

November 2021

## Full steam ahead – Gutmann's collective action against train operating companies certified to proceed

On 19 October 2021, the Competition Appeal Tribunal ("**CAT**") certified the opt-out collective proceedings order ("**CPO**") brought by Mr Justin Gutmann ("**Gutmann Claim**") against three separate current and former train operating companies ("**TOCs**") – namely, First MTR South Western Trains ("**First MTR**") operating the South Western Franchise (which was previously run by Stagecoach South Western Trains ("**SW Trains**")) and London & South-Eastern Railway ("**LSER**") operating the Southeastern Franchise.<sup>1</sup> It is alleged that the TOCs have committed an abuse of a dominant position by double-charging rail passengers who held Transport for London ("**TfL**") Travelcards<sup>2</sup> on routes where "**Boundary Fares**"<sup>3</sup> were applicable. Rail passengers, it is alleged, should have been charged only the "add-on" price of the Boundary Fares in conjunction with the TfL Travelcard ticket price rather than the higher full journey price (part of which would have been covered by the TfL Travelcard). The TOCs now face the prospect of a full trial. The Gutmann Claim is currently valued collectively at £93 million and is being brought on behalf of an estimated 3 million class members.<sup>4</sup>

This is the third and fourth CPO that the CAT has certified in the month of October alone.<sup>5</sup> In fact, the Gutmann Claim is two of only four CPOs in English legal history to have been authorised to proceed to trial, after two separate actions brought against [Mastercard](#) and [BT](#) were also certified by the CAT earlier this year in August and September respectively. Quite something when one considers it took almost six years since CPOs were introduced for the first such claim to be certified.



### The Gutmann Claim

The specific allegation against the TOCs is that contrary to the Chapter II prohibition under the Competition Act 1998 ("**CA**")<sup>6</sup> each failed to make

<sup>1</sup> The CAT's certification decision in the Gutmann Claim. Available at: [https://www.cattribunal.org.uk/sites/default/files/2021-10/20211019\\_1304\\_5\\_Gutmann\\_Judgment\\_1.pdf](https://www.cattribunal.org.uk/sites/default/files/2021-10/20211019_1304_5_Gutmann_Judgment_1.pdf)

<sup>2</sup> Travelcards are issued by TfL and allow unlimited travel within particular specified fare zones on London's public transport networks.

<sup>3</sup> Boundary Fares are a type of extension or add-on fare sold for use with a Travelcard. On the basis that a valid Travelcard will cover travel on the part of the journey to which it applies, the Boundary Fare is a charge for the journey from the outer edge of the zone to which the Travelcard applies to the customer's destination. All three Respondents sell (or have sold) such Boundary Fares for almost all journeys originating in each TfL fare zone to destinations on their network. See paragraph 18 of the CAT's certification decision in the Gutmann Claim.

<sup>4</sup> The current class sizes for the claims against First MTR / SW Trains and LSER respectively are not yet fully known. It is estimated that: (i) in the former claim, the class size is between 1,061,536 and 10,325,370 individual claimants, with a "central estimate" of 2,076,038 class members; and (ii) in the latter claim, the class size is between 472,362 and 5,834,499 individual

claimants, with a "central estimate" of 885,012 class members. Based on the combination these two "central estimates", the current estimated class size for the two claims is 2.9 million claimants. The claim against MTR / SW Trains is currently valued at £57 million and the claim against LSER is valued at £36 million.

<sup>5</sup> As noted above, the Gutmann Claim is actually made up of two separate claims, one against First MTR and SW Trains, which between them have run the South-Western rail franchise ("**SW Franchise**") since 1 October 2015, and the other against LSER, which has run the Southeastern Rail Franchise ("**SE Franchise**") for the same period. It should be noted that First MTR has held the SW Franchise since 20 August 2017 and the Stagecoach group operated the SW Franchise under a number of franchise agreements, including through SW Trains, from 4 February 1996 to 20 August 2017. The CAT has allowed the two claims to be heard together given that the issues raised by each are almost identical.

<sup>6</sup> Chapter II of the CA prohibits abuse of a dominant position in the UK.

Boundary Fares sufficiently available and/or to use their best endeavours to ensure general awareness among their customers of Boundary Fares. Had the TOCs taken sufficient steps to make information about the existence of Boundary Fares available and provided sufficient opportunities to buy the same, this would, in essence, have allowed class members to avoid paying for the part of their journey that was already covered by their TfL Travelcard. An illustrative example is set out below. Mr Gutmann asserts that these passengers would have been protected from significant over-charging.

