimants for the up to £30 figure in Pot 3 than, for example, the unlimited amount that each class member may claim in respect of Pot 1. This is significant given the differing total amounts available in each pot.

76. As regards the estimated take-up, the CR, at the request of the Tribunal, provided his estimate: see paragraphs 66 and 67 above. We would hope that, in future, such an estimate is provided in the original application for a CSAO. The estimate, that the range is probably between 10 per cent and 20 per cent of class members and on Mr Holt's figures of the class size, a range of between 140,000 to 280,000 claimants, means that the CR's estimate of the sum at issue is open to considerable variability.

77. The Tribunal, using its own experience as a specialist body and doing its own research, and looking at the situation in North America - in particular following up on the various cases referred to in the appendices of the expert report - considers that even 10 per cent may turn out to be an overestimate. Only once all the claims have been made and analysed under the distribution plan will be the actual figure be known. The empirical research needed to provide a robust estimate of likely take-up in this case simply has not been done.

78. On the basis of an estimated take-up of 10 per cent, the amount of claims could well be in the region of 5.6 million or £11.2 million on a 20 per cent take up. The mid-point is roughly £8.4 million. If the claims are at the mid-point, SSWT will only pay up to £10.2 million and, of that, up to £1.8 million will be available for Non-Ringfenced Costs.

79. However, the Original Proposed Settlement did not properly factor in the consequences of limits in Pot 3, whereby the total amount available in Pot 3 was only £2 million, whereas £19 million and £4 million were available for Pots 1 and 2 respectively. At the prompting of the Tribunal, the parties, sensibly, have changed the proposal such that there is now a 'waterfall' between Pots 2 and 3, such as in reality between Pots 2 and 3 there is now in total £6 million available. There is still £19 million available for Pot 1, which is for those who can provide sufficient evidence of their travel. For claims in Pot 1, those who are likely to apply are people who regularly travelled on that route, such as season ticket holders, and those are going to be the bigger claims if they are going to be made. Someone with a season ticket, spending a relatively large sum of money every year on his train, is probably going to be more incentivised to go and look in his bank statements or get evidence that he did, in fact, have the season ticket, than is someone who occasionally has travelled on a route, maybe up to six times, who probably will not be so incentivised to seek evidence from his own records or make inquiries of his bank.

80. The trial, assuming a successful outcome, and based on the figures of Mr Holt, including full damages and interest, will be for damages of £55.9 million. But, again, that is most likely to be an overstatement. This Tribunal on the evidence before it for this application is not in a position to determine that. Only 656

persons are registered on the website for information as to these proceedings, which is not a huge number. One can, perhaps, surmise from this level of interest that the take-up is likely to be low, but it does mean that those who registered could have provided a ready basis for a survey or request as to their likely action if confronted by the proposed claim form.

81. The priority must, in terms of compensation, be to ensure that any valid claims are met under a plan that is well advertised and is user friendly such that it encourages and does not deter claims. But what is a valid claim? It is a genuine claim. A claim may be genuine even if it only has the statement of a class member in support. Someone who has in fact travelled and has no documentary evidence should not be disadvantaged if the absence of evidence is not his fault, particularly the cash payers. One would hope that, in the case of the cash payers, if someone says: "I am a cash payer", it does not automatically exclude them from making a claim in Pot 1. Of course, such claims may be scrutinised. If, for example, this was a claim in the County Court and a claimant appearing before the court stated, "Look, I did travel on this route and these are the reasons I can show you I did, because this is my home address, this is my office address, I have my time sheets, you can see I have been going from A to B." He might be able to convince the judge that his claim is a genuine claim. On the other hand, the court may take the view that the claim is not credible and reject the claim having heard the claimant whose account did not in fact appear credible. Those administering the distribution plan should not automatically exclude claimants from getting more than £30 (6 journeys at £5 each) merely because they cannot produce their bank statements. There may be other forms of evidence other than bank or credit card statements which may reasonably satisfy the administrator that claims over £30 are justified.

82. We do accept to have a distribution system simply based on self-certification can lead to an unknown proportion of fraudulent or exaggerated claims. This risk is substantially mitigated albeit not entirely eliminated. First, Pot 3 claims requiring no evidence other than self-certification is limited to £30 per class member. Secondly, there are various checks that could be made, and banks do this all the time when satisfying themselves as to whether claims and transactions are fraudulent or not. Thirdly, there are the specific steps set out in

the Epiq report which it is not appropriate to list in this judgment, because otherwise people may take steps to circumvent them. Fourthly, there will be a warning and a declaration on each claim form, saying that the signatory satisfies the claim requirements and is aware of the possibility that proceedings may be taken against them if they make a claim that they know to be untrue.

