IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1527/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 9th October 2023

Before:

Ben Tidswell
The Honourable Lord Richardson
Derek Ridyard

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Proposed Class Representative

Alex Neill Class Representative Limited

v

Proposed Defendants

Sony Interactive Entertainment Europe Limited and Sony Interactive Entertainment Network Europe Limited

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A P P E A R AN C E S

Robert Palmer KC, Nicola Greaney KC & Antonia Fitzpatrick for Alex Neill Class Representative Limited (Instructed by Milberg London LLP)

Daniel Beard KC, Charlotte Thomas & George McDonald for Sony Interactive Entertainment Europe Limited and Sony Interactive Entertainment Network Europe Limited (Instructed by Linklaters LLP)

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Monday, 9 October 2023

(10.30 am)

Opening remarks

THE CHAIR: Good morning, everybody. Mr Palmer, Mr Beard, can I just check you can hear me?

MR PALMER: Yes, we can, sir, thank you.

MR BEARD: Loud and clear, sir.

THE CHAIR: Thank you. We are being live streamed, so I better start with the customary warning. An official recording is being made and an authorised transcript will be produced but it is strictly prohibited for anyone else to make an unauthorised recording, whether an audio or a visual, of the proceedings and breach of that provision is punishable as contempt of court.

Mr Palmer, we are talking about funding.

MR PALMER: We are, sir, thank you. I appear, as before, for the proposed class representative. I have with me Nicola Greaney KC, who is going to assist the tribunal, I hope, with one paragraph in particular of our skeleton argument, that's paragraph 42, dealing with the implications of Sony's argument for costs caps generally, as they put it, and in particular, the bleed across into conditional fee agreements, and am also accompanied by Antonia Fitzpatrick. For Sony, you have Mr Beard KC, who you see before you, who is leading George McDonald, Charlotte Thomas and Gayatri Sarathy. As you know, this is the resumed hearing of the application for a CPO in respect of the revised funding arrangements, following the Supreme Court's judgment in *PACCAR*. So, you have had some full written submissions and two skeleton arguments. I hope that you and your colleagues have had a chance to look at those.

THE CHAIR: Yes, thank you. They have been very helpful and we have had a chance

to look at that and indeed, the material that came in the bundles. So, I think we are pretty up to speed. What is your view on the timing, how do you see the morning playing out?

MR PALMER: As I understand it, we have until 1 o'clock, subject to the tribunal. So, I would propose to split that time equally between myself and Mr Beard. I would propose to speak now for about an hour, and save 15 minutes by way of reply, once Mr Beard has had his chance.

THE CHAIR: I don't want to take you off course, Mr Palmer and I certainly don't want to constrain you from saying anything you want to say, but we did think it might be quite helpful to get to Mr Beard sooner rather than later. And in those circumstances, it might be better for you to have a bit of extra time at the end, if there is anything that comes out of that that we wanted to ask you more about. That's partly just because of the way that the argument presents itself.

MR PALMER: I see.

THE CHAIR: As I say, I don't want to take you out of -- or indeed, curtail your way -- but maybe -- I wondered if we could perhaps skip through -- anything you particularly wanted to raise over and above the submissions and the skeletons, you should do, of course, but that's probably all you do need to do at the moment. We will have a few questions, I am sure, for you, but I imagine we could probably do that in, hopefully, less than the hour, possibly around about the half hour, if that is possible.

MR PALMER: Sir, I am content to do whatever is going to assist the tribunal most. So, I will certainly keep my opening remarks short and save my time till after Mr Beard is if that is going to be more convenient. I have no difficulty in that at all.

THE CHAIR: I think that would be helpful, thank you.

Submissions by MR PALMER

MR PALMER: There are four issues before the tribunal, in essence. The first relates to the new clauses 11.1.2 and 11.2.2, which have been reserved to as the percentage payment provisions. In the light of *PACCAR*, the funder's fee is now defined to be the "greater of a multiple of the costs limit or" – and, here, the words of which Mr Beard complains -- "only to the extent enforceable and permitted by applicable law, a percentage of the proceeds."

Sony say that makes the LFA an unenforceable DBA. That's the first issue. If those provisions do not make this a DBA, then that is the end of issue 1. If they were to, then there would be a sub-issue arising, which is can they be severed, which might be issue 1B, if you like.

The second issue is, is the current LFA an unenforceable DBA for another entirely independent reason, which is that the funder's remuneration will ultimately be taken from any stakeholder entitlements which, in turn, are part of the proceeds as defined, and so, Mr Beard says, are fixed by reference to the proceeds. And that, he says, amounts to a DBA. So that's the second issue.

The third issue is whether the current LFA provides for an excessive and disproportionate funder's fee.

And the fourth issue is whether the current LFA creates a conflict of interest, such that these proceedings should not be certified on that basis.

I will deal with my introductory remarks under each of those issues and then, perhaps, pass the floor to Mr Beard for him to develop his objections because, really, all these points are defined by Sony's objections.

But I will stake out my territory. First of all, on issue 1, the context in which this issue arises is well known to the tribunal. *PACCAR* decided that a litigation funder provides claims management services within the meaning of the Act. In so concluding, the Supreme Court overturned not only the approach of the tribunal and the Divisional

Court composed of three Lord Justices but with it also much received wisdom in the market as a whole. And the essential rationale for that was that the terms "claims management services" were broad enough to encompass LFAs and it was for Parliament, having entered the field, to determine whether and to what extent that definition should be narrowed or LFAs should be regulated, but that was the current state of affairs. And in so finding, the Supreme Court recognised the effect on litigation funding arrangements that had been completed to date would be far reaching.

Now, one possible response to that situation is that Parliament will respond to the Supreme Court's judgment by exempting LFAs from the definition of claims management services in due course, or otherwise making them enforceable in opt-out claims. And that is a question of public policy which is now a matter for Parliament and Parliament alone.

So, too, is the question of whether, if Parliament does act, any change should be retrospective, so as to cover LFAs entered into before the change in the law.

It is against that background and that background specifically, that the funder and the PCR have responded by entering into the current LFA. They have entered into it in the knowledge that as the law stands, any fee for an LFA cannot be calculated by reference to a percentage of damages, as it would be unenforceable by virtue of section 47C(8) of the Competition Act.

So, even if it was a DBA and even if it complied with the DBA regulations, at the moment section 47C(8) provides a statutory bar to that agreement, otherwise lawful, being enforceable in the context of an opt-out claim.

That agreement was also entered into in the knowledge that that may change. And that's what gives rise to an explicit and careful drafting of clause 11. You have that in the hearing bundle at tab 1, page 22 and top of page 23, 11.1.2, I read out the words: "only to the extent enforceable and permitted by applicable law,"

And that formulation is then repeated, for the avoidance of any doubt, in each of the boxes defining the funder's fee which is applicable in the various circumstances defined in the left-hand column. The right-hand column defines the funder's fee as "the higher of" a multiple of "the costs limit, or" again, "only to the extent enforceable and permitted by applicable law", a certain percentage of the proceeds.

That same approach is taken as 11.2, with that same formula being repeated at every opportunity.

So, those percentage provisions form no part of the payment that the class representative is to make -- I will come back to those words "is to make" -- unless and until there is a change in the law. And absent such a change, it cannot be said that the amount of the payment is to be determined -- and I will come back to those words "is to be determined "-- on the basis of the percentage provisions. To the contrary, the parties have agreed that the percentage payment basis is not engaged by including those words "only to the extent enforceable and permitted by applicable law ".

And if there is, of course, a relevant change in the law, such that the provisions can be applied, then of course there would be, by definition, no objection to them.

I said I would come back to those words. If I could ask you to take to hand the authorities bundle, tab 1, page 4, you will find the definition of the damages-based agreement in section 58AA of the Courts and Legal Services Act. In particular, in subsection 3, as the tribunal is familiar, but however familiar we are with this provision now, that is no reason not to have as close regard to its specific wording as one would ordinarily have. In my submission, many of Mr Beard's submissions that he makes throughout this case fail properly to focus on the words of section 58AA(3). So, you have the definition in subparagraph (a), 3(a):

"a damages-based agreement is an agreement between a person providing [here] claims management services [that's the funder] and the recipient of those services

[that's the PCR] which provides that the recipient is to make a payment ..."

So "is to make a payment: "

"... is to make a payment to the person providing the services if the recipient obtains a specified financial benefit in connection with the matter and the amount of that payment is to be determined by reference to the amount of the financial benefit obtained."

The simple fact is on the application of the law as it stands to this agreement as it is written, the effect of this agreement is neither that the recipient is to make -- is to make -- a payment, nor that the amount of that payment is to be determined by reference to any percentage of the proceeds or of any damages which are awarded. Hence not -- and I will come back to this point -- by reference to the amount of the financial benefit obtained by the PCR.

I will come back to those words, in particular, in issue 2. But for the moment, I focus on those words: "is to make" and "is to be determined". And given the wording of clauses 11.1 and 11.2 that I have shown you, no such payment is to be made and it's not to be determined in that way.

So, it is a short point but a complete one. I will deal with my answer to Mr Beard's counter-arguments in reply, in view of the Tribunal's express preference. So that is our case on issue 1.

On issue 1B, which is the severance issue, again, I will sketch out our point here now. We say the test for severance, if this is a DBA, is very well established. It is set out by the Court of Appeal in *Zuberi*, at paragraphs 6 to 7. I won't turn it up now because the tribunal will have seen it, but the bundle reference is authorities tab 13, page 241.

That test has not been displaced or is not to be glossed in any way, as Mr Beard seeks to do. Any attempt to do so has now been disposed of by the Court of Appeal's very recent judgment in *Volterra*, which I might just turn up at this stage. *Volterra*, in the

Court of Appeal, is in the supplementary bundle at tab 14, beginning from page 118 and the relevant passage begins at page 126, paragraph 27, where you can see four lines down in that paragraph, it is common ground that there was a three-stage test to be applied and that test is set out at 28, derived from *Beckett*, dicta of Lord Justice Maurice Kay, which has that three limbed test which the tribunal will also have seen in *Zuberi*. And the particular focus in that case, as well as in this, was “3 The removal of the unenforceable provision does not so change the character of the contract that it becomes 'not the sort of contract that the parties entered into at all'."

At paragraph 31, over the page, there is reference to the fact that the *Beckett* three-stage test was approved by the Supreme Court in *Egon Zehnder v Tillman*. Five lines up from the bottom of that paragraph, “The Court endorsed the *Beckett* three stage test” and applied it in that particular case, and then goes on to say, at the end of that paragraph:

"In the course of his judgment, Lord Wilson made observations on all three stages of the test."

The first stage relates to the blue pencil test. The second stage, 33, is dealt with in terms of whether there still remains consideration."

Again, focusing on the third stage, paragraph 35, the Court of Appeal here -- Lord Justice Stuart-Smith -- cites what Lord Wilson said about that third stage in *Beckett* which includes the passage referred to in Mr Beard's skeleton argument, where he suggests five lines up from the bottom of that page that:

"... the criterion would better be expressed as being whether removal of the provision would not generate any major change in the overall effect of all the post-employment restraints in the contract."

This being a case, of course, concerned with post-employment restraints.

And at 36, Lord Justice Stuart-Smith says this:

"Lord Wilson's partial reformulation in [87] did not involve rejection of the criterion that he had just said was rightly imported by the *Beckett* case. Taken in conjunction with the observations of Maurice Kay LJ [in *Beckett*], I understand Lord Wilson to mean that it is necessary to look at the overall effect of the post-employment restraints in the contract, with and without the severed part, to see whether severance would change the character of the contract so that it becomes 'not the sort of contract that the parties entered into at all.' In that context, his conclusion that severance of the word 'interested' would not generate any major change in the overall effect of the restraints had the consequence that severance would not make the contract as a whole 'not the sort of contract the parties entered into at all.' His approach to the legal effect of the restraints is most apposite where, as in *Beckett* and *Tillman*, what is proposed to be severed is one of a number of restraints." ,not our case, of course, I interpose,

"However, the question to be answered in any given case is whether the proposed severance would change the character of the contract as a whole so that, if severance was implemented it would cease to be 'the sort of contract' into which the parties had originally entered."

We say that test is amply passed in this case, for the reasons that we have set out in our skeleton argument. In that context, I draw particular attention to paragraph 30a, which is at page 15 of the supplementary bundle. We say that “Upon removal of the percentage payment provisions, the nature of the current LFA would not be changed at all.” Unsurprisingly, because the LFA expressly contemplates that any payment to the funder in consideration for having provided the funding for a successful claim, should be determined only by reference to the costs limit, in circumstances where DBAs remain unenforceable. So, there is no doubt -- and if there were any doubt, that would be resolved by clause 37. That is in the hearing bundle behind tab 1, at page 36, which makes that abundantly clear, particularly at 37.1:

"If any provision of this agreement, including any part provision, shall be held to be illegal, invalid or unenforceable, the legality, validity or enforceability of the remaining provisions (and part provisions) of this agreement shall not be affected."

At 37.4, there is specific reference to that three-part test, with “the Parties acknowledging and agreeing that, If necessary to ensure the enforceability, legality or validity of this agreement, any provision of this agreement which begins with the words 'only to the extent enforceable and permitted by applicable law', shall be severable: ... "

And then reference to the test in (a), (b) and (c).

We say that makes crystal clear that severing that, if it were necessary -- which we say it isn't, but if it were necessary -- would not mean that the resulting agreement was not the same kind of agreement at all.

So that is the argument on severability. And, again, I will deal with Sony's objections to that in reply.

So, moving on to issue 2, which is the alternative argument Mr Beard puts forward, he does so on a wholly artificial, circular and indeed, tautologous basis. Turning back to the statute, if I could ask you to take authorities bundle, tab 1, page 4 again, the definition --

THE CHAIR: Yes.

MR PALMER: -- in section 58AA, obviously it is a DBA only if it fulfils both conditions in (i) and (ii). (i) applies here because the agreement provides that the class representative must make a payment to the funder if the class representative attains a specified financial benefit in connection with the matter. And the specified financial benefit, as would be typical, and as I will show is the case here, will be an award of damages. It can, under the Act, also be a claim for a sum of money, but since this is a collective action under 47B of the Competition Act 1998 for damages, it will here be

damages.

Now the point we take from the statute is -- and from (i) in particular -- is that the specified financial benefit cannot logically consist of an order that a defendant pay the class representative's costs of bringing the action or in relation to any application, such an order as is made by the CAT typically under rule 104. An order for costs under rule 104 is not a financial benefit, even if there were 100 per cent recovery of the costs incurred, which in fact of course, there never is, but taken as an argument, even if there were, at most that would restore the class representative to the position it was in prior to bringing the claim and, of course, in practice would be much less.

The claim is not brought to get an order for costs and that is not the specified financial benefit referred to in (i). Similarly, moving on to a payment from undistributed damages, that is not a benefit obtained by the class representative either. A payment out of undistributed damages is precisely that: a payment by the class representative. The only financial benefit obtained by the class representative in the context of an opt-out claim is the damages. Albeit a benefit which is obtained in a class action on behalf of the representative persons the class representative represents.

So that is the financial benefit, and the payment including the funder's fee, is distinct from it. If that payment is made out of undistributed damages, that just reinforces the distinction in (i) between the payment on the one hand and the financial benefit which is obtained by the recipient. There is no sense in which the payment is itself something which is a benefit obtained by the class representative.

We say --

THE CHAIR: Can I just make sure I understand what you are saying, make sure I understand it properly, Mr Palmer.

Are you saying that the proceeds -- if we go to trial or, indeed, there is a settlement and there are proceeds, there is an amount that is payable by way of damages, are

you saying that that is a specified financial benefit in its entirety? Is that right, is that your position?

MR PALMER: The payment of damages is. There is a wrinkle here which I confront directly, which is, the definition of proceeds in this contract includes costs, such as might be awarded under rule 104. If there is such an award, that becomes, as defined, part of the proceeds. But it is to be remembered that such an application for costs will only be made once there are damages, once there are proceeds. It is ancillary to the success of the action. But on any view, the stakeholder entitlements -- the funder's fee, the other fees which may be payable in that event to solicitors, to counsel -- are a payment which is made out of the undistributed damages, insofar as they have not been recovered by rule 104 payment. And that is not itself, therefore -- that payment out is not identical with or cannot be assumed to be or treated as the financial benefit to the class representative.

THE CHAIR: So you are saying there is only one financial benefit to the class representative and that's the award of damages and anything else that happens after that is effectively mechanics which represents part of the money under the --

MR PALMER: Yes.

THE CHAIR: And your argument does not amount to a specified financial benefit to the class representative. That's the argument.

MR PALMER: Yes.

