IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1441-1444/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Friday 10th November 2023

Before:
Ben Tidswell

Dr Catherine Bell CB

Dr William Bishop

(Sitting as a Tribunal in England and Wales)

BETWEEN:

CICC I - II **Proposed Class Representatives**

v

Mastercard Incorporated & Others, Visa Inc. & Others **Proposed Defendants**

A P P E A R AN C E S

Alexander Hutton KC, Flora Robertson & James White (Instructed by Harcus Parker Limited) (on behalf of CICC I & II)

Brian Kennelly KC, Isabel Buchanan & George McDonald (Instructed by Freshfields Bruckhaus Deringer LLP and Linklaters LLP) (On behalf of Mastercard Incorporated & Visa Inc.)

Digital Transcription by Epiq Europe Ltd
Lower Ground 20 Furnival Street London EC4A 1JS
Tel No: 020 7404 1400 Fax No: 020 7404 1424
Email: ukclient@epiqglobal.co.uk

Friday 10 November 2023

(10.30 am)

THE CHAIR: Good morning. I take it you can hear me properly?

MR HUTTON: Yes, sir.

MR KENNELLY: Yes, sir.

Housekeeping

THE CHAIR: Good, thank you. Just a couple of housekeeping matters.

Firstly, just to say we have had a flurry of documents, I think, last night and this morning. Just so you know, we've looked at some of the ones that came in last night, but I'm not sure we've seen everything, so you might just bear that in mind. You might need to take us through anything that has come in you want to rely on particularly the things that came -- I don't know what came in this morning, but something did.

Could I also, just for the teams, not sitting behind you, but figuratively sitting behind you, just ask them if they're providing updates particularly so late if they could provide hard copies as well because otherwise the Registry are put into quite a difficult position, especially if there are other cases on, that would be helpful.

Just one other preliminary point, Mr Hutton, there was some correspondence about the costs order that were made recently and the compliance with that, I don't know whether you're in a position to confirm what the position is with that now. Has that been dealt with, do you know?

MR HUTTON: We believe so, sir. The position is that we have had confirmation that all but £50,000 has been paid and received. We understand the £50,000 has been paid and received, but we haven't had confirmation of that fact. We know that it was

requested and the request was actioned, but we haven't had confirmation that it's actually been received. We believe it has, but that is the only outstanding matter.

If it hasn't been received for any reason, it is on its way.

THE CHAIR: Yes, and is the reason for the lack of clarity is because the insurers are paying directly; is that what's happening?

MR HUTTON: Yes, exactly. Yes, that's right, sir.

THE CHAIR: Yes, I see. Mr Kennelly, do you have anything you want to add to that?

MR KENNELLY: Sir, on that point, sir, I'll have to check. I will take instructions on that last costs point that my learned friend made.

THE CHAIR: Yes. Thank you.

Well, Mr Hutton, I mean obviously there are apparently reasons why the payment wasn't made on time, that doesn't necessarily make them good reasons. Secondly, as far as the Tribunal is concerned, unless there's been a stay on agreement to extend time at the tribunal's behest, then the orders need to be complied with and that applies to courts orders as well as any other orders the tribunal makes. Again, for those behind you, if we should register our displeasure at non-compliance with that order.

If there are practical issues about the time it takes to ask the insurers to pay, then obviously the PCRs need to make sure those practical issues are dealt with on time. I don't think it's an answer for the PCRs to come and say they can't comply with an order because of the time it takes the insurers to actually make the payments and that's something you'll have to find a solution to.

MR HUTTON: Sir, absolutely. We hear what you say. We apologise for the fact that it wasn't paid on time. There was a delay when the consideration was made as to whether to appeal or judicially review the cost decision and ideally the request

should have been put in earlier, but the request was put in on the assumption that the insurers could turn it round more quickly than they could. I'm sorry, that's our error, we do apologise from that. We have learnt lessons from that. We know it takes longer than we previously understood and we will address that properly. I apologise both to the defendants and to the tribunal for the failure to comply with the order.

THE CHAIR: Thank you, Mr Hutton.

So I think that's all I have by way of preliminaries.

Mr Hutton, shall we jump in? It might be quite helpful, I think, just to work out what it is -- the task in front of us and what it is you are actually asking us to do and whether we're happy to do that, because I think the most recent amendment of documents, which I call the November documents, and particularly in relation to opt-in, opt-in funding and the ATE cover, it's not entirely clear to us what it is you're asking us to decide.

Certainly, there seemed to be a number of possibilities. One is you may be asking us to decide if the September approach is enforceable, so the documents or the provisions that applied in the September documents, notwithstanding that they're now superseded by primary and second position in the November documents.

Or, alternatively, it may be you're asking us to decide just simply whether in this round we can sensibly treat the funding arrangements as being enforceable, which would, I think, probably lead us to, first and foremost, a consideration of the November documentation.

I have to just say -- before you answer that, I have to say that we do have some reluctance to get engaged in the question of enforceability under the September approach. That seems to us to be reasonably complicated and not necessarily consistent with our role as a gatekeeper for the purposes of certification, which is

what we're really here for, which I think is -- might be characterised as a negative one, in other words are there any impediments we can see to certification rather than necessarily providing what might be seen as instruments to the funders of the insurance.

Perhaps if you could let us know how you think we should be dealing with that issue and what it is exactly you're asking us to deal with today.

MR HUTTON: Yes, sir. I totally understand why you raise that.

There has been a flurry of documents in -- over the last few days or a week.

The position is that in relation to the opt-out proceedings, the September documents are the only documents, save where it comes to the ATE insurer which I'll deal with separately. But the opt-out LFA we rely on the September documents, as you put it.

In relation to the opt-in position, our primary position was that the opt-in agreements did not need to be changed. As a result of seeing the Proposed Defendants' submissions on that, and the fact that there has been -- I think everyone involved in this has been involved in a journey since the decision of the Supreme Court at the end of July, recognition was given to some of those arguments and it was decided to revise those agreements essentially as a shortcut to take out the percentage and to give a multiple to the funder. My instructions are that we would seek a ruling on the -- sorry, I should proceed first.

The November opt-in agreements are now in the form of an alternative, namely either a percentage, as was the case before, or a multiple. We will -- we are asking the tribunal to rule on that agreement. We do not seek to rely on the previous opt-in LFA.

Now, there is an issue obviously as to whether you can have the alternative, an issue that came up in *Sony*, which is if this is enforceable, then X, but if it's not enforceable, then Y. That issue arises on the basis of the November opt-in

agreement. We do ask for a ruling on that.

Having said that, my primary submissions orally in relation to this will be focused on the multiple. Now, I understand what the tribunal says about the previous version of agreement which the alternative of the percentage, and of course I'm in the tribunal's hands.

We have our submissions, I've not got instructions to drop the arguments in relation to the percentage of the opt-in agreement, but nevertheless my focus this morning, particularly given the fact that we've got limited time, is to focus on the multiple arrangement.

In relation to the ATE insurance, the position is similar. I've not got instructions to abandon the previous percentage going to the ATE insurer, but nevertheless, my focus this morning is on the alternative which is hard figures rather than the percentage of any part of the proceeds.

I hope that is helpful. We have tried to set that out. I know it's been complicated by the number of documents. We have tried to set that out in the last few days as to that being our position.

THE CHAIR: I think that's very helpful, Mr Hutton, thank you. Just to make sure I understand that, you would like us to determine whether the approach of having alternatives is enforceable, contractually sound and enforceable?

MR HUTTON: Yes.

THE CHAIR: As you say, that issue came up in *Sony* as well, but beyond that the real focus is on the November documents in the round which I think you are saying leads you naturally to the alternative case, because it is, frankly, the easiest case to make and I think that probably is right without giving any view as to the primary case, if one could call it that, the September position.

MR HUTTON: Yes.

THE CHAIR: Clearly, you've taken the view that you can shortcut some of the criticisms made of that by the November position.

So that's where your focus is.

Now, I think you're certainly not abandoning, in relation to the opt-in funding agreement and the ATE, your ability or, rather, the funders and insurers' ability, to rely on the September approach if and when it transpires that they wish to recover and there is something to recover from. That's the position, is it?

MR HUTTON: Yes, that's a very helpful summary, sir. Yes, exactly.

THE CHAIR: Good, okay. Thank you.

Of course, it follows then that the judgment we produce is likely to take the same approach. I want particularly to be clear about that, because there are, for example, quite a lot of arguments about severance in relation to the September documents, it may be there are going to be arguments about severance in relation to the November documents as well, but clearly they would be put in a different way and may well have different implications.

What I don't think we're anticipating at the moment is reversing the September arrangements unless we reach the conclusion that the November arrangements didn't work, in which case it would be necessary, I suppose, to go back and confirm. But that seems to me to be an unlikely outcome that we'd get to the point where we accepted Mr Kennelly's arguments in relation to the November documents, but didn't accept them in relation to the September ones. Theoretically, I suppose, that's possible.

MR HUTTON: Yes, absolutely, sir. I think from the PCRs' position, obviously it would be helpful to have a judgment on the September documents, but, you know, we are in the hands of the tribunal. As I say, I'm certainly not instructed to drop them, they're there in our written submissions, but my focus this morning is on

the November versions.

THE CHAIR: Yes, that's helpful.

Just to be clear, I understand entirely why the PCRs and the funders and insurers would like to have clarity on the September arrangements. That, I think, as I said earlier, is not necessarily consistent with our gatekeeper role here. What we're primarily interested in is, when we get to the certification hearing in April, whether we can all be reasonably confident that we don't have to worry about enforceability of some funding arrangement, if indeed that's where we get to. Obviously, Mr Kennelly may persuade us otherwise and we have to deal with it differently, but that's the context in which we're carrying out this exercise.

MR HUTTON: Yes, understood. Thank you very much, sir.

THE CHAIR: Mr Kennelly, what's your view on this?

MR KENNELLY: Sir, yes, I understand what Mr Hutton is saying, my learned friend's position is understandable, but they have left us in a rather unfortunate position because as the tribunal sees on Monday and Tuesday of this week, they produced these revised draft agreements but it's clear even from them that their primary case remains the one based on percentages.

My learned friend says that although that's their primary case, they want the tribunal to address it, he'll be focusing on their alternative case suggesting perhaps a realisation, a realistic realisation on their part, that their primary case has difficulties.

It would be far better if they drop the primary case. If they had dropped the primary case and simply relied on the alternative case, that would make this hearing a lot more focused and save a lot of costs and then there will be cost consequences because of the PCRs' approach.

So because of the approach they're taking, we are compelled to address the primary

case and we'll have to make submissions about it in addition to the alternative case. Just stepping back for a moment, sir, I mean, we are where we are, but this hearing was ordered on 4 September and it was intended, as the tribunal knows, to address the enforceability of the PCRs' revised funding arrangement following the *PACCAR* judgment in July and you ordered a timetable for the production of those revised proposals and submissions and that was done.

Despite all of that, we have on Monday and Tuesday of this week received the revised proposed agreements and then further submissions two days ago from the PCR.

We're in a position to address them and we will do so, but it is regrettable that the PCRs approached it in that way. A great deal of work and cost has been potentially wasted because of that approach, and even now they're insisting on us addressing their primary case despite the fact my learned friend says he may not be relying on it himself orally today to any great extent.

But -- so it means that we are required to address the primary case as well as the alternative case and by that I mean the one expressed in the November documents.

THE CHAIR: That's helpful, Mr Kennelly. First of all, in relation to the lateness, I entirely understand the point you're making and, as you say, that wasn't the way it was set up. It might be said that it is better to be able to deal with it now rather than to find we went through another round and of course you have said they aren't entitled to do that. But to some extent we are where we are and you're quite right to say there may well be cost consequences in which case we'd consider those at the appropriate time. I'm concerned to ensure that you feel you have the opportunity to deal with this hearing with the issues in front of you properly. If you feel you can't do that and we need to make alternative arrangements for you to file subsequent submissions or something like that, then obviously you should let us know, but I'm

very grateful for your willingness to get on with it and see what we can achieve.

Just in relation to the primary and secondary case, I can see why the PCRs might want to keep the primary case live and, as we saw in *Sony* and I'm sure you've seen the transcript of the hearing there, certainly I think a view from some PCRs is that they would like to have the ability to rely on their primary cases in another situation, if, for example, in a hypothetical situation, the law should change and so what I don't want to do is give away the possibility of their preferred approach to return on their funding, but recognising that's not the law at the moment, and unless it does change, they need to have something which is compliant.

What you might say is that this has arrived at that point in a slightly messier way than perhaps the *Sony* documentation did where the first iteration of the revised arrangements was very clearly a primary and secondary case, with the act of the primary case being that the arrangements are unenforceable, a recognition that the arrangements are unenforceable.

Now, to the extent your invitation to Mr Hutton is to drop the primary case, it's actually an invitation to accept that against the current law the revised September arrangements are not enforceable, then that's obviously something he can consider and respond on.

I am anxious to avoid spending time on things that don't need to be resolved, and it does seem, I think, that the secondary case is probably the easiest one to deal with and, as I said earlier, if you were on the secondary case then I would have thought it's unlikely Mr Hutton is going to succeed on the primary case. That may be wrong, that's just my immediate reaction to it. I completely understand your position, Mr Kennelly, that you don't want to be left i embarrassed by not having addressed something which turns out to be material.

I'm not sure how else we can deal with it unless Mr Hutton is prepared to take that

step and of course that's a matter for him and his clients.

MR HUTTON: Sir, I'm happy to take instructions on that point. I certainly think that for Mr Kennelly's position -- and I entirely understand he's got these documents late and there's a primary and secondary case out there -- but for the moment my proposal would be let's focus on the secondary, the November case, and I'll take instructions as to whether, you know, I can take that -- the primary case any further. But certainly, as I said, my oral submissions today are focusing on the secondary November position, the multiples and the hard figures for the ATE insurers rather than the percentages.

THE CHAIR: Thank you. I think it would be helpful if you could take instructions. I have sympathy for Mr Kennelly's position because he can't really ignore the primary case because if we were to hear the argument, decide that Mr Kennelly failed on the primary case -- sorry, yes, that -- sorry, succeeded on the primary case, then obviously -- sorry, I've got that back to front. If we were to hear the argument and decide that Mr Kennelly succeeded on the secondary case, then of course, as things currently stand, he wouldn't want to find that we found in your favour on the primary case because it hadn't been fully argued. That is the position you're leaving open, unless you accept that they were not -- that the primary case was not lawful.

I'm certainly not saying you're obliged to do that, it's entirely a matter for you as to whether you want to take that step. Would it be helpful for us to give you 5 or 10 minutes? Would that be a helpful thing to do or is it not something you could deal with in that time frame?

MR HUTTON: It would be helpful to have 5 minutes. Yes, thank you very much, sir.

THE CHAIR: Let's do that.

MR KENNELLY: Just because I feel that I've put this ball in Mr Hutton's court, I think what the tribunal said earlier and Mr Hutton said earlier is that we need to have the

primary case addressed. What I was proposing is to deal with this quite shortly. The tribunal is well aware of the background from the *Sony* case. I can be efficient in my submissions. Mr Hutton suggests he would also be efficient in his response in the primary case and then we can deal with it and the secondary case.