To corroborate these allegations, a so-called "mystery shopper" survey was commissioned which found (amongst other things) that staff at station ticket counters frequently failed to check whether the customer had a TfL Travelcard that covered part of the cost of the route in question. Further, even where a TfL Travelcard was held and the Boundary Fare was mentioned by the customer, staff still failed to incorporate this into the quoted ticket price as much as 41.8% and 28.3% of the time in the case of First MTR and LSER respectively.<sup>7</sup> Moreover, automated ticket vending machines either failed to include Boundary Fares as a purchase option entirely or else made the process for selecting one unduly complicated. What is more, online sites like Trainline.com did not offer Boundary Fares at all.

### Illustrative example of how the Gutmann Claim works



Let's assume Mr Gutmann lives in Surbiton, which is TfL zone 6, and commutes into Central London for his daily work. Mr Gutmann holds a specific TfL Travelcard to ensure that all his journeys within TfL zones 1-6 would be covered.<sup>1</sup> However, Mr Gutmann travels to Woking every Friday evening to see friends and so needs to buy a ticket for this weekly journey. On a Friday evening, Mr Gutmann travels from central London (London Waterloo) and not from his home in Surbiton. Unfortunately, First MTR's ticket vending machines at London Waterloo seemingly do not offer any option to purchase a ticket from Surbiton to Woking if the station of origin is London Waterloo. Instead, the likely two options for Mr Gutmann appear to be to either travel to Surbiton with his Travelcard and alight there to buy a separate ticket to Woking (risking delays in catching a later train) or else buy a full fare ticket from Waterloo to Woking (even though most of this journey is already covered by his Travelcard). Since the former option is unappealingly cumbersome, Mr Gutmann sees little recourse but to opt for the latter at a higher fare than he is actually required to pay.

The Gutmann Claim was brought on an opt-out basis. This means that anyone who held or holds a valid TfL Travelcard since 1 October 2015 is automatically included among the class members unless they specifically elect not to take part. Mr Gutmann is seeking aggregate damages calculated as the difference between the full price journey ticket fare and the corresponding Boundary Fare for all relevant journeys. The TOCs objected to the grant of the CPOs on the basis that the claims were not eligible for inclusion in collective proceedings, thereby seeking summary judgment or orders to strike out the claims on the basis that they had no reasonably arguable prospect of success.

The CAT rejected the summary judgment/strike out applications sought by the TOCs and authorised Mr Gutmann to act as the class representative in both proceedings. The CAT also found that the claims raised common issues, such that they were suitable to be brought in collective proceedings on an opt-out basis.

<sup>7</sup> See paragraph 26 of the CAT's decision in the Gutmann Claim.

## CPOs – Origins and Certification

The UK's CPO regime was introduced by the Consumer Rights Act 2015 which amended the Competition Act 1998 providing for the first time the ability to commence opt-out class actions in relation to competition law breaches.<sup>8</sup> CPOs are akin to class action suits in the US, where each claim can involve thousands (if not more) of individual class members. They enable those that have suffered loss as a result of anti-competitive behaviour to join together to seek redress. Without such a regime, the costs and challenges involved for individual claimants to successfully prove breach, causation and loss might otherwise be insuperable.

However, CPOs have, until recently, faced considerable difficulties in getting their claims off the ground. In order for a CPO to be heard at trial, it must first be certified by the CAT. To achieve certification, the CAT must be satisfied that:

- A suitable individual can be authorised to act as the class representative<sup>9</sup> ("**Authorisation Test**"); and
- The underlying claim(s) are eligible to be heard as a CPO<sup>10</sup> ("**Eligibility Test**").

The former criterion has so far presented few, if any, problems, but the latter is much more stringent. For a claim to be eligible for collective proceedings – namely meet the Eligibility Test – it must:

- Be brought on behalf of an identifiable class of persons ("**Class of Persons Factor**");
- Raise common issues ("**Commonality Factor**"); and
- Be suitable<sup>11</sup> for collective proceedings, particularly for an aggregate damages award ("**Suitability Factor**").<sup>12</sup>

## Held at a Red Signal – Why the Gutmann Claim Faced Delays...

Before turning to the CAT's full determination of the Gutmann Claim, it is important to note that the CAT has, until recently, taken a highly restrictive approach to its interpretation of the Eligibility Test.

<sup>8</sup> To introduce CPOs, the Consumer Rights Act 2015 introduced amendments not only to the CA 1998 but also the Competition Appeal Tribunal Rules 2015 ("**CAT Rules**").

<sup>9</sup> The class representative in a CPO brings the claim on behalf of all the individual claimants.

<sup>10</sup> Section 47B(5) of the CA 1998.

<sup>11</sup> Rule 79(a)-(f) of the CAT Rules list a number of non-exhaustive factors that can be used to assess a CPO's suitability.