THE CHAIR: And just in relation to the costs. I mean, I think you are saying -- I think you are saying that it's not a financial -- an award of costs made under rule 104 you're saying is not a specified financial benefit because the class representative has had to pay them already. Is that what you're saying? It's a reimbursement?

MR PALMER: That's right. A reimbursement, an incomplete reimbursement. But itis not the basis -- and I will come to the actual agreement in a moment but just looking

at the words in the statute, we are focusing on circumstances where the recipient is to make a payment to the person providing the services, if the recipient obtains a specified financial benefit. And in this agreement, as in any other, that only makes sense if the specified financial benefit is an award of damages. That's what is going to trigger the making of a payment. It's not the award of costs which is just reimbursing what has been spent in getting to that point.

THE CHAIR: Just while we are on the subject of costs: is my understanding correct, that costs which I think are called recoverable costs, once they are awarded and defined, they pass through the tribunal, don't they?

MR PALMER: Yes.

THE CHAIR: Once we have ordered them, they go straight into the stakeholders' account, as I understand it, or rather, into the client account and then into the stakeholders' entitlement. Okay.

MR PALMER: That's right, they do.

THE CHAIR: Whereas the proceeds, any payment which you say would not be a specified financial benefit, those payments that are then made, they do come through the tribunal and have to be approved before they end up going into the stakeholders --

MR PALMER: They do. There is no power for the class representative to skim anything out of the pool of damages awarded for the benefit of the class, for the benefit of any other person, whether it be the funders, solicitors, counsel, save pursuant to an order of the tribunal permitting it.

THE CHAIR: Am I right in thinking there is possibly a different position in relation to the priorities agreement, but if you put the priorities agreement to the one side, I couldn't see anything in the LFA which itself referred to the limitations of a fund when making a payment. In other words, there is no express cap, as I understand it, in the

agreement itself, so that it says: you can't pay more than such-and-such into the stakeholders' account, or: you can't pay more than such-and-such to the funder's fee, other than just common sense and the award of a tribunal that would give rise to that. Is that a correct understanding?

MR PALMER: It is correct. Can I just take you to the agreement. It is in the hearing bundle 1, page 22.

THE CHAIR: Yes.

MR PALMER: I just want to take you to paragraph 10.4 --

THE CHAIR: Yes.

MR PALMER: -- which is the closest it comes.

THE CHAIR: Yes.

MR PALMER: It doesn't, in reality, act as a cap, other than the blindingly obvious inevitable cap which would apply in all proceedings here, which is that:

"The class representative shall pay any stakeholder entitlements into the stakeholders' s account within 10 Business Days of receipt."

The extent to which there is a cap in any shape or form is the class representative can't pay anything else beyond the stakeholder entitlements ie, beyond that which has been determined and ordered by the tribunal to be paid. So, the only cap is that which the tribunal permits will be paid and nothing else will be.

THE CHAIR: When you get into the priorities agreement, there is a waterfall which certainly implies that there might not be enough funds to pay everybody. So --

MR PALMER: Yes.

THE CHAIR: So, I am sure that Mr Beard will have some things to say about that. But I just wanted to be clear about the position before that.

Just on the ten days, can you just -- this is slightly tangential but seeing we are on the point, 10.4 -- how does this work? Presumably, in relation to recoverable costs, it is

straightforward because the money would come into the solicitor's client account and would then be paid straight into the stakeholders' account, in accordance with this. How does it work with other stakeholder entitlements that the tribunal might approve in its discretion? What does the ten days refer to? When it talks about ten business days of receipt, does that mean ten business days of the tribunal saying that the money has to be paid from the client account into the stakeholders' account? I wasn't clear how that worked.

MR PALMER: Yes, it will vary, won't it? If it is a rule 104 order, then that language naturally fits. The order is made and once the defendants have paid whatever the tribunal orders should be paid by way of the PCR's costs, that will be paid and then that becomes part of the stakeholder entitlements. So that must be paid within ten business days of receipt. In relation to any payment which is authorised by the tribunal to be made out of undistributed damages, the damages will be sitting in the client's account already, so there is no actual further act of receipt.

THE CHAIR: It probably ought to say "within ten business days of receipt or being ordered --"

MR PALMER: Or being ordered by the tribunal.

THE CHAIR: It probably ought to say that.

MR PALMER: Yes.

THE CHAIR: I am not sure it goes to anything, other than just being a little bit untidy. I am taking from what you are saying that there is no suggestion that the money would be paid before the tribunal made the order, obviously. Just a point I picked up as we went on. Sorry, that was a diversion and I have taken you off course.

MR PALMER: Yes. So that, in a sense, is in a nutshell what we say about the terms of the order. You have the points, sir. You have the skeleton argument, so I won't take further time to go through it. I will respond to what Mr Beard says in due course.

The simple point though, of course, is we say that none of that amounts to a DBA. If it were a DBA, then every single one of these agreements would be a DBA. We say that cannot be consistent with the statutory scheme. It is simply making clear that that which the tribunal has determined for itself, which will not be by reference to the amount of the specified benefit but subject to all sorts of other considerations which lie in the discretion of the tribunal, that doesn't amount to a DBA.

THE CHAIR: Sorry, Mr Palmer, just to interrupt you, just before you move on, just so we are clear where you are on this. In section 58AA(3)(a)(ii), the reference to "the amount of a payment being determined by reference to the amount of financial benefit", and this does bring back in the priorities agreement to some extent, but I understood the case against you to include the point that those words are to be read quite broadly and so where -- and this is probably not putting it as elegantly as Mr Beard is going to -- but where you have proceeds that represent the damages which you say are the only specified financial benefit, and then you have a consequence of things which, by implication, or expressly refer back to that amount as part of the process, for example, of the tribunal setting the amount that goes into the stakeholders' account, all of that amounts to a payment being determined by reference to the amount of the financial benefit. I understood you to say that's just not what the words mean. I think your skeleton says it is a much wider reading than the clause warrants. That's a slightly different point from the argument you have advanced, I think, isn't it?

MR PALMER: No, it confuses what the financial benefit is. It amounts to reading that subsection as reading the amount of that payment is determined by reference to the amount of the payment awarded by the tribunal. That payment, as I say, comes out of the financial benefit. It is not the financial benefit which is the award of damages. The fact that those damages are subsequently permitted to fund a payment, does not

convert the payments to being determined by reference to the amount of the financial benefit, save in the entirely uninformative sense that the payment must, of course, be less than the amount of the financial benefit. But that much is obvious and is not determining what the actual amount of the payment is.

THE CHAIR: So your argument, as I understand it, is that the only thing that 3(ii) could refer to is the award of damages and reference to anything else in setting a payment is neither here nor there; that's your argument?

MR PALMER: It's neither here nor there, exactly.

THE CHAIR: Thank you, good.

MR PALMER: So issue 3, the funder's fee is said to be excessive and disproportionate. It's not. This is a wholly artificial argument. Once it is recognised that there is no entitlement on behalf of the funder to the full amount of the funder's fee which is applied for, this argument absolutely has no basis. And there is clear authority from the Court of Appeal, as well as from the tribunal, that the tribunal has full power to control the amount of costs awarded and to ensure that which is awarded is neither excessive nor disproportionate.

Can I take you to two authorities? One is *PACCAR* itself, which you will find in the authorities bundle at tab 20. I would like to go to paragraph 98 which is at page 536.

THE CHAIR: Yes. So this is the Supreme Court?

MR PALMER: This is the Supreme Court. This is Lord Sales giving the majority judgment at paragraph 98, referring to the terms of the funder's fee in that case under the LFA which was expressed to include a percentage of the proceeds for litigation:

"As the appellants point out, according to the procedural rules in the Tribunal and by virtue of the Competition Act 1998 the funder of opt-out proceedings always takes the risk that all of the damages recovered will be distributed to members of the class with the result that there will be nothing left to pay its fee and also [separately] takes the

risk that the Tribunal might decline to exercise its discretion to order a payment in favour of the funder."

Then it goes on to explain the award of damages would be the result of success in the action. “Distribution of damages is governed by rule 93.” Members of the class are to be paid but it may well be that as some are unaware or uninterested, there may be a substantial amount which is not collected:

"Rule 93(4) enables the Tribunal to order payments out of undistributed damages in respect of the representative's costs, fees and disbursements ..."

And that may include a funder's fee:

"The Terms of the opt-out LFA between UKTC and Yarcombe are structured to take this mechanism into account. Clause 10.1 imposes an obligation on UKTC to pay the funder's fee ... save to the extent that the aggregate amount ordered by the Tribunal to be paid to UKTC in respect of that obligation falls below the funder's fee, and by clause 3.1.4 UKTC warrants that it will use its best endeavours to obtain such an award."

So the structure of these agreements is always that application is made on the basis which the funder believes is proportionate and to which it would be entitled. But whether that is right is a matter for the tribunal to determine at the appropriate time. And the tribunal will, of course, be able to take that time into account, whether it would be disproportionate if, for example, on Mr Beard's scenario of an early settlement, where little had in fact been expended by way of funds on legal costs, well that would be a material factor for the tribunal to take into account in any event. But on the other hand, if the matter were to fight all the way and lead to a substantial amount of damages being awarded in favour of the class, it may well be that the tribunal took the view that the full amount was entirely proportionate.

So that is a matter for the tribunal to determine at the appropriate time. There is

authority for that in *Gutmann* in the Court of Appeal at authorities tab 16, page 406, at paragraph 83, where the court averted -- six lines down -- to the risk that the system might incentivise the incurring or claiming of disproportionately high costs, and also the risk of a third party funder having an incentive to sue and settle quickly for sums materially less than the likely aggregate award.

At 86, on the next page:

"the answer to concerns such as those expressed lies in the close supervision of costs by the CAT to ensure that they are proportionate ... 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 ..."

So the point is that yes, that is a concern, but the CAT has the power to police and the appropriate time to do so is upon the award at the appropriate time.

In fact, should this matter go all the way and fight and lead to a substantial award of damages, as the class representative hopes, the funder's fee would be substantially lower than that which it would have been, had it been a percentage of damages. My learned friend says, well, you can't take that as a comparator because that was the product of an unenforceable agreement. Two points in response to that. This is a response to his point that he says that the funder's fee has gone up, not down. That's only in his extreme scenario of an early settlement, not otherwise, so it is a fair answer to that. And the second point -- my third or second point -- is that it again falls within the purview of the tribunal to police at the appropriate time.

I also note that when we last assembled, there was no point taken at that time that those potential funder's fee would have been disproportionate, even though, had we gone the whole way, they would likely have been much higher. That was not an objection taken then, it's not an appropriate objection to take now.

The last point is on issue 4, no conflict of interest. Sony have failed to identify any proper conflict of interest arising out of this new LFA. Once it is recognised that the application for costs has to be made, as we have indicated, and distributed, the only relevant incentives on the PCR are those which have always existed. That is to seek an award of damages and to maximise the award of damages that is made, and for the PCR to control their costs in doing so. And that's precisely what the LFA provides for.

Can I just draw your attention to some provisions of it? First of all, clause 15.1, that's in the hearing bundle, tab 1, page 26. Entirely unsurprising and uncontroversial provision that "The Class Representative shall have overall and day-to-day control and conduct of, and responsibility for the Action." That's the class representative, not the funder. And at paragraph 4.3, going back to page 17, "The Parties recognise that the Solicitors must at all times comply with their duties under the Solicitors Code of Conduct to act independently and in the best interests of the Class Representative and in accordance with their other professional duties." So, too, of course, must counsel.

And going back again to the class representative's obligations under clause 3, at page 16, 3.1.9.3 includes an obligation to "take all reasonable steps to incur only reasonable and proportionate costs and control the quantum of the action costs…."

And equally at 6 through to 8:

"... take all reasonable steps to minimise and control the quantum of the actual costs. ; take all reasonable steps to ensure that the Solicitors comply with the Legal Costs Agreement; [and] take all reasonable steps to ensure that the Solicitors, Counsel and other third parties do not exceed their estimated and agreed costs, expenses and fees and/or the costs limit."

So, wholly standard provisions. That is the duty of the class representative. The class

representative stands entirely independently of both the funder and the solicitors. The provisions of the CAT guide on which Mr Beard relies -- you will see what he makes of it -- have been misread by him. They are concerned in particular with conflicts which might arise if the funder or a solicitor is the PCR. That is not the position here. We have gone to considerable ends to make sure that the proposed class representative is a consumer champion, with background, experience and reputation for representing consumer interests, and it is Ms Neill's task to ensure that that is done to the fullest extent.

All of the alleged conflicts of interest proceed from an assumption that somehow the funder is the one pulling the strings. Despite all of that, the funder has control. The funder does not have control of the day-to-day conduct, nor the overall direction and there is nothing in these funding arrangements which give them that control.

So, again, I will respond to Mr Beard on that. But that is our position on each of the four issues that arise for your determination today, sir.

THE CHAIR: Thank you very much, Mr Palmer.

Mr Beard?

Submissions by MR BEARD

MR BEARD: Mr Chairman, members of the tribunal, I will deal with things in the same order as Mr Palmer, but perhaps with a little difference in emphasis. This hearing was, of course, convened to deal with the potential impact of *PACCAR*, and although Mr Palmer reached it in relation to issue 3, I think it is perhaps instructive to pick up some of the key provisions in *PACCAR*, since they do influence the way in which one has to consider these matters more generally.

But as I say, I will take things in the same order. So what he referred to as issue 1, the operation of the percentage payment provisions, the inclusion of those in the new

LFA, and then I will deal with the severance issues. Then I will deal with whether or not the new cost limit provisions, in any event trigger the requirements of 58AA(3), and then finish off with the further considerations in relation to proportionality and conflicts. So I will start with issue 1, and then turn to *PACCAR*. Just as the headline in relation to issue 1, obviously Mr Palmer's emphasis in relation to issue 1 is this idea that, really, once he's structured his agreement in the way that he has, that in those circumstances, clearly 58AA(3) is not engaged. He emphasises words like "determine" and so on.

It is important to bear in mind that on their face, the percentage payment provisions do trigger the requirements of 58AA, and are prohibited by reason of 47C(8). So really, issue 1 is less about the terms of 58AA and more about these magic words that are included in the contract, "only to the extent enforceable and permitted by applicable law". Because that is really the phrase that is doing the heavy lifting for Mr Palmer here in relation to issue 1. Because I think he accepts that without that, there is an unenforceable DBA in relation to those terms and provisions.

So let me take a step back with that to *PACCAR*, if I may. So it's in the authorities bundle at tab 20, starting at page 498. Now I am sure the tribunal has enjoyed reviewing this in advance of the hearing, so I will deal with it relatively swiftly. But I think it's important to pick up from page 502, the background here because the background informs the way in which the statutory interpretation exercise undertaken by the Supreme Court is undertaken. I won't read it out, but if the tribunal could just read paragraphs 11 through to 13, that might be useful just to set some of the context here.

THE CHAIR: Yes, thank you.

MR BEARD: Thank you. I can't actually see Lord Richardson, but I am going to conclude that his reading has concluded. For some reason he doesn't appear on my screen. With apologies.

THE CHAIR: We have him. It must just be you, I think.

MR BEARD: I am very sorry, with my apologies, Lord Richardson.

LORD RICHARDSON: It is probably for your benefit, Mr Beard.

MR BEARD: The invidious comment. I will move on.

So the reason I emphasise that is for three reasons, effectively. First of all, it is important to have in mind the overall context, which was the fundamental opposition of the common law to funding arrangements but the countervailing concern that funding arrangements were necessary, given the cost of litigation.

The second point is, therefore, that this depended on, very specifically, the intervention of Parliament and the structure of Parliament's legislative scheme. The third point is about the assumptions in the market. Because the Supreme Court has shown in *PACCAR* that there can be all sorts of assumptions in the market which can be justified by all sorts of economic discussion about the great virtues of litigation, many of which the advocates appearing before you are utterly delighted with, but do not amount to a good basis for allowing certain sorts of funding arrangements.

Now we then see in the decision, from paragraph 14, a detailed consideration of the statutory provisions. I won't go through all of those. It picks up, at paragraph 27, on page 510, the introduction of 58AA in 2009. Then you will see, at 512, in paragraphs 29 and 30, the various conclusions drawn in the majority -- the majority-supported judgment, in relation to the structure of the legislation.

The important thing, really, to emphasise there is that what is being identified in 29 and 30 is that damage-based agreements will work, so long as they comply with the subsequently introduced damages-based agreement regulations. There is, of course, one salient statutory exception in that regard: it is in relation to opt-out claims.