Now, that is not say -- Mr Hutton may well decide to drop the primary case now, in which would be great, but it won't detain the tribunal excessively, I don't think. I'll take a bit of time on the opt-in LFA and far less time on the opt-out. I think we can deal with it quite efficiently.

THE CHAIR: There is the efficiency, but the arguments on the opt-out are quite similar to the November opt-in, as I understand it.

MR HUTTON: That's right.

THE CHAIR: So the real question is whether we have to hear -- I suppose my concern about it, Mr Kennelly, is there's quite a lot on the opt-in, September opt-in arguments. For example, we've got all the severance things to deal with. Similarly, in relation to the ATE insurance, I think it is quite a complicated primary case compared with perhaps a less complicated secondary case. But look, perhaps if we just give Mr Hutton -- maybe I might give you 10 minutes and if you wanted to have a conversation between yourself, I don't know if that possible with the technology, but if I wanted to speak about it as well, then we can work out how you want to deal with it.

The most important thing from our point of view is we're happy to hear it. Unless we're forced to deal with the primary case, we don't have any intention of doing so, but we may be forced to do so if we're put in that position by some of the things we've discussed.

Why don't we, if we come back at 11.05, see whether, having taken instructions and any conversation you want to have, if there's any clarity on that?

MR HUTTON: Yes, thank you very much, that's very helpful.

MR KENNELLY: Thank you.

(10.54 am)

(A short break)

(11.05 am)

MR HUTTON: Thank you very much. So I've taken instructions and I hope this is an acceptable position for Mr Kennelly and for the tribunal.

We don't invite the tribunal to rule on the September documents in relation to the opt-in LFA and the ATE position. So we don't invite a ruling on it.

If you were to find that the November version of the documents was an enforceable agreement, then so be it, we have satisfied the tribunal in relation to certification in respect of that aspect.

As the tribunal has said, it's unlikely that the November documents would be unenforceable, but the September documents would, in the light of that, be enforceable. That's an unlikely way around it. So we don't invite you to rule on it. We don't think it's necessary for the purposes of the tribunal's role in certification.

We're happy on that basis, given that we're not inviting the tribunal to rule on it, to make the assumption that the percentages are unenforceable. Because when we come to the November version of the opt-in LFA we have the alternatives of the percentage and the multiple, and rather like *Sony*, albeit that they specifically agreed that it was unenforceable, we are happy that the tribunal approaches it on the basis that it's assumed to be unenforceable in percentage form.

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

Mr Kennelly, does that help?

MR KENNELLY: Sir, yes. It helps in the sense, just so I understand that -- and we're only looking now at the November document. As my learned friend says, in

the November documents for the opt-in LFA and the ATE, the percentage approach is expressed in the primary case. My learned friend is saying the tribunal does not need to decide whether that's lawful or unlawful, it can assume that it's not enforceable and proceed to consider the alternative case.

If the tribunal feels -- sorry, determines that the alternative case is enforceable, the question I have is what happens then to the primary case as expressed in the document because it will -- in the documents it currently sits -- and I'll take the tribunal to it -- it is expressed as the primary approach and only in the event that it's unenforceable will the alternative approach apply.

The appropriate approach, in my view, in my submission, is that if you determine that the alternative approach is enforceable -- and we have points to make about that -- the PCR should delete what -- what's now 2.1.3 and 2.1.4 in the opt-in LFA because we object to the caveat language, and I'll take the tribunal back to that. Then they will be left with what is their alternative case.

THE CHAIR: Yes. I think, Mr Kennelly, we -- as we discussed earlier, I can see why the PCRs want to retain their primary case, albeit even if it turns out to be in the alternative. I think all we're really concerned with here, as I said earlier, is whether we can be satisfied, when we get to the certification hearing in April, that there's a set of funding arrangements, however one gets there, that are enforceable.

I think Mr Hutton is saying the high point of the PCRs' argument on that is the alternative case, he doesn't want to give away the possibility of relying on the primary case, either as a matter of principle but he's happy for an assumption to be made that he's not relying on it for the purposes of the certification-related hearing, and he also doesn't want to give it away in case the law changes. I think that's probably where we end with that. You may have some points about how it's put which go to the question of whether or not the secondary or alternative case works.

In none of the discussion are we making any assumption about what the outcome of the secondary case is, and that clearly is very much for debate and discussion today. I think, if that accords with what you just said, we are all in agreements on this.

MR KENNELLY: That's helpful, sir. I'll address you then on the secondary case. I will make submissions about why, in our submission, the caveat doesn't work and that ought to lead the tribunal to direct that the primary case -- I should have said the primary case in the Priorities Agreement 2.1.3 and 2.1.4 in the priorities agreement -- that they should be deleted, but that's a matter for the tribunal.

THE CHAIR: We'll come onto that no doubt. That is very helpful. Can I just ask you, are you pursuing -- I think you are pursuing the regulatory point as well?

MR KENNELLY: Yes, we are. I won't take much time on it, but it's a short point but of importance and I want draw the tribunal attention to two matters that arise out of it, but it shouldn't take too much of your time.

THE CHAIR: I only ask because it was suggested in the correspondence, I think, that you might not. But it sounds as if you haven't been satisfied that the point has gone away. Good.

Is it still appropriate, given where we've got to, I think we suggested that you should open the argument, Mr Kennelly, because it's probably more productive to have your shots fired at the documents rather than have Mr Hutton try and defend them without you having fired them. I don't want to stick with that if you don't think it's appropriate any further, but it may still be the right may to deal with it.

MR KENNELLY: I'm happy to proceed on that basis, sir, I think it still is the right way to deal with it. I may pause in my submissions and invite my learned friend to tell me if he's no longer pursuing an argument and he'll have an opportunity then to clarify his position as I go. But I think that is still the right way to approach it.

THE CHAIR: That's helpful.

Just one other point. Just to be absolutely clear, I think Mr Hutton is inviting us to deal with the point as to whether the primary alternative construction works as a matter of contract and indeed I think your point, Mr Kennelly, will be a public policy one, as I understand it. We will definitely deal with that, I think we know we have to deal with the relationship between the primary and secondary case even if we don't have to deal with the primary case. Just so we're clear about that.

MR HUTTON: Yes, I think that's helpful, sir.

Just if it helps, we don't see that the issue of severance really arises there because the opt-in LFA in the November version isn't signed off or anything, it's a draft ready to be signed off subject to what the tribunal says, so -- I think Mr Kennelly indicated this, if you found that the alternatives arrangement just simply doesn't work and makes it unenforceable, then we could simply take those out. We don't need severance in the sense that it's not a concluded agreement and I think Mr Kennelly was indicating he was content with that. We are certainly focused on, as the tribunal said, trying to get to agreements that satisfy the tribunal rather than simply trying to strike out agreements in their current form.

THE CHAIR: That's helpful, I'm sure we'll get to that.

Just the last thing, we've now spent -- and this is my fault -- 40 minutes trying to work out what we're going to talk about. In terms of indicative timings, how do you see the timings work? Mr Kennelly, how long are you going to be?

MR KENNELLY: I will be -- I will try and finish before lunchtime, but -- in fact, I should finish well before then in view of the shortened approach. I spoke to Mr Hutton last night and we both think that we'll struggle to finish this whole thing by the current time estimate and we will need to go into the afternoon if the tribunal can accommodate us.

THE CHAIR: That's a helpful indication. We can do that, I think. No, sorry. You

can't do that.

DR BISHOP: I can't.

THE CHAIR: I'm afraid we can't do that. If you just give us a minute.

(Pause)

MR KENNELLY: Excuse me, sir, sorry to interrupt your discussions, but I'm looking at my notes. Perhaps I will need a good bit less than I just indicated because obviously I'm prepared to deal with the primary case. I also need to go to the response of the PCR and that's the point at which Mr Hutton may say to me that I don't need to address him on those points, in which case, again, my submissions will be shorter. So in view of what my submissions says, perhaps we should try to finish by lunchtime and see where we get to.

THE CHAIR: Yes, well, the answer might be that we need to take a bit of time after 1.00, if that's -- I think that might work. So it may be that we can give you a bit of extra time if need be. Let's see how we go, we can come back to that. We should probably get on with the actual discussion now otherwise we're going to spend all morning talking about how we're going to do it.

Mr Kennelly.

Submissions by MR KENNELLY

MR KENNELLY: I'm obliged. I'll go straight into the opt-in LFA and I'll go back -- and I know it's familiar ground, it's useful to look at it again -- to section 58AA of the Courts and Legal Services Act in the authorities bundle, volume 2. I have it in my volume 2, tab B/16. It's on page 582.

THE CHAIR: Yes.

MR KENNELLY: And we see -- and it's obviously very familiar for the tribunal -- section 58AA, the definition of DBAs and we're looking at section 58AA(3) and the

three limbs. The first:

"... an agreement between a person providing [for these purposes] claims management services and the recipient of those services ..."

That's the first limb.

The second limb that:

"The recipient is to make a payment to the person providing the services if the recipient obtains a specified financial benefit in connection with the matter in relation to which the services are provided."

Then the final limb, and I stress here the very broad words that are used:

"The amount of that payment is to be determined by reference to the amount of the financial benefit obtained."

If all those three limbs are met, the agreement will be unenforceable unless it complies with the DBA regulations and we have that from section 58AA(1) and (2).

In my submission, that broad language that we see in section 58AA reflects the common law. You saw in our reply submissions -- and I know you heard argument about this in *Sony* -- that champerty was concerned with the risk of abuse and in this legislation and in other legislation the restrictions on champerty were lifted, but the risks remained which is why Parliament ensured there was still careful control by the executive.

Now, here, in this case, the PCRs had conceded that the first two limbs of that test are met, and for that we go to the response and the hearing bundle, tab A/2, at page 24.

THE CHAIR: Yes.

MR KENNELLY: If you look at page 24, paragraph 21, under the heading "Is the opt-in LFA a DBA?" On paragraph 21 the PCRs say:

"It's accepted the opt-in LFA is an agreement between a person providing claims

managements services."

That's the funder, they say:

"And the recipient of their services, the solicitor."

So they accept that, for these purposes, the solicitor is the recipient of the claims management services provided by the funder.

If you go over the page to paragraph 22 it's further accepted, says the PCRs, but in relation to the second limb the LFA is an agreement which provides that the recipient is to make a payment to the person providing the claims management services if the recipient, here the solicitors, obtain a specified financial benefit with the matter in relation to which the services are provided.

Paragraph 23, we see the issue that is in dispute, they say the LFA is not an agreement which provides that the amount of that payment is to be determined by reference to the amount of the financial benefit obtained.

So it's the only issue between us.

They also accept that if it's a DBA, the opt-in LFA is unenforceable. You'll have seen that -- I see my learned friend is nodding.

So let's go to the opt-in LFA itself and that's in the supplemental bundle, the November version, and that's behind tab 1, page 2, please.

We see at clause 3.1 that the funder is entitled to receive a payment out of the proceeds in accordance with the waterfall.

So we see reference firstly to the capital P and waterfall with a capital W.

The proceeds are defined as the value obtained by the solicitors. We see that at page 13. There's a definition section in the same agreement, page 13: proceeds are defined. Just near the bottom of the page.

On the previous page, you see -- page 12 -- the DBA is defined, that's the agreement between the solicitors and the persons who receive damages in respect of the claim.

And then back to page 13, just as we're here, you see the priorities agreement is also defined, so the priorities agreement which was deferred to in this opt-in LFA is also defined in the opt-in LFA.

If you go to page 14, you see the waterfall is defined as having the meaning given in the key terms. So you've seen proceeds defined, now we see waterfall.

So we turn to page 17, to the key terms in the schedule and waterfall is that as set out in the priorities agreement.

THE CHAIR: Yes.

MR KENNELLY: So it's incorporated, we say, by reference the opt-in LFA has expressly referred to and relied upon the priorities agreement and the definition of waterfall in the priorities agreement. And the revised priorities agreement is in the same supplemental bundle behind tab 3, at page 39. If you go to the top of page 41, you see that in the priorities agreement the capitalised words have the meaning given to them in the opt-in funding agreement. So the priorities agreement itself uses the definitions in the opt-in funding agreement.

Then we have the crucial clause 2, repayment. Clause 2.1 refers to the proceeds, which we've already seen defined. Then they are paid out according to the waterfall that follows in 2.1.1.

If we go over the page, you see the primary case -- and I'll skip over this since it's not the focus of our submissions this morning – clauses 2.1.3 and 2.1.4, that refer to percentages.

Then we have clause 2.1.5:

"Subject to clause 2.1.3 above being unenforceable and/or not permitted by applicable law, the residual amount left over from the proceeds should be applied to (a) the funder up to the amount of its capital outlay; and (b) ..."

Since we're here, because we'll look at it when we come to the ATE policy:

"... to the insurers in the amounts set out in the ATE policy schedule."

Then 2.6 -- sorry, over the page, yes, 2.6(a), the next stage of payment is to the funder up to the amount of the capital outlay multiplied by 200 per cent.

"Such percentage increasing by 50 per cent on 1 January and 1 July in each year starting on 1 January 2024, and will stop increasing on the earlier of the dates which are set out in (a)."

Then this clause 2.1.7, and this is the main objection that we have to this revised arrangements. Notwithstanding the absence of percentages, we see here a cap:

"Notwithstanding any other provision of this agreement, the fees paid pursuant to the above waterfall, clause 2.1.1 to clause 2.1.6 above shall not exceed the total amount of the proceeds."

So that is a cap by reference to the proceeds.

We know from the DBA that the proceeds are 32 per cent of the recovery made by the PCR -- any recovery made by the PCR in the case.

So two problems. First of all, the payment is coming out of proceeds, and secondly, there's a cap being imposed.

Now, as to the fact that the payment is being made out of the residual amount, and that alone appeared problematic in *Zuberi v Lexlaw* and I'll take the tribunal to that, if I may. It's in the authorities bundle, tab 7.

The mere fact the funder is getting a share of the PCRs' damages --

THE CHAIR: Just --

MR KENNELLY: Sorry.

THE CHAIR: Sorry, Mr Kennelly. There's a difference, as you have pointed out, a difference between the proceeds as defined being the amount received by the solicitors and then of course what I think is referred as to the spoils of the litigation in *Zuberi*, which is the amount, as I understand -- and I do not know if Mr Hutton agrees

with this -- it being the amount which the claimants in the litigation actually recovers. Is that your position?

MR KENNELLY: I'll come back to that.

In my submission, it doesn't make any difference because we know from the DBA that the solicitors are receiving 32 per cent of the spoils. That's their share of the spoils and what we're concerned about now is the share of the share. But that makes no difference concerning *Zuberi*. On the primary case it makes no difference to the use of a percentage.

I'm not going back to that point in relation to the alternative case, but to the extent that *Zuberi* is concerned with spoils here, too, we see the proceeds being spoils of litigation. It's 32 per cent of the spoils of litigation.

THE CHAIR: I thought that was your case, I thought you would be saying that for the purposes of this analysis, because the funders' agreement is with the solicitors, the spoils of the litigation are the 32 per cent, and because there's a cap imposed -- well, the cap refers to something else, doesn't it? The cap refers to -- the cap -- is that right? Maybe we need to go back and have a look at that. Sorry, I'm probably -- you might want to go back and have a look at that cap again?

