IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1408/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 17 January 2022

Before:
Bridget Lucas QC
Tim Frazer
Professor Michael Waterson
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Elizabeth Helen Coll

-v-

Alphabet Inc. and Others

_____

A P P E A R AN C E S

Ronit Kreisberger QC, George McDonald and Matthew Kennedy (On behalf of Elizabeth Helen Coll)
Josh Holmes QC, Jamie Carpenter QC and Jack Williams (On behalf of Alphabet Inc. and Others)

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

Monday 17 January 2022

(10.32 am)

THE CHAIRMAN: Good morning, everyone. I am sure you are very familiar with the opening words for all of these remote hearings, but I will go through them.

These proceedings are being live streamed and, of course, many are joining on the Microsoft Teams platform. I must start with a customary warning: the proceedings are in open court, as much as if they were being heard before the Tribunal physically in Salisbury Square House. An official recording is being made and an authorised transcript will be produced but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of the provision is punishable as a contempt of court.

Having gone through those formalities, I would just like to thank the parties for their letter and draft Order which we received last night. I can probably kick off by saying that the proposed timetable does work from the Tribunal's perspective. I am sure we will come to the draft Order, probably at the end of today's CMC, but anyway, just to put down for the record that that will work and so we should be able to deal with that fairly swiftly.

So it seems that -- just to confirm I understand, confidentiality and the redactions and a request for further information are the outstanding matters which we will deal with first.

So if we start with that. If I can turn to Ms Kreisberger.

Submissions by MS KREISBERGER

MS KREISBERGER: I am grateful for that, Madam, that is the position. So I will turn

immediately to the confidentiality redactions and then, as you say, there's an additional question about evidence from the funder which we can deal with at the end. But, happily, case management, hopefully, can be dealt with swiftly.

Turning then to the confidentiality redactions. Just to summarise the position for you, Ms Coll, the Proposed Class Representative, has made very extensive disclosure of a large amount of information about her funding arrangements. In particular, she's disclosed her litigation funding agreement, the ATE insurance policy and she's also set out an extremely detailed litigation budget, and I will be taking you to those documents shortly.

Now, a small amount of material in those documents has been redacted and Google continues to object to a small subset of those. Other points have been dealt with by way of agreement.

The outstanding or disputed redactions are, to summarise:

The solicitors' excess provision (that's clause 7.6 in the litigation funding agreement);

The amount of the ATE insurance deposit premium;

The priorities deed;

Then, separately from those documents, there's an issue about success fees, which I will turn to last.

But I want to make two overarching points in relation to the confidentiality application before we go to the redactions themselves. The first point is that the redactions relate to material which is not relevant to points which the Tribunal needs to decide at the certification hearing. So before one gets to questions of confidentiality, of privilege, tactical or commercial sensitivity, no requirement to disclose arises in the first place. And what I will do is I will take you to the framework on certification to show you what is and isn't relevant to the PCR's funding.

THE CHAIRMAN: Thank you.

MS KREISBERGER: That brings me to my second point. This is a little like Groundhog Day for me because, as the Tribunal knows, a similar case has been brought by Dr Kent against Apple, and the same legal team is instructed, and the funding for each of those proceedings is provided by the Vannin Group.

Now, the first CMC in *Kent*, as you will know, took place in December. Apple, the Proposed Defendant, took an equivalent position on redactions to that now adopted by Google. Now, the Tribunal in that case, chaired by Mr Justice Morris, resolved all points in Dr Kent's favour, and that was following very careful consideration. We had almost a full day's hearing on the points and we have a detailed ruling, which you will have seen, and on which I rely for the purposes of this application.

Now, Google has had the benefit of the *Kent* ruling since 21 December, and we say it should have withdrawn its objections from that date.

Now, what Google says -- and we will come to the detail -- but what Google says in terms is that the Tribunal got it wrong. It wants to re-open these points.

So, with that, and with the *Kent* ruling in mind, I would like to turn to my first point, which is what funding or budgetary material does the Tribunal need to see for the purposes of the CPO hearing for certification.

THE CHAIRMAN: Before we get to that point, can I ask you a question. What are we to make of the *Kent* ruling? Because it would not be binding on us, would it? So what approach do you say we should apply?

MS KREISBERGER: So it's correct, it's not formally binding, but it's highly instructive for two reasons.

First of all, it builds on the relevant pre-existing case law, and that's standard case law in the High Court - *Excalibur*, *RBS* and so on. So it's a carefully considered

summary of the position, summarising the pre-existing precedents.

Alongside that, it's the Tribunal's application and articulation of the relevant propositions in the CPO context. That's a point which Google have made in terms. They say, well, you can't just blindly rely on the existing case law. We understand the point, but the Tribunal has looked at it once. Now, Google would need a very good reason to say the Tribunal got it wrong in *Kent*. We don't see any reason of that sort, or to formally distinguish it.

So whilst it's right that it's not formally binding, it's a highly instructive, carefully considered judgment, treading over precisely the same ground as we are about to traverse today.

THE CHAIRMAN: Thank you.

MS KREISBERGER: With that, Madam, if I might turn to *Kent*, which is at tab 14 of the authorities bundle. If I could ask you to turn up -- sorry, it's tab 13, and if I could ask you to turn up paragraph 14, which is at page 281 of the bundle; that's the bundle pagination.

This is the starting point here and this goes to the point I was making. What is the framework? What is the context for your determination today? In terms of certification. The Tribunal said --

THE CHAIRMAN: I am sorry to interrupt you, Ms Kreisberger, I have got a message on my screen. I am always slightly worried when they pop up, not being hugely technically minded, but there was an issue whether the transcriber's audio was recording.

(10.42 am)

(A short break to restore audio recording)

(10.49 am)

THE CHAIRMAN: Thank you, Ms Kreisberger, I am sorry about that interruption.

MS KREISBERGER: Not at all. I was just turning to *Kent*, so if I could ask you to turn up tab 13 in the authorities bundle and go to page 281.

THE CHAIRMAN: Yes.

MS KREISBERGER: Now, this is where the Tribunal sets out the framework, as I was just saying, for the assessment in relation to confidentiality and what the Tribunal said at the second line there is:

"The Tribunal will have to decide whether to authorise the PCR to act as the class representative, pursuant to section 47B(8)(b) of the Competition Act and Rule 78 of the CAT Rules. In so doing, it must consider, inter alia, whether the PCR would be able to pay Apple's costs if ordered to do so."

That's Rule 78(2)(d). And, further, paragraph 6.33 of the Guide provides that:

"By extension, the PCR's ability to fund its own costs of bringing the collective proceedings is also relevant, and in that regard the Tribunal will have regard to the PCR's financial resources, including any relevant fee arrangements with its lawyers, third party funders or insurers. The costs budget appended to the collected proceedings plan referred to above is likely to assist the Tribunal's assessment in this regard."

And then a further issue is any conflict of interest as between funder and class members.

Just to add for your note, there is also Rule 78(3)(c)(iii), and that's at authorities tab 2, page 6, and that picks up -- or rather, the Guide picks up the wording of that provision, which I will just take you to at the bottom of page 6:

"The Tribunal should take into account all circumstances, including any estimate of and details of arrangements of costs, fees or disbursements which the Tribunal orders that the class representative shall provide."

So that is, importantly, the framework here and that is set out in the *Kent* ruling.

So that frames the question of what is relevant, which is the first question in addressing objections to redactions.

Now, the Tribunal then went on in *Kent* to explain and set out the Tribunal's overall approach to privilege and confidentiality under that framework, under the paragraph 14 framework.

Perhaps if I could just ask the Tribunal to read to itself paragraphs 15 to 17, so on the next page, page 282.

THE CHAIRMAN: Yes.

(Pause)

MS KREISBERGER: So the position, just summarising there, is privilege of course, comes first, there's an absolute bar on disclosure of privileged material. But even if material is not privileged, then the Tribunal has a discretion and it exercises that discretion by balancing relevance with the interests of confidentiality. I will come a little bit later to the applicable legal principles on confidentiality, namely tactical sensitivity and commercial sensitivity, the two separate and distinct aspects.

Now, that is the correct approach, and as I say, unless there's a good reason to depart from *Kent*, it is the approach that should apply in this case.

Google doesn't accept it. In their skeleton, paragraphs 16 and 17 for your note, what Google says is the Proposed Class Representative is obliged to disclose her funding arrangements. They say the starting point -- it's full disclosure of every single provision in those funding arrangements, and even that the bar for relevance is low. And curiously, Google relies on *Kent* for that, but I have shown you that's not what *Kent* says. In fact, *Kent* is clear. There's no blanket requirement to disclose all of this material, there's a discretion.

The position is, in civil litigation of course, LFAs are not generally disclosed. But here,

under this regime, parts of the LFA are disclosed to show, in this case, that Ms Coll has sufficient funding for the claim.

There is no disclosure of privileged material, of course. If not privileged, then there's a need to balance relevance with confidentiality but there's no requirement and there's no presumption that parts of the LFA or other funding documents which don't elucidate the question of sufficient funding, should be disclosed.

So with that in mind then, I would like to show you what the Tribunal needs from Ms Coll to address the question before it, before I turn to the legal principles on sensitivity and individual redactions.

So just to be clear, I want to take you to what the Tribunal has, what Ms Coll has disclosed, in the context of that framework.

If I could ask you, Madam, to turn up tab 9 of the bundle. This is the litigation budget that's appended to Ms Coll's litigation plan.

I may just turn up my electronic version because I find the writing very small.

What the litigation budget does is it provides, in summary, and I'll show this to you, but it sets out three key categories of information.

The first is the total amount, which has been committed by the funder to the proceedings, and that's in the bottom right-hand corner of the main table. It's labelled "Total Funded Amount", and that figure is £11.29 million. As I will come on to explain, that covers discounted costs for lawyers and the ATE deposit premium.

Critically, that's the amount committed by the funder.

Secondly, this table shows, and I will take you through the columns, how much lawyers' work is catered for, and I will show you that.

Thirdly, it sets out the precise disbursements which have been budgeted for. For instance, you can see how much the experts in the pre-action phase will cost.

So those are the three categories of information. We say that's what you need for certification.

MR FRAZER: Ms Kreisberger, there is a corrected version in the supplemental bundle. Does it make any difference which one we are looking at?

MS KREISBERGER: I am grateful for that, sir. I've replaced it. In the supplemental bundle, it's tab 2. I have actually replaced tab 9 and I'll show you the correction, which is footnote 5, which says -- it now reads:

"The deposit premia are included in the Total Funded Amount."

The contingent premia are not, because they're payable only on success. So they're not covered by the funding agreement.

But I am grateful for that, sir. So then just turning to lawyers' costs, you see there on the left of this table, the solicitors identified by grade, counsel by name and experts below for disbursements. You see next to the legal team, in the next column along, the hourly rates for the lawyers. I will come back to that.

Then each column, as you move to the right, captures a phase in the proceedings. So you have pre-action, claim form, first CMC and so on.

So what the table shows is what Ms Coll has allowed for in the budget for each phase of the case, and that is broken out by numbers of hours and the amounts calculated for the lawyers at base rates. Now, base rates can be thought of as, essentially, standard hourly rates. So you can see there, hours and then the various sub totals are calculated by the hourly rates, to the left of the number of hours.

So for instance, you can see that for the CMC, Ms Coll's budget allows for 401 hours -- I hope I have got that right -- for the Hausfeld team, at a cost of £150,000.

THE CHAIRMAN: Yes.

MS KREISBERGER: So you can see there that's a very detailed breakdown of costs, and you can see precisely how much lawyers' work is catered for.

Now, again, to be clear, the budget gives a total costs figure on that basis, recorded in the table, and that's marked "Total Through to Trial." That's the figure of £15.42 million. Above that, you see a figure that's £1 million more than that. That accounts for £1 million of costs for distribution. That accounts for the difference. Those two figures do not include ATE premia; it's the costs in the table.

So in other words, either taking it through to trial or to the end of distribution, if we look at the £16.42 million figure, you could think of that as your rough guide of cost in normal terms.

THE CHAIRMAN: Yes.

MS KREISBERGER: But those amounts for costs, captured there in the £16.42 million figure, exceed the amounts paid by the funder as the litigation progresses, and that's because the legal team have deferred a portion of their costs, of their fees, which are only payable in the event of success.

So the funder pays a discounted rate.

THE CHAIRMAN: Yes.

MS KREISBERGER: The deferred element will then be recoverable from Google as the losing party, in the event of success, as the losing party, in the usual way, and any remainder will come out of undistributed damages after proceeds are distributed to the class.

THE CHAIRMAN: Yes.

MS KREISBERGER: So the short point to take away from that is that the deferred amounts aren't relevant to the question of whether Ms Coll has sufficient funding. They're not borne by the funder, they are at the lawyers' risk.

What the funder pays is the discounted rates, i.e. base rates minus the deferred element, and the ATE deposit premia, which are payable irrespective of outcome, plus disbursements, and that's £11.29 million.

THE CHAIRMAN: Just so that I can be clear, because this confused me a little when I first looked at the table, the Total Funded Amount then, is not readily calculable from the figures above it? Although it looks like it's a subtotal of all the figures above it, it's actually not.

MS KREISBERGER: That's correct, you can't reverse engineer -- if we exclude the cost of distribution, you can't, just looking at this table, work backwards from £15.42 million to £11.29 million. The reason you can't do that is because £11.29 million, because it's the Total Funded Amount, accounts for the deposit ATE premia.

THE CHAIRMAN: Yes, and discounts the deferred fee --

MS KREISBERGER: And it discounts the deferred fee.

THE CHAIRMAN: Yes.

MS KREISBERGER: So whereas "Total Through to Trial" is costs, including lawyers' costs at base rates --

THE CHAIRMAN: Yes.

MS KREISBERGER: -- which aren't payable in the event of -- if the PCR loses, those amounts aren't relevant.

THE CHAIRMAN: Yes, thank you.

MS KREISBERGER: And I am grateful, Madam, because that's obviously very important when we come to look at what Google has to say and what they want to see.

You can see there, just for completeness, in the table below, that's where the ATE premia are set out, but they're redacted from that table, and that's only the

deposit premia, given that contingent premia aren't funded, they're engaged in the event of success. But those numbers have been redacted. Those are the only redactions on this table.