Now, it is obviously something that the tribunal is highly cognisant of, but opt-out claims are not available outside the competition sphere in the UK, and what Parliament has

specifically done is said: you cannot have these DBAs in relation to opt-outs. But that is in the context where DBAs, more generally, are to be considered carefully by the Supreme Court and by all courts, and what we see in this decision is the sense -- and the interpretation that says the concept of a DBA is to be considered broadly, not narrowly, as the market had thought it could be.

So if we then move on through, you see the exposition of the issues in appeal in paragraph 31. Again, I won't go through that. There is a rehearsal of the Divisional Court's judgment at 37 through to 39. If we just briefly pick it up at 516, the heading is "The interpretation of part 2 of the Act, language, scheme and context".

In passing, I should touch within this section on paragraph 47 because this is germane to a couple of submissions that although Mr Palmer has not expanded upon, I anticipate he may want to come to in reply which is paragraph 47 which is picked up later in the judgment, says very clearly: you do not use subsequent material, such as the DBA regulations, to interpret the scope of the primary legislation that was enacted beforehand.

We then see at paragraph 50, the consideration of the wording decision -- wording, I am sorry, his conclusions on that. Then we move on into the context, which begins at paragraph 52, and in that section, what I would just pick up is in paragraph 68.

There is an emphasis on the breadth of this regulatory scheme. So what is being said is that you have a broad regulatory scheme for DBAs. We capture a lot in the primary legislation and then they have to be subject to these regulations. So we are not saying no to DBAs. What we are saying is we set our parameters widely and then we impose secondary legislation to deal with those issues. And that is the thrust, overall, of the Supreme Court's decision. And you see that carried through, if we turn over to paragraph 71, where, dealing with some of the rather technical arguments that were being raised, about how different bits of different statutes didn't fit together, you have

halfway down that paragraph, the admonition that I think probably resonates with all courts dealing with statutory interpretation:

"The statute book is not neat and tidy and there is no particular reason why statutory powers contained in different enactments should be regarded as mutually exclusive."

Again, I emphasise that because I think Mr Palmer, in reply, is going to want to talk about conditional fee agreements and all sorts of other things. It is important to focus on the DBA provisions and his conclusions on the wording and context are then summed up in 72. I say "his", obviously it's Lord Sales who was in the majority in relation to these matters:

"To sum up, therefore, I conclude that the statutory purpose of Part 2 of the 2006 Act was to provide a broad power to allow the Secretary of State to decide what targeted regulatory response might be required from time to time as information emerged about what was then a new and developing field of service provision to encourage or facilitate litigation, where the business structures were opaque and poorly understood at the time of enactment. The wide language used in section 4, and the degree of parliamentary control for the future exercise of the section 4 power, which is a feature of the scheme ... are strong indications of this."

The explanatory notes support it and so on. The important point here is we are dealing with a very particular case where Parliament has said: no DBAs in relation to opt-outs. But when we are talking about the interpretation of the nature of DBAs more generally, we need to recognise that the Supreme Court has said that the market has got this wrong to date, it has misunderstood the legislation and a broad approach is required.

I will move past the issues of potency and presumptions against absurdity. I will just pick up events after 2006, beginning on 532, but it is actually over the page at 534 that I would just note paragraphs 93 and 94 which are emphasising this idea you don't use later materials to interpret the Act. It is a point I was picking up in paragraph 47 that's

amplified and explained further here.

And whilst we're in *PACCAR*, and just for completeness, although this is going to deal with subsequent issues, Mr Palmer took you to some of the points made in relation to UKTC separate arguments. So there were two sets of funding arrangements that were at issue in relation to the *PACCAR* decision. There was the funding arrangements of the RHA, the Road Haulage Association and then funding arrangements of the UKTC which was a special claims vehicle that had been set up in order to bring class claims in relation to the Trucks infringement.

So you saw Mr Palmer taking you through paragraph 98 on 536. I will come back to that, because that's the one time he's talked about the funder's fee which is, of course, at the centre of the concerns that we have about the operation of these agreements. But it is just worth picking up 99 in relation to this. 99:

"None of this affects -- "

So this is after going through the material that Mr Palmer referred to in 98:

"None of this affects the application of section 58AA(3). The LFA provides that payment of the funder's fee is conditional on UKTC receiving a 'specified financial benefit' in the litigation. The payment to be made is obviously a success fee. As the appellants submit, the fact that a claims management service provider enters into an agreement which adds a further condition which must be met before a payment is due does not deprive the remuneration being of the character of a specified financial benefit within the meaning of section 58AA(3)(a)(i)."

Now the reason that's going to be relevant to the consideration is two-fold. One is although the condition here that's being talked about is the condition of the tribunal making an order, the statement being made is a general one. When we come back to Mr Palmer's magic words, that is a condition and what the Supreme Court is saying is conditioning these things doesn't change the analysis of the agreement. It is also an

observation or finding that is relevant to the points that are made about -- I think the way that Mr Palmer is now putting his case in relation to what constitutes a specified financial benefit and whether or not the arrangements actually fall within 58AA(3)(a)(ii). So I will pick that up in due course.

I wasn't going to take you through more of *PACCAR*. Certainly there is a lengthy dissenting judgment from Lady Justice Rose, who very articulately expresses the view that, actually, the market should have been given its head, essentially, in relation to the interpretation of those matters. It is not the law.

So let's take that back in relation to issue 1. It is worth bearing in mind that so far as we are aware, no one has embarked on this rather novel approach of trying to maintain percentage payment provisions in an LFA in relation to any sort of collective action claims.

Now, that, in and of itself, does not condemn what Mr Palmer's client is seeking to do at all. But it does cause us pause to think about what's actually going on here. Because if you just think of the percentage payment provisions in and of themselves, without the magic words, plainly they would constitute a DBA. Mr Palmer accepts that. He then says that if you add the magic words in, that makes a difference.

Now let's just take that in two stages. If we think about a contract, including those percentage payment provisions but with Mr Palmer's magic words, let's ask ourselves: is that an enforceable contract? And the answer is plainly no. You can't turn up with an unlawful contract and say, "Oh, it is a contract, it's perfectly valid, except that we can't actually enforce it at the moment because it is contrary to the law. We hope that the law might change in the future but that's still a valid arrangement."

And we say that absolutely is not a valid arrangement in the circumstances. And the fact that you add an alternative which he says is an alternative lawful funding measure which we will come back to in relation to the second issue, the fact that you add that,

that doesn't change the fundamental analysis here. You cannot have --

THE CHAIR: Mr Beard, it does, doesn't it? Because it is a condition, isn't it? It's a condition that has been put into the contract that says only in specified circumstances will that clause operate. And the condition happens to be that that clause is enforceable. Is there anything wrong with that? Why is it not possible to make it subject to a condition?

MR BEARD: Let's take out all the cost limit provisions for a minute. Let's just say we are focusing on those percentage payment provisions and test your question, Mr Chairman. Can you have a contract that says, first of all: we enter into a funding arrangement that is currently not lawful, on the basis that if it becomes lawful to do these things, then we would, presumably retroactively, want to apply all of these provisions. We say obviously you can't do that.

Now what we then say is the fact that you then attach an alternative structure to it doesn't change that fundamental analysis.

THE CHAIR: But are we simply talking about contractual interpretation here or are we talking about something else? Because if it is a matter of contractual interpretation, I am not sure why you say that. It seems to me if there is a condition that is applied, it is entirely for the parties to decide how that condition is framed, and they have put that in there. And as you say, it's an alternative, so there is no question that the contract is operable if the condition isn't met. So I don't understand. The bit I am struggling with is why you say that as a matter of -- maybe you are not putting it as a matter of freedom of contract, but as a matter of freedom of contract, why shouldn't they agree that?

MR BEARD: As a matter of freedom of contract, the parties can seek to agree all sorts of matters, but as a matter of public policy or illegality, because that's what we would be dealing with here, you can't agree to a contract that is unlawful and then

protect it by reference to a clause that says: well if it ceases to be unlawful in the future, that's fine. That, as a matter of --

THE CHAIR: That's circular though, isn't it? You are starting with the presumption that it's unlawful. But if the condition means that it is not unlawful, then that's not the right starting point.

MR BEARD: No, it's not circular. Because at the moment -- which is when we are having this discussion -- we know that the substantive terms of this arrangement in relation to the percentage payment provisions are unlawful.

THE CHAIR: What, with the conditions --

MR BEARD: So it is not circular.

THE CHAIR: But the condition prevents it from having that effect, doesn't it?

MR BEARD: The condition prevents it on the basis of what is said as being a contract that is then enforceable at some point in the future.

THE CHAIR: Well, I am not sure I understand that. Sorry, perhaps you can just tell me, what is it you say that that clause actually -- what is your construction of that clause, what does it do? What is the effect that is given to it by clause 11.1.2?

MR BEARD: Clause 11.1.2 is seeking to say that although these clauses cannot operate now because they are not lawful, if there were to be a change in the law, they can retroactively operate in future. That is what it is seeking to do.

THE CHAIR: You used the word "retroactively". Maybe just put that aside for a minute because I don't think it says that, that rather depends on how the law changes, I think. Putting that aside for the minute, isn't that simply saying that at the moment, the operative provision is not operative because the condition has not been met?

MR BEARD: Okay, let me go back to the example I was giving. If there weren't a cost limit provision in here, could this tribunal sensibly say that there was a sensible cost funding arrangement in relation to this position as we stand at the moment, in relation

to this litigation?

THE CHAIR: That doesn't help us, because there is cost limit provision in there. That's the whole point.

MR BEARD: I understand that.

THE CHAIR: I can see your point, but if the only mechanism by which the funder could be paid is 11.1.2, then that obviously would give rise to the question as to how the contract worked in its entirety.

MR BEARD: Of course.

THE CHAIR: But that's not how it is framed, it's drafted in a completely different way.

MR BEARD: Yes, but the drafters had tried to say: look, if we add something in, we change the way in which you have to effectively consider that clause, because if it were on its own, we all agree it doesn't work. As long as it's become an alternative, it is now workable. We say that's the wrong approach here. And, effectively, what is going on is trying to bolt together two contractual structures, one of which is unlawful and unenforceable and one that isn't and by bridging them somehow, using this conditional clause, you endeavour to circumvent the problem that arises in relation to operating a scheme that throughout the period of this litigation will provide a set of potential incentives to the PCR and the funder in relation to the way the litigation is operated.

Because, of course, we recognise at the moment there is not any immediate prospect of a change in the law, but the PCR -- and more particularly the funder -- wouldn't have provided this provision unless this was material to them in the way in which they approach these matters. That's why we say in those circumstances, to include something which you must think is material otherwise you wouldn't have bothered because no one else appears to be doing it at the moment, they may be, the PCR would say, missing something, but we say plainly it's material to them. What they are

trying to do is use this language in order to bridge between these two sets of contractual provisions. That doesn't work. The caveat that sits there doesn't operate to allow that to be suddenly an enforceable arrangement. It is a DBA. Contracts of this sort need to be considered broadly in line with *PACCAR*. And as I indicated and by reference to paragraph 99, the fact that there is a condition in there -- albeit not one pertaining to the discretion of the tribunal, effectively it is pertaining to the discretion of the legislature as to whether it operates to change this law -- doesn't alter the position here. And it is for that reason that we say in relation to issue 1 that the maintenance of these percentage payment provisions are things that fall foul of the broad scope of the DBA interpretation that's being talked about in *PACCAR*.

So what we are emphasising is that the notion that you can use this sort of conditionality which is specifically something, albeit in relation to a different type of condition but is deprecated by the Supreme Court to rescue what otherwise is, on its face, a DBA, leaves this agreement as a whole as a DBA.

So I think it is important in this context also to bear in mind that we make the decisions now, as a tribunal, as to whether or not these agreements are workable funding arrangements. And we have to make these decisions now in relation to the lawfulness of the components of that funding arrangement. And for the reasons that I have articulated, those funding arrangements that include the DBA language, the percentage payment language, even though it's subject to a caveat, are such that they should not be permitted by the tribunal now. And it should not be that matter that is left for the future, which is effectively what this clause is seeking to do.

Now, it's only if the tribunal is with me in relation to the interpretation of those DBA provisions that the issue in relation to severance arises. If the tribunal is against me in relation to the conditionality, and the interpretation of those DBA provisions, no issue as to severance arises for our consideration.

On the basis that the DBA element here, within the agreement as a whole, is critical to the agreement as a whole -- it wouldn't have been included by the PCR and the funder if it weren't critical to the structure of funding as a whole -- in those circumstances, the simple point in relation to severance -- and I will briefly go back to the authority Mr Palmer referred to -- is that those provisions being unlawful changes the overall nature of the funding agreement that is being put forward here.

Therefore, the third limb, as Mr Palmer put it, of the test for severance, is not made because you are moving from a situation where you had a DBA, you had an agreement that included provisions that amount to a DBA, that the magic words do not mean that the agreement as a whole ceases to be a DBA, and then are saying: nonetheless, if we put a line through those provisions, it's the same agreement, fundamentally. And that's the simple point in relation to severance. But if I may, I will just develop it briefly by reference to the case which Mr Palmer has already referred you to which is in the supplemental bundle at tab 14, I think, starting at page 118, the *Diag v Volterra* case.

It is perhaps just worth noting that in relation to that case, picking it up at paragraph 1, what was going on was dealing with what was effectively a hybrid arrangement, whereby essentially there was a structure in relation to which solicitors could be paid, effectively, at a guaranteed rate but then there was an additional discounted rate in relation to certain sorts of work, depending on certain sorts of conditions being met. And there was a concern that one of the clauses in the agreement rendered it unlawful and the question then was whether or not severance could be made in relation to the problematic elements.

As Mr Palmer indicated, the discussion begins at page 126, paragraph 47.

You will see there, as he said, the test set out, the three-part test that was articulated in the *Beckett* case, paragraph 28. You will then see, over the page, the consideration

of the *Beckett* test in the *Zehnder v Tillman* case. That concerned a rather different situation, employment restrictions, where the employment restriction not only covered direct competition but even shareholdings in rivals and it was said that the wording that restricted someone from even holding shareholdings in rivals could be removed and wouldn't overall change the employment contract or the restrictions on further employment. But that was applying the three-stage test.

And then, if we go on to paragraph 35, I know Mr Palmer briefly referred you to that. But looking at the consideration in *Tillman* by Lord Wilson that's quoted at 87 and 88, the emphasis on that third criterion, is it not the sort of contract that the parties entered into? We say in circumstances where you would be removing this very different methodology which is obviously of importance to the parties and, in particular, the funder, to retain since it has done so, you would plainly be changing the nature of the contract, where you seek to simply exorcise those provisions from the agreement. Indeed, to put it another way, as we have done in the skeleton: because the effect of the percentage payment provisions being retained within the scope of the contractual arrangements means that you look at the agreement overall as a DBA, what you would be doing is undertaking an exercise in severance which would move that agreement from being a DBA to not being a DBA; a fundamental change in the way in which the contractual scheme operated. So in those --

THE CHAIR: I am sorry, Mr Beard, I am sorry to interrupt you but just on that point, my observation when I read that was that you seemed to be attaching more importance to the label than the substance. But in fact, I think you are saying this is about the substance because you are saying that a DBA has a particular character and that character is something which, for whatever reason, you are saying is critical to the funders in this case and, indeed, the PCR. So I think -- if I understand your argument correctly -- this isn't just about the labelling, it is about the substance.

MR BEARD: No.

THE CHAIR: So does that mean that the necessary exercise for us, if this is engaged, is to compare the costs limit and the type of agreement that gives rise if you have a cost limit funding arrangement with a percentage funding arrangement which the DBA would import. Is that essentially the sharp point of comparison?

MR BEARD: Yes, I think that would be the sharp point in relation to this. I don't think one, as the tribunal, would need to go through some sort of assessment of the actual levels of recovery of funder's fees and so on in order to be able to reflect upon the differences in structure and arrangements. I mean, our point is a simple one. If there was no difference here between the agreement with these clauses and without them, given that the agreement is structured in the way that it is, we don't understand how it can be said that it isn't significant to the overall contractual relationship between the funder and the parties, or the PCR, in relation to these matters.

THE CHAIR: Well, the difference -- the reason -- I mean, I am speculating and, of course, this is only really for the purposes of a hypothetical --

MR BEARD: Yes.

THE CHAIR: -- so attach no importance beyond that. But let's say that the funders and the PCR want to do this because of the consequence -- it does change the nature of the return, the outcome.

MR BEARD: Yes.

THE CHAIR: So you would. And, obviously, if one does the financial calculation, you would -- if the damages, if awarded, were very, very large, then under a percentage basis, you get an awful lot more money.

MR BEARD: Yes.

THE CHAIR: And clearly that is different from the cost limit which is a much flatter profile of return, if one can put it that way.