83. The proposal is that there be £19 million in Pot 1. Pot 1 is for those with the proof of both the train ticket and the TfL travelcard. In our view, that is sensible - the priority must be to compensate in full those who can come up with clear evidence and that is likely to be relevant for the regular travellers, particularly the ones with travelcards. The parties have clarified that in respect of persons with season tickets, they are not going to be required to itemise each and every journey they have taken. That is very sensible. But the claim form does otherwise require that the class members (claiming for Pot 1) do specify the date of the journey and what journey was taken. It is recognised that could be a disincentive and it may simply not be practicable to expect persons to have or make available documentary evidence. That is why there are Pots 2 and 3 to at least give those persons the chance to easily make claims. This is particularly the case for those claiming under Pot 3 who may self-certify and do not even have to give the dates and route of journeys.

84. But we do see the sense in this. When the parties get to administer the plan, they should be wary of not discriminating against those who have paid in cash and that is something that is going to have to be worked out, as the distribution plan goes along.

85. It is estimated that 14 per cent of the tickets were paid for in cash. But there may be different forms of evidence that class members can produce, apart from bank statements, especially if they paid cash, such as the type of evidence we referred to in paragraph 81 above.

86. Pot 2 requires lesser evidence than Pot 1. This Pot may be claimed from where the class member can properly evidence the purchase of either the train ticket or the travel card. The maximum claimable amount in Pot 2 for each class member

is 20 claims at £5 each, which is £100. Pot 2 has £4 million in it. We think that is a sensible compromise, bearing in mind the various factors referred to above.

87. Pot 3, at the moment, is the smallest pot and provides for each class member a maximum of £30, for up to 6 journeys at £5 each. This has a relatively low cap of £2 million, so if claims were, let us say, £4 million coming in, each class member would only get 50 per cent. But that has now been modified by the revised proposal. The Modified Proposed Settlement now states that anything not taken up in Pot 2 goes into Pot 3 and vice versa if there is a shortfall in Pot 2 as against an excess in Pot 3. So if there is, let us say, only £1 million claimed in Pot 3 and there are £5 million in claims in Pot 2, then £1 million from Pot 3 goes up to Pot 2. On the other hand, if £2 million is claimed under Pot 2 and £4 million claimed under Pot 3, then £2 million from Pot 2 goes into Pot 3. This is sensible and will benefit class members and, moreover, given the likely levels of take up, it is reasonable to envisage that the claims under Pots 2 and 3 will probably be paid in full.

88. The original proposal for Pot 3 was that the claimants would have to give certain information, such as the date of travel, the route and those requirements have been removed now. The parties have come up with a proposal, which is acceptable, that all claimants have to do is to certify that they did take up to (no more than) six relevant journeys and they will be given £5 per journey. But, again, the class members will be advised that there is an audit system and further queries may come back. So they need to be careful to make sure that they are telling the truth when making claims.

89. It is obvious to the Tribunal that the majority of potential claimants will not claim, because of the likely claim size for most potential claimants and the elapse of time. It is noted that the CR gives the range of 10 to 20 per cent take-up based on North American experience but, quite frankly, no one knows for sure what that is likely to be.

90. When one looks at the consumer class actions experience in North America, an analysis of settlement campaigns issued by the Federal Trade Commission in September 2019 entitled: '*Consumers and Class Actions: A Retrospective*

and Analysis of Settlement Campaigns' suggests that take-up rate could be lower than the 10 per cent figure given by the Settling Parties. The Report states at page 283:

> "*Overall Claims Rate:* Across all cases in our sample requiring a claims process, the median calculated claims rate was 9%, and the weighted mean (i.e., cases weighted by the number of notice recipients) was 4%. We calculated these claims rates as a percentage of direct notice recipients.
>
> *Claims Rates by Method:* The claims rates varied by method. On average, campaigns that primarily used notice packets with claim forms to inform class members about the settlement had claims rates of approximately 10%. In contrast, the average claims rate for campaigns using primarily postcards and email was about 6% and 3%, respectively. Notably, campaigns that utilized postcard notices with a detachable claim form had average claims rates more in line with the 10% notice packet claims rate."