Just to summarise, hopefully without repeating myself, the table provides information on two relevant matters. This is zooming out now and bearing in mind the CPO framework, what's relevant.

This tells you whether the PCR's budget is adequate and sensible for every stage of the case. Because you can see how many hours have been catered for, for each of the lawyers.

It also shows you what the funder has committed overall.

What it doesn't show you is the amount at risk for the lawyers in terms of deferred fees, because that amount is not funded and, therefore, not a matter relevant to certification. I will be coming back to *Kent*. That's reflected in the *Kent* ruling.

So with that introduction, which I hope is helpful, I am going to turn now to the disputed redactions. As I said at the outset, we have clause 7.6 of the litigation funding agreement, the ATE deposit premia, which I showed you, and the priorities deed.

But first, I would like to set out the legal test on redactions, on tactical and commercial sensitivity, and then turn to those provisions.

At this stage, if I could ask the Tribunal to go back to *Kent*.

THE CHAIRMAN: Yes.

MS KREISBERGER: Again, if I could ask -- it's a long section, but it governs these questions -- if I could ask the Tribunal to read paragraph 19.

THE CHAIRMAN: Certainly.

(Pause) Yes, thank you.

MS KREISBERGER: Madam, so there you have -- there's a clear hierarchy:

relevance, privilege, confidentiality.

19.2, importantly, captures the proposition that if tactical advantage can be derived, then material can be appropriately withheld. So it's not right that the starting point is full disclosure.

Then you have the important principles on ATE policy, premia in particular which I'll come back to. That's at subparagraph 4.

Then paragraph 20 draws this together:

"While the above sets out a useful framework, we recognise it cannot automatically be read across to the very specific context of collective proceedings, where the Tribunal has a specific and express duty to examine the PCR's funding arrangements and where, as a matter of course, substantial aspects of those arrangements and the ATE insurance are necessarily disclosed to the proposed defendants. As regards [going on at 21] disclosure of the ATE premium specifically, at the CMC in *Gutmann*, Roth J, the ex-President, whilst indicating that there was no reason for the policy as a whole to be confidential, considered that the premiums were obviously confidential, as they will "*betray an assessment of risk*" and more generally suggested the provisions which "*disclosed the risk assessment*" can properly be kept confidential. In the CMC in *O'Higgins*, Marcus Smith J observed that premiums should be kept confidential because they "*show a certain insight into the risk that is being attributed to the success or failure of the litigation*"."

He went on to explain that disclosure in *O'Higgins* was due to the carriage dispute, so that was a separate issue which, happily, doesn't concern us today.

So there is a distinct discretionary ground of strategic sensitivity, which is wider than privilege.

As I said, Google is deploying arguments which the Tribunal rejected in *Kent*, and we

will see how that applies.

So by reference to that, I will address, really for convenience, on clause 7.6, the function of the clause, why it's not relevant to certification, why it's anyway sensitive, and then I'll address what Google has to say about that.

So the clause is at tab 7 of the bundle, page 41. If I could just show you the front of tab 7. This is the litigation funding agreement between Ms Coll and Vannin Capital. At page 41 is the disputed redaction.

Perhaps if I could ask you to just have that in front of you and I'll take you through it. Actually, most conveniently, the Tribunal in *Kent* summarised the LFA and the relevant clause. If I could ask you to turn to page 280 of the authorities bundle. The Tribunal said:

"*The LFA is an agreement between the PCR and Vannin Capital PCC for and on behalf of Project Greve* ..."

Here, it is Project Pontac, so we just substitute that in:

"... *pursuant to which the Funder has agreed to provide funding in respect of the PCR's costs of pursuing the proceedings, as set out in the Litigation Plan Budget at Appendix 1. Clause 7 of the LFA makes provision for a "Funding Notice", being notice given by the PCR to the Funder claiming payment for costs in respect of a particular period, and requiring the Funder to pay the amounts so claimed.*"

That's an accurate description of this LFA as well and the relevant clauses. Then you have clause 7.6, which I hope is in front of you, in our case, but they're identical.

Clause 7.6 -- actually, if I just perhaps explain clause 5.2 first, which is at page 38 -- so if you just go back a couple of pages in the Coll LFA. Clause 5.2 I could just paraphrase for you, provides that the funder pays the action costs up to a phase costs limit for each phase of the action. So that's a core commitment from the funder, and that's the wording below 5.2.2, in clause 5.2.

Then at 5.7, it says:

"*The Funder may, in its absolute discretion, from time to time, agree in writing to an increase to a Phase Costs Limit and to pay Additional Action Costs. If the Class Representative requests such an increase in writing, the Funder shall have the exclusive option to provide that additional funding* ..."

Then it goes on. Perhaps I could just ask the Tribunal to read that to itself.

(Pause)

In short, there's a series of phase costs limits, but it's possible for the PCR to ask for an increase, once a phase cost limit has been met. But that's then where we turn to clause 7.6. That is not correct, insofar as the law firm's costs are concerned, because of the excess provision which applies.

So no funding notices, other than in respect of the sums provided for in the litigation plan budget. The class rep acknowledges that no funding notices shall be presented to the funder in respect of the solicitors' fees until the amounts provisioned for the solicitors' fees in the litigation plan budget have been exceeded by the particular amount, which is redacted.

So Ms Coll can't ask for an increase in the phase cost limit until that threshold has been passed.

THE CHAIRMAN: Yes.

MS KREISBERGER: This is set out in paragraph 12 of *Kent* as well. So the Tribunal understood, and this reflects my submissions in that case, where for any stage, the solicitors' fees exceed the budgeted amount, then the funder will not fund that excess up to a certain amount. But in respect of fees incurred beyond that excess, the funder will pay those fees, in addition to the original amounts funded, if it agrees to do so. I took you to the clause; there is no requirement to do so.

The stated excess as the Tribunal said in *Kent* is never paid by the funder and is at the solicitors' risk. It's a slice that the law firm carry.

Just so it's clear, the excess sum is calculated cumulatively across the phases, it doesn't start again for each phase.

That's reflected at paragraph 35 of *Kent*, which is at page 289 of the bundle. The effect of the excess provision is that there is a slice of costs above budgeted amounts which the funder never pays and which are at the solicitors' risk. These costs are not recoverable from anyone, save if the claim is ultimately successful, in which event they are recovered out of damages.

So the Tribunal correctly stated the position in *Kent*.

MR FRAZER: Ms Kreisberger, what are we to make about the large amount of redacted text following that amount? How should we approach that?

MS KREISBERGER: So what we have said, and we have set it out in the skeleton as well, is that the wording which follows sets out how the threshold is calculated and what the next steps are once the excess is passed, the threshold is passed.

So it's explanatory of the circumstances in which the excess applies. So if -- as I will come on to explain -- you are not interested in the level of the threshold, at what point -- what is the size of the slice borne by Hausfeld for these purposes, then it will logically, not be of interest to you, how that threshold is set or what happens vis-à-vis the funder to take matters forward, once the threshold has been passed. It's all a part of the same issue, in short.

PROFESSOR WATERSON: Ms Kreisberger, might it be helpful if the text of that bit that is redacted was there but without the figures?

MS KREISBERGER: Well, when you say "helpful", the question is whether it's relevant. And the reasons why I say the threshold is not relevant apply equally

to the wording which follows. It's very difficult to distinguish because it's all part of the same point. In *Kent*, this is the wording that was redacted. That redaction was accepted by the Tribunal.

PROFESSOR WATERSON: Thank you.

MR FRAZER: It is, however, very hard to assess the relevance or otherwise of the text unless we actually know what the text is. Would it be harmful for Professor Waterson's suggestion to be followed?

MS KREISBERGER: Sir, I am just going to take instructions, if I may, on the point.

MR FRAZER: Thank you.

(Pause)

MS KREISBERGER: Sir, if I could come back to you on that, I think, rather than hold matters up, but I will also give you the reference in the skeleton where we've set out what the PCR is able to say about the content of the redacted wording. I will just give you that reference ...

(Pause)

Sir, just so you have it for your note, it's paragraph 14.2 of the skeleton, which is at tab 2, page 5 of the bundle, which says that the remainder of the clause is redacted but Ms Coll can confirm that in high level terms, it makes provision for how that threshold is calculated and what is to happen once it has been reached.

MR FRAZER: Thank you.

MS KREISBERGER: But perhaps it might help if I explain a little further why it's not relevant, why the threshold isn't relevant, and therefore, why the rest of the clause, equally, doesn't arise, in relation to your determination at certification.

I have taken you to the sections of *Kent* and what the Tribunal had to say on this and on which we squarely rely.

Sir, also, I should just say for your note, I think paragraph 29 -- no, I have given you -- yes, paragraph 29 is also relevant to this question of what happens next, paragraph 29 of the skeleton.

So turning then to what Google says. Google claims that clause 7.6 is relevant, or rather, the redacted wording is relevant, despite -- despite -- the *Kent* ruling, for two reasons.

It says "*it's likely to indicate the funder's confidence in the budget*", and they say, "*a small excess would likely indicate the funder's belief that the budget won't be exceeded and vice versa*", and, "*there's potential here for a conflict between Hausfeld, the law firm, and the class.*" Both those points are just wrong.

So taking them in order, the first point on confidence. It's both irrelevant and factually wrong, is the position.

The funder's so-called confidence in the budget is not a relevant consideration for the Tribunal because what you will do at certification is look at the litigation budget and decide if it's appropriate. What the funder thinks of the budget is neither here nor there, the funder puts the money up. Let me put it another way. Ms Coll could not say to you, in the context of certification: well, the Tribunal should endorse the budget because the funder is confident in it, whatever confidence in this context might mean. She won't say that and she couldn't say that.

So funder confidence doesn't arise.

Even if funder confidence were somehow in play, which we cannot see, anyway, the excess doesn't tell you anything about what the funder thinks at all. The excess is simply the product of the commercial negotiation as to how much risk the solicitors are prepared to bear.

I mean, it's often the case that solicitors bear all the risk of exceeding agreed amounts

in the budget. That doesn't mean that funders lack belief in the budget, it's just a question of where the risk lies.

So Google's first point is not a good one.

The second point they make is conflict of interest. Google's allegation is in terms, at least seems to be, that a large excess might inhibit Hausfeld from doing everything which is necessary to prosecute the claim. Just pausing there, that is a bold allegation to make and, with respect, it's one that should be given short shrift by the Tribunal. Hausfeld is one of the leading claimant law firms and the suggestion that it would not act in accordance with its duties to its client simply because it's at risk on costs, is not a proper or appropriate allegation here.

Law firms act on full CFAs and CFAs above budget, all the time, particularly in these CPOs. They take on risk, and where that pays off, they receive rewards. That's precisely how this regime is intended to work, because by doing so, the CFAs reduce the funding required to run these cases and that's what enables these cases to be brought. And that's how the regime ensures that consumers in particular, can vindicate their right to compensation for competition infringements.

So, to sum up, as the Tribunal aptly said in *Kent*, this amount is at the solicitors' risk, so it's not relevant to the PCR's ability to fund costs, and that applies both to the threshold and to the provision in the clause as to what happens if the threshold is exceeded. Neither is relevant here.

Unless the Tribunal has any questions on that point, I was going to move on to the ATE deposit premia.

THE CHAIRMAN: No, I think we can move on, thank you.

MS KREISBERGER: Thank you, Madam.

So the ATE insurance policy is at tab 8 of the bundle and, as you see there, the terms

of the policy have been disclosed. It's simply subject to a few redactions. Just to summarise, the policy provides for insurance cover up to a limit of £10 million, with five insurers participating.

Again, one can turn to *Kent* for a convenient summary, and hopefully to indicate, helpfully, that *Kent* is on all fours here with the issue that arises in this case. That's at page 279 of the bundle, paragraph 9.

The Tribunal said, four lines down:

"*As regards the premium, the ATE policy provides for a deposit premium and a contingent premium. The former is payable at the policy commencement date, is not contingent upon a successful outcome and is non-refundable. By contrast, the latter is payable only in the event of a successful outcome. These premia are payable by reference to two stages, at inception of cover and after the Tribunal certifies the collective proceedings. The amounts of the deposit premium and contingent premium payable to each insurer participating in the policy are redacted from the ATE policy filed in the proceedings.*"

That's an accurate summary for these purposes as well.

Google seeks disclosure of the deposit premia only. I've already taken you to the general propositions articulated by the Tribunal on deposit premia in *Kent* and there, applying those principles, the Tribunal ruled that the ATE premia were not relevant. And in any event, had they been, they are strategically sensitive and so should not be disclosed.

Now, turning then to Google's arguments here. On relevance, Google says, paragraph 39 of its skeleton, that it needs to see the deposit premium to understand the numbers in the litigation budget. Strangely, Google says all one gets is a single figure, £11.29 million.

Well, I've taken you to the litigation budget and I have shown you that you don't need

to know the amount of the deposit premium to see the overall funded amount -- that is the £11.29 million -- but also, importantly, how much has been catered for in terms of lawyers' hours and disbursements at every stage.

Now, Google needs to explain why it needs anything more than that. It hasn't done so thus far. All they have said is they want the overall funded lawyers' costs. In other words, if we were to give them the amount of the deposit premium, they could then work out how much is left from the £11.29 million to cover costs and disbursements; costs at the discounted rates, and disbursements. But my question, which, as I say thus far, is unanswered, is: what would that give Google? How would that help?

What the Tribunal needs to see is how the budget caters for costs at every stage, what number of hours are provided for in the budget. You see that at paragraph 24 of *Kent*. That's page 286 in the bundle.

Paraphrasing, in the interests of time, what the Tribunal says there is: you don't need to see that, it's not relevant. Just to be absolutely clear, if the PCR loses, the funder will cover the deposit premium and costs up to £11.29 million, and the lawyers don't get the deferred fees.

If the PCR wins, there will be an adverse costs order against Google in respect of the £16.42 million -- that's the total on standard hourly base rates, which include deferred fees -- and that will be recoverable from Google in the ordinary way and any remainder from undistributed damages.

So that's why the premia are not relevant.

Moving then to sensitivity. Our position is that the premia, even if they were relevant, are tactically sensitive because they're capable of giving an insight into the insurer's assessment of risk, and also the lawyers' perception of risk.