MR BEARD: Yes.

THE CHAIR: Because the ratchets really determine what the shape of the curve is or the line or whatever it is --

MR BEARD: I think it is preordained in a way that it isn't previously. I think flatter might be a kind way of dealing with the incremental ratchets really, yes.

THE CHAIR: I think if you merge them on a graph, I think it is flatter. You may have some observations about where the line starts, I think is the point you are making but does that mean that when *Egon Zehnder* talks about major change and overall effect, is that what we are talking about here? I think you just said we don't need to look at the outcome, but do we not need to look at the outcome, if that is what we are looking at? Isn't the overall effect, and the thing that is likely to be driving this, the actual number, at the very end?

MR BEARD: Absolutely, you have to look at the way in which it is doing it. All I was saying is you don't have to conjure up a specific number in order to undertake that exercise. It is going to be a difference in structure and incentive that matters here and that's what is very different between the percentage payment provisions and any cost limit. Even though, as we will come on to, is what the cost limit is trying to do is cap the sum of the incentive structure of a DBA. But we say they are saliently different. You would not have included them if you weren't recognising that salient difference; difference in potential levels, difference in structure of incentives and timing of incentive changes and so on, in relation to the agreement.

So I think there is an extent to which the PCR and the funder can't have their cake and eat it. If they say the cost limit provisions are materially identical to and therefore don't cause any substantial change from DBA provisions under the percentage payment provisions, then they are in danger of suggesting that these cost limit provisions shouldn't be permitted in any event.

THE CHAIR: Yes.

MR BEARD: We say there are differences.

THE CHAIR: Yes.

MR BEARD: But that's a long way of answering your question which is a yes, you will need to engage in that sort of exercise.

THE CHAIR: I am looking at the time. At a convenient point, we ought to give the transcription services a break. Perhaps when you're moving on to the second argument, whenever that it.

MR BEARD: If I can just finish with this case and then I will pause if I may.

THE CHAIR: I am sorry, I took you away from it.

MR BEARD: No, no, that's fine. I can try and deal with the remainder of the case relatively briefly. You will see that the test that is being discussed is whether or not it's the sort of contract that the parties have entered into if you have carried out the severance. We say clearly it's not the same sort of contract that the parties have entered into in relation to the arrangements that they have put in place with the conditional percentage payment provisions, as they are put forward.

It is worth just -- the conclusion, in essence, is set out in paragraph 40, where it's made very clear that the arrangements there that would provide for solicitors to be able to charge at a discounted rate without a conditional element, those effectively being included in an agreement because they would effectively tap into a different method of funding and paying, were saliently different from what was otherwise being envisaged. And, therefore, they couldn't be severed and we would say in carrying out your analysis, it would be important to have that as a touchstone. It is only by analogy because, obviously, it is a different structure but it's relevant to the assessment here.

So that's in relation to paragraph 40. I won't deal with the issues in relation to *Garnat*.

Just picking up in relation to *Zuberi*, because I anticipate this is something that may

be brought forward: you will have seen that there are arguments about the role of the case of *Zuberi*. I am in some degree of difficulty in dealing with this because, obviously, Mr Palmer has not opened in relation to it, but what I would broadly say in relation to *Zuberi* are two things. One is one needs to be extremely cautious about reading anything in relation to *Zuberi* now, because the whole of the *Zuberi* judgment is predicated, if you rely on Lord Justice Lewison's judgment, on a narrow interpretation of what constitutes a DBA.

The approach of Lord Justice Newey was very different. It was in relation to the application of the damages-based agreements regulations. Lord Justice Coulson actually agreed with both judges, so it is not quite clear how one now reads that post *PACCAR*.

Second of all, insofar as it's being relied on in the context of severance discussions, strictly speaking Lord Justice Lewison's observations about severance are in fact obiter, which you can actually see from paragraph 49 of the *Zuberi* judgment. It's actually referred to in paragraph 50 of this judgment. But in any event, it doesn't change the way in which one carries out the analysis under the *Tillman* test, which I have already made submissions in relation to.

So I think it's not necessary to take you through more of that since Mr Palmer has not emphasised any of those points so far. If he is going to go back through that material in more detail, I might need the opportunity to respond, but perhaps we can wait and leave that for a moment.

THE CHAIR: Thank you. If that's that convenient moment, we will take a short break and come back at five past 12.

MR BEARD: I am most grateful, thank you.

(11.56 am)

(A short break)

(12.08 pm)

THE CHAIR: I think we are ready, Mr Beard, when you are.

MR BEARD: I am most grateful. I will move on to issue 2. There are a couple of points I wish to come back on but I will pick them up at the end. You will see our consideration, effectively of the issue 2 points are picked up in our skeleton argument at paragraph 51 onwards. The tribunal has emphasised that it has read those provisions and I won't, therefore, repeat them. But I think it is important to have a look at just how this works overall, particularly given the submissions that Mr Palmer has made this morning, where as I understood it, he's said that the only financial benefit -- he's accepted that the financial benefit is the damages, and then he's saying that no payment in relation to the funders is in any way determined by reference to those damages, even though those are the only sums from which, in particular, the funder's fee is going to be feasibly paid. Because of course, the funder's fee is not part of the costs disbursement or other fees in these circumstances that could, even on his case, be ordered by the tribunal to be paid by Sony.

In other words, the pot of money from which the funder's fee will be drawn will inevitably be this putative financial benefit which amounts to the damages element that he says his client is entitled to bring the claim in relation to.

It is just worth perhaps stepping back to the terms of the agreement. We know that when we are considering these issues, we have to look at how it is the arrangements will be put in place for the funder's fee to be paid to the funder. We also know that the stakeholder entitlements are all going to be paid into the stakeholder account. It is worth perhaps just looking at the funding agreement -- the new funding agreement -- tab 1 of the bundle. So far as we can see, if we start at page 15, this is the external numbering, the class representative's obligations. It says, 3.1:

"The Class Representative will..."

And you will see when you go over the page to page 16, it says, 3.1.7:

"... procure payment of any stakeholder entitlements into the stakeholders' accounts."

And you are familiar with the definition of stakeholder entitlements which is set out at page 14.

THE CHAIR: Yes.

MR BEARD: And the stakeholders thereunder. If we go then back, it says, page 16, 3.1.8, that the class representative will:

"... pay any stakeholder entitlements to the stakeholders in accordance with clause 10.4".

Now there is something mechanistically odd that then occurs. Because if you go to page 22, you see under the heading "Stakeholder entitlements", clause 10.4, it just says:

"The Class Representative shall pay any stakeholder entitlement into the stakeholders' account within 10 business days of receipt."

This is the language, Mr Chairman, you were just picking up about timing issues. But there is something more fundamental here because you will see that the obligation on the class representative in 3.1.8 is "to pay any stakeholder entitlements to the stakeholders", in accordance with 10.4. Then, when you look at 10.4, all that is, is putting those monies into the accounts. This funding agreement then, doesn't deal with how those monies are to be dealt with. Now, as we understand it -- and that is not completely clear -- when one goes back to the meaning of the stakeholders' account on page 14, it --

THE CHAIR: Yes.

MR BEARD: -- says:

"Stakeholders' account means an account held by the solicitors on trust for, and for the benefit of, the stakeholders."

Now we are not aware of any trust documents that deal with how that arrangement operates. We assume that somehow the funder and the parties are thinking that the priorities agreement can somehow govern the way in which that trust operates. But that mechanism as to how it all works, is not completely clear to us. We got the priorities agreement on 29 September. We have obviously read it. We are not taking points in relation to specifically how it works. But we do see a gap in the way in which the structure is put together that we don't find entirely clear.

The point here is that what we are concerned about whether or not the funder's fee is in any way determined by reference to the proceeds. So far as we can see, the first and most basic point which is the one, sir, that you articulated very neatly earlier, is that the funder's fee has to come out of the financial benefit that is conferred through any damages award. Now Mr Palmer says: well, that doesn't matter, that's not the funder's fee in any way being determined by reference to these matters.

We say, well, actually, what you are achieving by way of payment here is being determined by what comes through the damages -- or putative damages award that then goes into the stakeholder account. But we have also identified two rather more specific points in relation to this. The first is that the cap on that level of funder's fee -- in other words, the level that the funder can receive -- is determined by reference to the level of the proceeds that are put into the stakeholder account.

Now going back to what I said about *PACCAR* being very straightforward in the Supreme Court saying "you need to interpret these provisions broadly", it is clear that if the limit on the funder's fee is determined by having regard to what it is that goes into that stakeholders' account, it is plain that 58AA(3)(a)(ii) is being met here. In other words --

THE CHAIR: Can we just have a look at that? I must say, I am not sure I do follow that submission you have just made. I just happen to have it in one of the skeletons,

I think in the PCR skeleton. But just wherever it is.

So you are saying that the reference point for application of (ii) is the amount of money that is paid into the stakeholder account as stakeholder entitlements. You are saying it is that calculation of that amount that is the relevant point at which we assess whether this applies or not. Is that the submission?

MR BEARD: Yes. So what we are saying is that at this stage, you can tell that even on Mr Palmer's approach which is to push all of these discussions far down the road, that in relation to the extent of the funder's fees -- in other words, identifying what the funder's fee is -- that will be determined by having regard to what is in the stakeholders' account.

Now he will say: yes, but the funder's fee may be -- if I am very successful, the funder's fee, as calculated, is going to be lower than that amount, in which case it doesn't actually operate in the particular case as a limit. And then he says: well that means that it's not being determined by reference to those sums. Now we understand that that, contingently, is the case --

THE CHAIR: I am sorry to interrupt you, just before you get into his arguments, I just want to understand your argument about why it is that the calculation of the funder's fees as it sits in the stakeholders' entitlement, is the reference point that we should be looking at. Because it seems to me that what 3(a)(ii) is supposed to be looking at is whether the amount of the payment to the funder -- so the funder's fee -- is to be determined by reference to the amount of the financial benefit which is the proceeds, isn't it?

MR BEARD: Yes.

THE CHAIR: Because that's the financial benefit to the PCR. Stakeholder entitlements are not a financial benefit to the PCR. So why are the stakeholder entitlements of any relevance at all?

MR BEARD: Because it is only from the stakeholders' entitlement that the funder's fee can be taken. Because that's how -- as I understand it, the way in which the interaction between the payments into the stakeholders' account then percolate through the priorities agreement to paying the funder's fee. In other words --

THE CHAIR: Yes, but we are not --

MR BEARD: -- (inaudible due to overspeaking) other funds available.

THE CHAIR: But we are not interested in the way in which the payments are made, we are interested in the way in which it is calculated, aren't we? Isn't 3(ii) all about the calculation, the amount, to be determined by reference to the amount of the financial benefit?

MR BEARD: Yes, we agree with that completely. That must be right. But the point we are making is that the amount of money you put into the stakeholder account in simple terms, dictates how much money is available for, in particular, the funder's fee.

THE CHAIR: Yes, and what does that have to do with the amount of the financial benefit? What's the relationship between those two?

MR BEARD: The finance benefit that's conferred acts to operate as a cap on what the funder's fee can be, claimed through the stakeholders' entitlements from the stakeholders' account.

THE CHAIR: Is the point as simple as this: because the proceeds -- let's put this in the context, let's say we have got to judgment and we have decided that there is a liability and we have awarded some damages and those become proceeds.

MR BEARD: Yes.

THE CHAIR: So that's the scenario we are in. Forget about settlement which is obviously a different scenario, if that arises. So we have got to the where we've decided how much is available. Are you saying that the mere fact that that number operates as a natural cap on how much the funder could ever recover is enough to

engage 3(a)(ii)?

MR BEARD: Yes.

THE CHAIR: That's the basic submission, is it? I just want to make sure I have understood it properly. That's the basic -- that's the heart of your submission on this?

MR BEARD: It is the basic submission because the money comes -- the PCR obtains the financial benefit that is put into the stakeholders' account, and the payment to the funder can only be made by reference to that amount. And in relation to the point that we are just discussing, that funder's fee is capped by the amount that is being paid into the stakeholder account.

THE CHAIR: Well that's a different cap, isn't it? Because a lot of the proceeds will never go into the stakeholders' account. Most of them will just go into the class representative's solicitor's account. It is a separate -- as I understand it --

MR BEARD: It's the same financial benefit. It's that financial benefit that is limiting what can be obtained by way of the funder's fee.

THE CHAIR: Yes, I think the point I am exploring with you, I just don't understand, really, why -- there are two steps here, aren't there? There is the amount of proceeds.

MR BEARD: Yes.

THE CHAIR: They will be going into the class representative's solicitor's account. There will then be an application to us for an order -- firstly, there will be an application in relation to costs and we will deal with that separately. Just put that aside for a minute.

MR BEARD: Yes.

THE CHAIR: Then there will be an application for the order for the payment of costs and disbursements, including funder's fee. That amount, once it is ordered, will then go into the stakeholder account. That, of course -- so there are two different numbers which do, in practice, give rise to a limitation on how much the funder could get. The

first is the absolute size of the proceedings and the second is the amount that we order goes into the stakeholder account. But the second of those has no necessary connection with the amount of the proceeds, does it?

MR BEARD: It doesn't have a necessary connection but it is limited by the scope of the proceeds. So it acts as an absolute cap overall.

THE CHAIR: That's the first point. I am just trying to see whether you are trying to make a separate point about -- there are two separate exercises. As I say, there is the size of the proceeds itself and whether that operates as a cap and then there is the amount that gets paid into the stakeholders' account and whether that operates as a cap. You seem to be spending quite a lot of time on the second of those which seems to me to be irrelevant, when the first is actually the thrust of your point, the cap is at the proceeds level, not the stakeholders' account level.

MR BEARD: It has to be at the proceeds level. What I was explaining was merely how it works when you get into the stakeholder account and what the entitlements are that are then passed through has an ambiguity about it because of the structure that's been put in place. But the fundamental point in relation to caps relates to the proceeds and the limitation as to what can go into the stakeholder account, and then available for distribution.

So it is a more simple point. We are not overcomplicating this. We are trying to say: look, in reality, you have a Supreme Court judgment that says you need to, for good policy reasons, read the scope of the inclusion of matters within the category of DBAs broadly. Where you have a situation where the amount of money that can be drawn down or ordered through into the stakeholder account is limited by the process, that limits the amount that can be claimed by way of a funder's fee. As such, it acts as a cap. It therefore acts as a determinant of the payments that can be made to the funder.

THE CHAIR: Is it not the case that every case where there is a funding agreement risks that outcome, doesn't it? Regardless of whether it is a DBA in *PACCAR* terms. Aren't you saying that wherever there is a possibility that the funding arrangement might give rise to a claim for funding that is greater than the proceeds, that's a DBA? Is that what you are submitting?

MR BEARD: It depends what the cap is. If the terms of the contract don't limit in this way, then no. If, in practice, people put these sorts of caps in place, then all of those caps contracts could fall within the scope, I can see that.

But that's a matter of the contractual arrangements that are put in place in relation to these issues. So far as DBAs are concerned, what we know in relation to DBAs is that the Supreme Court has said broad interpretation of DBAs, and they are only enforceable insofar as they comply with the regulations and if the regulations -- I am so sorry?

THE CHAIR: I am sorry to interrupt you. I just wanted, before we get back into the broader point, where is the cap, where is the contractual cap in this arrangement then?

MR BEARD: The contractual cap? I am so sorry.

THE CHAIR: What clause? Which clause says that you can't award that funder's fee that is greater than the proceeds? Where is that contractual cap?

MR BEARD: In practice, it's a cap on what can go into the stakeholders' account that can be then drawn down for the payment of the funder's fee. So it doesn't --

THE CHAIR: Where is that cap?

MR BEARD: I am sorry, I am not sure I understand why there needs to be a specific contractual cap in relation to these matters. In practice, you can't have anything more than the proceeds, and the proceeds are defined in the contract and they are what is being made available through the stakeholder account.

So what we are saying is that because the amount of money that can go into the

stakeholders' account which includes the costs and disbursements monies and the proceeds, that total limits the amount of money that can therefore be available to be drawn down for the funder's fee. If the funder's fee exceeds those sums, then in this arrangement there is a cap on the funder's fee by reference to the proceeds. In other words, the financial benefit. You don't need a separate additional --

LORD RICHARDSON: Mr Beard, I hope you can at least hear me, if not see me.

MR BEARD: Both.

LORD RICHARDSON: That is helpful. I wonder if the issue that perhaps the Chairman is getting at is I think everyone is agreed that the starting point here has to be 58AA(3)(i) and (ii).

MR BEARD: Yes.