MR KENNELLY: Of course. So we are in the priorities agreement, that would be at -- so clause 2.1.7:

"Notwithstanding any other provision of the agreement the fees paid pursuant to the above waterfall shall not exceed the total amount of the Proceeds."

Because proceeds is capital P, and because we know that the definitions, unless otherwise indicated, are those used in the opt-in funding agreement, that's what I took you to in clause 1.2 on page 41, that is proceeds as defined in the opt-in LFA.

THE CHAIR: That's my question really, which is why -- are you saying that all of this analysis sits within that framework which is funder agreement with the solicitors,

proceeds being what the solicitors received? If that's right, why does it matter what the relationship between the solicitors and the PCRs are? What's that got to do with section 58AA?

MR KENNELLY: Only because section 58AA is concerned with whether the amount ultimately paid to the funder is determined by reference to the benefit. The benefit here, because for these purposes we know the solicitor is receiving a benefit that the PCRs can accept that, the funders' payment is determined by reference to that amount, because there's a cap.

But even if we were concerned only with the benefit to the PCR, the benefit to the class in the litigation, we know from the DBA that a chunk of that, a specified percentage of that amount, 32 per cent, is in the pot, and that the cap is being applied to that, which again is the upper limit of the amount you pay to the funder is being determined by reference to that benefit.

THE CHAIR: Well, yes, but whether or not that's right -- and obviously Mr Hutton will have something to say about that -- I thought your position on this would be you don't have to worry about that, because you're just looking at, in the framework of section 58AA, the financial benefit is what the solicitors receive and therefore the analysis takes place entirely within that framework.

There may be a public policy point as to whether you had a connection with the spoils supports or doesn't support your argument. But I don't really understand on your argument why -- and Mr Hutton may take a different -- I think Mr Hutton does take a different view -- I understand on your argument why you need to look beyond what the solicitors received.

MR KENNELLY: I don't think we do, we're not at cross-purposes, sir. I agree with you, I am focusing only on what the solicitors received and that's all I need for my purposes.

THE CHAIR: That's helpful. I'm sure that's my fault. That's helpful.

MR KENNELLY: No, I'm sure it was mine.

But I took you to *Zuberi* just because of this statement by Lord Justice Lewison at paragraph 33, it's on page 243, where under the heading "What are the DBA" the Lord Justice says, at paragraph 33:

"There are two possible views of what the DBA consists of. [Having set out the definition] 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. 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 ... only those provisions in the contract of retainer which deal with payment out of recoveries amount to the DBA."

The amount in the DBA which is unenforceable unless it complies with the DBA regulations.

So it appears there the Court of Appeal is saying that if there's a payment to a lawyer which is a share of recoveries, that brings it within the meaning of the DBA definition.

But as the tribunal has seen from my submissions, our key point, our key point here, is that cap at clause 2.1.7, that the fees to be paid under the waterfall shall not exceed the total amount of the proceeds. As I said a moment ago, the effect of that is the payment to the funder is capped at 32 per cent of the financial benefit received by the PCRs, that's the proceeds received by the solicitors.

So if one recalls the definition in section 58AA, the maximum amount of the payment is directly determined by reference to the financial benefit obtained by the recipient of the funder services. That, we say, is squarely in the definition of section 58AA.

THE CHAIR: Don't we then get into the question of whether sub-- subsection (3)

captures everything which might have some bearing on the outcome of the financial benefit? Because there is a question here of just the extent of this. I mean, clearly you can start with -- if you've got percentage, it's very obvious, the percentage is the main driver and determines the outcome. There are other things that may mean that that's not the right answer. Indeed, in *PACCAR* we see Lord Sales saying the fact that the tribunal has the facility later to come to a different conclusion is neither here nor there because it still remains a percentage-based agreement.

Are you saying that the -- that that principle continues all the way through to anything which has a bearing on what the amount might be? So isn't that inconsistent with what Lord Sales was saying? So, for example, the intervention of the tribunal, according to Lord Sales, is not something which alters the fundamental nature of it. Are you saying -- you could say the same thing about the cap, couldn't you, that actually the fundamental nature of it is how it's described in the document and the cap is merely just a factor that may have an effect on it in certain circumstances?

MR KENNELLY: Sir, I make a virtue and I rely upon what Lord Sales says in *PACCAR* and it's not a question of contractual construction, it's a question of statutory construction. Because, as you say, sir, in PACCAR, the Supreme Court stressed the very broad language that is being used and that's material to your question about is it designed to cover everything that goes to the determination of the payment?

We look then at the language of section 58AA(3)(ii):

"The amount of that payment is to be determined by reference to the amount of the financial benefit obtained."

So if it's been determined by reference to the amount of the financial benefit obtained, it's caught. And what's clear by virtue of the cap is that the upper limits of all possible payments to the funder is fixed directly by reference to the amount of the

financial benefit obtained.

There's no dispute between us and the PCR that there is a financial benefit obtained by the recipient of the services in this case.

The question really for the tribunal is, properly construed: is section 58AA(3)(ii) concerned only with specific mathematical formulae that determine or formulae that determine all aspects of the possible payment? Is that what's envisaged? In which case, I lose, because the cap isn't that.

But that's, in my respectful submission, not what the language says. It's not limited to situations where every aspect of the payment is determined according to the amount of the financial benefit obtained. If the amount of the payment is determined by reference to it, then it is caught, and the cap sets the upper limit of all possible payments.

It may not apply in every case, but it is plainly -- reference to it is needed in order to determine the upper limit of any payment. That's why I say it's caught.

THE CHAIR: Yes, I understand, thank you.

Just to test that, if you assume -- well maybe you wouldn't accept this -- but let's assume for argument's sake that the tribunal is not going to be disposed to make an award to a funder that goes beyond the amount of proceeds. Forget about -- let's forget about the slight peculiarity in this construction where the agreements are between the funder and the solicitors. But just assume -- perhaps the more straightforward case where funder funds the PCR, the PCR recovers but doesn't recover enough to pay what is contractually owing under an otherwise unobjectionable funding clause.

If, as a matter of practicality, the tribunal is never going to make an award greater than that, isn't that something that is by reference to -- isn't that something that's been referred to, if you like, to determine the outcome for the funder?

MR KENNELLY: I see the point the tribunal's making. I think the reason why that doesn't arise here is because we're concerned only with what the agreement requires.

THE CHAIR: Yes.

MR KENNELLY: According to the agreement, is the amount of the payment to be determined by reference to the amount of the financial benefits obtained? The fact that outside the agreement the tribunal has a role is neither here nor there, the question is in the agreement is the provision that the payment is to be determined by reference to the amount of the financial benefit.

THE CHAIR: So if the PCRs were to take out of their draft 2.1.7, would your objections go away?

MR KENNELLY: They would be -- well yes, that's -- that's the main objection. There is still the problem with payment out of proceeds. The share of the proceeds, the *Lexlaw* point that I took you to a moment ago. My key point is at the cap. That's the clearest manifestation of section 58AA(3)(ii) because there it's plainly that the upper limit of the payment has been determined by reference to the amount of the financial benefit obtained. I would be in a more difficult position if they dropped 2.1.7, that's for sure.

THE CHAIR: It's a slightly odd outcome, isn't it, that if somebody puts in what probably reflects the likely reality, they put that under their agreement, it flips over and becomes a DBA, whereas if they don't say anything about it and leave it to the tribunal to reach that conclusion or possibly not.

I suppose you might say the tribunal may not have sympathy for the PCRs and the PCRs have just got to accept the contractual provision that comes with the funding, but none of that makes an awful lot of practical sense, does it, that you're in trouble if you put the clause in protecting the PCR from effectively a large obligation that

they're not funded for, but if you don't put it in, you take the risk, yet it's not a DBA. That doesn't sound like a terribly logical situation.

MR KENNELLY: But the -- I mean, I can see the difficulties that the PCRs face and I totally understand the point the tribunal makes about this is a cap designed to protect the -- to protect PCR, and therefore is it really appropriate to have an objection to it?

But we are fixed with the statutory language which Lord Sales emphasised again and again in *PACCAR* -- and I'll take you back to *PACCAR* -- as it is as wide as could be. It was designed to cast the net for DBAs wide to give the Secretary of State the greatest ability to deal with problems and eventualities that arose. And it's important to adhere faithfully to the statutory language because this question applies to all proceedings, sir. I entirely understand how in the tribunal, because of your very close case management and the particular processes and rules that we have here, it may seem illogical, but the question of the statutory construction applies to all proceedings not just those in the tribunal. That has to inform, I think, the tribunal's assessment of how it can be construed. It cannot simply be construed by reference to the protections that exist here, it has a broader significance.

THE CHAIR: Yes, that's interesting. You would say we have to ignore the processes that the tribunal will apply in these proceedings because the construction is the construction.

MR KENNELLY: Yes, indeed, and because this question of construction is not simply limited to the tribunal because it has much broader implications, we have to ask ourselves what did Parliament envisage, and what Parliament envisaged was not limited to what could and could not be done effectively in the tribunal.

THE CHAIR: Yes.

MR KENNELLY: Now, the PCRs say that a cap alone can't render an agreement

a DBA. But that, we say, has a very odd consequence. For this may I take you back to our reply submissions in the hearing bundle? There are some examples of how PCR submissions work. Go, please, to page 50.12, paragraph 38.

Because --

THE CHAIR: Which paragraph was it?

MR KENNELLY: Paragraph 38 on page 50.12, behind tab 3.

They say really what difference does a cap make? Why could that turn it into a DBA? But again, bearing in mind the broad scope, the deliberately broad scope, of section 58AA, Parliament would not want that to be circumvented by clever drafting because the idea with that broad reach was that many things would be captured and Lord Sales even acknowledged some things that would not necessarily require the DBA regulations, but the scope was deliberately cast wide in order to ensure that the DBA regulations were engaged and complied with, and you could get around the DBA regulations by the kind of drafting we set out in paragraph 38.1 and 38.2 where, according to the PCR, there would be a DBA, I think, because they accept *PACCAR*'s point on percentages. They could say 50 per cent of the proceeds capped at five times the capital outlay. Well, that is a DBA say the PCR, but something that would produce precisely the same result, so five times capital outlay, capped at 50 per cent of the proceeds, that wouldn't be a DBA.

That kind of drafting would circumvent the broad scope of section 58AA, and the DBA regulations on PCRs' construction.

The PCRs say well, our position is very unattractive, but the point about the cap was made by the Law Society in relation to CFAs in 2010 and 2011. May I show you that?

THE CHAIR: Yes. I'm not sure we attach a huge amount of weight to it actually, Mr Kennelly, but by all means show it to us.

MR KENNELLY: It's the CFAs, I understand that, and that's why I want to take two seconds on it. It's in tab 26.

THE CHAIR: Yes.

MR KENNELLY: And page 713 gives you the Law Society's guidance on what is and what isn't a DBA.

If you go to page 716, under paragraph 4.1, three paragraphs down:

"You should be aware a CFA may amount to a DBA where the amount of the costs are successfully payable is determined by the reference of any amount of the financial award obtained. This would be the case if the CFA provided for different levels of success fee dependent on the size of the financial award or this [and I rely on this] or capped the cost and/or success fee by reference to the level of that award."

I appreciate that's guidance only and it's about the CFAs, but it is telling that the Law Society took the same view that we maintain and so far from being unattractive, it was a construction which the Law Society itself adopted.

That's the short point on the cap. Before I leave it, I want to go back to some of the objections which the PCR makes and this is my learned friend's opportunity to tell me that these are not maintained in relation to the submissions that we've just made.

If you go to the hearing bundle and the PCRs' response, they made three arguments about why this isn't a DBA, and the first two may still be relied upon by my learned friend. So if you go, please, to page 25 of the PCRs' response, this is dealing with the opt-in LFA, and paragraph 24.

Now, here the PCR submitted that the payment in the priorities agreement does not mean that section 58AA is engaged because nowhere in the LFA itself does it provide that the amount of the payment is to be determined by reference to the financial benefit obtained and its amount and they rely on the fact that the waterfall is

in the priorities agreement and not in the opt-in LFA. So before I address you on that point, I'll ask my learned friend to indicate if that is still his case.

MR HUTTON: Yes, thank you very much. We don't pursue that in relation to the November agreement, so you don't need to rule on that argument.

MR KENNELLY: I'm obliged.

The second point is paragraph 27, and it's the point, I think, that we were discussing, myself and the chairman, a moment ago, the same page, page 25, about financial benefit. I think a distinction is made in paragraphs 27 and 28 about the spoils of the litigation being those related to the damages or settlement sum in respect of damage and not the financial benefit which the solicitors obtain, I think it's being said, under the DBA.

Again, I will pause there and ask my learned friend if that's a point which is being maintained in relation to the alternative case that we're discussing.

MR HUTTON: Yes, thank you.

No, that isn't in relation to the alternative case.

THE CHAIR: May I just check that that is a point about the opt-in. We're talking about the opt-in LFA of course and we'll come on to the opt-out. Is that a point that's going to come back in relation to the opt-out?

MR HUTTON: No, it doesn't come back on the opt-out.

THE CHAIR: So that's gone. Okay, thank you.

MR HUTTON: Yes.

MR KENNELLY: So on this issue, I'm very grateful to my learned friend, that leaves us then with the caveat.

The language that the tribunal saw a moment ago that the application of the primary case, 2.1.3 and 2.1.4, being contingent on there being enforceable and/or permitted by applicable law. I have two short points to make about that.

The first is that the drafting on its face doesn't add anything. It provides that if the clauses are unenforceable they are unenforceable.

But my second concern, my main concern, is the idea that clauses 2.1.3 and 2.1.4 continue to apply, but they could become unenforceable if someone challenged them or the law changed.

If that's the idea -- and that appears to be -- that's what it says, and that's the approach on the face of the agreement -- then that is contrary to public policy and should not be permitted. Because our case is that these clauses are unenforceable, and it's well established that if a party entered into a prohibited contract, and that's the concern that these clauses are prohibited, then the contract is unenforceable. We say it's not appropriate to accommodate possible illegality in a contract.

One can imagine many, many situations in which that could arise, but to give you a really extreme example, if the contract said: to the extent the Bribery Act 2010 is repealed, party A will pay party B one billion pounds payment in exchange for the award of a contract. I mean, to accommodate illegality or potential illegality in a contract is not appropriate.

Notwithstanding the understandable concerns which the tribunal has about allowing the PCRs to keep the point alive if the law changes, we are, for better or for worse, stuck with the law as it is. If, according to that law, these clauses are illegal and unenforceable, they should not be allowed to survive in the contract.

If the law changes, the parties can then deal with that change in those changed circumstances.

THE CHAIR: Would you maintain that objection if it reversed the presumption? In other words, if it acknowledged that the provisions in 2.1.1 and 2.1.2 and 2.1.1 all the way through to 2.1.4 were not currently enforceable under applicable law, but should become enforceable if the law changed, for example, if it said that. Then it said in

the absence of that 2.1.5, 2.1.6 in reply, effectively reversing the presumption?