That is set out at paragraph 28 to 32 of *Kent* on page 287. I think if -- rather than listen

to my dulcet tones, if the Tribunal could perhaps read those passages to itself, from paragraph 28 to 32.

THE CHAIRMAN: Yes.

(Pause)

Yes, thank you.

MS KREISBERGER: So we rely here on tactical sensitivity. I am not relying, for these purposes, on privilege, in the light of the *Kent* ruling, but I rely on tactical sensitivity of the premia, even if they were relevant, for precisely those reasons articulated by the Tribunal.

Now, Google is attempting, as you know, to re-open this issue and they advance two justifications for that approach, notwithstanding everything the Tribunal has said.

They say that the premia don't tell you anything about the insurer's view of merits, particularly because they are only asking for the deposit premium. Secondly, they say the average level of deferred fees, or in other words, the total chunk that can be deduced if the deposit premium is disclosed, doesn't give an insight into the assessment of merits.

Again, both those points are wrong.

The deposit premium does, or is capable of, giving an insight into the insurer's view of the merits. Speaking purely hypothetically, of course, if the merits are weak, the funder is more likely to demand a large deposit premium by virtue of the fact that the contingent premium is dependent on success. So if the merits are poor, the insurer won't get that.

So if it thinks there's a risk of the contingent premium not arising for payment, then it's more likely to ask for a big chunk in the deposit premium. By dint of logic.

THE CHAIRMAN: Can I just pause you there. I don't think Google are asking for the

contingent premium figure, are they?

MS KREISBERGER: Correct, just the deposit premium.

THE CHAIRMAN: If they don't know the contingent deposit premium, how will they know the scale in comparison, of the deposit premium?

MS KREISBERGER: Sorry, Madam, could you repeat that? If they don't know?

THE CHAIRMAN: If they don't know the contingent premium, how will they know the relative scale of the contingent premium to the deposit premium?

MS KREISBERGER: You're quite right, they will know the absolute number for the deposit premium and they're likely to have market knowledge of how these things work. They won't know the relative size of the deposit premium to the contingent premium, but they will have an absolute number, which is informative, we say, of merits and reflects the risk assessment. Because the risk is all on the deposit premium, as I explained, not the contingent premium. The issue isn't only a relative one, it's the absolute number.

THE CHAIRMAN: Can I ask you something else about that.

The deposit premium, is that calculated only on a view of the merits or is it a commercial negotiation between the parties? For example, you discussed earlier the solicitors' excess. That's a commercial negotiation, how much risk the solicitors want to bear. What other factors come into -- I am not asking you as an underwriter, I would hesitate to do that, but I just wonder what other factors come into calculating it.

MS KREISBERGER: I am going to take instructions, to make sure I give you an accurate response there, Madam, if I may.

THE CHAIRMAN: Thank you.

(Pause)

Would it be an appropriate time to take a break for the transcriber, would that be

helpful?

MS KREISBERGER: I would be grateful, actually, thank you, Madam.

THE CHAIRMAN: We will do that.

(11.43 am)

(A short break)

(11.50 am)

THE CHAIRMAN: Thank you, Ms Kreisberger.

MS KREISBERGER: Thank you. I am very grateful for that break, as I think I can answer the question a little more accurately, hopefully succinctly now.

There are really three points to make in response to that question, which I am grateful for.

In terms of the relativity, it's not simply the relative amount of deposit premium to contingent premium that's of interest or revealing, it's the amount of the deposit premium relative to the overall amount of the cover, which here is the £10 million figure. It's that comparison which is capable of giving insight into the insurer's assessment of risk: deposit premium to cover.

The other aspect to which giving access to the deposit premium amount is revealing is the relative comparison of the deposit premium here to that in other cases. That's a point I made in relation to industry knowledge, market standards ... so that would also be of interest to understanding the assessment of merits and risk.

Madam, you asked what are the other factors? There will, of course, be other factors, I'm not suggesting there's a straight line from deposit premium to merits assessment, but those other factors, and of course, I do not want to stray into giving evidence on behalf of insurers, but just at a very high level, those other factors will be standard across the market.

So, for instance, it's been explained to me that there might be a percentage which is broadly attributable to costs, including a reasonable rate of return. And there will be a market standard, and those with knowledge of these policies will understand that.

So knowledge of the deposit premium will allow those having access to it to control for those other factors.

Again, I am not suggesting a straightforward calculation is possible, but the fact that it is also the product of a commercial negotiation, which is of course right, doesn't mean that it's not of interest in relation to the merits assessment.

THE CHAIRMAN: Just exploring that, the merits assessment -- I mean, the case has merit, or your client wouldn't be looking to pursue it, and she's obtained funding and insurance to do so. So what extra element of knowledge of the merits will Google get if they know the level of the premium?

MS KREISBERGER: Well, the premium is principally revealing of the insurer's assessment of the merits. So, as I said -- and it's well established -- I haven't taken you to cases prior to *Kent* because *Kent* has conveniently summarised them, so I don't want to waste the Tribunal's time, but of course, and it's well established in ordinary civil litigation, as a matter of course, that insurance premia are tactically sensitive for this very reason, because they are revealing of the insurer's perception of risk. Just so you have it for your note, Madam, this is summarised in *Kent* at 19(4)(ii) on page 284.

The Tribunal said:

"*Even if not privileged, disclosure of the premium reflecting the insurer's assessment of the merits might give rise to an unfair tactical advantage and thus discretionary grounds to refuse disclosure.*"

Mr Justice Morris there relied on the case of *Excalibur* at paragraph 25.1, which is in

the bundle.

THE CHAIRMAN: That's a Mr Justice Popplewell decision; is that right?

MS KREISBERGER: That's correct, yes, that's correct.

THE CHAIRMAN: He wasn't sure, he didn't actually attach much weight, if I remember rightly, in that decision?

MS KREISBERGER: Well, he didn't need to because the parties made the concession, and perhaps I can take you to that later on.

THE CHAIRMAN: I think this leads me to another question. I hate to take you out of your course, but I was looking at paragraphs 28 and 29 in the *Kent* decision -- sorry, I have got a hard copy here, so that's page 12 of the decision -- I will be in trouble with Mr Waterson, who prefers the pdf bundle numbers but I'm afraid I have got an internal number.

MS KREISBERGER: I can helpfully give those. 287.

THE CHAIRMAN: Thank you.

MS KREISBERGER: It's tab 13, page 287.

THE CHAIRMAN: If we look at that, what Mr Justice Morris said was:

"Even if it does not clearly disclose legal advice on merits, it might give an insight into the perception of the insurers."

The passage you just referred me to, referred to it, "might give an indication of the assessment of risk." I think my overarching question in this context is: is "might" enough or do you have to be able to establish it would?

MS KREISBERGER: One can never do that, Madam, which is why that's the standard applied in the cases, because it's accepted that if there is a risk, then there should not be disclosure in the proceedings at all. So it will never be possible to answer the different question of: well, does it?

But remember, we've got to go through relevance to get to sensitivity and the nature

of the exercise is a discretionary balancing exercise. So one might be in a different hypothetical world if this material was highly relevant, but we say it's not relevant and it's sensitive because it could give an insight into risk, and that's why routinely -- it's right to say that Google has the policy, it's just the premia it doesn't have.

For completeness, this has formed the basis of the way the Tribunal has approached insurance premia in these cases. So paragraph 21 of *Kent* is very important because that's where Mr Justice Morris referred to THE CHAIRMAN's observations on this, which is that premiums are obviously -- obviously -- confidential because they can betray an assessment of risk or show a certain insight into the risk being attributed.

So one is not dealing in absolutes, one is dealing in risk.

THE CHAIRMAN: Thank you.

MS KREISBERGER: Madam, at that point, I was just going to turn to -- so that's why the premium is sensitive, the deposit premium.

Then turning to Google's second point, which is that the average level of deferred fees, which can be calculated if the premium is disclosed, is not interesting. It doesn't give an insight, they say, into merits assessment.

But that's wrong. Contrary to what they say, it's the average discount that is more revealing than any individual discount because it gives the legal team's overall view of palatable risk. So in other words, Google say: well if you give us the premium, all we can see, we can deduce, from the table, is how much of the legal fees have been deferred in full. What they won't know is by individual fee earner, each member of the team. They won't know that, they will just have the overall amount. And they say "What's the big deal?", essentially, "that's not informative." We say that's back to front. That is the informative question. How

it's allocated is not as revealing as the amount that is deferred. It's the total deferred amount that is the amount of risk borne by the team.

So we don't really follow that reasoning.

THE CHAIRMAN: I guess the same point could be made in this context -- I have your point on relevance -- but the fact that a CFA has been entered into at all, that sort of crosses a merits threshold, so far as Ms Coll's legal team is concerned.

I think there's a cap you mention in your skeleton by reference to the regulations -- I think it's 100 percent, is it?

MS KREISBERGER: That's correct.

THE CHAIRMAN: So in a way, what does the differential in the CFA amount -- what extra advantage does that give Google?

MS KREISBERGER: Again, one has to make out a case as to why that's relevant at all, because it doesn't form part of the funded amount, so that's my first question.

But it tells you what the lawyers' composite appetite for risk is, which is a highly relevant reflection of how they see the merits of the case. It's simply that. Bearing in mind that that part of the fees, which are deferred, will never be payable if Ms Coll loses. So that is the risk. So, as you say, a sort of basic merits threshold is crossed because the case has been brought, but success fees, for instance -- and I will come on to those -- are not routinely disclosed, precisely for this reason because it tells you about how the legal team have approached the question of risk, which is based on their assessment of the merits of the case.

THE CHAIRMAN: But is it just a factor of commercial negotiation? For example, if there was -- I don't know -- a 40 percent deferred fee or a 50 percent deferred fee, can I draw any distinction between that as to the assessment of risk,

meaningfully, in the light of the commercial negotiation that's been undertaken with the legal team?

MS KREISBERGER: Madam, I am just going to speak to those behind me.

(Pause)

I mean, the short answer is yes. As I say, there are no clear lines that can be drawn. Of course, there's commercial negotiation between funders and lawyers, but this really goes to the heart of the question. If Google knows how much the legal team are prepared to defer, then -- bearing in mind this is information that they do not require, and the Tribunal does not require, because it's not relevant -- the risk of a tactical advantage to Google outweighs any upside of disclosing this material.

As I say, it's a matter for your discretion, to balance these considerations, but if it's not relevant, there's no upside. And there is a very real downside in showing one's hand in relation to risk assessment. So we say, stepping back, there shouldn't be disclosure, given that risk.

THE CHAIRMAN: Yes, I understand, and I understand you've got your point about relevance too, I was just wanting to explore what you learn from it.

MS KREISBERGER: I can't say to you that a percentage point will be, you know, hugely revealing of some assessment. It doesn't work like that. But of course, you know, it's not a question of the difference between 40 and 50 percent; it is the number. What does the number tell them? In litigation of this sort, where there's no need for disclosure, that sort of tactical advantage should be avoided.

THE CHAIRMAN: There is another point, which I would quite like to get your views on, which is that if the agreement is relevant and you say this particular part of the agreement is irrelevant, if there is no tactical advantage to Google learning it, would you still be trying to redact what you say is an irrelevant piece of

information?

MS KREISBERGER: Yes. Yes, but that is purely hypothetical. It doesn't arise on these facts, because Ms Coll's position is this is tactically sensitive. So that's not where we are on these facts, but as a starting point, the starting point is the information ought to be relevant.

Having said that, if we weren't looking at premia, then if Google opposed a redaction and Ms Coll's position was there's no risk whatsoever, then one might be saying to the Tribunal: well, we can't see a need for disclosure but we are in the Tribunal's hands. But the balance tips very quickly in a different direction where there is sensitivity to the figures, as I say, where there is a risk of sensitivity and tactical advantage in the context of this kind of proceeding.

THE CHAIRMAN: So if we have a relevant agreement and you are right that it is an irrelevant consideration, and if -- and I say this -- this is an if -- if the Tribunal was of the view that, actually -- I know you have referred me to the case law and, obviously, we are all going to consider it and it's going to be discussed later with Mr Holmes and, obviously, you will have your reply -- but if we say that the disadvantage isn't a material one from our point of view, would you be saying that because it's irrelevant, that part ought to be redacted?

MS KREISBERGER: Yes, I don't give up, I certainly don't give up my argument on relevance, that is the starting point. But if I could distinguish two situations.

If the PCR -- if I were saying to you we don't want to disclose because we consider it to be irrelevant, but we are not concerned about sensitivity, you, the Tribunal, may then take a different approach. My position would still be no relevance, no disclosure. But once you have the PCR saying there's a risk, we consider there's a risk, the PCR considers there's a risk, the case law accepts the risk, the ex-President of the Tribunal thought there was a risk here, then it is not right

to simply say: well, we think it's relevant, therefore we are going to order disclosure.

With respect, we say the balance tips, given the PCR's position that there is a risk which is fully aligned with the case law that deposit premia should be withheld.

THE CHAIRMAN: Thank you, that's helpful.

MS KREISBERGER: Does that answer the question?

THE CHAIRMAN: Yes, it does, thank you.

MS KREISBERGER: With that, if I may move on to another category, which is the priorities deed. That's at Appendix 3 to the LFA, but there's nothing to turn up because there's a placeholder there, that has been withheld.

Now, the priorities deed contains the waterfall. That is the order in which Ms Coll, the funder, the solicitors and counsel are paid from stakeholder proceeds. Stakeholder proceeds are defined in the LFA and if I could just ask you to turn that up. That's at tab 7, page 35.

Stakeholder proceeds are, you can see there:

"*Any Recovered Costs, any amount paid to Ms Coll from Undistributed Damages after the class have had distribution of monies, by order of the Tribunal under Rule 93(4) or any amount [it may be and/or] approved under a Collective Settlement Approval Order, to be paid to Ms Coll as costs, fees, disbursements or expenses within the meaning of Rule 94*."

So Rule 94 is collective settlements, as I am sure you know, and Rule 93(4) relates to damages awards.

Now, this is a standard definition of stakeholder proceeds, which is carefully crafted, in all of these cases, as far as I'm aware, to comply with the CAT regime. In other words, stakeholder proceeds are, as you can see explicitly there, defined by reference to Rule 93(4) and Rule 94.

Apple dropped their request for disclosure of the document even before the CMC in the *Kent* proceedings.