LORD RICHARDSON: After that, what your argument must be is that this is a damages based (inaudible) agreement because the agreement between the parties, the funder and the PCR -- and using the words in (a) -- "which provides that", so it is the agreement which provides that the amount of the payment going to (ii) “is to be determined by reference to the amount of the financial benefit [being] obtained.” Now, I think the Chairman's point is to say: well, it seems -- and I think the reason we are keen to see to what extent your argument is founded in the terms of the agreement is because if it's not founded within the terms of the agreement, then why are we in paragraph (a) in the first place? And I wonder also, as a kind of development of that point, to what extent are we in the territory here that the amount of the payment which is going to the funder is actually being determined by the financial benefit, as opposed to it simply -- what you are pointing out are mechanistic parts. I appreciate there may be a connection there, but I wonder if a distinction can usefully be made between provisions which determine an amount and provisions which explain how payments are to be made.

MR BEARD: Yes, I completely understand. As I say, the broadest way of reading this is to say that any mechanism which is drawing down on the proceeds in order to pay the funder's fee, falls within the scope of the definition of DBA. To answer your question about the terms of the agreement, it's because the agreement requires the PCR, on obtaining the proceeds, to put them into the stakeholders' account that's then drawn down, that you have this link between the proceeds and the funder's fee being paid.

So at the most simplistic level, we can say what you are able to get as the funder under your funder's fee is determined by the existence of a pot of money that comes through from the damages claim that is put into the stakeholder account. And that would be the broadest reading.

We recognise that it is then said against us: but that isn't a determination by reference to that sum, that is just the mechanistic approach and we say we can see that the mechanistic approach fits between what *PACCAR* and the Supreme Court has determined as covering damages-based agreements. But we then say that there are two particular issues but the one we are focusing on is the cap issue which means that in every case where you are considering what the level of the funder's fee is, that will be determined and limited by the amount of the proceeds that are going into the stakeholder account.

Fortunately, therefore, we say that's more than merely mechanistic. We recognise it as a product of the mechanism that's been built but it does mean that the funder's fee that can be drawn down is being determined by the amount that is awarded by way of proceeds.

Now the Chairman raised the issue of: well, you could have the proceeds going in two directions. There is a potential that tribunal says some of it goes to the client account and some of it goes to the stakeholder account. With respect, that doesn't make any

difference to this point, because the ultimate cap is on the basis that all of the funds go to the stakeholder account. And the second point I would make in relation to that is going back to paragraph 99 of the Supreme Court judgment, where it says the fact that you can have a tribunal decision that can intervene in relation to these matters, doesn't change the overall characterisation of whether or not this should be seen as a DBA. In other words, that there is reference to the financial -- I am sorry, I am concerned to use the correct language -- the financial benefit obtained when considering the payment, i.e.,. the funder's fee to the funder.

So I entirely take the point, Lord Richardson, that there are two ways of looking at this in relation to caps. One is seeing it as just the role of the financial benefit. One is a pure mechanistic issue. We say that *PACCAR* is broad enough to cover that. But we then say the cap issue is a more specific matter that you would have to have regard to in relation to the consideration of the funder's fee in every case and it sets the funder's fee in that regard.

THE CHAIR: Can I just pick up the point you referred to there. This point about where the money goes, I think is important, the money flow. If you look at 3.1.9.9, which is on page 16 --

MR BEARD: Yes.

THE CHAIR: -- that provides that the class representative is to make payment of "all proceeds into the client account." Now the client account is a different account from the stakeholders' account.

MR BEARD: Yes.

THE CHAIR: As I understand the scheme of this thing, the client account is the class representative's solicitor's account, the stakeholders' account is the trust account that's been set up for the purposes of -- for the stakeholders but not the class representative. And the only money that goes into the stakeholder account is money

that no longer belongs to the class representative because it has been determined it goes somewhere else. It seems to me we might be slightly at cross-purposes, if you are saying something else is the case, and we may need Mr Palmer to help us with it as well. But just in your analysis, you seem to be assuming that the proceeds get paid into the stakeholders' account. I don't think they do, if I have read that correctly.

MR BEARD: I think, with respect, one has to be a bit cautious. One has to read 3.1.9.9 in the light of 3.1.9. These are subsidiary obligations to which you are referring, Mr Chairman.

THE CHAIR: If would be very odd, wouldn't it, if the proceeds were being paid into the stakeholders' account which is not controlled by the class representative. Let's just say for argument's sake that the damages were £200 million or something like that and let's say that the stakeholders' entitlement was 50. Why on earth would you pay the £200 million into the stakeholders' account which is controlled by the stakeholders and not the class representative? It doesn't make any sense.

MR BEARD: I am sorry. You are saying it doesn't make sense for that money to go into the stakeholders' account. From the funder's point of view, I'd have thought it makes perfect sense to allow those monies to go into the stakeholders' account.

THE CHAIR: Well the stakeholder's account is not controlled by the -- the class representative is not a stakeholder, so the stakeholders' account is controlled by somebody else. They have just given the money away. They are not going to do that. My reading of the scheme, and I think Mr Palmer is nodding, my reading of the scheme is that the money goes into the class representative's account and only that bit which the court, the tribunal, orders -- putting aside costs because they are different -- the only bit that goes into the stakeholders' account is what the tribunal orders is payable to the stakeholders, the stakeholder entitlements.

MR BEARD: You are obviously right that in the end, the tribunal can dictate these

issues. That is not the same point as that which we are making. We are saying the maximum that the tribunal could permit to go into the stakeholders' account will be the total of all that is available.

You may be right, sir, that in practical circumstances, the tribunal doesn't allow those sums to go across into the stakeholders' account. But on the structure of the contractual arrangements that exist at the moment, the level of the funder's fee will be capped by what can go into the stakeholders' account. And as we read the arrangements, there is no specific limit, contractually, on what can go into that account, and it requires the tribunal to intervene and say: actually, no, this money should not go across.

THE CHAIR: I don't think that is right. I think it's the other way round. I think the money all goes into -- the proceeds all goes into the class representative's client account. And once the tribunal has authorised the payments of stakeholder entitlements to the lawyers, the funders, anybody else, then it goes into the stakeholders' account. The reason this -- I hesitate to dig too deep into the point, Mr Beard, and I am taking you off course, but the reason I raise it is it seems to me you are eliding two things. You are eliding the concept of the proceeds being an absolute cap on what might be awarded to stakeholders, which we all understand and is clear, and an exercise by which monies are paid into the stakeholders' account and the way in which they are distributed. Because it seems to me the second of those has no necessary relationship to the amount of the proceeds. That's the point I am making.

MR BEARD: Let me take a step back. In relation to the position in relation to the client account, you can have a situation where the default payment might well be into the client account. But the point we are making is that the absolute cap on what can be recovered through the stakeholders' account by way of the funder's fee -- because,

of course, what we are really interested in is - is there some kind of limit on the funder's fee that is determined by reference to the sums of money that can be recovered? And the point we make is yes, there is. That is the absolute amount. The fact that it may come through a process of an order of the tribunal doesn't alter the fact that that operates as the cap. Therefore --

THE CHAIR: That's your broad point.

MR BEARD: Yes.

THE CHAIR: That's your broad point.

MR BEARD: Yes. I'm trying to disentangle that and go back to the more simple position.

THE CHAIR: I'm trying to explore, really, whether there is an alternative to the broad point. Because I think the way you are putting the alternative is all dependent on the operation of the stakeholders' entitlement and the stakeholders' account. I am struggling to see what that has to do with the proceeds, other than your broad point.

MR BEARD: Yes, well, look. We are simply -- as I said at the outset, there is a degree of ambiguity about how this structure works in relation to the stakeholders' account and the stakeholders' trust arrangements. We are simply saying we don't fully understand how that works but let's assume, sir, that you are absolutely right about how that mechanism works. It doesn't change the underlying point we are making in relation to the operation of the cap. You may say that is a simplistic point and it may have ramifications for lots of agreements, and we say simplicity is not, in our view, in any way a problem. That is a clear demarcation that is causing this agreement to fall within the scope of the DBA. The fact that it might have ramifications for other agreements, again, we don't apologise for. That is one of the things that is coming out of this process of scrutinising funding arrangements, as is really very evident from the Supreme Court's judgment in *PACCAR*. So I think those are our two key answers in

relation to this. You have got a cap, by reference to the proceeds. There is no more that the tribunal can give by any order coming out of the client account. That acts as a limit that is a determination of the funder's fee, by reference to the financial benefit in the circumstances.

THE CHAIR: Yes, thank you.

MR BEARD: I think the other point I wanted to pick up, however, is in relation to what sometimes has been referred to as the allocation issue which pertains to the structure of clause 11 here.

THE CHAIR: Yes.

MR BEARD: Because you actually have a slightly odd mechanism, so far as we can understand it, whereby the level of the funder's fee is ascertained -- so the actual level of the funder's fee that can be claimed -- leave aside all the discussion we were just having about the cap -- depends on whether or not an order is made that monies can be claimed from the proceeds directly or from undistributed damages. Because if we look at 11.1, and the funder's fee:

payment of the funder's fee other than from undistributed damages. “If the Class Representative makes any application ..."

So slightly oddly, it is just based on the application --

"... for an Order for payment of the Class Representative's costs, fees and disbursements, other than from undistributed damages, the funder's fee shall be the greater of -- "

And then we have these multiples of cost limits, where it starts off at particular measures -- I am just concerned that I am not going to say anything that my bundle does not have marked "Confidentially".

THE CHAIR: I think we are familiar with the structure. I think the basic point is, isn't it --

MR BEARD: Yes.

THE CHAIR: -- that if it is an application before undistributed damages, and one can put it as simply as that, then that has a lower multiple than if the funder has to wait so that it is distributed from undistributed damages. That's the point, isn't it?

MR BEARD: Yes, that's the point.

THE CHAIR: So we see that and understand that, yes.

MR BEARD: The point I make is that all of the multiples have being calculated not by reference to a percentage of the financial benefit but by reference to the financial benefit and how it's being distributed by order of the tribunal. We say again that by structuring the actual level of the funder's fee itself by reference to these arrangements, that the amount of the payment to be made under the funder's fee, assuming there is no cap issue here at all, is being determined by reference to the financial benefits obtained. Because in both cases we are referring to the proceeds and the undistributed damages. In other words, the financial benefits.

THE CHAIR: It is being determined by reference to the timing of the application rather than the amount of the financial benefit?

MR BEARD: It's being determined -- well, it may or may not be the case that timing is of an issue, because whether or not, you can, in principle, apply for distributed and undistributed damages relief in relation to the funder's fee at the same time -- so you could make the application at the outset, saying: we would like X per cent from main damages, X per cent from undistributed damages. So in principle, it doesn't have to be.

In practice, you may well be right, Mr Chairman, that you would have two applications.

THE CHAIR: Perhaps put another way, it may be there is some other variable, but is the variable here the size of the proceeds? I don't think it can, because the proceedings, of course, are constant, so they don't vary. It just seems to me that there

is some other variable other than the proceeds which is the reference point for this change and return, isn't there?

MR BEARD: There are going to be other variables that will affect the funder's return. That is absolutely true. But the point we make here is that the actual level of the funder's fee, by reference to the cost limit, is being itself varied by reference to the proceeds, depending on how they are then distributed. So in so far as you're saying that that latter stage is an additional variable, we are saying well, if it is, it is still by reference to the financial benefit.

So we are not trying to say it's the only variable and nor do we say that -- and we don't understand the case against us to be -- that under section 58AA(3)(a)(ii), that this has to be the only determinant that it is being determined by reference to. And we say that that plainly is the case, given the structure of clause 11.

So I think those are the points -- unless there are others -- I am just turning to those next to me -- that we were going to make in relation to the stages of concern, having regard to *PACCAR* about the determination of the funder's fee by reference to a mechanistic approach, the gaps and, indeed, the allocation that I have just dealt with in relation to those points. So I was going to then move on.

MR PALMER: I hesitate to interrupt. I just note the time, sir. It is quarter to one. I appreciate the tribunal want Mr Beard to have the first opportunity to make his points, but I just wonder whether I can ask now if I might still have some opportunity to come back in relation to these objections.

THE CHAIR: You will certainly get an opportunity to come back, Mr Palmer. I think it would be very awkward if we are telling you were not going to. I think it does look rather as if we are going to end up going after lunch, aren't we? That's what it looks like at the moment.

MR BEARD: I am sorry, but I think we are. Working through these matters. I am

sorry if my exposition has caused these things to be longer but I think I do need to deal with the further incentives point and the conflict of interest point.

THE CHAIR: Yes.

MR BEARD: Albeit they should be much shorter.

THE CHAIR: There is no criticism at all. We have taken you well out of your way on various things. I think the answer, Mr Palmer, you will get a go after lunch and hopefully, we won't encourage you to be any longer than you might otherwise be -- (inaudible due to overspeaking).

MR PALMER: That is no difficulty at all. I just wasn't sure if the tribunal was actually available after lunch. If you are, then I have no difficulty.

THE CHAIR: I should check. We are, but I should check that you both are, just to make sure that does work.

MR BEARD: Yes. Although what I was going to say was depending on how quickly I can get through things, it may be possible that Mr Palmer, if we slightly delay the start of lunch, we may be able to get through. Shall I see how I get on and whether or not the tribunal has further questions in relation to these matters?

THE CHAIR: Let's see where you get to. I rather suspect, Mr Palmer -- looking at where we are now, he may need a bit more time. Why don't we see where we get to, Mr Beard, thank you.

MR BEARD: Certainly.

So if I could turn to the next issue which is actually turning to, in some way, points that I have already been referring to in broad terms. We, in our skeleton argument, from paragraph 64 onwards, raise concerns about the funding arrangements that are being put forward here more generally. In particular, the proportionality of the arrangements and the incentives they engender. Now in relation to the proportionality issues, we have set out in our skeleton argument some examples of how moving from a costs

outlay mechanism to a costs limit reference can radically change the amount of money that the funder can at least initially claim as the funder's fee. You will see that at paragraph 67.

I am not going to refer to the specific numbers but if you could just look at that. What we are looking at is a shift from funder's outlay to a cost limit mechanism that shifts the returns by more than an order of magnitude.

And more than that, that is the minimum change in funder's fee, and of course that, as we set out in paragraph 68, can be increased but further than that, of course, we have the annual ratchet mechanism, whether or not any funder's fees would be attributed by reference to proceeds or in relation to undistributed damages, the annual ratchet operates in the same way.

And therefore you have a complete divorce from the costs outlay, and massive potential returns based on the numbers that are included.

Now the reason we emphasise that, is to step back towards *PACCAR* again, which of course is the reason we are here. What *PACCAR* makes clear is that the notion of DBAs is broad and that means, of course, there is a broad range of funding agreements which are entirely prohibited in relation to opt-out class actions. Parliament has made that decision that there should not be DBA funding in relation to opt-out class actions; conditional fee arrangements, whereby success fees are linked to outlay, are not treated in the same way.

What we say about the proportionality overall of the returns that we are looking at here is they are entirely divorced from any outlay, and in doing so are being set at a level by reference to these multiples that in essence are moving towards or substituting for the sorts of sums that the ambitious funder thought might be available under the percentage payment provisions. In other words, a DBA.

We have emphasised the importance -- and the tribunal is obviously cognisant of

it -- as the important gatekeeper role that the tribunal fills at this stage of certification in relation to these matters. We say that in assessing whether or not the sorts of returns that are being built in to the structure here are proportionate and appropriate, we are not ignoring the fact that funders quite properly need incentives -- the Supreme Court, as I took you to, recognise that in the early paragraphs of the judgment -- but equally it was recognising that Parliamentary intent not to have damages-based agreements in relation to funding arrangements unless they fulfilled the DBA regulations, or not at all in relation to opt-out arrangements. And what we say here in very simple terms is that this goes very, very far beyond those arrangements.

Now Mr Palmer's answer is to say: close your eyes, don't worry about those things now, we can sort it all out in due course. We say that's the wrong approach. It is part of the way in which the tribunal should engage at this stage with the certification process. It is the message that has come out of a number of cases, both in relation to substance but we also say in relation to costs issues and funding issues, that this tribunal should be critical of what it is that is being put forward as an acceptable structure for litigation that will proceed -- and this takes me to the second point -- the incentives in relation to which will be geared round these sorts of levels of putative return.

Now Mr Palmer faintly sought to say, well, these levels of return aren't as big as the ones I might have got if I was under a percentage payment provision. Obviously two points there: one is it is never a good comparator to suggest what I could do unlawfully is a good benchmark against what I should do lawfully; the second point is obviously there is no limit to the ambition of PCRs and funders when they come up with figures for damages. That doesn't in any way render them relevant here.