<sup>12</sup> Rule 79(1) of the CAT Rules. Available at:

[https://www.legislation.gov.uk/ukxi/2015/1648/pdfs/ukxi\\_20151648\\_en.pdf](https://www.legislation.gov.uk/ukxi/2015/1648/pdfs/ukxi_20151648_en.pdf)

Indeed, the first CPO to be officially certified by the CAT – that of the collective action brought by Mr Walter Merricks against Mastercard ("**Merricks**") – was originally refused certification by the CAT in July 2017. It was only after a series of appeals that the Supreme Court finally clarified the proper approach to be taken vis-à-vis the application of the Eligibility Test to a prospective CPO. Full details of [the Supreme Court's landmark ruling in Merricks](#), which was handed down in December 2020, can be found in our previous client alert.



For present purposes, it is key to appreciate that the Gutmann Claim had been held in a state of abeyance since 2019 (when Mr Gutmann issued opt-out proceedings against the TOCs) pending the outcome of the Supreme Court's judgment in Merricks. The CAT granted an official stay in the Gutmann Claim on the basis that the Supreme Court's judgment in Merricks would have a fundamental bearing on the assessment it would conduct. Without this precedent, it is quite possible that the CAT would have refused to certify the Gutmann Claim on similar grounds to its original refusal in the Merricks case.

## The CAT's Judgment

As mentioned, ultimately, the CAT refused the summary judgment/strike out application put forward by the TOCs and made a number of determinations in the course of its application of the Authorisation Test and Eligibility Test to the Gutmann Claim (following the decision in Merricks).<sup>13</sup>

## Summary Judgment / Strike Out

The TOCs argued that Mr Gutmann's claim that a dominant company had a special obligation to promote a cheaper alternative price (i.e. Boundary Fares) was a "*dramatic extension of the law*" on

<sup>13</sup> A case management conference to finalise the specific terms of the CPO has been listed for 18 November 2021.

abuse of dominance – it amounted to consumer protection claims rather than competition law breaches. The CAT disagreed and held that Mr Gutmann's Claim was reasonably arguable. It was not "*extraordinary or fanciful*" to argue that a dominant company should operate a fair selling system, in particular, where a cheaper alternative price was available for the same service but not effectively communicated in a transparent way to customers. This could potentially constitute an abuse of dominance, especially where the customers are "*consumers*" and not "*commercial undertakings*".

### Authorisation Test

Consistent with the approach taken in other CPO applications, the CAT held that it would be "*just and reasonable*" for Mr Gutmann to act as the class representative. Although the TOCs in fact did not raise any objections as to Mr Gutmann's suitability, the CAT considered the point and was satisfied that the Authorisation Test was met in this case.

### Eligibility Test

Taking each of the Eligibility Test criteria in turn, the CAT held the following:

#### Class of Persons Factor

The CAT considered the Gutmann Claim was clearly brought on behalf of all TfL Travelcard Holders. Mr Gutmann's proposed class definition (i.e. all those on whose behalf the CPO is being brought) was, in essence, anyone who, during the relevant period between 1 October 2015 and now, purchased an entirely new ticket for the totality of a journey rather than extending their TfL Travelcard beyond the relevant travel zone, i.e. rather than just purchasing the additional Boundary Fare.

The CAT recognised that it may be difficult to estimate the total size of this class. For instance, though the number of total TfL Travelcard holders at any one time could be estimated,<sup>14</sup> it was far more complex to gauge how many times each TfL Travelcard holder would have paid double for a journey (i.e. not benefited from the Boundary Fare available). However, given this was more an issue for the Commonality Factor and Suitability Factor, the CAT was satisfied that the proposed class definition was enough to constitute an identifiable class of persons.

#### Commonality Factor

The CAT considered that the Commonality Factor was met if those elements of the claim that were

"*sufficiently similar*" were assessed collectively. The Gutmann Claim risked falling into a similar malaise to one the Merricks case faced in its first judgment from the CAT in 2017. One reason why the CAT originally refused to certify the Merricks case was because the extent of overcharges passed on to individual Mastercard payment card holders from the multilateral interchange fees ("**MIFs**") would have varied, meaning the class members would inevitably have suffered varying degrees of loss. Similar issues were found to be prevalent in the Gutmann Claim. For one thing, almost all class members would have made and paid for a differing number of full price journey tickets. Furthermore, some class members would have held a valid Travelcard at different times (i.e. not for the whole of the relevant period) and still others will have used different means for buying their tickets which would have affected the extent to which Boundary Fares were available.<sup>15</sup>

Notwithstanding these complications, the CAT referred back to the Supreme Court's decision in Merricks which held that the issue to consider was whether the class members' individual claims were "*sufficiently similar*" as a result of the same (alleged) misconduct to constitute common issues, not whether the class members had all suffered the same or a comparable degree of harm. On this basis, the CAT determined that the Commonality Factor was met.