Now, we can turn up Rule 93(4) and Rule 94, which are -- I am using my own version, but they're in the bundle at tab 2, page 10. As I say, I am using a non-bundle version, like you, Madam.

93(4) provides that:

"*Where the Tribunal is notified that there are undistributed damages, it may make an order directing that all, or any part of any undistributed damages, is paid to the class representative in respect of all or part of any costs, fees or disbursements incurred by the class representative in connection with the proceedings.*"

So in other words, as reflected in clause 1.42 of the LFA, the definition of stakeholder proceeds, at the point at which the Tribunal orders that the PCR has won, and there will be a damages award, it can make an order for recovered costs, in the ordinary way, and it can also order payment of costs out of undistributed damages. I am labouring the point because it's important, because it goes to Google's objections.

These are monies that are paid out after the class has had distribution of damages, after monies have been paid to class members.

Just for completeness, it's Rule 94(4)(b) that has a provision for the payment of costs as part of a collective settlement. That works slightly differently. Simply done as part of the settlement.

Google says it needs to see the priorities deed for two reasons. They say (1), to confirm that it only applies to stakeholder proceeds, so it wants confirmation, and (2), it says it needs to see if it creates a conflict of interest between the class representative and the class, which, if it applied, is, we accept, a matter for the Tribunal, possibly not one for Google.

Coming back to the first point, this is really a strange submission on the part of Google, if I might say so. First of all, can I just draw the Tribunal's attention to paragraph 45 of Google's skeleton, which acknowledges in terms that the priorities deed contains the waterfall for payments out of undistributed damages. That's quite telling. It's quite right, and it's quite right because that's how these things ordinarily work. So this may be treated as something of a manufactured objection because that's what we said. Google say how could we possibly know that, but they concede it in their skeleton, because that's the ordinary course.

In any event, Hausfeld has confirmed in correspondence, and I'm confirming in oral submissions today, that it is the case that the priorities deed, in the ordinary way, applies to stakeholder proceeds. So I think we need to hear from Google what the objection is. I trust they are not suggesting that Hausfeld are misrepresenting the position here. That is the position, I'm confirming it.

Thirdly, and this is set out, for your note, at paragraph 33 of Ms Coll's skeleton, I've shown you that this is covered by the Rules. Payments to the class representative, other than covered by a recovered costs order, are covered -- are addressed -- by an order, out of undistributed damages, or as part of the settlement. It's how it works. That's why, as I said, the LFA has been drafted in these terms.

So this is controlled by the Tribunal. I mean, Google seems to be saying that Ms Coll would simply flout the Rules. As I said, I think we need to hear from them, but that would be an abuse of the Rules, so we are not really sure what the point here is, other than an improper allegation.

The second point which Google raises is the point on conflict, and my submission is that's equally hopeless. I have been very careful to show you that, under this

regime, stakeholder proceeds come out of undistributed damages, so by that stage, the interests of the class have been served by damages payments. So there isn't any scope for conflict and, again, I think we need to understand from Google precisely what the objection is.

Final point on the priorities deed. Here, the confidentiality issue, which Ms Coll raises, which for your note, is at paragraph 34 of the skeleton, is that the terms are confidential vis-à-vis other funders and other law firms. So it's a commercial sensitivity that's the issue here. That wouldn't be addressed even by disclosure into a confidentiality ring, because it's Hausfeld vis-à-vis other law firms, and there's another law firm in the confidentiality ring.

THE CHAIRMAN: So the only ground is commercial sensitivity for Appendix 3; is that right?

MS KREISBERGER: On confidentiality, yes, on confidentiality. But I heavily rely on relevance.

THE CHAIRMAN: Yes, yes, understood. Again, I asked about it in the context of the premium and the CFA, deferred rates. How does the commercial sensitivity, in reality, arise? What is the basis for it?

MS KREISBERGER: So perhaps if I could just take you to paragraph 34 of our skeleton. I mean, the ... the question is what terms the law firm is prepared to engage on in relation to the waterfall. That's highly commercially sensitive to the law firm. There are many law firms competing in this space and one could say it's something of a crown jewel for the market to know what Hausfeld have agreed, in terms of order of payments.

THE CHAIRMAN: But that would be very specific to this particular case, wouldn't it? I mean, would it tell you very much about what they would do in any other case?

MS KREISBERGER: Madam, I am going to take instructions so I don't misspeak on

that, it's an important point.

(Pause)

In the cut and thrust of commercial negotiations, it could be said to Hausfeld: well, you agreed X on that case, why aren't you prepared to give it to us on another case? So it could really be -- I mean, it's got a very practical application here for the law firm.

THE CHAIRMAN: Right, thank you.

MS KREISBERGER: The market is interested in this sort of information.

I should add that the same applies to the funder and the insurer. The parties to which the waterfall is relevant, they don't want these terms out in the market, because it can be used against them in commercial negotiations. So there's a serious point of commercial sensitivity.

But as I say, in particular, having another law firm having access to it in the context of confidentiality ring would fail to meet the objective of keeping this from the market, if another law firm had access to this material. So the confidentiality ring would not be a panacea for this form of commercial sensitivity vis-à-vis law firm/funder/insurer.

THE CHAIRMAN: Thank you.

MS KREISBERGER: I am grateful. Madam, I was going to, with that, turn to success fees.

THE CHAIRMAN: Yes, thank you.

MS KREISBERGER: Google are seeking the percentage success fees applicable here under Guide 6.33, which I showed you.

They say they are entitled to it, given the wording of the Guide and also, they raise again the question of the risk of conflict between Ms Coll and her lawyers on the one hand, and the class on the other.

So those are Google's two justifications which it advances. Again, they're misplaced. Guide 6.33, I can take you back to it but I showed you its content as captured in the *Kent* ruling at paragraph 14. The key point is the Guide refers to "*relevant fee arrangements*." Of course, we accept that. Success fees aren't within the category of relevant fee arrangements because they are not relevant to the class representative's ability to fund her own costs.

That's reflected at paragraph 36 of *Kent*, page 289 of the bundle. In the last sentence, the Tribunal said -- and this was in relation to clause 7.6, the excess:

"It is not an amount which is relevant to the issue of whether the PCR has the ability to fund her own costs."

And, therefore, it's not apt for disclosure. That was on 7.6, but the same point applies. If there is information which doesn't tell you, the Tribunal, anything about Ms Coll's ability to fund her own costs, then it is not relevant.

Again, success fees do what they say on the tin. They're payable out of undistributed damages in the event of success, but undistributed damages. So again, they don't arise until the interests of the class have been satisfied. So Google's second objection is not operative here. There's no scope for conflict between the legal team and the class. And -- and we don't need to go back to it again, but I've shown you Rules 93 and 94. These matters are carefully supervised by the Tribunal. The regime has been carefully crafted to ensure that there is no possibility of conflict. This is par for the course.

THE CHAIRMAN: Could I just raise one issue on that. I just wonder if you could clarify for me whether Appendix 3 specifically says that the undistributed damages are such as the Tribunal may order -- I can't remember which Rule it is.

MS KREISBERGER: 93(4).

THE CHAIRMAN: 93(4) -- yes.

MS KREISBERGER: Sorry, Madam, whether it says?

THE CHAIRMAN: So whether there's any other concept of undistributed damages. Because there will be a pot, and then the Tribunal makes an order -- I am just trying to establish whether Appendix 3 envisages it's only -- it's only subject to any order that the Tribunal may make.

MS KREISBERGER: In the LFA, undistributed damages are defined. It's at clause 1.45 of the LFA. I will just give you the reference: that's tab 7, page 35.

THE CHAIRMAN: Yes.

MS KREISBERGER: So it's below the definition of stakeholder proceeds:

"Undistributed Damages means Proceeds that have not been distributed to Class Members within any period stipulated by the Court for distribution to Class Members following success."

THE CHAIRMAN: Yes. Am I right in understanding that the 93(4) regime, what would happen would be you would apply to the Tribunal for an order that you can apply some of that to your costs. What I am trying to just get to the bottom of, is that what you envisage happening, is that what Appendix 3 envisages happening, there would need to be --

MS KREISBERGER: Precisely.

THE CHAIRMAN: So it's the authorised pool of undistributed damages available for payment of fees that the Tribunal ultimately orders. Is that how it works?

MS KREISBERGER: Precisely. So the priorities deed relates to stakeholder proceeds, which is defined by reference to Rules 93(4) and 94, which means that the waterfall contained in the priorities deed is engaged in relation to an order for costs and the 93(4) order.

THE CHAIRMAN: Yes, I've got it now, thank you.

MS KREISBERGER: So they go hand in hand.

THE CHAIRMAN: Yes.

MS KREISBERGER: I think I can say this without misspeaking. This is standard stuff. This is how these cases work.

THE CHAIRMAN: Yes, thank you.

MS KREISBERGER: Just coming back to Google's objection of a conflict here, I have shown you that that's not capable, both within the context of the prescribed regime and the particular definition of the LFA stakeholder proceeds.

But, you know, there's a wider point here. CFAs are generally acknowledged to make the interests of solicitors and their clients aligned. Because both are then invested in the success of the action. So it's the opposite of creating scope for conflict. Many solicitors act on CFAs all the time, full CFAs even, and they comply with their professional obligations. So there seems to be a veiled allegation of potential abuse, abuse of the Rules here.

Madam, I'm grateful to you for picking up the point that's in paragraph 39 of my skeleton, and that's at page 15 of the bundle, at tab 2, that the maximum level of any success fee is prescribed by statute. You have the reference there.

THE CHAIRMAN: Yes.

MS KREISBERGER: Then finally on success fees, and this is set out at paragraph 40 of the skeleton, turning to confidentiality -- so my submissions thus far were on their relevance, why they're not relevant. Turning to confidentiality, we have set out there in the skeleton, even when success fees were recoverable from defendants, contrary to the current position, the CPR expressly stated that there was no requirement to specify the amount of those fees until they fell to be assessed. For your note, you've got the reference there to the old Costs Practice Direction.

So it's well established that this information is not disclosed, even when they were recoverable. Now, the position is success fees are not, in this context, recoverable from Google. They don't concern Google, so there's no need to disclose, they come from undistributed damages.

Finally, we say that the amount of the success fees would give an insight into the lawyers' assessment of risk and thus give tactical advantage to Google. Again, I rely on paragraph 29 of *Kent* for my submission on that.

Madam, that brings me to the end of my submissions on the redactions. Perhaps I should pause there and ask if the Tribunal has any other questions.

MR FRAZER: Yes, you were going to get back to us on clause 7.6 of the LFA, the text element of it.

THE CHAIRMAN: I think you were asked by Mr Waterson whether --

PROFESSOR WATERSON: That's right.

THE CHAIRMAN: -- there was any particular harm in keeping the wording redaction.

MS KREISBERGER: Madam, I am just going to confer on that.

(Pause)

I think we'll take instructions over the lunch adjournment, if I may, and come back to you on the wording that follows.

THE CHAIRMAN: Yes, that's fine.

MS KREISBERGER: Would that be suitable?

THE CHAIRMAN: Yes, thank you. Yes, Mr Holmes?

MS KREISBERGER: Sorry, Madam, to trespass. I should say there is the question of evidence from the funder but I think it would make sense for me to deal with that once we have heard from -- I think it will be Mr Carpenter on these points.

THE CHAIRMAN: Yes, of course. Yes.

Submissions by MR CARPENTER

(Connectivity issues. "..." where audio connection falters)

MR CARPENTER: Yes, Madam, I have unmuted myself because I have the pleasure of dealing with the funding-related issues in this case.

There is just one other item to add to the agenda, easily overlooked, but I will need to address it, and that is the question of the timing of any alternative updated funding arrangements which Ms Coll seeks to rely on, in answer to the substantive points that we have taken in correspondence. It's probably convenient if I address that at the same time as I address the witness statement from Vannin that we are seeking.

I will start with the redactions, and in the same way as my learned friend, I propose to make some general submissions about this regime and then address the specific redactions which are in issue.

In my submission, my learned friend's articulation of what she says is the correct approach does not sufficiently acknowledge the nature of these proceedings and the requirements of the governing regime ... litigation because the Tribunal is required to scrutinise the PCR's funding arrangements.

... not only demonstrate a claim which is suitable to be brought by way of collective proceedings but also her own personal suitability to bring it. And that requires the Tribunal to consider the various matters in Rule 78 that we have looked at, and I don't propose to go back to it now, the Tribunal is very familiar with them.

Those matters are sufficiently important ... into account for ... presently of the points which ... take ... in the CPO judgments in *Merricks* at paragraph ...

THE CHAIRMAN: I am sorry to say I am having some issues hearing Mr Carpenter, I don't know if that's affecting anybody else.

PROFESSOR WATERSON: Yes.

MR CARPENTER: I have just noticed, Madam, things freezing on my screen which would be consistent with that. Hopefully it's a temporary blip. If it becomes anything more chronic ...

THE CHAIRMAN: We can hear you at the moment. Shall we crack on and see if it happens again?

MR CARPENTER: Yes, you did just then freeze momentarily ...

MR FRAZER: We have lost Mr Holmes. I think we have lost Mr Holmes.

THE CHAIRMAN: Have we lost him or has he made himself invisible?

MR CARPENTER: I think Mr Holmes has made himself invisible, perhaps in the hope of saving some bandwidth. You may have already inferred that we are in the same room together and all drawing on ... it may be that that will improve matters. If it doesn't, we may need to see what we can do at this end but I do apologise.

So perhaps going back slightly then on where I was. I was just referring to the need for any PCR to satisfy the Tribunal of the matters specifically listed in Rule 78, and those being sufficiently important matters that ... takes into account ...

I see my learned friend shaking her head, I wonder if that means that there are still problems ...

THE CHAIRMAN: "It was sufficiently important that", dot, dot, dot, I'm afraid.

MR CARPENTER: It was at that moment that I think something froze. Madam, I worry about the time my submissions might take if we have to keep stopping like this. Might I perhaps suggest an early break, during which we can try and work out what is going on at this end and see what we can do to fix it?

THE CHAIRMAN: Yes, it is annoying. You seem to be in full flow one minute and then we have disjuncture the next, so yes, I think that probably would be wiser. We will stop/start all the way through which is unsatisfactory. So if we take an

early luncheon adjournment and come back at -- can we say 1:30?