MR KENNELLY: I can see on the face of that language that appears the tone of these is less objectionable, but ultimately it makes no difference, in my submission. It's still accommodating the possibility of something which may be entirely illegal, and it's either illegal or it isn't, and if it is, well, that's possible, it ought not to be contemplated in any way on the face of the agreement.

THE CHAIR: Well, that depends how it's put, doesn't it? Maybe I didn't put it precisely enough. If the wording makes it plain that the clause is not enforceable unless something happens to make it enforceable. It is actually recognising that it isn't lawful, but it's approaching the matter as a contingency, that if that contingency would arise it has contractual effect. In other words, it has no contractual effect unless the contingency arises.

MR KENNELLY: I see that sir. In that situation it's hard to see how to generate any of the bad incentives which were debated before you in *Sony* and as we've raised in our own case, but what does it add, in my submission? As a matter of contract, it adds nothing at all and will have no legal enforceable effect. It's a declaration, and therefore adds nothing. So unless I'm told otherwise, I can't see what it would --

THE CHAIR: I think what it does -- I think for the PCRs' point of view it preserves the possibility of pursuing that funding return if something happened to allow them to do it. As a matter of contract with the PCRs, they have a commitment, if the contingency arises, they're entitled to default to that.

MR KENNELLY: Well, then, sir, we are in the territory of incentives. We'd encourage the funder to act in a way which increased the possibility of its return in the event that it could rely on these options which are currently unenforceable, it might become enforceable in the future, so that would generate an incentive on the funders' side -- I'm not suggesting this in relation to this funder, but just as a matter

of incentives -- to rack up costs, to the extent the funder is able to, to drive the litigation in a way which is contrary to public policy because it has in its mind the possibility that it will be able to have the benefit of the percentages which are currently unenforceable and which might become enforceable in the future.

My learned friend reminds me, that's similar to the bribery example that I gave you. The problem with that bribery example is, sure, the Bribery Act is currently in force and nobody can pay bribes, but if one puts it in the contract in a blatant way it can generate incentives for the putative briber to lay the groundwork, to think about it, to incentivise his own actions, in the hope and expectation that the Bribery Act could be repealed and he can then do the thing he wants to do. The fact that it's currently illegal and unenforceable does not completely remove the incentives which are contrary to public policy.

THE CHAIR: I think the incentive is not to drive up cost. I think that the November approach, if anything, gives the incentive notto drive up costs because the return is based on the outlay, I would have thought. There may be other incentives, obviously there are other incentives because that's the whole reason for the historic dislike of funding arrangements, but that is probably not to drive up costs, I think.

MR KENNELLY: Sorry, my learned friend tells me the law changes nothing to stop them renegotiating arrangements at that point and personally before the tribunal. That was a point I made a moment ago, that if the tribunal's concern is to allow them to take advantage of a change in the law, that's something they can do and it's best done when the law changes and they can renegotiate arrangements and put them before you. That's, as I tried to suggest a moment ago, the appropriate way of dealing with future changes in the law and the interests of the funder and the PCR at that stage. The tribunal's in a much better position to address the propriety of that at that point with the particular and specific legal change before you than to try and

anticipate it now and allow in the possibility of something which is currently, on our case, illegal.

THE CHAIR: Just to be clear, our concern is not, as you put, the system to do anything in relation to the funding, our concern is simply to determine whether or not we have a funding arrangement that, as the law presently stands, is enforceable. The observation was simply an explanation of I think why they are concerned to retain the primary case. That's my understanding, certainly from -- that was the position articulated quite clearly in *Sony* and I anticipate from Mr Hutton nodding his head that he's going to say the same thing here.

I just want to be absolutely clear we have no view on whether the law is going to and should change or indeed what the effect of that is in the funding agreements. That's a matter for Parliament, of course.

MR KENNELLY: Of course. With all that uncertainty, sir, which you very fairly acknowledge, tells against anticipating it in any way in the current agreement. Making an agreement that reflects the law as its stands and it's appropriate for the funder and the PCR to come back before you in the event the law changes and the proposed defendants or defendants, if we're certified, would have to deal with that in a constructive way as the tribunal expects us to do.

THE CHAIR: Yes, I absolutely understand your argument. I understand the point you're making.

Thank you.

MR KENNELLY: Before I move on, sir, onto opt-out, those are my submissions on the opt-in LFA. Before I move on to opt-outs, does the tribunal want to hear Mr Hutton on that or shall I move on to opt-outs directly? It's a short point.

THE CHAIR: If Mr Hutton wants to jump in, I think it will be helpful for you to finish. I suspect there's a fair degree of overlap between opt-in and opt-out, so it might

helpful if you did the whole lot and Mr Hutton is nodding.

Just before you do, can I ask you to come back to the proceeds point. You've two points, haven't you, one is this capped point and there's a more general point about the proceeds point.

As I understand the proceeds point, the proceeds point is if you have an arrangement where you're effectively getting the funder's fee paid from the proceeds, then inevitably there's a linkage between the two and that's your broad interpretation. It seems to me that, I think we're agreed, that argument might apply to the opt-out case, but not necessarily to the opt-in case, because the proceeds -- because the reference point for the analysis is simply the agreement between the funder and the solicitor.

Now, I'm just not completely sure I understand where you are on that. I've tried to pin you down and you are not susceptible to being pinned down. Are you still arguing that your broader proceeds point works for the opt-in? In which case, that's fine and I understand the point. Or are you just confining it to the opt-out?

MR KENNELLY: I'm sorry, I wasn't deliberately trying to avoid being pinned down, I probably just didn't express the *Lexlaw* point clearly.

I made the point about being paid out of the proceeds both for opt-in and opt-out because although, as we discussed with the tribunal, proceeds is defined as the money that the solicitors receive. Because the solicitors are receiving a percentage of the recovery by the PCR, it's still a share of the proceeds within the meaning of the Court of Appeal in *Lexlaw v Zuberi*.

THE CHAIR: How does that sit with 58AA, because it's not concerned at all in the opt-out agreement, it is not concerned at all with what the PCR receives, it doesn't make any difference. You may be making a public policy point which amounts to the same thing, but in terms of the application of the statutory provision, it doesn't apply,

does it?

MR KENNELLY: It's -- no, it's because recoveries -- if you look at -- the recoveries is the solicitor's return, so the solicitor's return is the recovery for these purposes. It's what the solicitor is getting. That's their -- that's the spoils of the litigation, to use the language of *Lexlaw v Zuberi*.

THE CHAIR: I agree with that. The point -- I certainly don't mean any disrespect by talking about pinning you down -- but I'm still not entirely sure about what you say that the significance for the opt-in case is of the amount of money which the PCR recovers by way of damages, if they do. Is that significant at all on the analysis of the opt-in? I can see you might say it's significant on the opt-out, but on the opt-in, I can't understand the argument as to why it's significant.

MR KENNELLY: Sorry, now I understand.

That point isn't -- isn't -- relevant because I only made that point because of what my learned friend had said in the response at paragraphs 27 and 28 which he said he's not maintaining.

THE CHAIR: No, I understand. No, that's very helpful, I understand how it fits into that. So your argument in relation to the opt-in is actually single shot, it's the cap. In the opt-out, I think you're going to come on and argue this broader proceeds point as well. Is that right?

MR KENNELLY: Yes.

THE CHAIR: That's really helpful, thank you.

MR KENNELLY: And a cap point also.

If you go to in the opt-out agreement, again you have the point that we're only concerned with whether the amount of the payment to the funder is determined by reference to the amount of the financial benefit obtained. And you'll see in the opt-out agreement also a cap, not drafted in exactly the same way, but it operates as

a cap nonetheless.

So could you go, please, to the opt-out LFA, hearing bundle, tab 7.

THE CHAIR: Yes.

MR KENNELLY: Page 113, you see the same clause 3.1, the payment to the funder, but here you see a payment out of the total fee. Total fee is a defined term in accordance with the waterfall.

Then at page 117, clause 7.4 -- just before I get into 7.4, I'm not going to go back to it because it's the same priorities agreement, but that's the waterfall that sets out how the total fee is to be distributed.

Then we have at clause 7.4 the cap, the total liability of the class representative for the total fee shall not exceed the sum total of the amount of any unclaimed damages which the tribunal orders to be paid to the class representative and any costs and disbursements recovered from the defendant.

For completeness, we see, in page 126, the definition of the priorities agreement. Page 127, the definition of the total fee.

Then page132, annex 6, the total fee is the amount equal to the capital outlay, the insurer outlay, and I've been skipping over the funding agreements, they all refer to payments to insurers and ATE, but we'll come back to that. But the amount of the success fees due to the solicitors and an amount equal to the capital outlay multiplied by 200 per cent which increases, as the tribunal sees. But then this, the cap at the end:

"Notwithstanding any other provision of the agreement, the total fee shall not exceed the portion of the proceeds that have not been distributed to class members within any period stipulated by the tribunal and distribution to class members following success in the claim."

So the cap is the undistributed pot and the costs recovered.

So, although expressed in different terms, the effect is the same as we discussed in relation to the opt-in LFA and the priorities agreement. Here, again, the upper limit of the amount of the payment to the funder is determined directly by reference to the amount of the proceeds.

The proceeds, as set out here in annex 6.

THE CHAIR: It doesn't refer to the proceeds, does it? It refers to a subset of the proceeds, which is an amount which is left after the distribution of the class members. So that is slightly different, isn't it?

MR KENNELLY: It is, the subset of the proceeds. You're quite right, sir. Still, again we come back to the broad language in *PACCAR* and that the problem here is that by reference 2 is broad enough, more than broad enough, to catch a subset of the proceeds.

If more narrow language had been used, again my position would be more difficult, but it's hard to imagine broader language.

THE CHAIR: Yes. So the financial benefit received by the PCR is the proceeds. That's right, isn't it?

MR KENNELLY: Yes.

THE CHAIR: Yes. And here we're talking about the fee being determined by reference to the balance of the proceeds after something has happened.

MR KENNELLY: Yes.

THE CHAIR: Yes.

MR KENNELLY: Exactly.

THE CHAIR: Are you going to take us to -- sorry, carry on.

MR KENNELLY: No, sir, please.

THE CHAIR: Are you going to take us to the priorities agreement?

MR KENNELLY: The priorities agreement is behind tab 12 at page 223.

THE CHAIR: Yes, that's fine. Yes, that's actually -- we were looking at the opt-out Mastercard and that's the same, wasn't it?

MR KENNELLY: They're drafted in the same terms.

THE CHAIR: Here we don't have the contingency point, do we? Here there's no question about at the primary and secondary, we've just got a secondary case here now, haven't we?

MR KENNELLY: Yes, exactly.

THE CHAIR: It's interesting. The way in which the money is distributed, of course, is -- is not actually -- doesn't line up directly with the calculation of the total fee. The total fee goes through this process of working out what the capital outlay is, the insurers' outlay, the CFA success fees and then it adds this multiplier which increases.

MR KENNELLY: Yes.

THE CHAIR: When you get in -- and that gives you the total fee -- when you get into the priorities agreement, which is about how it's going to be distributed, you see that actually money goes out with different reference points because it goes -- the capital outlay, the money the insurers actually paid and then the solicitors get some money and then there's a balance which ends up going to the insurer and the funder are different percentages. That's right, isn't it?

MR KENNELLY: Yes, I see that sir. I mean, I don't take issue with that. I see the point the tribunal is making, it is odd that there isn't a read across from how total fee is defined, which suggests itself how the money is to be divvied up, but that's not really -- unless I'm told otherwise -- material to the point I'm making, which is simply that by reference to section 58AA the upper limit of the payment to the funder is determined by reference to the proceeds as defined in this agreement, because although it's not a direct immediate calculation that one gets with a percentage, it is

still by reference to the recovery and that's enough to satisfy section 58 --

THE CHAIR: So you don't rely on anything in the priorities agreement to bolster their case, you rely entirely on the last sentence of annex 6.

MR KENNELLY: Exactly, sir, yes.

THE CHAIR: Of course, is your broader point about -- because here there obviously is a direct connection between the proceeds and the total fee, so your point being that -- your broader point being that there's inevitably a reference to the proceeds, when one is fixing the total fee.

MR KENNELLY: Indeed.

THE CHAIR: Yes.

MR KENNELLY: Now, in response to this, the PCRs say don't worry because the amount of unclaimed damages that's paid to the class representative is determined by the tribunal and so it can't be a DBA.

The tribunal can interpose itself in this way and that stops it being a DBA, but that argument or very similar argument was made and rejected by the Supreme Court in *PACCAR* and we see -- just go to *PACCAR* now and I'll show you briefly how that was addressed.

PACCAR is in the first -- sorry, the second volume -- sorry, the first volume of authorities, behind tab 12, page 448. And it's paragraph 96, please, on page 478. We're looking paragraph 96, the bottom of 478, by H, UK TC made a reference to the funders' recovery. It made first the point that -- this is why it shouldn't be a DBA -- argued UK TC subject to prior payment to members of the opt-out class to their full share of damages. Then this: subject to the discretion of the tribunal pursuant to section 47C(6) of the 1998 Act. And the tribunal looked at this in *Sony* and you're very familiar with this language.

Over the page, we see how Lord Sales dealt with it, between A and B, the point that

UK TC was making was that this amount that is ultimately going to the total fee for our purposes is subject to judicial control and in fact extensive judicial control by the tribunal.

Lord Sales says, 97:

"I don't accept UK TC's submissions on this point the claimants provide a convincing answer."

And between B and C on paragraph 98, we see how he deals with it:

"According to the procedural rules of the tribunal and by virtue of the 1998 Act the funder of opt-out proceedings always takes the risk that its referred to there and always takes the risk also that the tribunal might decline to exercise its discretion to order a payment in favour of the funder."

And none of that, says Lord Sales, affects the application of section 58AA(3).

THE CHAIR: As I understand it, I think he's saying if we start with, in this case, an obvious percentage and so therefore an obvious infringement, if you like, of 58AA, then it's not fixed by the tribunal having a discretion to do something different. That's the point I think he's making, isn't it?

MR KENNELLY: Precisely, and that's the point I make, that's the only point I make about these passages to you now.

THE CHAIR: Yes. Is it -- if -- we'll see what Mr Hutton has to say about that. I'm sure he'll have something to say about that.

MR KENNELLY: So that's all I wanted to say to you, but I'll quickly check with my team to see if there's anything else I have left out.

(Pause)

No, that is -- unless I can give any further assistance, those are my submissions on that and I'll move on to the ATE points.

THE CHAIR: Just in terms of timing, I'm conscious the transcriber will need a break

at some stage. I think we're anticipating we're going to go past 1.00. How long will you be on the ATE policies? I don't want to hurry you, I just want a sense of how that works.

MR KENNELLY: Probably about -- no, it could be between 5 and 10 minutes which is probably -- this is probably a convenient moment because then I can deal with ATE and regulatory together relatively quickly and then move over to Mr Hutton.

THE CHAIR: I am just concerned that Mr Hutton will have enough time and you may want to say something further. If we take 5 minutes now that leaves us with about a bit over an hour. You are going to be another 10 minutes, are you? Is that right? Maybe 15 at the outside.

Mr Hutton, how are you going to be placed for time?