#### Suitability Factor

The CAT also considered that the Gutmann Claim was suitable to be brought in collective proceedings for two main reasons:

- **Cost-Benefit Analysis:** There would be no realistic prospect of a class member pursuing an individual claim given the time and cost involved relative to the very low level of claim value that would make the entire claim procedure wholly disproportionate. The CAT recognised that a cost-benefit analysis came out against the granting of the CPOs having regard to different aspects (e.g. low estimates of recovery for each class member of around £100, the significant cost of the proceedings, the likely benefits to the funder and lawyers as opposed to the class members, etc.). Nonetheless, the CAT decided that the Gutmann Claim was still suitable for collective proceedings – especially taking into account the other number of common factors

<sup>14</sup> For instance, a total of 54.7 million Travelcards were sold over the period 2015/16 to 2017/18.

<sup>15</sup> For example, TVMs provided more of an opportunity to purchase Boundary Fares than online platforms did (most of which didn't allow any option to purchase Boundary Fares at all).

already outlined above - and therefore, allowed the CPOs.

- **Aggregate Damages:** The CAT considered that the economists in the Gutmann Claim had set out a workable and credible methodology for calculating aggregate damages, contrary to the arguments advanced by the TOCs. The proposed methodology for calculating the extent of damages owed to the class members – which, in essence, involved an assessment of the full price journey tickets paid for by class members, the savings that would have applied from Boundary Fares (had they been sufficiently made available), the number of Travelcard holders and the number of Boundary Fares that *were* sold – was sufficiently credible to merit an examination at trial. The CAT emphasised that the certification stage is "*not an occasion for a full evaluation of the merit and robustness of an expert methodology*".<sup>16</sup>

### Opt-in/Opt-out

Finally, even though this specific point was not raised, the CAT has the discretion to consider whether a CPO application is more suitable to be brought on an opt-in<sup>17</sup> or opt-out basis. The CAT considered in the Gutmann Claim that opt-in proceedings would not be practicable given that few persons were likely to proactively join the claim and, even if all the eligible class members *were* to opt-in, the resulting proceedings would be difficult to manage due to the size of the eligible class members. Though the TOCs attempted to use these factors to argue that the Gutmann Claim should fail the Eligibility Test on the basis that few would submit a claim after an award of aggregate damages, the CAT dismissed this submission. The CAT stated that "*participating in potentially lengthy and uncertain litigation from the outside is a very different proposition from claiming even a modest payment, for which the claimant is eligible to apply, from an existing fund*".<sup>18</sup> Given the strength of the claims and the fact there was, in the CAT's view, a realistic prospect of success, the CAT allowed the Gutmann Claim to be brought on an opt-out basis.

<sup>16</sup> See paragraph 155 of the CAT's decision in the Gutmann Claim.

<sup>17</sup> As the name suggests, if a CPO is brought on an opt-in basis then any prospective class members must specifically and proactively elect to take part in the proceedings. In this way, potential class members will not benefit from any award of aggregate damages granted at trial if they failed to opt-in, regardless of whether they are technically eligible to share in this compensation.

<sup>18</sup> See paragraph 184 of the CAT's judgment in the Gutmann Claim.

### What does this mean for the Gutmann Claim and the rail sector?

The Gutmann Claim, like the other recently certified CPOs, has clearly benefitted from the substantial relaxation of the Eligibility Test post-Merricks. Prospective CPOs now face a much greater chance of success at the certification stage than existed previously. That being said, the Gutmann Claim still has a long road ahead. For the moment, the CAT has merely allowed the claim to proceed to trial. It by no means guarantees any successful outcome. Indeed, unlike Merricks, which relies on an underlying infringement decision from the European Commission, Mr Gutmann will need to successfully prove that an abuse of dominance did in fact take place before the issue of damages can even be addressed. However, assuming the Gutmann Claim *is* ultimately successful at trial, millions of rail users who can prove they have been double-charged by the TOCs will be compensated for such losses.

More consequentially still, the Gutmann Claim will (and to an extent has already) set a worrying precedent and possibility for **any** train company which operates a service that passes through the TfL zonal system to be subject to similar collective actions. Any train companies which have not offered Boundary Fares or made the same sufficiently known to customers and available to purchase may therefore be vulnerable to CPOs premised on identical grounds to the Gutmann Claim. Whilst no other such CPOs against other rail companies are as yet known or in progress, industry stakeholders should monitor the progress of the Gutmann Claim closely. If Mr Gutmann has his way, similar actions against other TOCs may well follow.

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