MR CARPENTER: Certainly. May I, Madam, just mention one thing, in the light of the instructions that my learned friend is going to take on clause 7.6 of the LFA. There is the possibility that we have already raised in correspondence that if we see the text, we won't need to see the figure. So if it is decided that we should be allowed to see the text, the sooner we can have that, so we can consider our position, the better.

THE CHAIRMAN: Thank you.

MR CARPENTER: Thank you.

THE CHAIRMAN: Also, I should have mentioned this at the time, and I am not quite sure how best to address this now, but I hope you have received a copy of the ruling in *BGL*, which touched on confidentiality, and apologies, I didn't pick it up and Ms Kreisberger has not made her points on that. Mr Carpenter, would you be happy for her to do that in reply and then if there was any point you wanted to make relating to it, you would have a short -- right to say something further, limited to that?

MR CARPENTER: Certainly. I was going to say something briefly about it, and thank you, Madam, for bringing that to our attention. I will make brief reference to it in the course of my submissions and if my learned friend says anything I wasn't anticipating in reply, if I could have the opportunity to come back on that if necessary.

THE CHAIRMAN: Thank you. Thank you. So we will rise until 1:30.

MR CARPENTER: Thank you.

THE CHAIRMAN: Thank you.

MS KREISBERGER: Thank you.

(12.39 pm)

(The luncheon adjournment)

(1.32 pm)

THE CHAIRMAN: Thank you. Yes, Mr Carpenter, I'll just raise a couple of matters with Ms Kreisberger.

I think you were going to take instructions on the word redaction in clause 7.6. Have you had a chance to do that?

MS KREISBERGER: I have, thank you, Madam. I'm happy to report that the wording, save for the threshold amount, has now been disclosed to the other side under the terms of the confidentiality ring, which will apply once that ring has been ordered, and I'm grateful to Mr Carpenter for confirming that Google no longer pursues disclosure of the threshold amount.

So clause 7.6 has been dealt with by way of agreement. The unredacted wording will go into the confidentiality ring, once established, and so the Tribunal will be able to see that as well. But there's no further dispute on that clause now.

THE CHAIRMAN: Thank you. Thank you very much. Then we also received an authority from you, the *Tuke v Hood* authority. If it's alright with you -- we have the paragraph reference -- I was going to propose that we carry on listening to Mr Carpenter's submissions and you could make a point on that in reply. Again, if there's any point that needs to be covered off, then the Proposed Defendant could address that after you had concluded your reply.

MS KREISBERGER: Thank you, Madam, yes, I'm grateful to deal with it in that way.

THE CHAIRMAN: Thank you.

So Mr Carpenter?

MR CARPENTER: Thank you, Madam. Thank you, first of all, for giving us the opportunity to sort out our IT difficulties. I am now using my instructing solicitor's laptop with a hard wired ethernet connection, as a result of which

I think my name may have changed, so I hope that won't cause too much confusion.

I do want to add one qualification to what my learned friend just said about paragraph 7.6. Everything she said was entirely accurate and, having seen the text, we are content not to pursue disclosure of the figure.

But sight of the text has given us some concerns, in that we find it very hard to understand on what basis that text was ever covered up. Given that we are in open court, I certainly can't read it out, and I am not going to, but I do say, Madam, that we would like the Tribunal to see that text before it makes any decision on any of the other redactions, because we do say the fight that was put up over what seems to us very innocuous wording, does call into question the assertions that other redactions which are maintained are ones which it's really necessary to maintain.

Coming back then, Madam, substantively, to where I was before we adjourned, I had just made the point that these are unusual proceedings compared with ordinary litigation in which the Tribunal specifically has to consider the matters in Rule 78 and I think the point at which we got stuck was that those are matters which it's not merely for the defendant to address, but which it is for the Tribunal to consider of its own motion.

Two references for that, if it's necessary -- I don't propose to turn them up -- paragraph 20 of the *Merricks* CPO judgment, which is page 169 of the authorities bundle, and paragraph 49 of the *Gutmann* CPO judgment, which is page 217 of the authorities bundle.

So in order to meet those requirements, a PCR is undoubtedly required to put her funding arrangements before the Tribunal and to disclose them to the defendant, so the defendant can make submissions on them. We have seen

the text of paragraph 6.33 of the Guide, I don't propose to go back to it, but it does say the Tribunal will have regard to the matters set out there.

So in relation to funding, this is absolutely a cards on the table regime. I do say, therefore, that the starting point should be full disclosure of a PCR's funding arrangements.

Now, there may be particular grounds on which some part of those can, in fact, be withheld, but that cannot be objectionable as a starting point.

I do say that the transcript of the CMC in the *Trucks* case contains some valuable observations by the former President on the degree of openness which is expected on those who seek to benefit from the regime.

If I can ask you to turn that up briefly, that is tab 14 of the authorities bundle, and the particular page is 315 in hard copy -- I think it may be 317, if anybody is using the internal pdf numbering.

THE CHAIRMAN: I'm sorry, could I have the page reference again, the bundle reference?

MR CARPENTER: The 315 is the printed hard copy bundle reference.

THE CHAIRMAN: Thank you.

MR CARPENTER: You'll see at line 5 of that page, THE CHAIRMAN says:

"*Maybe there are bits of the project plan that need to be redacted, but it is hard to suppose that the entire document needs to be redacted. So I do not think we can sensibly take it further today, but again I would like to leave you, as we have left Mr Thompson on a very different issue, and you will have no doubt noted that although you say all these things, or your funder says they're commercially terribly sensitive, they are in the same market as the funder to UKTC and UKTC has had no difficulty disclosing most of the equivalent material, as did the funder in the Merricks case.*"

Mr Flynn:

"*I do note that, Sir, and take due notice of it. We raised the issue of undue tactical advantage and I could not comment on the wisdom of a strategy of disclosing everything*.

THE CHAIRMAN: "Form of proceedings for which your clients get various benefits… Yes, but there is, as it were, a price to pay to get those benefits."

That, I do say, is absolutely it, and the financial value of those benefits is very great indeed. The entities who are funding these proceedings, which include the funder, the ATE insurers and the solicitors, are seeking to make a substantial return. In the case of the funder, that is likely to be tens of millions of pounds. And to do so necessarily at the expense of the class members, since most of that return, and in the case of the funder, all of it, is only paid out of undistributed damages.

So I do submit that it's unattractive to seek that benefit while denying the Tribunal and the defendants the ability to examine fully the arrangements which are the basis for that benefit and which the Tribunal is required by legislation to examine.

That being the case, in my submission, the Tribunal should be very slow to permit any redaction on the grounds, simply, of irrelevance. Once it's agreed that an agreement -- the funding agreement or an ATE policy is, in principle, relevant, which is common ground, then prima facie, in my submission, every substantive term in those documents is relevant.

There's a real danger of allowing a PCR to be the gatekeeper of relevance because it essentially allows her to mark her own homework on an issue which is of central importance to this regime. And that's particularly the case when, as here, unredacted versions haven't been supplied to the Tribunal.

So we are all working, essentially, on trust.

When it comes to the issues of privilege and confidentiality, my learned friend took you to paragraphs 19 to 21 of *Kent*. I don't dissent from the summary of the law in paragraphs 19 and 20 of *Kent*. But I do make three additional observations.

Firstly, when considering the question of legal advice privilege -- though I think, actually, in light of paragraph 7.6 having fallen away, I don't think I need to say anything about this because my learned friend accepts that the deposit premiums are not subject to privilege, so I think I can move on to my second point, which is the issue of tactical prejudice. When you are considering what is said to be tactical prejudice resulting from disclosure, in my submission it's important to consider the effect of what has already been disclosed. I can illustrate that, if I may, by reference to a short passage from the Hollander textbook which is in the authorities bundle at tab 18 at page 575.

This is a paragraph which is referred to in the ruling in *Kent* on the issue of tactical prejudice. It's just the first few lines of that paragraph. Mr Hollander writes:

"*It is obvious that there are real problems in giving disclosure of an ATE policy. It gives the other party a tactical advantage to know the terms of funding, exactly how the mechanics of the settlement would work, who has to be consulted and who has to approve and how the matter is to be sorted out in case of dispute. It may make clear the limitations on funding, the exclusions and indicate the pressures that can tactically be brought on the insured party.*"

The reason I go to that, Madam, is that that is a list of matters, all of which have already been revealed in these proceedings by what has already been disclosed. So the focus must be, in my submission, on the incremental tactical advantage which it is said would be given to Google by any further disclosure, on top of what has already been disclosed.

The third of what would have been my three points, now the second, is when it comes

to any balancing exercise, in my submission there should be a strong presumption of disclosure of material which may be relevant to assessment of a PCR's suitability.

Where, at this stage, the Tribunal, and the defendants, are unable to see that material, it is dangerous, in my submission, to make assumptions about what will or won't, in the end, turn out to be important.

This is an area where there is a very important point of distinction with the ordinary litigation cases. If we take ATE premiums, for example, as a particularly obvious example, in those cases that have dealt in the High Court with disclosure of ATE premiums -- or ATE policies, I should say -- the premium has been of no conceivable relevance. So it's not at all surprising that it has not been required to be disclosed and I think, actually, in every single one of those cases, although the court expresses a view on the disclosability of the premium, in every case the defendants volunteered that the premium could be redacted but that simply does not read across here.

I will develop that point when I address you in a moment on the specific issue of the litigation budget.

In respect of paragraph 21 of *Kent*, I do say, with respect, to that Tribunal, that the observations made there about ATE premiums are a little too broad, and again, I will come back to that when I address the litigation budget.

But an important point of distinction, certainly with the cases that are quoted from in paragraph 21 of *Kent*, is that it doesn't appear in those cases that any distinction was being made between the deposit premiums on the one hand and the contingent premiums on the other. Whereas we, as I am sure the Tribunal has understood, we only seek disclosure of the deposit premiums. Again, I'll address in due course what we might conceivably be able to infer or what

tactical advantage we might conceivably gain from simply knowing those.

I do say, generally, that the Tribunal should examine critically, any assertions of commercial or strategic prejudice from disclosure. Here, I will refer, if I may, to the *BGL* decision, and in particular, paragraph 9. This hasn't, I think, made its way formally into the authorities bundle but I hope everybody has a copy somewhere to hand.

THE CHAIRMAN: Yes, I think we all do, thank you.

MR CARPENTER: It's paragraph 9 that I would just like to draw attention to, where THE CHAIRMAN said, picking it up at the second sentence:

"*The confidentiality regime cannot and must not be informed by nothing more than a subjective desire to keep names and figures and other material out of the public domain, unless that desire is supported by a clearly and specifically articulated reason why the release of this material will cause harm.*"

I stress "will", because there was the exchange between you, Madam, and my learned friend about: well, is it enough to say it might cause harm? And I certainly say, no, it's not, it has to be shown it will cause harm and that's what it says here:

"Unless that reason can be articulated clearly and specifically, and the need for confidentiality maintained, if necessary, supported by evidence, and the harm identified is a material one, then the material cannot and should not continue to be confidential in the proceedings."

The fact is, without any need for compunction, other PCRs and other funders have not been so coy. In *Trucks*, where there are two PCRs, both PCRs have disclosed all aspects of their funding arrangements, including all ATE premiums, deposit and contingent, not only within a confidentiality ring but in the public domain as well. That's also true of the two PCRs in the *FX* cartel proceedings, *O'Higgins* and *Evans*. Both of those have made full disclosure, not only within but outside

a confidentiality ring, of every aspect of their funding arrangements.

Even if it's said: well, that's in the context of a carriage dispute, the clear fact is that neither of those PCRs thought that the sky would fall in if they did so.

Since we are only talking about disclosure within a confidentiality ring, no questions should arise of Hausfeld's or the funder's business interests being harmed vis-à-vis their competitors in the market. I do say that's pretty far-fetched in any event but there's going to be no competitor of the funder within the ring, there's going to be no competitor of the ATE insurers within the ring. My learned friend referred to matters not wanting to be known to the market but the market is not in the confidentiality ring.

There is only other one firm of solicitors within the confidentiality ring, being those instructing me. So it's not enough just -- to articulate these vague and unparticularised assertions of concern, if it's going to be said that there is a real problem with, for example, my instructing solicitors knowing something about Hausfeld's arrangements then it needs to be articulated in greater detail and with more particularity than has been done to date.

Finally, Madam, before I move on to the remaining specific redactions in issue, I just want to deal with the submission that what we are seeking to do is relitigate *Kent*. I do say that's a misplaced submission. Google is not a party to *Kent*, it's not seeking to relitigate anything. What my clients are asking is for a differently constituted Tribunal to reach different conclusions on some issues, on the basis of different arguments, and that is a perfectly proper position to adopt.

THE CHAIRMAN: What is your position? I raised it with Ms Kreisberger. What is your position about how persuasive an authority we ought to consider *Kent* to be?

MR CARPENTER: It's persuasive in the sense that it is a decision of another Tribunal on much the same issues. It may be that the correct approach is essentially that which is taken to judicial comity in the High Court. One could perhaps split hairs endlessly as to what precisely the test is. But of course, even when one looks at, for example, judicial comity in the High Court, one sees in the cases on ATE disclosure, different views being taken by different Tribunals on that issue.

So this certainly isn't an appeal against the *Kent* decision, however much my learned friend might like to frame it in those terms. If you take the view, Madam, that notwithstanding *Kent*, that on the basis of the arguments that I put forward on the points that you do actually need to decide, that insofar as *Kent* touches on those issues, you prefer to take a different approach, then, in my submission, you are entitled to do so.

THE CHAIRMAN: Thank you.

MR CARPENTER: The first disputed point now, that I think I need to get into, is the deposit premium. I do this not by reference to the ATE but by reference to the litigation budget because it is the budget which is the justification for disclosure.

Now, there's no dispute between the parties that a PCR is under an obligation to provide a costs budget, and my simple submission is this is not, in reality, a budget, this is a single number. That single number is the number that appears in the box next to "Total Funded Amount", and for this part of my submissions, it is probably helpful if you don't already, to have the budget open. It's page 93 of the hearing bundle.

THE CHAIRMAN: I think we looked at the amended one, just for consistency for the referencing, the supplemental bundle.