MR HUTTON: So I would expect to be an hour at least, I would say. Possibly slightly longer. Although I'm very conscious of time. But something between an hour and a hour and a quarter, something of that sort.

THE CHAIR: Yes. Okay. Well, we might have to -- we'll have to see how we go. Let's take a break now for the transcribers and keep it to 5 minutes and come back at 12.20. Thank you.

(12.15 pm)

(A short break)

(12.20 pm)

THE CHAIR: Mr Kennelly, I think what we might try and do is manage to squeeze our time a bit here. If we could ask you to be finished by 12.35, please if that works for you, and gives you a good 15 minutes.

Mr Hutton, we'll then give you until one o'clock as your first tranche and take half an hour for lunch. After lunch we'll give you another 45 minutes until 2.15 and that will give you 70 minutes overall. Will that be enough, do you think?

MR HUTTON: That's very helpful, sir, yes, I am sure that will be enough. I shall make it enough.

THE CHAIR: That will leave you with 15 minutes to reply which might be tight, but hopefully is manageable.

MR KENNELLY: We'll manage, sir.

THE CHAIR: Good. That's very helpful. Thank you.

MR KENNELLY: Okay, so on ATE policies, there are two points to make here. The first is whether the ATE providers are providing claims management services and if they are, then there's a cap, and the same cap is the cap that you saw in the opt-in priorities agreement. That applies to the payments to the insurer as much as it does the payment to the funder and if these are claims management services within the meaning of section 58AA, then there is a cap applicable to the amount that the provider of the claims management services is getting paid and that fails -- well, that's caught by the definition for the reasons I've given you.

So I'll focus my submissions on whether ATE is claimants management services or not.

MR HUTTON: Just to help on that. In relation to the November agreements, we don't argue and seek a ruling on whether it's claims management services or not, the remaining issue in relation to ATE on the November agreements, as I understand it from Mr Kennelly's point of view, is that it's part of a cap.

THE CHAIR: So you're happy to rely, for present purposes, on the argument as to whether or not it's a cap.

MR HUTTON: Yes.

THE CHAIR: In common with the opt-out and opt-in funding agreements and that's all we need to deal with today.

MR HUTTON: Yes, that's right.

THE CHAIR: That's helpful. Mr Kennelly, that is helpful isn't it?

MR KENNELLY: Yes, it is. I'm grateful for that intervention. I must say, I appreciate my learned friend is being helpful and we are all anxious to get on with this, this would be a lot more helpful if we had been told this a week ago or two weeks ago. But we are where we are, but we will take that and then I don't need to say any more then about ATE because I rely on the points I made about the cap earlier and I adopt those points on the assumption that the ATE provider is providing claims management services, although I appreciate the tribunal won't be determining that today.

THE CHAIR: Yes, thank you.

Mr Kennelly, just so I'm clear, when you talk about the cap, can you remind me -- I'm losing track slightly -- of what's in the agreements and where they are. Are you talking about a cap in the insurance policy or are you relying on the cap that comes from the funding arrangement and therefore effectively flows through to the policy because it's a percentage of -- it's not a percentage of the policy anymore, of the funding anymore --

MR KENNELLY: For the opt-in LFA it is clause 2.1.7, it's the every same cap in the opt-in LFA that I showed you. That is in the supplemental bundle, tab 3, and the opt-in priorities agreement.

THE CHAIR: So there's not a separate -- you're not talking about a separate cap -- you're talking about the cap on the total fee that comes through the funding agreements?

MR KENNELLY: Yes.

THE CHAIR: Yes, I understand.

MR KENNELLY: That's clause 2.1.7 in the opt-in LFA and it's the reference to -- it's the total fee cap that I showed you a moment ago for the opt-out LFA.

THE CHAIR: And just -- sorry to -- and this may be a silly question -- but given the -- I don't know whether these are draft or executed, I think they are draft, that the draft endorsement of the ATE policies which remove any reference to the total fee and now are, as I understand it, entirely based on fixed sums at different stages, are you saying that the cap point still applies because insurance proceeds have to be paid from the total fee? Is that the point?

MR KENNELLY: Yes. And as far as I understand it, that's because the deferred premium is payable only on a successful outcome and in accordance with the priorities agreement. If you turn, in the hearing bundle, tab 19, page 293.

THE CHAIR: Yes.

MR KENNELLY: You see the definition of deferred premium.

THE CHAIR: Yes.

MR KENNELLY: It's payable, three lines down: the deferred premium will be payable in accordance with the priorities agreement. So it's the priorities agreement that tells you how it's going to be paid, and therefore the vice is the fact that the priorities agreement contains the caps which apply equally to the upper limit of the payment that the ATE provider can receive. So if the ATE provider is providing claimants management services, its payment, its ultimate payment, is also being determined by reference to the benefit, the financial benefit received by the recipient of the services.

THE CHAIR: I thought -- I mean, I appreciate there may be a difference with the opt-in and the opt-out, but I thought you weren't advancing an argument based on the priorities agreement for the opt-out case, and so --

MR KENNELLY: Sorry ...

THE CHAIR: I'd understood -- well, I'd understood your original argument in relation to this to be the deferred premium was set by reference to a percentage of the

funder's fee, and as a result that linked the premium to the funder's fee which you said -- that you say is objectionable for whatever reason and we'll see whether it's the LFA or -- and the opt-in or the opt-out. Once that connection's gone, because the deferred premium is no longer determined by the funders' fee, it's determined by fixed sums, I'm not entirely sure what you're saying is the connection between the calculation of the deferred premium and the financial benefit received by the recipient, either the solicitors or the PCR, and the opt-in and the opt-out.

MR KENNELLY: It's because -- sir, just to step back. We're concerned here with ATE, on the basis of the new endorsements there's no percentage issue. The concern is only that because the insurer for opt-out is being paid out of the total fee, and the total fee is capped in the way that I showed you, the upper limit of what the insurer can get is being fixed by reference to the benefit received.

THE CHAIR: Yes, okay, that's helpful. Thank you.

MR KENNELLY: So I'll move on then to the regulatory position, unless I'm told I've missed anything on ATE, and on this I can deal with it relatively shortly as I indicated.

Our concern, as the tribunal has seen, is that the funder has carried out and may carry out specific activities for which it doesn't have permission. And we raise this in a constructive way with the PCRs. As you saw in our submissions, we weren't pressing the point, we simply sought reassurance in relation to it, but what we got back from the PCRs did not reassure us fully which is why we want to bring it to your attention now.

Just to recall what the regulated activities are, you can see those in the regulated activities order in the authorities bundle behind tab 19. Bundle 2, the second authorities bundle.

THE CHAIR: Yes, thank you.

MR KENNELLY: Page 630, it's the Financial Services and Markets Act 2000 Regulated Activities Order 2001, and you see specified kinds of claims management activity, a claims management activity is a specified kind of activity when it is an activity specified in any of the articles 89G to 89M.

Over the page, at the top -- near the top of the page, (i) -- it's I actually -- investigating is defined:

"Investigating means carrying out an investigation into or commissioning an investigation of the circumstances merits or foundation of a claim."

I'll come back to that, but I'll deal first with what you see near the bottom of 631:

"Seeking out referrals and identification of claims or potential claims."

So (i):

"Each of the following is a specified kind of activity when carried on in relation to a claim of a kind specified in paragraph 2."

Then (b) in particular:

"Referring details of a claimant [(ii)] a claimant or potential claimant to another person including but not limited to a person having the right to conduct litigation."

Then the kinds of claim where this applies, we see over the page sub (2)(b):

"A financial services or financial product claim."

Then further regulated activity, middle of the same page, and I rely on:

"Investigating or investigation in relation to a financial services or financial product claim, each of the following activities are the specified kind of activity carried on in relation to a financial services or financial product claim.

"(b), investigating a claim."

And as the tribunal knows very well, the underlying claims against Visa and Mastercard concern interchange fees which are, we say, financial services and financial product claims. The claims are derived from the setting of interchange fees

on payment card transactions which again, as you know all too well, involves interchange fees passing between issuing and acquiring banks, these activities are regulated and those who engage in these activities are subject to strict authorisation requirements. So because you're dealing with what on any view of financial service or a financial product claims these particular activities are regulated.

The PCRs explained what the funders had done in a letter of 30 October. I'll ask you to go to that, it's in the hearing bundle, tab -- sorry, page 347. Near the back of the hearing bundle.

347, the letter of 30 October. It's behind tab 27 in my version. So we have a letter from Harcus Parker referring to our concerns by reference to the regulated activities order that I've shown the tribunal. If you go to page 349, they respond first on our concern about the funder investigating or commissioning investigations into the -- into financial services and financial product claims, and far from resiling from this in any way, they say at 9:

"Every funders investigates the merits of a claim before permitting funds to a claim ... keeps them under review."

Paragraph 10, refer to the due diligence that they did, and the clarifications they took from the PCRs' legal team before obtaining independent third party legal advice on the merits of the claims in order to assure itself of the prospects of success of these proceedings.

And we don't deny that's the kind of activity which funders no doubt do, but the problem is that in this particular type of claim, financial services and financial services product claims, if the word "investigating" or "investigation" into these claims means what it says, well then the funders appear to be doing that which is a regulated activity under the RAO, but then this, even clearer, at the bottom of 349, in relation to the concern that the funder was identifying and referring to class

members.

Paragraph 11, over the page, on -- three lines down -- on three distinct occasions before *PACCAR*, the individual employed by the funder happened to provide contact details for potential class members of the PCRs' legal representatives and no privilege is waived, and it was appropriate, they say, for them to deal with it. They, the tribunal can see in this paragraph, deny that they are regulated and therefore offer no assurance that they won't do it again.

Now, it would have been very easy, not least because they say themselves this was not a widespread activity by them or the focus of their business, to say, for the avoidance of doubt, we won't do it again, we'll inform our employees or the employees concerned not to do it again, but we see no such assurance, and that of course could have been given without prejudice to their point that they are not doing regulated activities.

We wrote to them asking for that confirmation and we got a response on Tuesday, and that's in the supplemental bundle, page 86.

THE CHAIR: Mr Kennelly, I'm conscious of the time. Why don't you give us the reference here, and if you want to cut to the chase here. What I'm not sure is where you are going with this. Are you actually asking us to make a ruling in relation to the enforceability of the document under FSMA, or are you just putting up a warning shot?]

MR KENNELLY: The latter, sir. I'll give you the reference first.

THE CHAIR: Yes, please.

MR KENNELLY: Supplemental bundle, page 86. That's where they declined to confirm that they or their employees will not do this again. They declined to give us that reassurance. Because they've not done that, we have to bring this to your attention. These are important matters which are regulated with real care and we

have an overall concern about how the PCRs have approached this case generally. It has not been approached in an organised way and we have real concerns about the way they handle things and we've seen that again at this hearing and this is just one further example which when pressed reveals breaches, they may not be serious but they are in relation to important matters. We wanted to put down a marker and draw the tribunal's attention. I ask for no ruling on the issue today, but in view of the fact that they are important regulated matters, that we should bring it to your attention.

THE CHAIR: Yes thank you.

MR KENNELLY: I'm reminded, of course, they are criminal offences. There's no suggestion these are just minor matters that can be waved aside. They are serious matters and need to be taken seriously. That's the marker I wanted to put down.

THE CHAIR: Yes, thank you.

MR KENNELLY: Thank you, sir.

THE CHAIR: Okay, thank you very much, Mr Kennelly, that's very helpful.

Mr Hutton, we've got to get going. We'll take a break at one o'clock. If you think you need longer, either of you, we can shorten our lunch break, but I am conscious that means for everybody. I'm keen to give everybody some time off. Let's see where you are when we get to 1.00.

Submissions by MR HUTTON

MR HUTTON: Thank you very much, sir, yes.

In terms of the way that the PCRs have approached this, obviously our interest, the PCRs' interest, is to have enforceable and robust agreements which satisfy the requirements of the tribunal and, as a consequence of that, to properly protect the potential defendants' interests as well.

There has been an element in the written documents of suggesting that because the tribunal, in relation to the CPO application, did not make that CPO and stayed it, that therefore somehow the PCRs are in the -- drinking in the last chance saloon, and that if there was anything wrong or the tribunal was to find there was anything unenforceable about these agreements, that therefore they should be struck out.

That's not the way that my learned friend has put it this morning which is helpful. We say, you know, the background in relation to what happened in the CPO should be viewed separately to this. Everyone is struggling with the decision in *PACCAR* and the implications for the funding market and we have tried to do our best to find enforceable agreements.

There's plenty of precedent in the CAT for the CAT saying "Well, I don't like this bit of the agreement, perhaps you need to go redraft that," and we are very willing and open to redraft everything that will satisfy the CAT. That's certainly our approach. If there's anything in the November documents which are thought to be problematic in that regard, then we are open to changing anything to satisfy the CAT.

Obviously, in relation to the issues here, my understanding is that there are something like 29 opt-out cases in the CAT currently running. I don't know whether that's accurate and you, sir, might have a better idea, it came from Susan Dunne of Harbour and the ALF. But they are all funded, they all have third party funding, and so the implications of these issues go across the piece in terms of how these matters should be dealt with.

I was anxious to head off the sort of argument that, because of what happened in relation to the substantive application, we were somehow at a disadvantage in relation to this. We would ask, I'm sure the tribunal will approach it, on the basis that the starting point is the same as it is in the *Sony* case or is in any of the other cases that are grappling with this issue.

In relation to the substantive issues, if I can come to that, I want to deal very briefly -- I think that the most effective way I could deal with it, given the time, is to briefly go to the funding documents, much more briefly because Mr Kennelly has been very helpful in going through those, and then to make submissions in relation to the defendants' objections globally in relation to the two points I think they make now in relation to both opt-in and opt-out LFAs, namely firstly, the monies are coming out of the proceeds, and secondly, there's an express cap. And submit why we say that doesn't bring us within section 58AA and these agreements are not DBAs.

THE CHAIR: I think Mr Kennelly has accepted that the proceeds point really only applies to the opt-out rather than the opt-in, but in any event we have to decide it, so I don't think it matters quite how you present it in relation to what context. Just to be clear, I think that's where we got to.

MR KENNELLY: I'm sorry, sir, then I've not helped you. I maintain the proceeds point for both.

THE CHAIR: Do you? Okay. I misunderstood you. I'm sure I'll be able to work that out when we look at the transcript.

I'm sorry, Mr Hutton, I'm misleading you. Carry on as you were.

MR HUTTON: My misunderstanding was the same as yours, I understood Mr Kennelly accepted that point, but so be it.

In relation to the funding agreements just globally, the obvious difference between the opt-in arrangements and the opt-out arrangements is that the opt-in arrangements are made between Harcus Parker and the funder, whereas the opt-out arrangements are made between the PCRs and the funder.

The logic of that distinction is because the opt-in agreements work on the basis that the money that goes into the waterfall which pays the various stakeholders, including the funder but not obviously limited to the funder, the money from that comes from

Harcus Parker's DBA fee. That is the 32 per cent plus VAT of the proceeds. That money then gets taken down the waterfall to pay, in the way that you have been shown, the various stakeholders involved. Whereas in the opt-out arrangements, obviously there's no DBA fee because you can't have a DBA in the opt-out proceedings, so the opt-out LFA is between the PCR personally, the PCRs and the funder, so not Harcus Parker and the money is paid to the funder and the other stakeholders by the PCR out of the proceeds of the litigation.