The point I make is that in relation to the absolute numbers we are talking about in

respect of the cost limits, these are enormous sums escalating in ways that seem to have no justification even when we are talking about allowing funders reasonable or indeed ambitious rates of return in relation to the way in which they fund these agreements. And we say the tribunal does need, at this stage, to look at the structure that's being put forward, the levels that are being talked about, the multiples and the ratchet scheme that is being built into this. Because in its role as a gatekeeper, it is important that whilst in ordinary inter partes litigation there are all sorts of direct incentives to constrain costs, to limit the way in which matters are dealt with, the dynamics as we know in relation to class actions and in particular opt-out class actions are very different. It is, one assumes, for that reason that DBAs are absolutely prohibited in relation to opt-out class actions.

Mr Palmer says, well, within the contractual scheme there are all sorts of provisions that will keep us honest, and the funders will sit once removed. If it were true that those contractual schemes were sufficient, it is difficult to understand why there would be that statutory objection to DBAs and the concern about the levels of recovery that can be made by funders in relation to this sort of class action.

So we say we understand the contractual provisions. We say, however, that is not an adequate answer to a structure that so far as we can see creates disproportionate potential returns in relation to the funder's investment here, and is completely out with the sort of returns that might be possible if you were to relate this to the funder's outlay in the way in which a conditional fee agreement, which would be permissible, should operate.

So that's in relation to proportionality. The point that I would emphasise in relation to incentives is a point that I have emphasised already. I emphasised it in relation to issue 1, because one of the problems that we have, both in relation to the percentage payment arrangements and in relation to these cost limit arrangements, is the sort of

incentives that then inure in the litigation throughout the relevant period.

Now I emphasised in relation to issue 1 that those incentives continue to exist notwithstanding the conditional terms under which the percentage payment provisions were put forward, otherwise they wouldn't exist. But when we come to the cost limit provisions, we also see incentives that do not align with the ordinary manner in which litigation would be conducted, nor in relation to any sort of conditional fee arrangement litigation.

Indeed, the way in which the ratchets work on an annual basis will create very strange dynamics in relation to pursuing or settling cases as one approaches or departs from the point at which the ratchet bites. As we've explained in relation to the arrangements set out and described in our skeleton argument, that sawtooth effect in relation to incentives is something that the tribunal should be extraordinarily concerned about, because it does place an incentive on the funder to act in ways that would not be congruent with the interests of a class representative at certain points in the process.

Again, Mr Palmer may protest the contractual terms. We do not consider that those are sufficiently powerful in relation to these funding agreements, and this tribunal should be cautious about any sort of acceptance of an incentive structure that savours of a damages-based agreement in terms of its quantum and in terms of the way in which it operates overall, added to that because of the ratchet mechanism it can create perverse incentives along the way and it is vastly different from the way in which the legislatively accepted structures of a CFA would incentivise and deal with the way in which claims can be brought.

That, I think, then takes me finally to the points on conflict of interest that we dealt with in our skeleton argument at paragraphs 76 onwards. Again, these points overlap with the issues to do with incentive structures that arise.

We set out in paragraph 78 the potential distortive effect on funder's incentive to settle

which goes back to the modalities of the cost limit mechanisms and the multiplication mechanisms that obtain; we highlight in 78(2) the funder's incentive to specify a high class cost limit from the outset in order effectively to amplify potential funder's fee recovery; and we don't see how that is consistent with the position that would be taken by a class representative. Whilst when you are thinking about conditional fee arrangements, whereby outlay can be something that has an interest for the class representative because you are buying the services -- whether or not it's the advocacy service, the analytical or expert services and so on -- that will help you bring the claim. In relation to the cost limit, the funder has an incentive to set it high and that doesn't inure to the benefit of the class representative at all in relation to this.

We then highlight at 78(3), the PCR's obligation in clause 10.1 to seek an order that the funder be paid from any proceeds before distribution to class members. So what this is doing is baking in that primacy of the very large sums that the funder is seeking through the contractual mechanism.

Now we recognise, of course, the points that are made by the PCR in relation to *Le Patourel* about early payment being potentially appropriate. We understand that. But it is the combination of those arrangements setting cost limits as very high figures, untethered from the work that's actually being done, and the demand that these monies should be effectively protected and prioritised for the funder, that creates a tension between the interests of the funder and those of the class representatives.

There is also the issue we have highlighted at 78(4), that the funder's incentive in the circumstances, going back to mechanistic issues, may well be to maximise the size of undistributed damages. That, of course, is a matter of particular concern for a tribunal that will not want, if any damages are to be awarded, to create incentives for a lack of distribution, and yet here it will sit.

The fifth point we note is in relation to delays and the way in which the ratchet effect

effectively amplifies the amount the funder can obtain by way of the funder's fee in relation to the claims being brought because of the ratchet effect in clause 11.

Now, we set out in 79 our responses to the PCR's responses to these issues. We have explained how the issues arising here are really key issues between the class representative, acting on behalf of the class, and the funder. This idea that it is a tension between the class representative and the class is unrealistic.

We have also dealt with the issue that the fact that the funder is supposed to stand off any arrangements through the contractual scheme is insufficient to change the analysis that we are talking about in relation to these matters.

So to sum up, we started off with a concern whereby we say to this tribunal, as a gatekeeper in relation to these arrangements that are being put forward, essentially the arrangements in this new LFA not only have some confusion in them, but are built to effectively include part of an unenforceable arrangement. We say, as we set out in relation to issue 1, that that means that clause doesn't operate and in fact it is a DBA overall.

If, Mr Chairman, one were to see this simply as a matter of enforcement of contracts, you would have to say that those elements are not enforceable and a magic conditional wording doesn't solve it.

I dealt separately with the issue of severance, given the significance of those provisions.

When we get then to the terms themselves and whether or not they fall foul of 58AA(3)(a)(ii) in particular, I have explained both the mechanistic cap and allocation issues. But it is important then also to take this step back and look at the overall proportionality and incentives that matter here, and these are matters that need to be dealt with now. Pushing these issues down the road and waiting for some proportionality assessment to be dealt with at a much later date is inadequate in terms

of ensuring that this litigation is carried out properly, effectively and fairly, whether it goes through to full trial, whether elements or all of it is dropped, or indeed putatively that some sort of settlement arrangements are discussed.

I don't comment on any of those potential options as to their likelihood, but all of them are matters which are affected by the funding structure now and need to be determined now so that any litigation rolling forward, if this tribunal decides to certify, is on a basis that we all understand as to what monies are going where at what point on what basis, obviously subject to the final outgoing of any assessment.

Unless there is anything else I can assist you with? I have tried to speed through those matters. I recognise Mr Palmer may want a little bit of a break but it may be that we can deal with these things with an extended lunch.

THE CHAIR: Lord Richardson, unless there is anything you wanted to raise?

I think we are finished with you. Thank you very much, Mr Beard.

Mr Palmer, I assume you are going to be more than just a few minutes, in which case -- unless you are going to tell me you are going to be ten minutes -- I think we should probably take the lunch adjournment and start again at 2 o'clock.

MR PALMER: That would be more convenient. Thank you very much.

THE CHAIR: Thank you. We will rise and we will start again at 2 pm, thank you.

MR BEARD: Thank you.

(1.03 pm)

(The short adjournment)

(2.00 pm)

THE CHAIR: Mr Palmer.

Reply submissions by MR PALMER

MR PALMER: Thank you, sir. I am going to begin with issue 1 and work my way

through again. A general theme of Mr Beard's submissions which he introduced under issue 1 but it sorted of leaked across several issues, was his characterisation of the Supreme Court's decision in *PACCAR* as establishing that a very broad approach, as he put it, was to be taken to DBAs, and what a DBA actually is.

In our submission, that is incorrect. *PACCAR* was concerned with the meaning of the words "claims management service". It is right to say, as I said right at the outset of my submissions, that it establishes a very broad approach should be taken to that phrase, at least so as to include litigation funding agreements and then beyond that, how those are regulated within that bracket is a matter for the legislature.

But it has that narrow ratio. The litigation funding agreement in *PACCAR* was accepted to be based on a percentage of damages, and it was accepted that it didn't comply with the DBA regulations. The sole issue, therefore, was whether litigation funding agreements fell within the bracket of claims management services. So, yes, a very broad approach to that question, but, no, not a licence to read the words of definition of a DBA itself broadly, as Mr Beard asserted.

The second point in relation to issue 1 is he said against that background, the words in clauses 11.1 and 11.2 of our LFA, "only to the extent enforceable and permitted by applicable law", were magic words. And I had to rely on them as importing some form of magic to convert what would otherwise be a DBA into something which was not a DBA.

It's not helpful, in my respectful submission, to think of them as being magic words because they don't work by magic and it's no part of my submission that they do. They have substance. They condition the effect of the percentage payment provisions to applying only in circumstances where percentage provisions are enforceable and permissible, and only to the extent that they are. And there is no reason in law why that's not an acceptable approach to take.

I am going to deal with two points why Mr Beard suggested that that was unacceptable. The first relates to what the Supreme Court said in *PACCAR* at paragraph 99; the second relates to what he referred to as the effect of -- or the non-effect -- of illegal agreements.

So *PACCAR* 99, the tribunal will remember, is behind tab 20, and appears at page 536.

THE CHAIR: Yes.

MR PALMER: And Mr Beard recalls that what -- this is the very final substantive paragraph of Lord Sales' judgment. So he's arrived at the position here already that litigation funding agreements do fall within the meaning of claims management services, and of course, as was uncontroversial, that particular LFA did purport to set a fee by reference to a percentage of damages. So the starting point here was that there was an LFA which was a DBA.

From that starting point, at paragraph 99, Lord Sales says -- perhaps unsurprisingly -- that none of those earlier conclusions are affected by the conditionality of there needing to be an order from the tribunal, permitting a fee to be paid to the funder. The introduction of that additional condition didn't change the fact that it was that DBA, for the reasons that I have given.

But that's not our starting point here, as the condition which we are concerned with here goes to whether what Mr Beard terms the DBA element of the LFA, has any effect or force at all in the first place. And we just get sucked into circularity, if Mr Beard says: oh, that's a condition and the Supreme Court in paragraph 99, said conditions don't make a difference. They do make a difference when the nature of the condition concerns whether this provision is to come into effect and have any force in the first place. So that is qualitatively different. And as you observed in the course of argument and I respectfully agree, there is no reason why, as a matter of contract, parties can't

do that.

For that reason, because of that conditionality, it doesn't become a DBA and wouldn't become a DBA unless and until DBAs became permissible and enforceable by virtue of some further Act of Parliament.

The second string to Mr Beard's bow, as I understood his argument, related to what he termed the illegality of this arrangement. This I understood to be a reference to what he said in his skeleton argument but not developed orally, based on an extract from Chitty that the tribunal has in the authorities bundle at tab 23 and page 610.

I would just like to turn to that, if I may, 610, because that passage from Chitty in fact discloses a distinction between different types of illegality which, in my respectful submission, Mr Beard tended to elide in his submissions, both on issue 1 and what I called earlier issue 1B, namely the severance point which affects this point.

So if you look at page 610, the top paragraph, 18001. Could I just ask the tribunal to read the first ten lines of that paragraph?

You see the distinction that that sets up between cases in which claims will not be enforced on the grounds of illegality in a narrow sense, as being contrary to public policy because the contract somehow involves the commission of a legal wrong, and cases in which the claim may not be enforced for reasons of public policy, even though no otherwise unlawful act is involved. And further, for reasons that may also be described broadly as public policy, some contractual claims are rendered unenforceable by statute, statutory illegality.

Then it goes on to explain, turning on that distinction, the effects of public policy differ considerably, depending on the circumstances. You see what it said there in the rest of that paragraph and the way that a contract is rendered unenforceable by statute is concerned.

Over the page at 611, we skip to the paragraph dealing with severance and public

policy. That is 18-261. This is the point under severance that Mr Beard was alluding to:

"The court will not sever the bad from the good unless this accords with public policy. ...(Reading to the words)... For example, part of the consideration for the promise of either party may be such as so gravely to taint the whole contract that there is no ground of public policy requiring the courts to assist either party by severing the offending parts."

And then a quote:

"In all cases, a distinction is taken between a merely void and an illegal consideration [that's what Mr Beard referred to]. In this context, illegal means that which amounts to a criminal offence or is contra bonos mores, where on grounds of public policy, the illegality may, though it does not invariably preclude severance."

So in that category of case,

"Agreements, the object of which is to defraud the revenue or which involve trading with the enemy, have been held to be incapable of severance."

They are just tainted as a whole:

"On the other hand, examples of mere voidness on grounds of public policy are agreements as to jurisdiction of the court and agreements which are merely in restraint of trade."

And we've seen an example of a restraint of trade in the authorities. So here what we have is not a contract, even on Mr Beard's highest case, that this is a DBA, if we do get to the question of severance. It is not a contract which is in itself concerned with an unlawful act in a way that such as trading with the enemy might be. As Mr Beard was careful to accept and concede, there is nothing wrong with DBAs -- at least those that comply with the DBA regulations. They are perfectly lawful arrangements. The bar to the enforceability here is the bar in the Competition Act, section 47C(8), which

says that for opt-out claims, they are unenforceable. So that's a rule of public policy introduced by statute but not one which is such as to taint the whole contract on the grounds that its whole object is either a criminal offence or contra bonos mores.

We can see some development of this in *Volterra*, the Court of Appeal case, the recent case which you will remember you have in the supplemental bundle at tab 14, at page 125, paragraph 24. We had some echoes of this as Mr Beard took us through *PACCAR* and he took us to the history of why these agreements were originally unlawful in the first place, that they were viewed as a form of champerty and unlawful until that changed later on.

It is important to note here that the reference at paragraph 24 to *Sibthorpe v Southwark*, where Lord Justice Neuberger -- sorry, Lord Neuberger, then Master of the Rolls, said:

"In my judgment, when it comes to agreements involving those who conduct litigation or provide advocacy services, the common law of champerty remains substantially as it was described and discussed in ..."

In those historic cases, also discussed in *PACCAR*.

We don't, unfortunately, have *Sibthorpe* in the bundle before us. I am going to invite the tribunal to read not only the unredacted paragraph 40 that we have there, but to go back to paragraph 35 through to 40 which explains the context in which those comments were made when Lord Neuberger was saying that other agreements which provide for these conditional payments and so forth, are no longer considered to be champertous and the law has moved on. There is nothing illegal about that. It is only specifically the conduct of litigation or provision of advocacy services outside the arrangements, the conditional fee arrangements, authorised specifically by statute which that now catches. So it's wrong and an over simplification simply to condemn this as an illegal agreement, even if it is a DBA, such that severance cannot apply.

Instead, therefore, in my submission, if severance is necessary, what would be necessary is to excise that narrow part of the agreement which offended against the ban on DBAs in the Competition Act. But to do so would, for the reasons I have given, not change the whole nature of the contract. In context, I just want to pick up on some remarks which were made during the course of argument with the Chairman about the effect of the agreement. Because we are not here concerned with the effect changing in terms of the likely quantum of the calculation of the funder's fee in various different scenarios between, on the one hand, one calculated by reference to a multiple of the cost limit and on the other, one calculated by reference to a percentage of damages. We are not here comparing the effect in terms of that factual consequence, as to how that quantum might end up.

We are talking about a contract here which expressly provides for two alternative bases for that calculation to take place. One of which is expressly qualified by those familiar words about whether they are permissible and enforceable. And the effect of severance would simply be to remove that and to leave the other accepted and permissible basis of remuneration. The key point here is the fact that it may well be -- and indeed, currently is the case -- that that is the only permissible basis of remuneration in the contract, is expressly contemplated by the agreement itself, by the conclusion of those words and, in particular, to put it beyond any doubt, the conclusion of clause 37 and 37.4, which shows that the parties are well aware that at present, that alternative damages based formulation is not enforceable and is not permissible and that the only available basis of remuneration at the moment is by reference to a multiple of the costs limit.

Reducing to it, that doesn't change the contract into something which it was never intended to be, and is completely different to the position in *Volterra*. We still have *Volterra* open. Mr Beard took us to paragraph 40, which is on page 130 of the

supplementary bundle --

THE CHAIR: Yes.

MR PALMER: -- where you can see just how many poles apart the CFA in that case was. That was a CFA with an unlawful success fee. Because of the prospect of obtaining that success fee, the solicitor's services were being offered at a discounted rate and in the event of loss, the solicitor would only be remunerated at that discounted rate. That discount being offered because of the prospect of the success fee, should the claim be successful, as it ultimately was. But given that that success fee was unlawful, the question was whether it could be severed. The answer to that question at 40 was that to sever that would fundamentally change the nature of the contract, so that it would cease to be the sort of contract into which the parties originally entered. The agreement was a CFA was a substantial proportion of the solicitor's proposed remuneration being conditional upon the contingencies outlined, that being the stated consideration for the discounting of the normal fees in the side letter. So upon severance, it would become a conventional retainer providing simply for the solicitors to charge at a discounted rate, with no conditional element at all.