MR CARPENTER: I have got the original one as an A3 hard copy, which is

enormously easier to read. The only difference between the two is the correction of whether contingent premiums are included or not. So if you don't mind, Madam, I am going to keep working from my A3 version at page 93 but there is no material difference for these purposes, if anyone is looking at the revised version.

THE CHAIRMAN: Thank you.

MR CARPENTER: I don't take any issue with my learned friend's description of what is in this document. What I do take issue with is what its significance is for these purposes. My submission is, actually, the only meaningful number in this document for these purposes is the £11.29 million-odd, which appears next to the words "Total Funded Amount".

I will make good that submission. The ordinary understanding of the word "budget", I would submit, is that it implies some kind of breakdown, a breakdown by category of expenditure and a breakdown by time.

That is purportedly what this document shows. I submit that what it must also imply is that the breakdown is of sums which the PCR is actually going to have to pay because that is the purpose of the budget. It's to show what the PCR is going to have to fund over the course of the proceedings. Whilst it looks to all the world as if we have some kind of breakdown here, actually these figures are meaningless because in respect of all of the lawyers, Hausfeld and the counsel team, the figures which are in this document are not sums which the funder will have to pay. They do not contribute to the total funding figure.

So as my learned friend perfectly accurately explained, that figure of £16.4 million-odd, that is the total of all of the numbers in the table at the top of the page, but that is not the total of the funding which the funder is going to provide. That is the amount, as my learned friend said, which would be sought from the defendants

in the event that the claim succeeds. But because the solicitors and counsel are on discounted CFAs, there is a difference between that number and the amount of their fees which the funder actually has to fund. We don't know what is payable under those discounted fees, as the case goes along.

All we know is that Ms Coll has £11.3 million of funding, in total, out of which she must pay the discounted fees of the solicitors and counsel, other disbursements and the deposit premiums. You cannot break that figure down by category of expenditure beyond the non-counsel disbursements which we can presume are going to be the same either way. Beyond that, you cannot break the figure down between categories of expenditure, and you can't break it down by phase.

The inability to break it down by phase is very significant because, as my learned friend explained, and she showed you paragraph 5.2 of the litigation funding agreement, the funding is limited by phase. Ms Coll doesn't have £11.3 million to do what she likes with. She's got X pounds for phase one, Y pounds for phase two and so on. And those limitations are baked into her funding arrangements. She cannot spend more than the limit for a phase, without the funder agreeing, at its absolute discretion, that she can do so.

We simply do not know what those figures are. We simply do not know, for any phase in this budget, what the funding available for that phase actually is.

All we know is the total funding.

A significant factor in that being the case is the fact that the ATE deposit premiums have been redacted. Now, my first point on the lifting of those redactions is that it is fundamentally not consistent with this being a budget. To redact anything in it, let alone something which is clearly a key component of the expenditure; it's clearly relevant. The redaction of the deposit premiums is qualitatively no different from if Ms Coll had redacted an entire phase from the budget or

redacted the whole of the disbursements. I am sure she would not, in those circumstances, be saying, "well this is a budget you can rely on"; of course she wouldn't. But it's no different here. This is a key part of what she is looking to fund, it is a key part of the budget.

Now my learned friend asked, rhetorically, the question: well, how would it help us to know what those deposit premiums are? Well, leaving aside the point I have just made, that they are simply just part of the budget so we should see them, with knowledge of those premiums, what we can do is work out how the budget breaks down between phases, because we can strip out the disbursements and we can assign what is left, proportionally, to what we know are going to be the full costs payable under the various CFAs.

Now, what we would be left with then would still be far from fully informative. It wouldn't allow us to break that down further in a precise way between Hausfeld on the one hand and counsel on the other, but we are trying to be proportionate. It would take us a long way towards understanding what funding is actually available to Ms Coll, for which phases of the proceedings.

THE CHAIRMAN: Just pausing there, how does the solicitors' excess clause work in this context then? Because it's not quite right, is it, to say that if she spends the money up to the discounted rate, then the funder has to agree to continue to fund it. I think the clause 7.6 point is that, actually, the solicitors would then be required to carry on funding it if the work needed to be done.

MR CARPENTER: Well there is an element, and we accept we are not now going to know how large it is, above the budget, which is in relation to solicitors' fees -- it is only solicitors' fees. So if there's an overspend on disbursements, whether it be counsel or other disbursements, that is not at Hausfeld's risk. In that situation, if that meant that a phase limit was going to be breached, the funder

would have an absolute discretion under paragraph 5.7 of the LFA, whether to grant the additional funding for those extra costs.

So the excess provision is a buffer which only relates to Hausfeld's own fees. When that buffer is exhausted, there would presumably then be a conversation with the funder about what further funding might be needed and that would be, again, at the funder's absolute discretion under paragraph 5.7.

PROFESSOR WATERSON: Can I come back to you on that? You are giving the barristers full fees, whatever happens, but in the spreadsheet, three of the four barristers are on a CFA agreement.

MR CARPENTER: Yes, our understanding was that all of them were on some form of discounted CFA. So the difficulty with not knowing what funding is available by phase or breaking it down between the various categories of expenditure, applies equally to counsel.

PROFESSOR WATERSON: I thought you said it would all come out of the solicitors but ...

MR CARPENTER: If you're talking about the excess provision, the excess provision only relates to Hausfeld's own fees. Hausfeld are not being asked, in anything we've seen, to risk their own remuneration for an overspend that doesn't relate to their fees. So if the experts turn out to be more expensive than expected, only the funder is going to be looked to for that. If counsel's discounted fees are more than expected, only the funder is going to be looked to for that.

I hope that answers the question.

PROFESSOR WATERSON: Yes, I think so.

MR FRAZER: Just before you resume, Mr Carpenter, I just want to ask you a question in relation to the point you were making slightly earlier. Is it your argument that nothing can be redacted from a budget because that would prevent

a breakdown in the way in which you have explained to us, so that in principle, unless you can break down by phase to the detail required in your submissions, that simply would render it not a budget in your terms, and therefore impermissible? Is that what you are arguing?

MR CARPENTER: I certainly say that about this budget, yes.

MR FRAZER: This budget in particular because of the way it's been constructed, or how does this differ from other budgets in which a redaction would be possible?

MR CARPENTER: I am just wary of making generalised submissions without, perhaps, being able to conceive of what might be the circumstances in another case. The key point I make about this is all of the detail in this document is entirely spurious because it gives the impression of being a useful breakdown of what the funding is but it's not that at all. Because the redaction of the deposit premiums means that the only number that we can take usefully from this document is the total of £11.3 million.

PROFESSOR WATERSON: So, just to come back on that again, the point that Mr Frazer made -- just by way of an example: if, at the foot of each phase, a total figure was given, would that meet your objection?

MR CARPENTER: Absolutely it would. Because it would give us the total funding for that phase. Now that would necessarily have to exclude the deposit premiums. If there were another line at the bottom of the upper table which said "total" and then "funded total", we would have no difficulty with that because that would then show us what is actually available for what you might call real work in each phase, and it would show us what was available for real work in total and the deposit premiums would then go on top and the total of all of that would then be the £11.3 million, which is the figure that we can see here. So that would lead us to the same point by a different route.

PROFESSOR WATERSON: I am just trying to explore what, in your mind, constitutes a budget.

MR CARPENTER: It has to involve a breakdown, it has to be more than a total number. My fundamental submission is that a single total number is not a budget. That's not what the Rules and the Guide envisage. They envisage a useful breakdown. And that's particularly so when we know that Ms Coll's funding is limited by phase. As I said, she doesn't just have a pot of £11.3 million, she has a certain amount for this and a certain amount for that and this does not tell the Tribunal what she has for this and what she has for that. It's fundamentally not a useful document for the Tribunal. It doesn't do what Ms Coll needs this document to do for the Tribunal to be satisfied of the matters in Rule 78.

PROFESSOR WATERSON: Thank you.

MR CARPENTER: So that's what I wanted to say about relevance. I then need to address the confidentiality and alleged practical advantage points which are made against me. Firstly, in relation to the premiums per se, and, secondly, in relation to what we might be able to infer about the level of the deferred fees.

As far as the premiums are concerned, there is a lot more art than science that goes into this, when it comes to underwriting these sorts of policies. And I obviously also have to be wary of giving evidence, and I am sure I will be stopped if anybody thinks that I am straying into that territory. But what we do know is that we have five underwriters of this policy, taking different slices of the liability, each of which will have made their own underwriting decision.

THE CHAIRMAN: Can I just pause there? Where do I get that from, Mr Carpenter?

MR CARPENTER: The number of underwriters comes from the policy itself. So at the end of the policy -- it begins at ... I am just turning it up. It's tab 8 and it

begins at page 88. What you will see from page 88 onwards, that and the next four pages, is for each of the individual participating insurers, what their own individual participation is and what their own individual deposit and contingent premiums are, each of which have been redacted.

THE CHAIRMAN: So just pausing there, they're redacted. When you're asking for the deposit premium, you're asking for an overall figure, not these individual figures here for each underwriter?

MR CARPENTER: Yes, that's right, Madam, we have not sought to have these individual per insurer figures revealed. That's why I say I make this submission by reference to the budget, not by reference to the ATE.

THE CHAIRMAN: Thank you.

MR CARPENTER: But the important point is we have five participating insurers, each of which will have made their own underwriting decision, contributing to the total and that in itself is an unpromising position from which to submit that we could infer anything about how this premium has been calculated.

My learned friend also addressed you generally on the factors which go into underwriting an ATE premium. These are commonly understood and are referred to in various authorities that have dealt with the amount of ATE premiums in ordinary litigation when they were recoverable, so it's certainly not giving evidence to tell you, Madam, that it's well understood that, obviously, the merits is a factor in that, but only one factor. Other factors will be, for example, the amount that the insurer is paying in respect of brokerage, what its own other costs are, what profit it's looking to make.

My learned friend said these are all market standard. I am not sure what she means by that. She is certainly not in a position to say and there's certainly no evidence that these are matters which do not vary from one insurer to another. They are

bound to. These are competing commercial entities who have their own costs, their own profit they are looking to make, their own overheads. So those are key factors in the calculation of the premium.

Another important factor in the calculation of the overall premium will be how it's split between the deposit and contingent elements and then other much less scientific factors will be basic things like capacity and market positioning. Is this a line of business that the insurer is looking to get into or looking to get out of? That's obviously going to affect its pricing. How much capacity does the insurer have? If they don't have much capacity, would they rather devote it to this case or to a different case?

These are all factors which go into the art of underwriting, so even if we knew the entire premium, even if we knew the deposit element and the contingent element, there's no way we could reverse engineer that to say: ah ha, this underwriter over here thinks that this is a case with 67 percent prospects. We couldn't do anything like that and we are not asking to see the whole premium, we are only asking to see the deposit premium.

My learned friend expressed the concern in relation to the deposit premium: well, if it's very large, it might show that the insurers are very worried about this, and if I may say so, Madam, you asked the pertinent question: effectively, how are we to know whether it's large or not? Large compared to what? I do say, well, you can't know how large it is without knowing what the contingent element is, because what matters is the split of the total premium between the deposit element and the contingent element.

Now the contingent element itself may be very large so there may be nothing to be inferred from the split and even if it wasn't, that may indicate simply an insurer which would prefer to have greater certainty, perhaps, of a smaller premium,

rather than waiting to receive a larger premium. There may well be, for example, a cash-flow element here because, of course, the contingent premium will be paid, if it is ever paid, much further down the line.

So you simply can't undertake the task which it's suggested we might be able to undertake, and then use, somehow, to our tactical advantage of knowing how concerned or unconcerned these insurers are about this. It's just not a realistic proposition.

Moving on then to what we might be able to infer about the deferred elements. We do accept, indeed we say, that if we know the deposit premium, then we certainly can calculate at a global level what the amount of the lawyers', as an entire category's, fees that are being deferred, is.

We say that's a point in our favour. We can't discern what any individual member of the group, whether it be Hausfeld or any individual barrister, might think about their appetite for risk.

My learned friend says: well, actually, on the contrary, this is a key point for Ms Coll because it's the broad average that matters. And that just cannot be right. It may well be that different members of the team are deferring different proportions of their fees. It may be that somebody is deferring 50 percent, somebody is deferring 25 percent. It's very unlikely that that reflects different views of the merits of the case on the part of those two people, or entities. What it's much more likely to represent is a different attitude to the value of work in progress, a different attitude to the benefit of certainty of payment versus what you might have to wait for contingently down the line. Some people prefer certainty of payment, some people are happy to wait for the prospect of receiving more.

Fundamentally, this will be the result of a commercial negotiation between the lawyers

on the one hand and the funder on the other. It may well be that the lawyers would have loved nothing more than to have been paid in full throughout and to have had no contingent or deferred element to their fees, and it was the funder that insisted that they defer some of their fees. We simply don't know. There's no way of knowing. There's nothing useful that we can infer from knowing what those figures are on that broad global basis.

Even if there was something, even if there was something vaguely useful that we might be able to take from that, the fundamental point here is that we are in the territory of a balancing exercise. This isn't privileged territory.

If the alternative to revelation of the deposit premiums is an essentially uninformative budget which one can't really call a budget, then in my submission, the balance clearly favours disclosure.

THE CHAIRMAN: Mr Carpenter, do you say it's relevant for you to know, or so that you can make submissions to us at the application, what the element of deferred consideration is? Because the deferred consideration is only payable once we have made our decision and the result is known, the PCR is successful. Do you say it's important for you to know that bit? It may follow you can work that out, but is it important for you to know the deferred consideration?

MR CARPENTER: We don't particularly look to know it. The fact that we will discover it is put forward by Ms Coll as a reason not to demand sight of the deposit premium. We don't particularly look to find that out. What it does allow us to do is work out the phase-by-phase budget and that is actually important, that is an important consideration. How much funding Ms Coll has on a phase-by-phase basis is significant and we might well make submissions on that in due course. It's very unlikely we are going to be making submissions on the

deferred element per se, but that's not per se what we're trying to find out. That's what Ms Coll says we will find out if we know the deposit premiums. And she is concerned about that and it's those concerns which I submit are misplaced.

THE CHAIRMAN: Thank you.

MR CARPENTER: That's all I wanted to say about the premiums and I will move on then to the priorities deed.