So that explained the difference in approach.

Now, we have accepted that in terms of section 58AA(3) that doesn't make a difference because in relation to the opt-in arrangements, where the agreement is between the funder and the solicitors -- and it is odd, but this is -- we accept the effect of *PACCAR* -- if one looks at section 58AA, which is at B16 in the authorities bundle, at page 582, subsection (3) provides:

"a damages based agreement is an agreement between a person providing ... claims management services, [that's the funder, per *PACCAR*] and the recipient of those services..."

Now, the recipient of those services in the context of the opt-in arrangement is the solicitor, because the funding pays the solicitor. Now, the PCR is obviously a recipient of those services, they are benefiting from their claim being funded, but we accept that in the opt-in arrangements that can apply to the solicitor. So that's how we get engaged in the opt-in provisions with section 58AA.

Then it provides that the recipient, that is the solicitors in the opt-in arrangement, the PCR in the opt-out arrangements, is to make a payment to the funder who is providing the claims management services:

"... if the recipient obtains a specified financial benefit in connection with the matter ..."

So in relation to the opt-in arrangements, the solicitor is receiving a specified financial benefit, namely the DBA fee. So they get a specified financial benefit in relation to the matter. But then, in addition to that:

"the amount of that payment is to be determined by reference to the amount of the financial benefit obtained."

We take issue with the defendants' submissions in relation to that, both in relation to the opt-in and the opt-out on the November agreements. We say that effectively relates to a percentage of the damages, and we don't have a percentage of the damages either in the opt-in LFA or in the opt-out LFA or indeed in the ATE arrangements per November versions.

In relation to the funding agreements themselves, if I look -- if I come firstly to the opt-in LFA, which is in the supplementary bundle at A/11, what I just wanted to highlight in relation to that is at clause 3.3 is proceeds and at clause 3.2 -- so 3.1 says that funder is entitled to receive a payment out of the proceeds and 3.2 is:

"Subject to the terms of any order or direction of the tribunal on each occasion, if any, in which proceeds are received by the counterparty [that's the solicitors] the solicitors will procure that those proceeds be applied in accordance with the waterfall."

It is expressly now predicated on the basis that it is subject to the order or direction of the tribunal, which reflects the arrangements in the CAT rules as to the role that this tribunal has in respect of those.

Just a couple of other points in relation to that agreement. If one goes to clause 11.3 and 11.4, which appear at page 8 of that bundle, and I don't think we need them, but those are the severance provisions which are in fairly standard form which allows if any part of it is to be found unenforceable, then it will be removed, and then clause 11.4 then the solicitors will execute anything, et cetera, to preserve its rights.

So there are severance provisions within it.

Then in terms of the definitions, on page 10 of that bundle, firstly the capital outlay is, as one would expect, the amounts that have been paid by the funder under the agreement, essentially. And in relation to proceeds, which appears at page 13, that is the proceeds received by the solicitor. So that's the solicitor's DBA fee, the 32 per cent, plus VAT, those are the proceeds. Then, as Mr Kennelly pointed to, the waterfall is set out in the priorities agreement.

I needn't go to the opt-in DBA apart from to say that it provides for 32 per cent, plus VAT, to be paid to the solicitors, which then goes down the waterfall.

In relation to the opt-in priorities agreement, that appears on the same bundle, the supplementary bundle, at A3. We've obviously looked at that already. We go to 2.1.3, and the wording which Mr Kennelly challenges:

"Subject to this clause, 2.1.3, being enforceable." Which he says is objectionable.

That is -- I know, you sir, raised the issue about whether it could be turned around, so the presumption would be that it was unenforceable. That wording is very similar to the wording that was used in *Sony*. Of course there hasn't been a ruling on that.

The wording in *Sony* in relation to the alternatives was:

"Only to the extent enforceable and permitted by applicable law."

Whereas ours says:

"Subject to it being enforceable and/or permitted by applicable law."

Then one comes to the different alternatives, at 2.1.3, and 2.1.4, which are the old version, and then the replacements 2.1.5, and note in relation to 2.1.5 at (b), there is the payment to the insurers which it now expressly states that if 2.1.5 applies, then the percentage due to the insurers out of the remaining part of the proceeds is deleted and replaced with a fixed amount. So that ties in to the point.

There is, of course, a direct agreement in relation to the insurance, and it doesn't

necessarily have to go through the waterfall, it could be -- it could be direct. It goes through the waterfall because everyone is in effect treated the same through the waterfall. But it doesn't absolutely have to go through the waterfall. That goes to Mr Kennelly's point about the cap, because if it goes through the waterfall, obviously it's subject to the cap.

But it is important to emphasise what the cap is. It's at clause 2.1.7, and it says:

"Notwithstanding any other provision of this agreement, the fees paid pursuant to the above waterfall [clauses 2.1.1 to 2.1.6 above] shall not exceed the total amount of the proceeds."

Now, that is -- that is the total amount that goes through the waterfall, so that's the amount that goes to paying the funder, the insurer, the solicitors, the counsel, et cetera. On a number of occasions Mr Kennelly referred to the funder's fee being directly determined by the cap, but that isn't really quite correct. The funder is only one element in relation to that cap, it's an overall cap of all the money going through the waterfall. It's not as simple as the funder has a cap, the funder is one of the stakeholders and the overall cap is no more than the total amount of -- that is going through the waterfall, which is in effect the solicitor's DBA fee.

Then moving on to the opt-out arrangements, which unfortunately are in a different bundle, that's the main hearing bundle, and that's at tab B/7, and page 113 of that bundle. This deals with -- this is in the context of the opt-out, so it is an agreement between the PCR and the funder. And at clause 3.1, again in similar terms, it says:

"The funder is entitled to receive a payment out of the total fee in accordance with the waterfall.

Again, those words:

"Subject to the terms of any order or direction of the tribunal on each occasion which proceeds are received."

They will be funnelled down the waterfall. So in similar terms to the opt-in arrangement. But again both are subject to the order of the tribunal.

Then they have the concept of the total fee which -- so there's definition to annex 1 are at 123, the total fee is referred to there at 127, but is actually set out at 132. The total fee at 132 is no longer a percentage, obviously, of the proceeds, it is simply the capital outlay, which is the funders' capital outlay, the insurers' outlay, what they've paid out, the amount of the success fees due to the solicitors and then the multiple as we've looked at. The cap comes in at the bottom there at:

"Notwithstanding any other provision of this agreement, the total fee shall not exceed the portion of the proceeds that have not been distributed to class members within any period stipulated by the tribunal, for distribution to class members following success of the claim."

In other words, in the opt-in arrangements, the cap is the total amount of proceeds that comes through from the solicitor's DBA. In the opt-out arrangements, it is only the undistributed damages that is the cap. The undistributed damages provides the cap, but again provides the cap in relation to all the stakeholders together, so the funder but also the solicitors and counsel and insurers. That is an overall cap in relation to the total fee.

The priorities agreement, which was referred to briefly, is at B/11, or B/-- yes, B/11, and I'm not sure that anything arises now in relation to the priorities agreement. There is, of course, in the waterfall, at 2.1.3, that's at page 210, a provision that once solicitors, counsel, insurers, have been paid off and the funder has been paid off its capital outlay, the balance will go 16 per cent to the insurer and 84 per cent to the funder.

Of course, eyebrows are raised at the mention of a percentage there, but of course this is not percentage of proceeds, it's not related to the amount of damages and

Mr Kennelly makes no point about that, the total fee that comes through is simply the various capital outlays of the stakeholders involved and the multiple. So that's how the opt-out provisions work.

We would submit obviously -- and I'll come back to this point -- there is nothing which smacks or a percentage of proceeds going to any of the stakeholders including the funders. In contrast to the position in *PACCAR*, and in contrast to the original versions of these agreements pre-*PACCAR*.

In relation to the submissions -- I note that it's 1.00 now, what would you like me to do, sir?

THE CHAIR: Just whenever is convenient to you. I think we will take a break for 30 minutes, if that is convenient. Is now a good time to stop?

MR HUTTON: Yes, I think that would be a good time to stop. Yes, thank you.

THE CHAIR: Let's do that and we'll resume at 1.30. Will that give you enough time, Mr Hutton? How are you doing? You will have 40 or 45 minutes then depending on how prompt we are.

MR HUTTON: I will absolutely do my best to keep to that, it is quite tight, but I will do my best to keep to that.

THE CHAIR: If it's helpful, the key point really that is being advanced is the cap, isn't it, and that's the point we'd like to hear you on.

Obviously, there is the broader point as well about the connection with the proceeds, so those two things, if you want to direct those, and of course if you want to say something about the regulatory position. I think we have narrowed the areas of the dispute down to the cap in particular and the more general proceeds point, so hopefully you can get through that comfortably in the time.

MR HUTTON: Certainly, yes. Thank you, sir.

THE CHAIR: We'll start again -- we'll rise and start again at 1.30. Thank you.

MR HUTTON: Thank you.

(1.00 pm)

(The short adjournment)

(1.30 pm)

THE CHAIR: Yes, Mr Hutton.

MR HUTTON: Thank you very much, sir.

Can I start just by confirming something that was raised earlier? We now have proof of payment of the outstanding costs and that was paid yesterday. Again, we're very sorry that it wasn't paid within time, but it's happily all paid now.

THE CHAIR: Thank you.

MR HUTTON: Coming on to the substantive issue, essentially, as we understand it, the defendants' case is predicated on the basis that in relation to the opt-in LFA, the opt-out LFA and indeed in relation to the ATE insurers, that they come out of the proceeds and/or they are subject to the cap. So those two points.

Now, those two points are quite loosely related. But -- because if it comes out of the proceeds you might say that it was capped anyway because the proceeds are the cap, and that's all that is provided.

But if it's convenient to the tribunal, I intend to deal with both together in relation to both the opt-in and the opt-out, because although there are some differences which I've highlighted, the essential issues are the same: is coming out of proceeds and/or is a cap, does that turn the agreement into a damages-based agreement under section 58AA?

Now, my submission is that there are nine reasons or factors for why they don't. They are not, each of these nine, all determinative of the point, some of them are merely factors. I use that word "determinative" or "determined by" advisedly because one of the points I'm going to come to is the wording in section 58AA which

uses the word "determined by" and we say that that has a very specific meaning in this context, and that the payments to the funders are not determined by the amount of damages.

Now, the first point is in relation to *PACCAR* itself. I don't think it to be controversial, I am sure it isn't, but if I could just bring up *PACCAR* at tab A12 in the authorities bundle, and go in that bundle, A/12, at page 453 is the particular reference. If one sees there in the judgment of Lord Sales at paragraph 3, it makes it quite clear the context in which *PACCAR* was decided. Paragraph 3 says:

"The specific issue for determination is whether litigation funding agreements, pursuant to which the funder is entitled to recover a percentage of any damages recovered, constitute damages-based agreements within the meaning of the relevant statutory scheme of the regulation."

So the point there is , specifically, the issue that was determined was whether LFAs with a percentage of any damages going to the funder came within a DBA.

Of course, we don't have a percentage of any damages here, and so the decision in *PACCAR* does not determine this issue. Of course, it is open to this tribunal to find that the reasoning in *PACCAR* should be extended to a case where there's a multiple and/or where the payment to the funder comes out of the proceeds, but that will be an extension of the principle in *PACCAR*. We say there are very good reasons, including public policy reasons, why the tribunal should not go to extend *PACCAR* into agreements of the November kind here.

Then the second point, we've made this in our submissions, is that the defendants' case is deeply unattractive. The essence of them appears to be that if the PCRs' liability on behalf of its class members to the funder was unlimited, then the agreement for a multiple of capital outlay would be enforceable without any need to comply with the DBA requirements. But because the PCRs' liability to the funder is

stated to come out of the proceeds of the litigation: and/or is capped by reference to the proceeds, that makes the agreement unenforceable.

Now, by capping it to an amount by reference to the proceeds, that's not in the funders' interests, why would the funder agree that? That's in the PCRs' interests only. So by doing something in the interests of the PCRs, the argument is that that makes the agreement unenforceable.

In the opt-out proceedings, of course, a DBA is automatically unenforceable under the Competition Act. In the opt-in proceedings, in theory the litigation funding agreement could seek to comply with the DBA requirements, including the DBA regulations. But the reality is that it's frankly impossible to do so because those regulations were drafted -- and I don't think this is controversial -- with lawyers in mind. And they simply don't make sense for funders.

For instance, regulation 4 -- and we can come to it if necessary -- of those regulations says that any payment to the person providing the claims management services has to be netted off, has to be net of any costs and/or counsels' fees, received from the other party to the litigation.

Now, that can't be done here because we've got -- Harcus Parker have got a DBA which is a DBA where they've already netted that off because regulation 4 requires them to do so. How can the funders then net off the same amount that has already been netted off by the solicitors? That's just one demonstration of why the DBA regulations don't simply work for funders. Therefore, although strictly in the opt-in proceedings there is another option complying with them, in practice that option doesn't exist.

That is reflected, the difference between costs received from the other site and the funders' fee is reflected in the CAT rules. Costs received from the other side are dealt with under rule 104, and payments to the funders are due under a different

rule, those aren't costs within rule 104, they are payments to the funder under rule 93(4) and in the case of collective settlements, rule 94.

They are apples and oranges and you can't set off one against the other, particularly where those have already been set off.

Now, deep unattractiveness in concept leading, we say, to absurdity, is something that the courts and the tribunals should avoid. It doesn't necessarily decide the point on its own, but it is an important factor for considering my learned friend's submissions as to whether it really was intended by the law-makers to -- the result that he contends for, namely if you cap your fees, you have made an unenforceable agreement, but if you leave them uncapped so that the client has an uncapped liability, then that is enforceable.

Let me just give an example of that in the authorities as to that approach. It's an authority that has been added recently, so it's in the supplementary bundle, not the authorities bundle, but the supplementary bundle. It wasn't us who added it, but it does helpfully summarise the point. It's in the supplementary bundle at AD, 4.7. Within that bundle it's page 70.34, which in the internal page numbering of the decision in *St Johns Shipping Corporation v Joseph Rank*, it is page 282.

Because it came in late and the authorities bundle hadn't been updated, it came into the supplementary bundle. But it is an authority.

It's tab AD, 4.7, and it is page 70.34 at the bottom. It's a decision of Mr Justice Devlin who, of course, is a distinguished jurist, and at the top of page 282 the issue at hand doesn't really matter, he says this:

"Of course as Mr Wilmer says, one must not be deterred from enunciating the correct principle of law because it may have startling or even calamitous results, but I confess I approached the investigation of the legal proposition which has results of this character with a prejudice in favour of the idea that there may be a flaw in the

argument somewhere."

Then moving on to page 289 in the authority, page 70.41 at the bottom, in the middle of that page 70.41, it is this passage starting at the beginning of the paragraph:

"I think also that it is proper in determining the scope of the statute to have regard to the consequences which I've already described and to the inconveniences and injury to maritime business which would follow from upholding the defendants' contention in this case. In the light of all these considerations I should not be prepared to treat this statute as nullifying contracts for the carriage of goods unless I found myself clearly compelled by authority to do so."