91. Pot 3 in the current form is clearly the most convenient to claim and the limit being just above the average of £27.90 is a sensible limit to have. This is likely to receive the largest number of claims.

92. The waterfall mechanism satisfies the Tribunal that it is most likely that all claims within Pot 3 are going to be satisfied in full, up to the limit of 6 journeys.

(a) The amount of the settlement

93. Looking at the criteria set out in rule 94(9)(a) of the Tribunal Rules i.e. the amount and terms of the settlement including any related provisions as to the payment of costs, fees and disbursements, the amount of the settlement in terms of Ringfenced Costs - that is £4.75 million - and £25 million being an 'up to' figure is, in this Tribunal's view, fair and reasonable given that the merits are not necessarily strongly in favour of the CR.

94. The Tribunal did have a concern initially over the reverse waterfall structure whereby nothing would flow into Pot 3 if there was a shortfall, and Pot 3 was anyway capped at £2 million. This has now been remedied. The Tribunal is not dealing with the amounts of any payments out for legal expenses, funders' fees, either costs or expenses. That falls to be considered at a much later date, further down the line, on the basis of a proper application. It may well be that that application will await what happens with the other two actions.

95. We do, of course, bear in mind the terms dealing with Ringfenced Costs, Non- Ringfenced Costs and the structure whereby anything up to £10.2 million (the difference between the amount claimed and that £10.2 million maximum) is going to go by way of Non-Ringfenced Costs. Of course, we have borne that in mind, because of the potential for an incentive to have as low as possible number of claims, so ensuring there is more money available for Non- Ringfenced Costs. But that has been fully dealt with, to the satisfaction of the Tribunal.

(b) The number or estimated number of persons likely to be entitled to a share of the settlement

96. We bear in mind what is set out in the Guide, that there should not be too onerous terms attached to making claims otherwise there is going to be a significant shortfall in claims. But we do not consider that the terms related to the Modified Proposed Settlement are too onerous, particularly given what is now in Pot 3 and the revised claim form requirements referred to from paragraph 79 onwards.

97. As already noted, Mr Holt's estimate of the number of class members is 1,431,360, with an average claim of £27.90 per person. The figure for the total claim without interest is £38.9 million and is only a rough estimate and the figure may be less.

98. The take-up rate, in our view, is going to be low. Initially we were concerned that there had been no detailed research involving actual or potential class members into the likely take-up in this case, based on the proposed claim forms. But we do not think that that is now required, given the amounts now to be available in the various Pots. We think those sums will be sufficient to meet the amount of the likely take-up. It clearly would have been preferable had the parties undertaken proper research into anticipated take-up rates based on seeking feedback from actual or potential class members.

(c) The likelihood of judgment being obtained in the collective proceedings for an amount significantly in excess of the amount of settlement

99. While it is possible that, were the matter to proceed to trial, the CR would obtain judgment in the SW Proceedings for an amount significantly in excess of the amount of the Damages Sum (£25 million), Mr Lawrence (having regard to all of the uncertainties) does not believe there is a likelihood that a significantly greater amount would be recovered from SSWT. The Damages Sum is a substantial proportion of the quantum claimed, and as set out in Mr Lawrence's report, that is an important factor that has led Mr Lawrence to conclude that it is reasonable for the CR to accept that offer.

100. The headline figure in the proposal is £25 million. But the alternative way of looking at this is that the Tribunal does not actually know what the figure is, because it is an 'up to' figure. It is based on a structure whereby the figure to be paid out is going to be a minimum of up to £10.2 million (including any payment of Non-Ringfenced Costs, subject to the order of the Tribunal) and any more is going to be subject to there being valid total claims exceeding that 'up to' a maximum of £25 million. As already indicated the Tribunal doubts that the figure of £10.2 million is at all likely to be exceeded and the actual class member claims may well be significantly lower than a 10 per cent take up.

101. Looking at the claim figure of £38.99 million, but that may be less, plus interest, which is £49.5 million up to 20 March 2024, the amount agreed as an 'up to' figure is roughly 50 per cent, assuming that all £25 million is taken up. But we do not know how much is going to be taken up. However, we are satisfied that the amount of likely take-up means that there is going to be sufficient compensation for all class members who make a claim, or at least sufficient opportunity for those class members to make a claim.