I agree with my learned friend what this document is likely to show. That's common ground. It will deal with payment out of the undistributed damages in accordance with a waterfall which will be set out in that document.

Now, before I come on to relevance, we simply do not understand how that could be a confidential document. It essentially just says who gets paid in what order. We do not understand how disclosure within a confidentiality ring could be in the slightest bit harmful to anybody on Ms Coll's side.

Madam, when you pressed my learned friend on that, the only answer she could really give was: well, we don't want the market to know what various people's appetite for this, that and the other is, but, as I have already said, the market is not going to see this. She did not, I would say, give you a reason why there should be any concern on Ms Coll's part about disclosure of this document into a confidentiality ring.

As for the reasons why it should be disclosed, firstly, it is a part of the LFA, which is fundamentally a relevant document, and in accordance with my general submission that, in principle, everything in that document is relevant, then this appendix to it falls within that submission.

But also, in terms of relevance, it has to be kept in mind that this is a document which governs a central aspect of the opt-out regime, namely payment of all these

parties who are looking to benefit from these proceedings out of the undistributed damages. The submission that it is just not a relevant document, is, I would say, a surprising one.

It could give rise to issues that are going to be material to the CPO application. Because the order of payment could give rise to issues of conflict or other concerns because, depending on where particular parties appear in the order of payment, and what they are looking to receive, there may be inappropriate incentives not to maximise recovery of damages, there may be inappropriate incentives not to maximise distribution of damages. For example, whoever is first in the waterfall may have a commercial incentive not to pursue recovery of more than is necessary to make them whole.

Anybody later in the waterfall may have an interest in not maximising distribution. Now, it may be that in the end, this doesn't come to anything. It may be that it's a point we take, it's a point we don't take, but at this stage, what we're considering is should we be allowed to see the material that would enable us to consider whether to raise the point at all. And to shut it off in that way, right at the outset, before anyone can consider it at all, is in my submission, inappropriate.

But there's another angle to this, which is what my learned friend actually addressed as our first reason for seeking sight of the priorities deed, and it does appear, with respect to her, that she had misunderstood the point that we were making.

In summary -- and then I will make this good -- in summary, Ms Coll is relying on the priorities deed in order to meet some substantive points that we have taken on the terms of her ATE insurance, which are in themselves inappropriate. If she is relying on this document to cure what certainly appear to be inappropriate terms, then she is plainly going to have to disclose it and she should do that

now, so that we can take it into account in formulating the CPO response.

To make that good, may I show you, Madam, three clauses of the ATE policy that give rise to the concern. So we are back in tab 8 of the hearing bundle and the first clause is 3.1.8, which appears on page 68. There are three clauses that I need to show you in total, all of which raise variations on the same point. So I'll illustrate that first of all by reference to 3.1.8. You will see if you start at 3.1 at the top of the page, if you have that, that this is what the insured agrees to do and agrees to instruct the representative to do. The insured is obviously Ms Coll and the representative is Hausfeld. And under 3.1.8, she agrees to instruct Hausfeld to:

"... *hold all sums recovered from the Opponent, other than interim recoveries of the Insured's own Costs, subject to a trust for the Insured's liability to the Insurer for the Premium or the proportion payable by the Insured in accordance with the Priorities Deed and with clause 5.4 below.*"

What we say is objectionable about that and is going to lead to real problems down the line if these terms remain as they are, is that what -- Hausfeld are required to hold on trust is all sums recovered from the opponent, not -- this is the key point -- the sums out of which these entities can actually be paid, the undistributed damages.

So you may recall, Madam, before the short adjournment, my learned friend took you to the definition of stakeholder proceeds.

THE CHAIRMAN: Yes.

MR CARPENTER: That definition hasn't been carried across here. We have a real problem here, because Hausfeld are being required to hold on trust, sums which Ms Coll cannot give them instructions to hold on trust. There is no way they can hold on trust everything that is recovered inter partes, that is simply

not consistent with the Rules, it's not consistent with how this regime works.

In fact, a very similar issue arose with the litigation funding agreement in *Merricks* and the funder had to go away and rewrite the agreement to make sure that it caught the right sums. Because the funding agreement in *Merricks* also required things to be done with sums that the lawyers would have no right to handle in that way. We have that again here.

What we see is, again, the same point arising in clause 3.16, which is on page 72.

And the general effect of clauses 3.16.1 and 3.16.2 is to give the insurer first call out of, again, all sums recovered, for anything that it's paid out under the policy. But those are terms that it's going to be impossible for Ms Coll to comply with because she does not have the use of all sums that are recovered.

Then we see it over the page -- this is the final reference in clause 5.4 on page 73 -- we see that in relation to the premium, the contingent premium -- and again, we see that Ms Coll is promising to instruct Hausfeld to hold all sums recovered from the opponent to pay the contingent premium. Again, that is a clause which it will be impossible for her to comply with. It's simply inappropriate in opt-out proceedings.

Now, those points were put by those instructing me to Hausfeld in a letter on 7 December of last year, which I will show you if I may, at tab 21 of the hearing bundle, page 140. You will see there's a heading, "ATE Insurance", towards the top of the page and in the middle of the page a numbered paragraph 3 and although there was a mistake in naming clause 3.1.9 rather than 8, you'll see in those three lines that that point is put to Hausfeld and it says "*These clauses should be amended*."

The response came from Hausfeld in a letter of 23 December, which is tab 27, and the relevant part at page 176.

THE CHAIRMAN: Sorry, could I have the reference again?

MR CARPENTER: I am sorry, Madam. 176, tab --

THE CHAIRMAN: 176, thank you.

MR CARPENTER: Paragraph 16, towards the bottom of the page. They pick up that we've referred to the wrong clause. Okay, fair enough, but then in the final sentence they write:

"*Clauses 3.16.1 and 5.4 are expressly '[s]ubject to the terms of the Priorities Deed' which, by definition, only applies to Stakeholder Proceeds (as defined by the LFA).*"

So Ms Coll's answer to the point that we raise is to rely on the terms of the priorities deed. Now, we don't know anything about what's in that priorities deed, we certainly don't know that it only applies to stakeholder proceeds. And indeed, Madam, you put that very point to my learned friend this morning and she told you what she understood the situation to be, but we need to be able to see that for ourselves. And there can be no question of trying to, save what are plainly inappropriate provisions in her ATE policy, without disclosing that document.

So even if that's the basis on which you might be satisfied that this is a document we should see, in terms of the timing, it is something that it would be much better for us to see now -- the point is clearly live, it's out there in the correspondence -- so that we can take it into account when we formulate our CPO response, rather than to have to simply repeat what we have already said in the response and then get a reply that says: oh, well, we rely on the priorities deed and then at that point have to say: well, give us the priorities deed then. It makes much more sense simply to let us have it now.

Madam, unless you have any questions arising out of that, I intend to move on now to the success fees.

THE CHAIRMAN: I don't know if my fellow panel members have anything? No, I think we can move on, thank you.

MR CARPENTER: I am grateful. The framework for this is that the CFAs are fee agreements which are relied upon by Ms Coll to demonstrate that she fulfils the requirements of Rule 78 and prima facie should be considered by the Tribunal. The fee agreement -- and those are the words used in the Guide -- that refers to the CFA. My learned friend made her submissions on the basis that, somehow, the success fees could be hived off as some sort of separate fee agreement. The provision for the success fees is simply a term in, a provision in, the CFAs. The relevant agreements are the CFAs.

If that's something to which the Tribunal should have regard, then it's something that we should be able to see.

And it is something which could give rise to concern. This has nothing to do with funding Ms Coll's own costs. That was, I think, the basis on which my learned friend made her submissions. They were directed at the wrong target. We don't say this has anything to do with funding of Ms Coll's own costs. The potential concern here is of conflicts which might arise when it comes to distribution of damages, in the knowledge that the success fee will only be paid out of undistributed damages. My learned friend said: well there's no difficulty with CFAs, there are no conflicts in CFAs. CFAs are replete with conflicts and you may know, Madam, when they were made lawful, there was a very great deal of concern about the conflicts which might arise from the use of CFAs between lawyers and their clients because suddenly the lawyers have an interest in the outcome, which they didn't have before, under traditional funding arrangements. It may be in the lawyers' interests to accept a particular offer which may not be as much as the client might be able to achieve if they fought

the case for a bit longer. So we all know that CFAs are full of conflicts of interest, they are just conflicts which we have learned to live with and we manage them. What this creates is an added conflict on top of those which already exist in the general run of things.

Again, I am not going to put my submission too high and I am not making any imprecations against Hausfeld and their professional obligations, it is just that it's a feature of this regime and as a feature of this regime, it's something we should know about.

The answer to the point can't be: well, payments out of undistributed damages are subject to the scrutiny of the Tribunal because the Tribunal only becomes involved under the structure of the Rules once the time for distributing damages is over. So any order disposing of the proceedings will set a time in which class members can claim their damages. It's only when that process is over that the class representative, as she will be by then, if she is, comes back and says: right, we've got this pot left over and we would now like to pay the funder out of it, we would like to pay the insurer out of it and we would like to pay Hausfeld out of it.

Now, in terms of the concern that we articulate, that horse has bolted. So the ability to scrutinise payments once you know what the undistributed damages are, can't help you with a concern about how maximal the distribution will be before that.

THE CHAIRMAN: Mr Waterson has a question.

PROFESSOR WATERSON: Could I just raise a point: is this more a question of the publicity plan than -- to be taken at this stage? In other words, we scrutinise the publicity plan and comment on the publicity plan, and if that seems appropriate, then that will gather, hopefully, the right number of people who are

keen to come forward.

MR CARPENTER: Yes, that's certainly one element of it but if one knows the numbers, one has to be realistic, one has to operate in the real world here. We can envisage a case in which the amounts that had to be paid out of the undistributed damages to the funder, to the other parties who had an interest in them, were sufficiently high that when compared to the level of damages actually expected, you could see that, actually, there wasn't very much room for damages to be distributed before that starts impacting on the returns that these parties are actually going to make.

So, yes, one could have, in principle, an adequate distribution plan but one also has to operate in the real world, where there will be commercial pressures in other directions. It may be that in the end, again, it doesn't amount to very much. All we are asking for is the information so that we can put forward a fully reasoned case if there's one to be made.

THE CHAIRMAN: Mr Carpenter, I do think it's implicit in your submission that you assume that Hausfeld won't do their job properly.

MR CARPENTER: I am not in a position to make that submission. I am not instructed to make that submission.

THE CHAIRMAN: Thank you.

MR CARPENTER: Looking at the confidentiality side of this, of course I accept that there is a greater connection between the success fee and an appreciation of the merits than there is in other areas. Of course I accept that.

But I don't accept that there is a direct correlation. I certainly don't accept that you can reason from: well, the success fee is this, to: well, therefore, they think the prospects of success are this.

I submit that you're not assisted here by what the regime used to be in ordinary

litigation, where, yes, you had to tell people you had a CFA but you didn't have to tell them what the success fee was, because the issues were quite different. It's a point I've already made, I do not want to labour the point. It would never have been relevant in those proceedings to know; in these proceedings, it is relevant to know, for the reasons that I have given.

Madam, those are my submissions on the redaction points.

Now, I am entirely in your hands as to whether it's convenient for me to go on to deal with the Vannin witness statement which is effectively my application or whether you would prefer to hear my learned friend in reply on the redaction points first.

THE CHAIRMAN: I think it might be appropriate to hear from you on the further information because I think you're right, that is something you are specifically asking for and then my learned friend is quite -- I think more properly considered to be defending that application for further information, so if we do it that way round.

MR CARPENTER: Yes. The headline point which I hope is clear from our skeleton argument, is that what we are asking for is something which the PCR in Kent, Dr Kent, who is instructing the same solicitors, at least broadly the same counsel team and is using, most importantly, the same funder, has already agreed to provide. So we were rather hoping that given that it's been provided in those proceedings, what will be largely the same statement might be agreed to be provided to us. The slightly unhelpful, half-hearted position adopted in Ms Coll's skeleton argument is: well, we'll provide a statement if the Tribunal thinks it would be helpful. So clearly I do have to persuade you that it would be helpful.

But it is a statement which, in large part, will already exist and will have been served already in those other proceedings.

The point, Madam, is this: the funder in this case is a Jersey entity called Vannin Capital but it's expressed in what, to an English lawyer, looks slightly unusual terms. If one turns to the front page of the LFA -- which is tab 7, the first page behind tab 7, which is 29 if anyone wants to go straight to the page --

you will see there that the counterparty to this agreement is described as "*Vannin Capital PCC for and on behalf of Project Pontac PC.*"

Now, Vannin is a Jersey company, so there are no published accounts. We know nothing about the state of its finances. It's not at all obvious what is meant by "*for and on behalf of*". We know nothing about the relationship between Vannin and Project Pontac or the assets that are available to either of them.

There is nothing in Ms Coll's witness statement about this. I don't propose to turn it up, there's simply nothing to see there. Commonly in these cases, one sees, with the claim form a witness statement from the funder, but we don't have that in these proceedings.

So there is nothing before the Tribunal to explain what the relationship between these two entities is and what the assets are that are available to either of them. So those instructing me wrote to Hausfeld on 7 December, in the same letter that you have already seen -- if we can go back to that but to a different part of it. It's tab 21 again, but this time page 138.

THE CHAIRMAN: Yes.

MR CARPENTER: You will see at the bottom of the page there's a heading there, "*The LFA*" -- it might be easiest if I just invite the members of the Tribunal to read the paragraph at the bottom of that page and then the two paragraphs at the top of the next page.

THE CHAIRMAN: Yes, we'll do that.

MR CARPENTER: Thank you.

(Pause)

THE CHAIRMAN: Yes, thank you.

MR CARPENTER: The response then is also in the letter from Hausfeld, which would be 23 December which we looked at earlier, so that's back in tab 27. Again, this time page 175. It's paragraphs 5 and 6 there, and, again, it may be easiest just to invite you, Madam, just to read those two paragraphs.

THE CHAIRMAN: Certainly.

(Pause)

Yes, thank you.

MR CARPENTER: So that is all the material we have. It appears to be the case that Project Pontac is a sort of company within a company. This is clearly some Jersey peculiarity; it may well be that Project Pontac's assets are ring-fenced from Vannin's general assets but that is simply what I can infer from what I have read because I am certainly not a Jersey lawyer. And it says nothing about the capital available to Project Pontac or Vannin more generally, it says nothing about the revenue streams that are available to them.