The fact that severance would remove the stated consideration for the solicitors' agreement to discount their fees, emphasises the difference in the nature of the contract before and after severance. Before severance, the solicitors discounted their fees in return for the prospect of success fees. After severance, they discounted their fees for no consideration. So it was, in effect, to remove that consideration for the discount which is what is so substantially different. And you had from Lady Justice Andrews at paragraph 82, page 138, further support for that, rejecting an argument that the solicitors had made on the basis of an authority called *Garnat* and distinguishing that, distinguishing it on the basis that the solicitors in this case --:

"The terms -- "

Five lines down:

"... the terms that were subject to the CFA were those relating to remuneration for all the services provided by the solicitors after the date of the side letter. To allow the solicitors to still receive the discounted rate for that work would completely change the character of the bargain that the parties made. It would also be contrary to principle and authority."

So that fulfilled the test of changing the whole basis of the contract. What we are faced with here is very far from that. It is still conditional. The funders will get nothing, in the event that the claim does not success, and instead, they will be exposed to a very large loss, namely all the fees that they have paid and, of course, they are exposed to adverse fees and, of course, would have to pay a substantial premium for after the event insurance to defray that event, should it occur.

That remains the position. It remains the position now and on this basis of severance being required, the contract specifically contemplates that the only permissible basis for the fee to be calculated is by reference to multiples of the cost limit. So we say they are in an entirely different territory and we say that's a complete answer to the argument on severance.

Now during his submissions, Mr Beard hinted at a different argument which might be made. I will make it in outline. But in my respectful submission, I don't need it. I don't need any additional point. I am home on severance already. But if I am wrong about that, and another argument is needed, there is one readily available in *Zuberi* which you will find at authorities tab 13, at page 247, in the judgment of Lord Justice Lewison, from paragraph 32. You will see at the foot of 247 he sets out the familiar definition and then over the page at 33, two possible views of what the DBA consists of. “One view is that if a contract of retainer contains any provision which entitles the lawyer to a share of recoveries, then the whole contract of retainer is

a DBA. In other words, a DBA is a contract which includes a provision for sharing recoveries."

That's the basis of Mr Beard's argument, of course.

"But another view is that if a contract of retainer contains a provision which entitles a lawyer to a share of recoveries; but also contains other provisions which provide for payment on a different basis [that is us] or other terms which do not deal with payment at all, only those provisions in the contract of retainer which deal with payment out of recoveries amount to the DBA. In my judgment, there are good reasons for preferring the latter view."

And he gives those reasons which I needn't read out. The tribunal will see them at paragraph 34. So that was Lord Justice Lewison.

Now my learned friend, of course, is absolutely right in saying that that view didn't command the acceptance of Lord Justice Newey, who preferred to determine the case in the same way, page 260, for different reasons. You see that at paragraph 71. His reasons in full are at 72. The rest of his judgment is really concerned with explaining why he doesn't agree with Lord Justice Lewison's narrow view of the DBA.

So then you get to Lord Justice Coulson at page 261, paragraph 77. He says:

"First, I agree with my Lord, Lord Justice Lewison that the term 'damages-based agreement' should be given a narrow meaning. It is the agreement between the parties relating to the payment as defined in the Regulations, namely that 'part of the sum recovered in respect of the claim or damages awarded that the client agrees to pay the representative'. Other elements of the agreement between the solicitor and the client, such as at which of the solicitor's offices the work will be done, or the level of expenses incurred ... or, as in this case, the termination provisions, have nothing to do with the payment as defined in the Regulations, and are therefore not part of the DBA itself."

And, secondly, over the page, he then agrees with Lord Justice Newey's alternative basis as well.

So the majority of that Court of Appeal took a narrow view to the DBA. My learned friend says as to that: well, that was pre-*PACCAR*, which says you have to take a very wide approach to DBA, not narrow. Two points. The first point is that is not what *PACCAR* said. It is a wide approach to claims management services, not DBA. Secondly, we now have the benefit of Court of Appeal authority post-*PACCAR*, going back to *Volterra* again for one more point. And that is *Volterra* in supplementary bundle, tab 14 again, at page 132, from paragraph 47.

THE CHAIR: Yes.

MR PALMER: And paragraph 47 introduces the fact that reliance had been placed on *Zuberi*; introduces the issue in *Zuberi* at 47; records, at 48, that Lord Justice Lewison rejected the submission that if a contract of retainer contains any provision which entitles the lawyer to a share of recoveries then the whole contract of retainer is a DBA, explaining what he did find and the fact that Lord Justice Coulson had agreed with him. And, at 49, that Lord Justice Newey had taken a different approach. At 50, as my learned friend drew your attention to, expressed a view that the conditions for severance were amply fulfilled. It was not an issue of severance but it was an issue as to what was a DBA and what wasn't.

And then, you can see at 51, the argument which is advanced in this case which sought to build on Lord Justice Lewison's narrow approach. We can see that in relation to a CFA, though, rather than a DBA. That's why it is a building.

At 52, it is recorded that Mrs Justice Foster had rejected that submission. Top of page 133, distinguishing *Zuberi* on the facts, and on the basis you see there. And in particular, in the last few lines, on the basis that different public policy considerations apply which tended to favour enforceability in *Zuberi* -- exercising the DBA

element -- and which were not transferable to the proscription to continuing to act for that client under a CFA. Then Lord Justice Stuart-Smith says at 53:

"In my judgment, Foster J was right to reject the solicitors' submissions based on *Zuberi*, essentially for the reasons that she gave. The starting point is the terms of [the relevant Act] section 58(2)(a) [regarding CFAs] ... that definition of a CFA precludes splitting off the provisions for payment of the solicitor's discounted fees and treating them as not forming part of the (unenforceable) CFA. I accept the client's submission that the discounted fee provisions ... are part of the core agreement ... second, the provision for discounted fees is not analogous to the 'termination' provision in *Zuberi*. Third, the considerations of public policy which supported Lewison LJ's narrow construction of the meaning of a DBA are absent in a case involving CFAs such as the present."

So even post-*PACCAR*, recognising that there is a difference between the public policy considerations which support the narrow construction of the meaning of a DBA rather than the approach that Mr Beard takes. So there is that additional point as well. As I say, I don't need it. I am conscious that it was a point in which, for the first time, it emerged the Court of Appeal was split, and that is why I don't need to and I don't rest my entire submission upon it. But the tribunal has the point.

That concludes my submissions on issue 1. Unless there is anything further from the tribunal which would assist, I propose to move briefly to issue 2.

THE CHAIR: Yes, thank you.

MR PALMER: This is Mr Beard's alternative argument. For this purpose, of course, we have to assume that he's wrong on issue 1 and he seeks to attack this LFA on an entirely independent basis.

My submission on this is that Mr Beard's fundamental submission here is entirely artificial and, indeed, I would say incoherent. Stakeholder entitlements may be limited

by the proceeds, in the sense that the proceeds is a pot of money which, like most pots of money which I have ever encountered, is finite, and therefore, the payment cannot exceed the proceeds. Acknowledging that uncomfortable financial reality, that a pot or a source of money from which the payment is to be made is finite, does not assist in any way in determining what the payment should be. And it does not -- and I quote Mr Beard -- directly determine the amount the funder will be paid. It does nothing of the sort.

Now, it is helpful just to take a step back and remember that that pot provided by the damages can be drawn upon in two circumstances only for the benefit of payment of costs such as -- or disbursements such as a funder's fee.

The first is before the damages have been distributed and the second is after the damages have been distributed, although a third possibility is some combination of those two: some before, some after. As the tribunal will have seen, clause 11 of the LFA caters for all three of those eventualities.

Now the source of the power to make that payment after distribution is readily located in rule 93 of the CAT rules. The tribunal has that and I need not turn to it.

The source of the power to do so before distribution was made clear by the Court of Appeal in *Le Patourel.* I might just turn that up. That's in the authorities bundle at tab 15. It is paragraph 99 which is to be found at page 374.

THE CHAIR: Yes.

MR PALMER: The tribunal will recall that the issue being dealt with here was whether it was acceptable for the damages to be distributed by way of an account credit to BT customers. You see at 99:

"Finally, we address for the sake of completeness an issue that arose briefly during the hearing concerning whether an order for an account credit provides opportunity for the class representatives and funders to be paid. The concern has arisen because the

only occasion where costs are expressly dealt with in the context of the opt-out/opt-in regime is in relation to the allocation of undistributed damages to charity. Here the law empowers the CAT to make provision for costs in favour of the representatives out of the sum otherwise to be paid to charity."

That's the rule 93 point and, indeed, section 47C(6), as the court here records:

"We detect no difficulty here. It would defeat the purpose of opt-out proceedings, which might routinely require third party funding, if costs orders could not be made in any case where an account credit was the chosen means of achieving distribution. As to this the CAT has a wide discretion to make any case management order it sees fit and it is within its power to ensure that funders and representatives are paid. It also has a broad discretion to make orders as to costs under Rule 98 which applies to the collective action regime. The Tribunal could for instance make a sequential order that: (i) there be an award of damages; (ii) costs be defrayed from the award (before or after the damages are paid to the representative or authorised third party); and (iii) the residue is then to be distributed according to whatever method is considered by the CAT to be most appropriate be that a fixed sum, an account credit or by some other sensible means."

So we are not there, contrary to what is said in my learned friend's skeleton argument, limited to cases involving account credits. It can be fixed sum, account credit, or some other sensible means.

So we have that possibility. And in the context of that being a possibility, we remain conscious of two matters. One is whether that possibility is actually deployed in any case is for the tribunal and nobody else to determine. Secondly, the tribunal will only determine that issue if an application is made to it. Hence we get the provisions in clause 10 of the LFA where the funder protects its position by requiring the PCR to make an application for the fee to be paid before distribution of the damages. That

doesn't mean that the fee will be paid before distribution of the damages. It means that the tribunal will have an opportunity to determine whether that is or is not appropriate on the facts and in the circumstances of this case.

If and to the extent that fees are not paid at that stage, then there is the further obligation to apply -- I think it is clause 10.3 -- for an order that undistributed damages be the source of the fee and then there is the further possibility, as I mentioned earlier, contemplated the fee might be provided by some combination of those two matters.

Now later on, when we get to issues 3 and 4, Mr Beard refers to these provisions as setting up some outrageous conflict of interest or affecting the incentives of the PCR and the funder, or otherwise being a symptom of the excessive and disproportionate nature of the fee claimed. All it is, is providing an opportunity for the tribunal to determine how, on the facts of this case, in the event of success, any funder's fee should be paid.

So, returning then to the issue 2, bearing in mind that in either of those cases, the single pot is the pot of damages. That is the specified financial benefit which the PCR is pursuing in the first place, and it is only if that specified financial benefit is achieved, i.e. if damages are awarded, that any payment to the funder arises. Any question of payment arises. And that payment is then made out of that pot, that the amount of that payment is not conditioned, is not determined in any way by how big that pot is. The highest Mr Beard can put it is saying: well, it can't exceed the pot. But it never would, because the first priority for the tribunal, having awarded damages in favour of the class, would be to ensure that those damages are to a greater extent, distributed to the class. There will always only ever be a subsidiary element of that which is awarded by way of funder's fee or success fees for solicitors or counsel or anybody else, deferred premium for after the event insurance policies. All these things will no doubt be balanced by the tribunal but it is simply unrealistic to suggest that all of the

money, all of the damages, would be awarded straight to the funder without more. So there is no connection between the fact that there is that theoretical maximum and what the fee is actually determined to be.

And that's the flaw. That's the missing link in Mr Beard's argument. He can't transition from that theoretical limit, reflecting the fact that the pot is finite, to some link which actually engages with the words of the statute which shows that the payment is determined by reference to the amount of the specified financial benefit, i.e. the award of damages. The fact that there is a ceiling is irrelevant.

The next point, the cap that Mr Beard refers on, again reflects the fact that the permissible source is finite. That is it. It is uninformative, and I respectfully adopt the position raised in argument by the members of the tribunal that it is a feature of the definition of a DBA that it must be the agreement which provides for it. And that agreement does no more than it is just structured around the fact that, inevitably, it is a function of the statutory scheme that the only way a funder can be remunerated for the funds it has provided, the risks it has taken in doing so, is to be remunerated out of damages either before or after they are distributed.

That's a feature of the legislative scheme. You see it is specifically laid out in section 47C. For your note, that is authorities tab 2, page 10, subsections 3, 5 and 6, which expressly provide that damages, insofar as not distributed, be paid to charity, subject only to the tribunal's power to make an award out of them to funders and others, such as representatives, insurers and so forth, legitimate third parties in that way. That's a feature of the legislative scheme. It is not something that the agreement needs to provide for. That is the context in which the agreement is arrived at.

Next point on this, and I think the penultimate point on issue 2, is the priorities agreement. We say that is irrelevant. The class representative is not a party to that agreement, and it does not concern or relate to any further payment by the class

representative. By the time it is engaged, an order has been made by the tribunal that monies being paid in respect of those disbursements, as well as under rule 104 in respect of costs, those payments have been made to the stakeholder account. There is then an agreement which operates as between the defined stakeholders. That is the funders --

THE CHAIR: Mr Palmer, sorry to interrupt, I think we have that point and I don't think you need spend more time on it. I am conscious of the time. I think you have been running now for about 35 minutes. I think we would quite like you to wrap up in the next ten or 15 if that is possible, please.

MR PALMER: Thank you. Then I will just say on issue 2 that the allocation issue that Mr Beard returns to adds nothing. I will not develop that further. See skeleton argument.

Issue 3, I can also deal with briefly. This was the allegation that the funder's fee is excessive and disproportionate. The analysis that you had revolved entirely upon the scenario set out in Mr Beard's skeleton argument as to the prospect of early settlement, with low costs having been incurred. He says that's not -- the levels of payment envisaged by the LFA for the funder's fee are disproportionate to that; large sums being paid which are an order of magnitude different to those that would have been paid, et cetera.

What all of that fails to recognise, two points, is even where a funder has, in fact, only had to pay out a low level of costs, that funder has still entered into a commercial bargain by which it is committed to fund up to the costs limit. And if there is no early settlement, and those fees are incurred, it has no choice but to meet those fees. Those fees are committed, and at the same time, they are taking the risk of an adverse costs order being made against them in the event that the claim fails. That commitment of fees and that risk in respect of adverse costs and the necessity that that latter risk

brings with it to take out an after the event insurance policy with a hefty premium, all combine to create a very high degree of commercial risk. It is that which is being rewarded first and foremost. Not the precise levels of costs which happen to have been paid out at the time that settlement is reached.

But secondly, as I had said earlier, even where settlement is reached at an early stage, the fact a low level of costs had in fact been paid out, would still be a factor which the tribunal could have regard to in deciding what money should be authorised to be paid out of damages.

Mr Beard has no answer to that point. He says it all has to be determined now, as part of the gatekeeper role of the tribunal, as to whether this is acceptable. He cannot point to any authority to say that remuneration calculated on this basis, that is the multiples basis relating to cost limit, or of this order of magnitude, is somehow unacceptable from a public policy point of view. He took you to no authority and, indeed, in the most plausible scenarios, the fees are lower than they would have been.

THE CHAIR: Mr Palmer, can I just pick up that point. You may be going to come on to this, but can I ask you to just turn up clause 11.4 in the LFA.

MR PALMER: Yes.

THE CHAIR: Unless I'm mistaken, this is a new clause in the document; is that correct?

MR PALMER: I think it is. We can double-check on tab 6.

THE CHAIR: I am looking at the mark-up in tab 6. It is certainly marked up as new. I couldn't see it anywhere else. It may be I have missed it, but I couldn't see anywhere else where it appeared in the previous version.

MR PALMER: I think that's right. Yes, that's right.

THE CHAIR: If we are talking about incentives which I think is the bit we are in at the moment --

MR PALMER: Yes.

THE CHAIR: -- and just to maybe step back a little bit, I think what we are doing here is we are actually going back to the function of the tribunal to assess under law 79, the eligibility of the proceedings, and we are looking at the cost benefit analysis.

MR PALMER: Yes.

THE CHAIR: And also, of course, we, in the course of looking at authorisation, we look at issues like conflict of interest, so the two all play together. And Mr Beard I think will say when we do that exercise, which is really the exercise we have carried out once already on the previous document in June --

MR PALMER: Yes.