102. What would happen if it did go to trial? Two things would happen. One is, in our view, if the case were to go to trial and the CR wins, he is likely to get judgment for a figure substantially in excess of the amounts that SSWT are going to have to pay out under the current revised proposal.

103. The second thing that would happen is that there would be no, in effect, reversion back to SSWT. If there were to be an amount left after payments to the CR, the lawyers and the funders, that sum would go to charity. It would not go back to SSWT.

104. We have looked at the merits of the case and we have read all the material, been through the pleadings and we have to exercise some form of judgement. But we cannot be precise. We have looked at Mr Lawrence's report and we cannot come to a definitive view on the merits. What we can say is: we do not regard this as a wholly speculative claim with a low prospect of success, but we do not regard it as an overwhelming case either, and, at trial, there is a real possibility that the CR may lose.

105. However, we can say that there is at least a good arguable case and it is probably neither constructive nor prudent to try to reach a firm view on the merits, in terms of identifying a percentage. What we would say is that this case could easily go either way. It could be a complete disaster for one side or the other, but for the class representative to get nothing would be a meltdown. But for the SSWT, if they go down at trial it is going to be a very, very big figure, much greater than this, with all the additional costs on both sides. Had we considered that the merits were strongly in favour of the CR we may not have accepted this settlement, whereby the defendant ends up with paying in damages a relatively low amount of the total claims and nothing goes to charity. In such a case, it may have been the decision of the Tribunal that the matter should go for trial with the strong prospect that damages in full would have to be paid and any amounts not taken up would go to charity.

106. So we can see that, in that context, the settlement figure and proposals which we judged as not reasonable in the Original Proposed Settlement, now that the parties have sensibly come back with an amended version in the form of the Modified Proposed Settlement, can now, in our view, be regarded as a fair and reasonable settlement.

(d) The likely duration and costs of the collective proceedings if they proceed to trial

107. As noted in paragraph 6 above, the Tribunal has ordered that the SW, SE and GTR Proceedings be tried together at three separate trials taking place between 2024-2026.

108. We can quite easily see this case as being a *Jarndyce v Jarndyce*, whereby it could go up on appeal, coming back, and we may still not have an ultimate result by the end of 2027. That is possible. On the best outcome for everyone, one would get a result at the end of 2026. But we cannot be sure.

109. But what one can be sure of, is that very significant costs are going to be incurred between now and the end of trial. Legal costs, funders' return fees on one side, SSWT's own costs and, if they lose, they are going to have to pay a huge amount in costs, etc. That goes back to the point we said earlier in this judgment, that there is a public interest in settlement. We have limited resources as a Tribunal. Parties have limited resources and settlement of this case on the terms proposed is sensible, in the interests of the class members.

(e) Any opinion by an independent expert

110. As set out above, we have the opinions of the legal representative, the applicants, in the form of the evidence that has been put before us and the skeleton arguments and submissions of Mr Moser KC on behalf of the CR. We also have the opinion of Mr Lawrence who is a seasoned campaigner in this type of case. As mentioned above, he is well qualified in these matters and known to the Tribunal. He has prepared his report of 27 March 2024. Mr Lawrence's report concludes:

> "4.1…I can see considerable merit in the terms agreed from the perspective of the Class.
>
> 4.2 The potential £25 million Damages Sum agreed appears to me to be soundly based and to reflect the evidence and information available, albeit that broad assumptions have necessarily been made for the purposes of calculation. Because of the number of issues still in dispute, and the related uncertainty of outcome, it is not possible to rule out that the amount of the settlement could conceivably be significantly exceeded in any judgment after trial. However,

> …, it seems clear to me that the amount agreed does not fall below the bottom end of any range at which the decision to settle might be regarded as reasonable from the perspective of the Class. It seems to me that it is certainly not possible to conclude that there is a likelihood that the amount would be materially exceeded at trial.
>
> 4.3 As regards the pot mechanism and variation of amounts according to production of documentary evidence, this seems reasonable in principle. I consider, in light of the materials provided to me, that the requirements to produce specific evidence for claims on Pot 1, in particular, do not appear to impose unreasonable practicable obligations on members of the Class with valid claims. Indeed, it could be said that the Settling Parties have made appropriate efforts to seek to maximise the prospects of a strong takeup in this case.
>
> 4.4 The other provisions of the Settlement Agreement that are within the scope of my instructions raise no particular concerns from the perspective of the Class.
>
> 4.5 Stepping back, and based on my experience, this type of settlement can be readily understood. It is in my opinion reasonable and sensible for the Class Representative to wish to settle at this stage, and on a basis such as that which has been agreed, particularly in light of the complexity and uncertainties inherent in the underlying claim and the potential attendant benefits of settlement (including costs savings in the remaining proceedings). Settling the claim will give a degree of certainty to the outcome, securing a recovery for the Class without further risk. It will also lead to future reduced costs. I see no material risk of disadvantage to the Class and, potentially, substantial benefits."