Now, we say that, in the context of this case, where the implications of my learned friend's arguments are so calamitous in the words of Mr Justice Devlin, as he then was, that this tribunal respectfully should treat it in the same manner, namely you should only come to that conclusion if you find yourself clearly compelled by authority to do so. We say you're not. *PACCAR* clearly doesn't compel you to do so.

What is the mischief, which my learned friend seeks to identify, where, if you cap your payment, you are therefore -- need to be subject to regulation? And you need to comply with the DBA regulations, otherwise your agreement is unenforceable and in the opt-out proceedings of course it's automatically unenforceable?

My learned friend doesn't seek to answer that point, really. He says: ah well, if it's capped there's an interest in increasing cap. But they're entitled to the multiples, the cap is only reducing in certain circumstances what they get, so by including the cap they can only reduce their recovery. We say that in terms of the mischief that is supposed to be caught by this, my learned friend simply has no answer to it.

THE CHAIR: I think he says -- I think he says that you have to take a broad reading of the sub-clause in order to give effect to the policy considerations which are

obviously set out in *PACCAR*. It really comes down to the question of -- I think the mischief, if you like, he says, is what happens if you read subparagraph (3) narrowly, is that you then have abuse of the use of funding.

I don't think it's so much a question of why is the cap a problem, it's really a question of why do you need to read the word "determined" which you identified as being the critical point, why do you need to read that narrowly or widely?

MR HUTTON: Well, we would say you need to read it narrowly because there is no public policy reason why, by agreeing a reduction in your fee, you thereby offend public policy and/or you need to comply with further regulations. There's no logic in that distinction because the uncapped liability is much worse for the client than the capped liability and there's no benefit to the funder in having the cap. So there's no public policy reason --

THE CHAIR: Sorry to interrupt you, but in his response I think he -- Mr Kennelly makes the point that you can take advantage of a narrow reading to get round -- get round the provision, so he's saying you -- depending on how you phrase it, you could actually use the cap to allow you to have a percentage return, and -- and he gives a couple of examples, one of which he takes from you.

That is the point he's making, I'm not saying I agree with him, I want to be clear. I don't think this is an argument about whether the particular implementation in the funding agreement is itself heinous and offensive, it's just if you read -- as Mr Kennelly says, if you read the sub-clause as it should be read, which is broadly, it will capture that as well as other things and the purpose of that is to make sure there's not abuse of the generally principle. That's the point he's making.

MR HUTTON: Yes, I understand that, but of course this agreement has got to be looked at alone, ultimately. This is -- the question is whether this agreement amounts to a DBA or not. Looking at this agreement, one has to -- one has to view it

as it's an unlimited liability but the funder has chosen to impose a limit on its recovery which is not in the interests of the funder. How does that lead to abuse? If anything it does the opposite, we would suggest.

The third point is that there are capped CFAs which, on the logic of my learned friend's argument, where they are capped by reference to any damages, they then become DBAs, so you then have a CFA which is also a DBA. Now we say that that isn't right, and it's demonstrably incorrect in the context of personal injury CFA -- personal injury CFAs post April 2013 where there is a statutory obligation to put a cap on the success fee by reference to the damages.

Now, the logic of my learned friend's argument is that they have thereby turned that CFA into a DBA, and we submit that that cannot be right because you cannot have something which complies with the personal injury requirements of a CFA that also complies with the requirements of a DBA.

I just want to go briefly to demonstrate that that is -- that that is incorrect because I suggest that Parliament would never have intended, when introducing the requirements for caps in relation to CFAs, to turn it into a DBA where you cannot comply with both because they're incompatible requirements for each.

Can I just briefly take you -- I mean, one of the answers that my learned friend has to that is to rely on the *PACCAR* decision, at paragraphs 47 and 93 to 94, to suggest that different statutory -- different statutes and/or subordinate legislation pass at different times, means that you cannot construe the earlier statute by looking at the later statute or the later secondary legislation.

Now, that of course is right, but it's misconceived in relation to this instance because the provisions that we rely on are provisions that were all brought in the first part of 2013 as a result of the Jackson reforms and an interlocking package of reforms.

If I can take you to -- I ought to go back just briefly, I'm afraid, to *PACCAR* again in

the authorities bundle just to make good this point. That's at A/12 in the authorities bundle. I do apologise for jumping from bundle to bundle.

THE CHAIR: Yes.

MR HUTTON: At *PACCAR* at A/12 at paragraph 45, which is at 464 at the bottom, Lord Sales is talking about the argument that was run there that you can construe claims management services and what it meant by looking at the 2013 regulations. A proposition that he rejected and the majority indeed rejected.

At paragraph 45, he says:

"Further, part 2 of the 2006 Act specifically contemplated for its operations the Secretary of State would define its scope by order. Given the broadly contemporaneous nature of the scope it can fairly be regarded as being in combination with a 2006 Act part of a single scheme to introduce a new statutory regime in part 2."

Then if I can just -- there's a reference to McCool and to Bennion and to A, and then between F and G on the right-hand side, it says this:

"Lord Hope of Craighead said that where a statute which received royal assent on 28 July 2000 and subordinate legislation which was made on 28 September 2000, laid before the Parliament the next day, the interval was so short that taken together they can be regarded as all part of the same legislative exercise albeit that it was not in that event necessary to refer to the subordinate legislation."

Next sentence:

"Where the primary legislation and the subordinate legislation are drafted by or on the instructions of the same government department at about the same time as would be normal in this type of case, it is reasonable to suppose that they are inspired by the same underlying objective and intended to reflect a cohesive position as understood at the time of the primary legislation presented to Parliament."

In relation to these provisions, if I can take you to B/16 in that same bundle, and to look at section 58. This is section 58 which deals with conditional fee agreements. Obviously section 58AA, which comes next, deals with damages-based agreements. In section 58 there was introduced in relation to personal injury CFAs, new provisions which provided for a cap, at subparagraph (4)(a) on page 579 of the bundle. It says:

"The additional conditions that are applicable to a conditional fee agreement which provides for a success fee and relates to proceedings of the description specified by order of the Lord Chancellor for the purposes of this section [and we'll see that's personal injury] the additional conditions are that the agreement must provide that the success fee is subject to a maximum limit, the maximum limit must be expressed as a percentage of the descriptions of damages awarded in the proceedings that are specified in the agreement, the percentage must not exceed the percentage specified by order."

Et cetera.

So this provided for a cap in relation to CFAs and we can see how that worked out in the CFA order, which is at B/22 in the same bundle, and at page 672, regulation 5, it says:

"The management success fee specified in proceedings in relation to the proceedings specified in article 4..."

Sorry, I should have started from that, that's a claim for personal injuries:

"The percentage prescribed for the purposes of section 58(4)(b)(c) of the Act is in the first instance 25 per cent and the description of the damages for those purposes is general damages and damages for pecuniary loss."

So what was -- what the personal injury CFA must provide post April 2013 is that there is a cap of 25 per cent of the damages described there, namely the general

damages and damages for pecuniary loss other than future pecuniary loss. That related to the success fee alone.

Now, that, on the logic of my learned friend's submission, is a cap in relation by reference to the damages under section 58AA, and indeed he specifically submits that because he took you earlier to the guidance by the Law Society which suggested that if you capped your CFA at a level, you would thereby or may be turning it into a DBA.

Now, that guidance itself was given in relation to employment cases in 2009, and withdrawn by the Law Society when these provisions came in as a package in the early part of 2013, so it's pretty weak support for his argument.

The logic of his argument is that if you comply with these requirements in the personal injury context, you thereby have a CFA because you have to comply with these to make it an enforceable CFA, but that also turns it into a DBA. The DBA regulations are at the next tab in the bundle, B/23, and that provides, at page 673, again these were passed -- these are the same date as the CFA regulations, 1 April 2013, and the amendments to section 58 as well as section 58AA were all made in the first part of 2013, all part of the same Parliament, the same government, and all part of the Jackson reforms.

I accept that section 58AA(3) dates back to 2009, but my point is not in relation to that, it's in relation to the CFA provisions, and Parliament, on his case, knowing that by requiring parties to comply with the CFA regulations in personal injury cases, they were thereby turning their CFAs into DBAs which we say is inherently unlikely, but also it's incompatible, the two are incompatible and I make that point at 677 because the definition in the DBA regulations is payment at the top of that page means that part of the sum recovered in respect of the claim or damages awarded, that the client agrees to pay the representative, and excludes expenses but includes, other than in

employment case, disbursements in relation to counsels' fees. The payment has to be that, the portion of the damages, and covering counsels' fees.

Then regulation 4 says in respect of any claim or proceedings other than an employment matter, the DBA must not require an amount to be paid by the client other than the payment net of any costs.

Well, if you limit your success fee in accordance with the CFA provisions to 25 per cent of parts of the damages, it cannot at the same time be a payment because, for instance, it doesn't include counsels' fees, which the payment must do. So it can't be a payment within the DBA regulations. The two of them are incompatible.

THE CHAIR: I have that point.

Sorry to interrupt you. I think we have that point. Can you help us a bit with the timing?

MR HUTTON: Yes.

THE CHAIR: As I understand it, section 58AA -- and this goes to the *PACCAR* point about contemporaneous packages -- so 58AA was inserted into the Courts and Legal Services Act in 2009 by the Coroners and Justice Act. I think I've seen somewhere that if that was limited to employment matters then and it was only in 2013, so in 2013 -- I mean, it doesn't say that on the notes on page 584.

MR HUTTON: It doesn't, no. But that's absolutely right, it was introduced specifically only for employment in 2009, and then extended as part of the Jackson reforms on 1 April 2013 to apply to all proceedings.

THE CHAIR: You say that's how it meets the *PACCAR* test in paragraph 45.

MR HUTTON: Yes, and I go beyond that because the changes to section 58 in relation to CFAs were all made -- I think the original changes to section 58 which added 4(a) and 4(b) about limiting your success fee were, according to the notes in

this document, first added on, I think, 19 January 2013. But that is pretty much contemporaneous with 1 April 2013 when the rest of these things came in. That's why I took you to *PACCAR* to suggest that the two-month gap that there was referred to in there was regarded as all part of the same package. The point is the package has to be read together, so --

THE CHAIR: Yes.

MR HUTTON: -- it shouldn't be incompatible with each other.

THE CHAIR: I think we have that. I'm conscious of the time. You are 3 out of 9 and I don't want to miss out on 9. We have that point. Do you want to keep going?

MR HUTTON: Absolutely, yes.

We say that effectively gives the lie to the argument that simply by putting a cap in relation to damages you are turning your CFA into a DBA because Parliament cannot have intended to do that to make requirements of CFAs but thereby by a side wind make them even -- if you comply with them, make them into a DBA. Then, when you look at it, they can't be both because they're incompatible with each other because they're apples and oranges, so we say that gives the lie to the fact that merely putting a cap on the damages is a DBA.

Then the fourth point, I'll come on quickly, is in relation to those damages-based agreements regulations which are at B/23. The explanatory note to those, which is at 680, says, second paragraph of the explanatory note:

"DBAs are a type of no win no fee agreement under which a representative defined in those regulations a person providing claims management services to which the DBA relates, can recover an agreed percentage of a client's damages if the case is won but will receive nothing if the case is lost."

Now, that is only an explanatory note of what DBAs are, but we say it's entirely consistent with our submission that DBAs are all about damages-based agreements,

they are an agreement to get a percentage of the damages.

Consistent, we say, with that, point 5, so hopefully I'm speeding up through my points, what Mr Justice Jacobs said in *Bugsby* which, just to shorten matters, is at paragraphs 42 and 55 of our written submissions, and in the recent decision of *Therium v Bugsby*, he referred to the fact that there had been an article by professor Rachael Mulheron, who is a well known expert in this field, who suggested that an agreement for a multiple was not a DBA, and he recorded and agreed with counsel, Mr Carpenter's concession in that case that it's the percentage that makes it a DBA. At paragraph 55 he says similar things. So that's all of apiece, we would say.

Now, I acknowledge that in relation to *Therium v Bugsby*, what Mr Justice Jacobs was dealing with was an application for an injunction where he was determining whether there was a serious issue to be tried. I'm sure that point will be made. But he makes it in clear terms that a DBA relates to a percentage of damages. We say, again, that's not determinative, but it is a factor.

Then point 6 is, our point which -- which you made earlier, the funders' fee has to come out of the damages, that's how it works in the Competition Appeal Tribunal. At paragraph 56 of our submissions we refer to that and to the provisions which allow for the payment of the funder to come out of the proceeds. We refer there to *Merricks* v *Mastercard*. Can I just take you to the relevant reference in the authorities bundle for *Merricks* which is at tab A/3. This is page 97 in the authorities bundle.

Now I'm giving everyone a good workout from all those bundles, I'm sorry for that.

THE CHAIR: Which page?

MR HUTTON: It's page 97, tab A/3, it starts.

This was the CPO application, and most of it was in relation to the substantive

matters in relation to the competition issues which eventually went to the Supreme Court. But the funding provision -- the funding discussion about whether the funding passed the certification process starts at page 123. The passage I wanted to highlight -- there are three -- at paragraph 115 of the decision, at page 128. Paragraph 115, a decision of Mr Justice Roth:

"Section 47(c) of the Competition Act introduced new and distinct provisions concerning the costs of collective proceedings. We see no reason to give the words used a special meaning or to treat them as terms of art by jurisprudence. In the ordinary sense if a third party agrees to provide substantial monies in order to fund the litigation, the payment has to be made to that third party in consideration of this commitment, whether out of damages recovered or otherwise, is a cost or expense."

Then if one goes on to paragraph 126, and quoting from Hansard, Baroness Neville-Rolfe, in the indented section of paragraph 126, this is what the minister said:

"We have thought carefully about this, the bill already contains restrictions on the financing of claims as it prohibits damages-based agreements and does not provide for the claimant to be able to recover any uplift in a CFA. Therefore, there is a need for the claimants to have the option of accessing third party funding so as to allow those who don't have a large reserve of funds or those who cannot persuade a law firm to act pro bono to be able to bring a collective action case in order to ensure redress. Blocking access to such funding would result in a collective actions regime that is less effective."

Then Mr Justice Roth goes on at paragraph 127:

"The government in promoting the legislation therefore clearly envisaged that many collective actions would be dependent on third party funding and it is self evident that this could not be achieved unless a class representative incurred a conditional liability for the funder's costs which could be discharged through recovery out of the

unclaimed damages."

So that is what the regime envisages, that is inherent to the process of third party funding in these types of claims, that the funder's fee will come out of the proceeds of the litigation, only be payable in the event of success.

We have obviously referred to the CAT rules in that regard in our submissions. Obviously at rule 94(8) and (9), which I don't need to look up at the moment, but it's tab B/23, is all about whether the terms are just and reasonable, and it goes to the point made earlier that it is inevitable, we would submit, that unless something exceptional happened, the tribunal would not want the PCR, particularly in these circumstances where the PCR is effectively carrying out a kind of a public responsibility on behalf of large numbers of others with no personal interest, would not want them to end up having to put their hand in their pocket and the only way that that can be done is if it's paid out of the proceeds of the claim.