THE CHAIR: -- I think Mr Beard would say we should be doing that with the *PACCAR* mood music playing in the background, if I can put it that way. And we don't need to get into whether he is right or wrong about that for present purposes. What we are certainly doing is having a look and making an assessment as to whether we think the funding arrangements are appropriate for the purposes of clause 79.

MR PALMER: Yes.

THE CHAIR: In that context, we did have some concerns about 11.4. It seems to us that what it does is create quite a steep increase in the funder's return, based on no other variable other than time. And that's a little bit different from other things in the agreement, where one might understand that there are certain circumstances where the funding might go up, where there are choices to be made and so on. Most notably this question about when the application for the funder's fee is made.

It wasn't entirely clear to us how the clause worked. I think we think it works that when you get to four years, the multiples that we have seen earlier on in the tables double. And then for the next year -- we weren't entirely sure whether they doubled again or whether they just had the increment of the original multiple.

MR PALMER: I can take instructions and check, but my understanding is that they double and keep doubling, like a desperate gambler. It is just one times the stipulated rate being added on every year.

THE CHAIR: Yes. Whichever it does, it does seem to create quite a hockey stick in terms of the multiple that's applied. We do have some concerns about what incentives that might create for the class representative and, indeed, the funder, as that point in time approached. I completely take the point you made earlier, that all of this is based on an assessment of the economics and the risk so far as the funder is concerned. And clearly this agreement has been changed in a number of respects since June. I suppose our reaction to this -- it wasn't entirely clear to us why this bit was changing so much in this way, and why that was necessary in order to reflect whatever risks there may well be inherent for the funder in this.

MR PALMER: Well, I think there are a number of parts there I will answer. The first answer is that as time passes, the value of money decreases and the costs to the funder of keeping that level of funds committed has a cost to them. They are being kept out of their money for that much longer. They are taking more of a risk --

THE CHAIR: That makes sense. I am sorry to interrupt you. That makes sense, I completely understand that, but then why would you not deal with that as a more gradual increase in the profile of the return? Why does it become a hockey stick? The point I am making to you is it is not based on the amount that the funder might receive because, of course, as we know, there are a number of ways that could play out. And, of course, as you've pointed out, that is subject to the tribunal's oversight. What I am more concerned about here is the way in which the sharp rise in the funding costs might change the incentives of the parties as that date arises --

MR PALMER: Can I deal with that incentives point directly? The first point is that it doesn't change the class representative's incentives at all. If anything, the class

representative's incentive is to minimise fees and to maximise the amount of damages which can properly be distributed to the class. So the class representative is not incentivised to do anything by this agreement, other than progress, as indeed she's obliged to do, progress the claim as expeditiously and cost effectively as possible.

The suggestion made by Mr Beard, that the funder is incentivised to drag things out, has two flaws. The first thing is that the funder is not in a position to drag things out because the funder does not have conduct of the proceedings.

The second flaw in the argument is the more the funder drags things out, the more the defendant's costs will increase as well, so the greater the jeopardy for adverse costs as well. So if the funder could be assured of success at the end of the day in advance, then of course, that would be one thing. But it is different when there remains that element of jeopardy.

So all parties are incentivised to get on with the matter and to achieve a successful outcome as soon as possible. But the real focus of the tribunal here should be on the PCR's incentives. Mr Beard says: oh, well, Mr Palmer has shown you the contract which makes it crystal clear that the PCR has conduct and overall control of litigation, but that is not effective enough. The question is: why is that not effective enough? There is no basis for that. No suggestion in any other authority that that is the position. Indeed, to the contrary. It has often been emphasised that a properly appointed PCR is in a position to resist any improper pressure from a funder. So there is no actual nexus --

THE CHAIR: I think the point is a slightly different one. I think we are not really rehearsing Mr Beard's point, although it comes out of some of the things he said. The point is as you approach this four year deadline and as you rightly say, I am sure the PCR or the class representative at that stage would have in her mind the desire to maximise the return to the class, but of course, what is going to happen is that either

side of that date, four years out, there is going to be, potentially, quite a significant difference in what the class does receive. That is going to cause the class representative to have to deal with the opportunities and options open to her at that time, to resolve the matter, potentially. And, actually, there are all sorts of people who might have views and apply influence in relation to that and in relation to the class -- and quite possibly the defendant as well. The defendant knows that date is there and knows that on the other side of the four year period, a substantial chunk is going to come out of the class members' pocket.

I am not saying -- I don't think we are saying that any of this is unmanageable. And indeed, as you've said, it doesn't necessarily end up on that basis because the tribunal that determines it, whether it is us after a judgment or someone else after a settlement, may well take the view they are not going to pay it. But that isn't really the point. The point is that it seems that the consequence is not actually in any way linked to anything that the class representative can necessarily control. That's the problem. So that when you get to this point, the things that she can control may force her into decisions that she wouldn't otherwise make because of the sharpness of the curve. That's the point I am making.

MR PALMER: Yes. I understand the points --

THE CHAIR: I don't understand, for example, why you couldn't achieve the same objective by having a more gradual increase in the multiple to reflect the time value of money more naturally.

MR PALMER: There may be a number of ways in which it could be structured and the fund has chosen to and agreed with the class representative to structure it in this way.

When you say, sir, it's not the point the tribunal has ultimate control, I would stress it very much is the point, in terms of what the parties know will happen as that deadline

approaches. Because you suggested to me --

THE CHAIR: But they don't know, do they --

MR PALMER: Exactly.

THE CHAIR: -- because we are not going to say now what the answer to it is and actually --

MR PALMER: Exactly.

THE CHAIR: -- in order for us to do so, I think we would want to hear certainly submissions and possibly evidence on what the real underlying economics were, which would include, potentially, some understanding of what the portfolio exposure for the funder was or funders generally. I'm not sure what -- we haven't got to that stage in any of these cases, have we, so we don't really know. But I don't think -- if this is where you are going -- it feels to us that it's sufficient to just indicate we have concerns about it and leave it to that to deal with the incentives, such as they are.

MR PALMER: Sir, it is precisely that point. I entirely accept and, indeed, enthusiastically endorse the suggestion that the class representative and the funders and the proposed defendants will not know at that point what the effect of passing that deadline will be because at all times, it will be subject to the tribunal. And what that will mean in practice, of course, is if the funder wants that increased fee, it will have to produce an evidence justification explaining the basis for it at that point that it is properly incurred.

The tribunal won't decide what these fees should be in a complete vacuum, but will want to see some justification. I am told -- I am instructed very helpfully at this point -- that it is in common with after the event insurance premiums, particularly deferred and contingent premiums, that they jump up in large increments as time progresses and that the funder's fee jumping up as time progresses is no different. That might be right, that might be wrong, that will be a matter of evidence to be put

before the tribunal, for the tribunal to consider at the appropriate time. What this isn't, first of all, is a reason to knock out, as Mr Beard will have it, the application for a CPO at this stage. What it is, is for the parties to take very careful note of what the tribunal has said about that and to -- bear that very strongly in mind, you know, as matters progress. But if there is a proper justification which is reflected in the costs and the economic consequences for the funder, it's right that the agreement should make provision for that and it's a matter for the tribunal, at the end of the day, to decide whether that's proportionate and justified. In terms of the incentives, the incentives of the PCR, as I said, are to progress matters as quickly as possible and as that deadline approaches, it won't be a case of knowledge that passing that deadline means that the fees jump up and that the class is worse off. It may or may not be the case. It is entirely dependent on the justification for that.

THE CHAIR: I am not sure that we accept that as a matter of reality, Mr Palmer. You are absolutely right as a matter of process. But I think we remain concerned that there is something which is really, arguably, a penalty that's being applied for a delay, in circumstances where the class representative may have little or no ability to influence that outcome. And that does seem to us to create a distortion which will operate, regardless of what the tribunal might say later. It may be significant or may not be, I don't know. Perhaps the way to leave it -- I am not sure you can take it any further. I completely understand it was sprung on you in this sense -- it would be helpful, I think, if the PCR and the funder could consider the exchange we have had --

MR PALMER: Yes.

THE CHAIR: -- and consider whether there are other ways of achieving whatever the underlying economic objective is that aren't quite so dramatic. That's the concern we had, that this operates as a relatively dramatic change in the funding arrangement for, as I say, arguably an arbitrary purpose and by reference to an arbitrary factor and one

which the PCR has little or no influence over, and therefore operates as something of a penalty for delay.

If it is really about making sure that the funders obtain proper economic return for being out of their money or, indeed, for having their money committed, then I would imagine there are other ways of expressing that that might be less dramatic.

MR PALMER: Sir, I will certainly take instructions on that. Perhaps we can revert to you in the light of what you said.

THE CHAIR: And certainly in correspondence -- and I am sure if there was anything Mr Beard's clients wanted to say in response, they would do so as well.

MR PALMER: No doubt.

So unless there was anything else on issue 3, I was going to just deal with -- effectively we have tipped into it, on the conflicts of interest under issue 4.

THE CHAIR: Yes.

MR PALMER: Really it's very difficult beyond the point, sir, that the tribunal has raised, to see any basis for the submission that this funding arrangement -- that is the change from the old DBA arrangement to the current LFA -- presents any different issues at all. Indeed, was judged to be -- or at least no point was taken by the proposed defendants on this last time round.

I have shown you the ways in which the funder's position needs to be protected, for the application to be made at the various stages, so that the tribunal can determine what's appropriate. It's always a matter for judicial determination. The fact that application is made doesn't create a conflict of interest.

I have shown you the provisions of the LFA which give conduct of proceedings to the PCR. The provisions on settlement and termination by a funder have been recognised, potentially, to create conflicts of interest in the previous authorities but those provisions on settlement and termination haven't changed since the superseded

LFA and, of course, the tribunal may remember it included that formula which the tribunal has come to insist upon, in respect of termination by the funder, including the necessity for advice to be taken from independent counsel. So that's all still there.

There is reference there in my learned friend's skeleton to the tribunal's guidance, tab 7, page 42. It's the bottom paragraph on that page which my learned friend seeks to draw inspiration from. He misreads it.

What that paragraphs explains is there is a range of pre-existing bodies which could potentially seek to carry out the role of class representative, and lists various, including law firms, third party funders or, as we had in our case, a special purpose vehicle. And there is no blanket prohibition against certain types of organisation taking on the role of class representative but the tribunal will closely consider the nature of that body, its motivations for being involved and, crucially, whether there is an actual potential conflict between that body and the interests of the class members.

Then specifically zero-ing in on two of those types of body, the potential conflicts between the interests of a law firm or third-party funder and the interests of the class member, may mean that such a body -- that's a law firm or a third-party funder -- is unsuitable to act as a class representative.

Then moving on to the alternative case, which is where we are: where the proposed class representative is an SPV, the tribunal expect to be given details of the constitution and management of the SPV, and reasons why it was established and the tribunal will consider each application's individual circumstances and PCR should be prepared to explain why they are suitable to carry out that role.

That's what we have done. But the language relied upon by my learned friend is specific to law firms or third-party funders acting as PCRs, where the potential conflicts are, with respect, obvious but do not arise here.

It is difficult to discern any other conflicts identified by my learned friend. Indeed, the

supposed conflicts which are set out at the end of my learned friend's skeleton argument, in particular paragraph 78, which Mr Beard took you through, has no basis. I will deal with it in bullet point fashion. 78(1), supplementary bundle page 41, there is no distortive effect on the funder's incentive to agree to a settlement. Absent decision, ultimately, of the PCR. Two, the funder's incentive to specify a high cost limit from the outset to maximise its recovery is referred to. But the cost limit was arrived at by reference to the costs budget which the tribunal has and was submitted before and the tribunal was able to identify. And what matters here, of course, is the risk that the funder is taking.

Three, the PCR's obligation in clause 10 of the current LFA to seek an order be paid before, I have dealt with, there is nothing sinister in that.

Four, the funder's incentive to maximise the size of undistributed damages applies in every case and that is why we have a responsible PCR, with a plan for distribution which the tribunal has. That has not changed even slightly since superseded LFA.

And fifthly and lastly, incentive to delay is not something which is in the funder's ability and I have addressed you on that point. We will revert to the tribunal on the point which has interested it.

So for at all those reasons, we say there is no proper conflict identified, such as to make this class representative unsuitable.

Sir, I am conscious that we trailed right at the outset of my submissions that we had Ms Greaney here to address you on the relationship with CFAs. We are entirely in the tribunal's hands as to whether it wishes to hear those arguments developed.

THE CHAIR: Firstly, I am very grateful, Ms Greaney. Thank you for giving us your time. I am sorry you have had to listen to a lot of things that you probably would like to have said something about and have not had the chance yet. I don't think we do need to hear from you, thank you. I think we are comfortable with that bit of the

argument. I don't think we would gain anything from your assistance, but thank you very much for attending the hearing in any event.

MS GREANEY: Thank you --

MR BEARD: Sir -- I am sorry, I cut across Ms Greaney.

THE CHAIR: Yes. Mr Palmer, are you finished?

MR PALMER: Sir, then that completes the submissions on behalf of the PCR. I am very grateful for the tribunal's patience.

THE CHAIR: Let me just check whether Lord Richardson has anything further for you? Thank you.

Mr Beard, anything you wish to say?

Reply submissions by MR BEARD

MR BEARD: There are four quick points I need to pick up. Because it was a reply, there were some references that Mr Palmer went to that had not been referred to initially. No criticism of Mr Palmer, given the structure of the hearing. Can I just briefly deal with those? They will take me a couple of minutes.

THE CHAIR: Are they proper new points, not points that were in your skeleton? Are these proper new points? I don't think you get a reply, just because --

MR BEARD: No, no, I am not going to get a reply in relation to stuff generally. I wasn't -- they are actually all in relation to issue 1, except for one point. So I think it's important Mr Palmer expanded this notion of illegality and referred to Chitty. The key issue here is the unlawfulness we are talking about is statutory unlawfulness. Under section 47C, subparagraph 8. It's not some broader issues of public policy that we are talking about. We are talking about that statutory scheme which prevents you entering into arrangements where you get a share of the spoils.

The second point is in relation to *Sibthorpe* which was referred to in passing and he

referred the tribunal to various paragraphs in the judgment. The judgment isn't in the bundles. I had a quick look at it whilst Mr Palmer was making submissions on it. That concerns the situation involving a CFA, where there was an indemnity and it was said the simple fact there was an indemnity arrangement in the CFA didn't render the situation necessarily champertous. That is completely different to a situation where you have a statutory scheme saying these sorts of share in the spoils arrangements are not enforceable.

I do think the tribunal needs to see paragraph 33 of *Zuberi*. Because I made the point previously but it is important that there, Lord Justice Lewison sets out two versions of how you interpret the term "DBA". This is at tab 13, page 248, paragraph 33.

THE CHAIR: I think you are definitely straying beyond reply now.

MR BEARD: I am. It is important --

THE CHAIR: (Inaudible due to overspeaking) continue in your response to a reply.

I think you have the reference to it, Mr Beard -- (inaudible due to overspeaking).

MR BEARD: I will provide that reference. There are two quick remarks to be made. Mr Palmer said *Volterra* is significant because it is a post-*PACCAR* case. It is not surprising there are no references to *PACCAR* in it. If you look at the dates of the hearing, they are 12 and 13 July. That is supplemental bundle page 118. 12 and 13 July, that was before the *PACCAR* judgment came out. So that is important to bear in mind when one is interpreting what's said there, particularly about *Zuberi* which was relied upon. And there are just two quick points to pick up that Mr Palmer asserted that the only funding that was envisaged under the scheme for funder's fees was from damages.

That is not part of the scheme. It does not appear in section 47C(3), as he suggested. I leave you with a reference to *Gutmann*, tab 19, page 406, paragraph 9. That's where our apparently wrongful interpretation of the guidance came from.

I don't have anything else. But I thought it was important that those corrections were provided.

THE CHAIR: Thank you, yes, that's very helpful.

Thank you both for all the material which you produced which was, it is fair to say, compendious. I think we have covered every conceivable point that could be covered, so thank you very much for that. As you will appreciate, we were quite advanced. In fact, we had pretty much a draft judgment ready to release on you before *PACCAR* came out. It is going to require a little bit of time now to deal with all the points that you you've raised but we will try and get you that judgment as soon as we sensibly can. What we will want to do, I think, is then obviously deal with any consequential matters after that and we will be in touch about that.

But we will let you have the draft as soon as we sensibly can.

MR BEARD: We are most grateful, and I am grateful for the hearing today.

THE CHAIR: Thank you.

MR PALMER: Thank you very much.

THE CHAIR: We will now rise.

(3.10 pm)

(The hearing concluded)