111. We agree with paragraph 4.2. In relation to paragraph 4.3, on the basis of the material before Mr Lawrence, we still would have had a concern because of the issue of the reverse waterfall and no waterfall going down into Pot 3, but that has now been rectified. He might have highlighted the lack of research involving class members on the likely take-up, but he did not. Subject to those points, the Tribunal agrees with paragraph 4.3 with the qualification it should be read to refer to the revised proposal, as opposed to the original proposal. We agree with paragraph 4.5, subject to the comments that we have made on paragraph 4.3. So we have taken that into account.

(f) The views of any represented person (or other appropriate category of person)

112. Pursuant to the Tribunal's Directions Order of 4 April 2024, the Non-Settling Defendant filed submissions in relation to the CSAO Application, but it did not

seek to oppose the Proposed Settlement.[2] The Defendants in the SE and GTR proceedings decided not to file submissions and they did not oppose the Proposed Settlement[3]. There was no submission from any class member.

113. We have taken into account the views of the CR, Mr Gutmann, in his fifth witness statement. But the fact we have no separate submission from any class members reinforces, in our view, the need for the Tribunal to be given as much information as possible and to be given points which militate both for and against acceptance of the settlement. We consider that the lack of empirical research and no surveys made of actual class members should have been highlighted in the original application.

114. Similarly, the Tribunal should have been provided with sufficient information on how the pots were likely to work in practice, including a robust estimate of the likely claims in each pot based on research involving class members. This concern has now been resolved as noted above.

(g) The provisions regarding the disposition of any unclaimed balance of the settlement

115. As regards the question of allocation of any unclaimed balance to charity, under section 47C(5) CA 1998 and Rule 93(6) of the Tribunal Rules, where the Tribunal makes an award of damages in opt-out collective proceedings, the Tribunal is required to order that all or part of any undistributed damages is paid to charity (i.e. the Access to Justice Foundation), subject to any order for undistributed damages to be paid towards the CR's costs. In those circumstances, undistributed damages cannot be returned to the defendants.

116. In contrast, there is no prohibition on undistributed damages reverting to the defendant following a collective settlement. Rule 94(9)(g) states that "*a*

[2] The settling and non-settling parties have reached agreement on the barring provision and related terms.
[3] By a letter from Freshfields Bruckhaus Deringer LLP, for the Defendants in the SE and GTR Proceedings dated 12 April 2024, the Defendants in the SE and GTR Proceedings confirmed that they do not intend to contest the CSAO Application, and they were not represented at the hearing of the CSAO Application.

provision that any unclaimed balance of the settlement amount reverts to the defendants shall not of itself be considered unreasonable".

117. In this case there will be a substantial unclaimed amount which will, in all probability, go to the CR and funders up to the difference between the amount of the actual claims and £10.2 million. Nothing is going to charity and the structure means, in real terms, SSWT is likely to pay significantly less than the £25 million figure.

118. However, as long as there is sufficient funds actually being made available for take-up by the class members and they all have a reasonable chance of making claims, we think that those points are not a reason for refusing this settlement, in the context where the Tribunal has not reached the view that the merits are strongly in favour of the CR.

119. There could have been a balance going to charity. It has not been proposed here. In the submissions of the parties, with some exaggeration, it was asserted it would not be appropriate for any unclaimed balance to go to charity. We do not accept that. It may be appropriate, but it may not be necessary. We cannot require parties to pay anything to charity.

F. CONCLUSION

120. The Tribunal is satisfied that the terms of the Modified Proposed Settlement are just and reasonable. This judgment is unanimous.

Hodge Malek KC
Chair

Hugh Kelly

Eamonn Doran

Charles Dhanowa OBE, KC (*Hon*)
Registrar

Date: 10 May 2024