Indeed, that was acknowledged in *Merricks v Mastercard*.

It would be very strange, we would suggest, if that was inevitable and inherent in the position, and yet you weren't allowed to make it explicit in your agreement, that by making that explicit in your agreement you thereby offend against the -- you fall into the trap of the DBA which you can't comply with and, of course, a DBA which is unenforceable per se in opt-out proceedings. That would be a very strange result we would suggest, and another pointer towards the fact that these funds are going to come out of proceeds.

Then I'm conscious of time, but the next point which is point 7, so I'm making progress, is in relation to the wording itself of section 58AA. If I can come to that. It's at B/16 in the authorities bundle. It's page 582.

In relation to the wording, a damages-based agreements and subsection (3), we accept that it's made in relation to a personal funding litigation providing claims

management services and the recipient, both in relation to the opt-in the and opt-out, although the recipient in each is different. In one, the opt-in is the solicitor, in the opt-out, it's the PCR.

Secondly, the recipient is to make a payment to the person providing those services if the recipient obtains a specified financial benefit in connection with the matter. In the opt-in, again the recipient is Harcus Parker, the solicitor, their benefit is that they get their DBA fee. In the opt-out proceedings, the recipient is the PCR and the specified benefit is the recovery of proceeds.

So it's (ii) therefore (a)(ii):

"the amount of that payment is to be determined by reference to the amount of the financial benefit obtained."

Now, in relation to that, in *PACCAR* of course a straightforward percentage of the damages was paid to the funder. In those circumstances that straightforward percentage clearly falls into an amount of the payment is determined by reference to the amount of the financial benefit obtained.

Here, the agreement in relation to the funder is simply a multiple of the funder's outlay, and on the face of it a multiple of the funders' outlay is not determined by reference to the amount of financial benefit obtained, it is determined by the amount of the funders' financial outlay, subject of course to the tribunal's order. So it doesn't have the look of something that's within subsection (ii), the determination is the capital amount, it's not the damages.

We suggest that the words "determined by" in those circumstances are akin to "calculated by" and that's how it should be interpreted. That is clearly a straightforward percentage, that is calculated by the amount of the financial benefit, it is not the case in a multiple coming out of the proceeds. It is contended, for the reasons that we've said, that there is no public policy requirement to extend

the scope of it beyond the straight percentage that was in issue in *PACCAR*.

We say that "determined by" is a very specific -- is very specific wording. I used an example earlier of, well, some of these points are not determinative, they may be relevant factors, but they're not determinative. We say the damages is not determinative in these circumstances, and therefore the amount is not determined by the damages.

We also rely on the fact that the wording is very specific in subparagraph (ii), it says: "The amount of that payment is ... determined by the amount of the financial benefit obtained."

That could have said: that payment is to be determined by the financial benefit obtained, for instance. There are two amounts in there, which we say gives an indication to the fact that this is a very specific -- a very specific calculation, the amount and the amount. It didn't have to say that, if my learned friend's submissions was right. Indeed, in paragraph 2 of his reply submissions, he summarised that provision as being the payment to the funder is determined by reference to the financial benefit. He missed out the two references to amounts.

Now, I'm not suggesting that that was in any way indicative of anything other than the fact that actually it doesn't say that, it says: "the amount of" and "the amount of", we say points towards a very specific calculation in relation to that.

We say that when you look at it in the context of the statutory purpose, and the fact that in the terms of the -- of Mr Justice Devlin, the results of finding in favour of my learned friend's argument, would be calamitous because any agreement of this kind which simply allows for the payments to be out of proceeds, which was specifically said to be the purpose of the legislative provisions by Mr Justice Roth in the Competition Appeal Tribunal in paragraph 127 of *Merricks v Mastercard*, any payment of that kind that comes out of proceeds would be -- would amount to a DBA

and would be automatically unenforceable in opt-out and in all reality unenforceable in opt-in provisions.

That gives you an indication as to why those words should be construed narrowly in these -- in this context.

We also say that when you look at how the cap applies, it is a million miles away from determining the amount of the financial benefit. Because in the opt-in provisions the cap relates to all the payments in the waterfall, it doesn't relate to the funders' payment alone, it relates globally to all the payments in the waterfall, including all the stakeholders that are going to get paid out of it. That is how at cap works in clause 2.1.7 of the priorities agreement in the opt-in proceedings, and in the opt-out proceedings it is similar in relation to paragraph 7.4. That's how the cap works, it's a global figure.

When you go back to look at is the amount of the funders' payment being determined by reference to the damages, well, it's a very obscure and indirect way of doing it. You've got to then take out all the payments to others, you've got to apply the cap to all of them globally, so it's remote, it's indirect, it's obscure, the relationship between the two. We say that gives an indication that it is not determined by. It may be a factor in certain cases but it's not determined by. The relationship is far, far more remote, obscure and indirect than in a percentage of damages where it's not remote, indirect or obscure, it's direct. You can simply look at the damages, look at the percentage that is due to Harcus Parker, for example, 32 per cent, and it gives you the answer. You cannot do anything like that in these circumstances.

We say that's consistent with the explanatory notes, et cetera. Yes.

THE CHAIR: You're really running out of time, Mr Hutton, you have a minute to do points 8 and 9 and I am going to hold you to the timetable, we have a hard stop here and Mr Kennelly needs an opportunity to answer. So can you please wrap up now?

MR HUTTON: I will certainly, I am conscious of that.

Point 8 I'm going to deal with very briefly. Where damages-based agreements in the damages-based agreements regulations has a limit, the limit is a percent, no more than a percentage, which gives an indication that what is intended by section 58AA(3)(a) is a percentage because that is -- you can't claim more than 50 per cent, for example. It's a percentage. That's all consistent, we would say, with what that is to do with.

Then point 9 is about the tribunal's role. You have the point about the tribunal's role in terms of ordering money, it's up to the tribunal as to what gets paid out of the unclaimed damages.

Now, that wasn't determinative, to use that phrase again in *PACCAR* -- and I'm not going to take you to it -- but the point is that in *PACCAR* it has -- and it's said in the words of Lord Sales -- in paragraph 98/99, as a matter of substance the LFA retains the character of a DBA as defined. Here it doesn't at all, it's completely different. If you look at the LFA it does not have the character of a DBA and therefore it is distinguishable.

Those are my nine points in relation to that.

In relation to the ATE, I think the only point, just to flag up the references, the original ATE is at -- in the original hearing bundle is at D/19, page 308, is the original ATE. It provided for a 16 per cent of part of the funds to go to the insurer after others are paid out. That is now on the November agreement, that comes out specifically and it's tab AA4.1 of the supplementary agreement, page 70.2, that specifically scrubs the percentage and gives specific figures that you have referred to.

In those circumstances, really the same arguments about whether it comes out of proceeds and/or is a cap, apply to the ATE provisions, but the implications of my learned friend's argument is that every single ATE arrangement, which has

a deferred premium that comes out of proceeds, because it has to come out of proceeds there's nowhere else it can come from, that would be an unenforceable DBA. Not only are funders having unenforceable agreements, all ATE agreements which have that deferred premium in the cap would necessarily be unenforceable.

On the regulatory concerns, my learned friend dealt with it very briefly, we've answered the points, it is in the correspondence, we've sent a letter which, if you're interested is at B/12 in the supplementary bundle, explaining the two or three instances of where a referral was made in a social occasion in relation to clients and since my learned friend isn't seeking a ruling on it, in my submission, given this isn't a regulatory hearing, it doesn't require any determination by the tribunal.

Those are my submissions.

THE CHAIR: Thank you very much, Mr Hutton.

MR HUTTON: Thank you.

Reply submissions by MR KENNELLY

THE CHAIR: Mr Kennelly, I think we can give you at least 10 minutes, and if you needed a little bit more we might be able to stretch that, but we really are pretty much limited to that.

MR KENNELLY: I understand, sir.

So taking those nine points in turn, the first point was that *PACCAR*'s issue was LFAs -- where the recovery was fixed by reference to a percentage. We have never said that *PACCAR* determines the issues before you, our point is that the approach to construction of section 58AA leads inevitably to our submission. We rely on *PACCAR* for that point.

The second of my learned friend's factors was that our position is unattractive because, if you remove a cap, it leaves the PCR with unlimited exposure. Of course, as we said, you can have a cap, you just can't have it by reference to the proceeds,

you can't have it by reference to the amount recovered.

He made a broader and surprising point that in fact it's impossible for funders to comply with the DBA Regulations which are designed for lawyers. If you look at them in your deliberations you'll see they can be complied with by funders. But in any event, if that was a good point, it would have been a good point in *PACCAR*, because in *PACCAR* they were dealing with the consequence that the DBA regulations would apply to funders.

My learned friend says this will have calamitous results, relied on *St Johns Shipping*, but whether an LFA can comply with the DBA regulations or not, whether a funder can comply, needs to be assessed by reference to a specific case. My learned friend cannot say in the abstract and he hasn't shown you in the abstract that no funder in an LFA can comply with the DBA regulations. But he's very, very far from establishing that.

He said the cap reduces recovery, what's the problem in that case? And he says focus, please, on construing the agreement. But, as I've said repeatedly, we are concerned here with statutory construction. My learned friend said you should read section 58AA(3)(ii) narrowly -- I quote -- but I repeat, as I said in opening, the language of that subsection is broad, so you give it it's ordinary meaning, that's a broad construction. And its purpose was stated clearly by the Supreme Court in *PACCAR*, it was given a broad reading to catch as much as possible so that the Secretary of State could control and apply DBA regulations to ensure protection. The test was not whether there was immediate benefit to consumers or not, it was about ensuring the broad scope of the Secretary of State's power.

The third factor he said was that under the current rules CFAs must have a cap, and therefore how can that be reconciled to the application of the DBA regulations? There are two answers to that. The first is he is relying on the 2013 CFA regulations

to construe section 58AA that was introduced, as the Chairman pointed out, in 2009. That is not a gap of two or three months, that falls directly into the error which the Supreme Court identified in *PACCAR*. You cannot use regulations in 2013 to construe prior legislation in 2009.

My learned friend says, well, in 2009 the definition of DBA is applied to employment cases, extended in 2013, but the meaning of 58AA(3) did not change when its scope was extended. What 58AA(3) meant in 2009 was exactly what it meant in 2013, nothing changed. Parliament intended those words to mean cannot have changed over the passage of time, and so you must focus on how it was meant when it was enacted in 2009 and cannot rely on the 2013 regulations to construe it.

In any event, before 2013, as I said, the Law Society shared our view that a cap can turn a CFA into a DBA. The Law Society withdrew that guidance in 2011, not in 2013.

The fourth factor, under the DBA regulations, 2013, the explanatory note says that a DBA can be an agreement to pay a percentage of the winnings. As my learned friend conceded, that's not an exhaustive description of what counts as a DBA, even in the explanatory notes, and very limited weight should be placed on it.

His fifth point, *Therium v Bugsby*. Again, he relies on this to suggest that a DBA is only intended to catch agreements where the funders' recovery is a percentage of the proceeds. He then had to acknowledge that of course all that Mr Justice Jacobs was addressing in that case was whether there was a serious issue to be tried. There was no definitive finding on a point of law, and again very limited weight should be given to that.

His sixth factor was in relation to the proceeds point. Here he was responding to my reliance on *Lexlaw v Zuberi*, and paragraph 33 of the Court of Appeal, where I think I did not make the point clearly to the tribunal in opening. My short point there in

relation to proceeds was that where the Court of Appeal in *Lexlaw* says that a DBA is where a lawyer gets a share of recoveries, I apply the same reasoning to our situation where the funder is getting a share of the solicitor's recoveries because under the opt-in LFA, as my learned friend accepts, the recoveries are the financial benefits obtained by the solicitors and the funder gets a share of those. That is a DBA, applying the reasoning of Lord Justice Lewison in *Lexlaw v Zuberi*.

He said that that would lead again to calamitous results but in reality, for opt-in agreements, that simply begs the question: can the DBA regulations be satisfied? We say they can. If there are difficulties with them, that's a matter for the Secretary of State. For opt-out, that may ultimately be a matter for legislative change. All the tribunal can do is apply the law as construed by the superior courts.

Factor 7, the wording, finally we come to the statutory wording of section 58AA, telling, in my submission, that of the nine factors, we only get to the language of the provision we are construing by the seventh factor. My learned friend placed great reliance on the language of "determined", payment is to be "determined". He said that could be meant as payment is to be "calculated". In my submission "calculation" makes no difference. The key language which he omitted to address is the wording "by reference". It's the wording "by reference" that gives this its broad scope. True it is that in these agreements the starting point is not taken by reference to the ultimate recovery, but the maximum amount of the ultimate payment is determined by reference to the proceeds. The maximum amount of payment is fixed according to the financial benefit obtained by the solicitor. That is as clear as day within the scope, the language and the purpose, of section 58AA.

Even if I'm wrong about the implications of payments out of proceeds, I should succeed in my submission on the cap, because the cap is even more clearly by reference to the solicitor's recovery in this case.

Now, the point, the cap is a global figure, it's not a straightforward percentage, it's only indirectly determining by reference the upper limit of the recovery. Similar submissions were made in *PACCAR* where it was said in the Supreme Court, well, the funders' recovery may be made conditional on other things and not simply a single step. The Supreme Court said in *PACCAR* in terms at page 479: the fact that there are intermediate steps and other conditions imposed does not stop the agreement in the LFA becoming a DBA, the interposition of other conditions or steps does not prevent the fact that the ultimate payment is determined by reference to the recovery.

The next point was that the DBA regulations 2013 themselves -- this is factor 8 -- refer to a percentage limit. That falls again directly into the trap referred to in *PACCAR*, you cannot use -- my learned friend can't use the 2013 regulations to construe section 58AA of the Act.

The final point is the tribunal's role, the fact the tribunal can step in and deal with what the funder ultimately gets in order to refute the suggestion that the ultimate payment to the funder is determined by reference to the proceeds. That submission was said by my learned friend not to be determinative in *PACCAR*. Not only not determinative, it was made and rejected by the Supreme Court in *PACCAR*, that very point was made and rejected by the Supreme Court in *PACCAR* and it should be rejected by this tribunal today.

Those are the nine factors -- and I've gone slightly over my time, sir, if I've missed anything, I'll be told now.

I'm told that the Law Society note made was withdrawn after 2011. That's the only correction I've been asked to make.

THE CHAIR: Just give me that again, Mr Kennelly. You are saying -- did you give us a bad reference earlier and you're correcting it?

MR KENNELLY: I thought the Law Society guidance on CFAs had been withdrawn in 2011. My learned friend tells me it may have been withdrawn later than 2011, but the answer isn't in the file. We were trying to find that out during the short adjournment. Nothing turns on that.

THE CHAIR: No, that's helpful. Thank you also for doing that so briskly, but we've got all that. Thank you, very helpful. Thank you to all the teams.

Obviously it has been a bit of a rush to get through all that, but I think we've found it tremendously helpful and thank you for being so adaptable today to make the timings work and also just to focus on the key issues.

We will reserve our judgment and will let you have that as soon as we sensibly can. Thank you very much.

MR HUTTON: Thank you very much.

MR KENNELLY: Thank you very much.

(2.35 pm)

(The hearing concluded)