So what we seek, given that it goes to a crucial aspect of the Rule 78 requirement, is a witness statement addressing Project Pontac's ability to fund these proceedings. That is what was agreed to be given in Kent in respect of the equivalent cell, Project Greve, in those proceedings.

But there's also another aspect of this that doesn't seem to have been given any prominence in the Kent proceedings that we also raise now.

That is the question of the relationship between the funding available in this case and the funding available in other similar cases, because we know that Vannin is funding Kent. We know that Vannin is funding equivalent proceedings against Google on the one hand and Apple on the other in Australia. And there may be

others. A very relevant question to ask, we would say, is: are these proceedings all drawing from the same pot of funding or do they have ring-fenced funding?

Now, the first time that we were told anything about that was in Ms Coll's skeleton argument for today. What appears there actually gives us more concern than we had when we didn't know anything. Can I ask you, Madam, to find paragraph 44.3 -- I don't know if you have this in the bundle or have it separately. I don't actually have a bundle reference ...

THE CHAIRMAN: I have a hard copy.

PROFESSOR WATERSON: I have a hard copy of this.

MR CARPENTER: Thank you. The first point I draw attention to is the last line of internal page 15, at the bottom of this page, where this paragraph begins, because it refers to proceedings being "*funded by Vannin, in the [UK], Australia or any other jurisdiction*." So the first question that that obviously gives rise to is: are there proceedings in another jurisdiction? Are there more than even the ones that we know about?

Then it goes on:

"*The funding of Ms Coll's proposed action is not linked to the funding of any other cases against Google or Apple in any other jurisdiction. As to cases in this jurisdiction, it is public information that Vannin is also funding the Kent proceedings. There is no requirement for Vannin to transfer funds between the Kent proceedings and these proceedings. The PCR in each action could request the agreement of the PCR in the other action and Funder to transfer to it unused sums in a Phase Costs Limit (as defined in the LFA); but the PCRs and Funder have absolute discretion to refuse any such request and the PCRs must always act in the best interests of their own class members.*"

That appears to be raising arrangements that there is no sign of in the LFA. If that is right, what appears to be said there is that funding is only available for an overspend in one claim, if there's been an underspend in the other claim. So there's a sort of symbiotic relationship between the funding for Ms Coll and the funding available to Dr Kent. What they seem to be saying here is if there's an unused sum for Dr Kent in a phase, Ms Coll could seek to have that allocated to her. But what happens if there's an overspend in both claims? If that is the only basis on which additional funding -- and we all know that budgets get exceeded. So if, in fact --

MR FRAZER: Sorry to interrupt. Does it really say that? As I am reading it, it simply says you can actually ask for a transfer from one fund to another if there's an agreement of the PCR. It doesn't actually say those are the only circumstances in which you can fund an excess and I am just wondering how this differs from any other litigation funder that might be funding several litigations contemporaneously, as would necessarily be the case in the real world.

MR CARPENTER: Well, my first answer to that is this is what we want to know. Just tell us what the position is. It's not ideal that we are trying to divine the situation from what has been put in a skeleton argument. This is why we want it in a witness statement. We want to hear it from Vannin themselves. But to come on to the specifics of your question, this is unusual because one would assume, looking at the LFA, that Vannin has access, generally, to funds which could be made available, which it could use to fund an overspend. One wouldn't assume there was any link, necessarily, between the funding of one case and the funding of another. There is in the LFA a discretion to fund an overspend and they can exercise that discretion or not.

What this seems to be doing, for the first time, is making a link between the two. Now,

how far that link goes, we don't know, that's what we want to know. But on the face of it -- on the face of it, there is some sort of tie between an underspend in one case and ability to fund an overspend in another. It may be, were we to get a proper statement, it would say: well, no, that's not the whole story, there's more to it than this. Where does this come from? As I said, this does not appear in the LFA, so this is important information which we need and at the moment, which we don't have.

All we are asking for is a witness statement, a witness statement which Dr Kent was happy to provide in the other proceedings and was ordered to provide in those proceedings by 7 January, so that statement must already be in circulation. If that statement didn't address this issue of ring-fencing or linkage of funding, well, then there's a little bit more work to do to add that but really not a lot. And given that this is crucial information going to Ms Coll's ability to fund her way through these proceedings, we submit it's information which is going to have to be provided and now is the right time to provide it, the same argument was made in *Kent*, because we can then take it into account when preparing our CPO response.

In terms of date, it may just be convenient to mention now so that my learned friend can address everything in the round --

THE CHAIRMAN: Can I just ask one further question before we get on to the practicalities of date. I might be misremembering but is there a link -- so if you underspend on one of the phases, does that underspend roll forward to fund later phases? Is that how it works?

MR CARPENTER: Automatically, I believe not. If one looks at the interaction of paragraphs 5.2 and 5.7 in the LFA -- it may actually be helpful to turn this up so we're looking at the right provisions. It's tab 7, pages 38 to 39.

THE CHAIRMAN: I'm sorry, could I have the page reference again?

MR CARPENTER: 38 and 39. 5.2, as my learned friend showed you earlier, that is where the phase-by-phase limit comes from. And 5.7 simply gives the funder an absolute discretion to increase any phase costs limit. So prima facie, if in phase five there's a £100,000 underspend, that doesn't mean that Ms Coll then has £100,000 extra to spend in phase six. It would be entirely up to the funder whether to let her have that funding or not.

THE CHAIRMAN: Yes.

MR CARPENTER: Which could be said to be another reason, going back to the deposit premiums, why it's so important to be able to break down the funding phase by phase.

THE CHAIRMAN: Thank you. You were going to refer to a date?

MR CARPENTER: Yes, I was just going to give you, Madam, our revised date. In light of the date we have now agreed for the CPO response which is 14 February, we would ask for the statement two weeks before that, which would be 31 January or two weeks from today.

THE CHAIRMAN: Thank you.

MR CARPENTER: Thank you, Madam. Unless there's anything I can assist the Tribunal with, those are my submissions.

THE CHAIRMAN: I am looking at my panel members. Are there any further issues either of you would like to raise? Thank you, Mr Carpenter.

Yes, Ms Kreisberger?

MS KREISBERGER: Hopefully I am off mute now.

THE CHAIRMAN: Yes, you are.

MS KREISBERGER: Sorry, that wasn't controlled by me. I wondered if now might be a convenient moment for a brief transcriber break?

THE CHAIRMAN: Yes, that does sound convenient. Thank you for reminding me. We will rise for five minutes, until 2:55.

MS KREISBERGER: I am grateful.

(2.49 pm)

(A short break)

(2.55 pm)

THE CHAIRMAN: Thank you. Yes, Ms Kreisberger.

Reply submissions by MS KREISBERGER

MS KREISBERGER: Thank you, Madam. I've got a number of points to deal with on redactions, and I will come back to the funder's statement at the end, if I may.

THE CHAIRMAN: Yes.

MS KREISBERGER: Broadly, I am going to follow the approach that I took at the outset, which I think Mr Carpenter has followed, in terms of structure. So I'm going to say a few words on overall approach, the test and then turn to the categories -- we have the litigation budget, the ATE premia, deferred amounts and success fees, are what's left on our shopping list, now that 7.6 has gone. I will say a word about 7.6 though as well.

THE CHAIRMAN: Yes.

MS KREISBERGER: So, first point on the list is, Madam, coming back to you on the approach which should be taken to *Kent*. I am grateful for the indication that you have received the authority that we've circulated on this. That's *Tuke v Hood* from 2020, a judgment of Mr Justice Jacobs and it's a case concerning dishonest assistance, and I won't get into the complexities of that, but you see the substantive context at paragraph 149 of that case at page 21 and following. But in substance, a series of High Court judgments were relied on by one side. These

are High Court authorities which were relied on before the High Court, before Mr Justice Jacobs, and you see that -- I think it's paragraph 162 and following, which cites three High Court authorities: Lewison J, Christopher Clarke J and then the relevant finding, Madam, is over the page, page 24, paragraph 168.

The judge said:

"*I approach the present argument on the basis that, as a matter of judicial comity, I should follow the decision of another judge of first instance, unless I am convinced that the judgment is wrong ...*"

And he cites two authorities there, including a Supreme Court authority from Lord Neuberger:

"*So far as the High Court is concerned [Lord Neuberger said], puisne judges are not technically bound by decisions of their peers but they should generally follow a decision of a court of co-ordinate jurisdiction, unless there is powerful reason for not doing so.*"

So that's the test. *Kent* applies unless, in your judgment, there's a powerful reason for not doing so. You'll see here, Mr Justice Jacobs went on to follow those authorities.

Now, here, not only is there no powerful reason for not doing so, there is a particularly powerful reason for following the ordinary approach. Unusually, you have here a ruling from the Tribunal, very recently given, in the last few weeks, at the end of last year, in respect of a claim brought by the identical legal team, both Hausfeld and counsel, in relation to an equivalent set of funding docs, with equivalent material redacted from those documents, and the underlying case -- that is the competition case -- is substantively similar. And, of course, we're operating in precisely the framework on which the Tribunal relied, that's a CPO framework, and how the applicable legal principles on privilege,

strategic sensitivity, commercial sensitivity, ought to apply within the context of that framework.

So, Madam, my submission is it would be quite extraordinary to depart from the approach set out in *Kent* in your judgment.

THE CHAIRMAN: Thank you.

MS KREISBERGER: My second point, staying with overall approach, is to turn to the *BGL* ruling and I am grateful to you for bringing that to our attention. Now, Madam, you will be more familiar than anyone with the substance of the issue that arose in *BGL*, but, broadly, it concerned the confidentiality, or anonymity, of parties, third parties, who gave commercially sensitive and/or competitively sensitive information to the CMA, in response to requests for information by the CMA. And the CMA had agreed to withhold that information. You will be familiar with the provision in the judgment, that it explains that a subjective desire to keep names and figures out, in other words redacted, is not enough. That's a perfectly sensible proposition, of course, as articulated by THE CHAIRMAN. He said that any reason for withholding information needs to be articulated clearly and specifically, and the particular issue which arose before you there was the need to cross-examine a witness, as I understand it, on that information.

Apart from observing that this is a very different context, there is nothing in the *BGL* ruling that causes difficulties for your assessment here, or runs counter to the principal authority of *Kent*.

Here, you have a very clear framework for making your assessment, which is: is the material relevant? If it's privileged, it must be withheld. Otherwise, is it sensitive, tactically or commercially? And, if so, you have to exercise your discretion in balancing those various considerations.

Now, we are fully on all fours with THE CHAIRMAN's concerns, as expressed in *BGL*, in that very different context, which is why Ms Coll has disclosed a very large amount of information and has just made a few small redactions where material is sensitive and could cause harm, in that it could give the other side a tactical advantage -- I will come back to that.

I do hope, Madam, that the concerns on Ms Coll's part have been clearly and specifically articulated and so are in line with the spirit of the *BGL* judgment.

Madam, just to finish on that point, you pressed me on whether you need to be satisfied that sensitive material will cause harm or whether a risk is sufficient. Just on that point, I don't think we need to turn it up, but for your note, at paragraph 23 of the *Excalibur* case, which is at page 110 of the bundle, what Mr Justice Popplewell said there was -- it's halfway down paragraph 23, so it's tab 8 of the authorities bundle, for your note:

"*If and insofar as the disclosure of the funding arrangements would or might give the other side an indication of the advice […] it would be covered by legal advice privilege.*"

I am making the same point in relation to tactical sensitivity. So it's "*would or might*" is the correct test; that's the threshold. Because one can never answer a higher threshold or a more positive formulation by virtue of the fact that the sensitive document should be withheld.

THE CHAIRMAN: Thank you.

MS KREISBERGER: Then, staying with overall approach, Madam, Mr Carpenter relied heavily on the *Gutmann* transcript, and he took you to that transcript. But *Gutmann* does not assist Mr Carpenter's position. I've taken you to the relevant passages, they are set out in *Kent*, most conveniently, at paragraph 21, but this can be followed through to the transcript in *Gutmann*, which is in the bundle.

But if I just turn *Kent* up at -- again, I'm sure you know this by now -- tab 13. It's page 284 of the bundle. Paragraph 21. The ex-President, Mr Justice Roth, said that the premiums were obviously, obviously, confidential, as they will betray an assessment of risk and, more generally, he suggested that such provisions disclose the risk assessment and can be properly kept confidential. And the current President agreed with that in *O'Higgins*.

So *Gutmann* does not assist Google. We rely on it heavily.

I would like to correct another point on authorities, which is at tab 18 of the authorities bundle -- this is the excerpt from Hollander which Mr Carpenter took you to, paragraph 26-07 at page 575. He took you to the section on why the editors of Hollander think there are real problems in giving disclosure in ATE policy, but he didn't give you the full passage, and the section he didn't read says:

"*The terms [of the ATE policy] may well also give some indication of, or opportunity to infer the nature of the legal advice received. It is therefore likely that parties will seek disclosure of ATE policies for tactical reasons under the guise of needing the information of cases for management purposes.*"

I know you have the point, that I am not pressing legal advice privilege because we rely on *Kent*, but the underlying point is the same. It may be that it goes too far to say a premium tells you what the legal advice is, it discloses legal advice, but it gives an indication of merits assessment, and that's why it's sensitive. So, again, this provision relied on by Google actually supports Ms Coll's position.

THE CHAIRMAN: I think the issue that arises under that paragraph you have just read though, is that "*under the guise of needing the information of cases for management purposes*". Because here, it's not case management purposes, it is actually the Tribunal's determination of the application for certification that's in issue, so it's actually the substantive matter in the case rather than a case

management matter.

MS KREISBERGER: I fully accept that and I will come back to that on relevance. As you know, Ms Coll's position is it's not relevant. But why I'm drawing this to your attention is that the editors of Hollander consider that the terms of an ATE policy do reveal the merits assessment, and that's why I draw your attention to it. And it's important, given that Mr Carpenter took you to it, that you have the full effect of that passage.

So it's in relation to the sensitivity point, tactical sensitivity, and I'll come back to that on insurance premia. I'll develop this point, if I may, Madam.

THE CHAIRMAN: Yes.

MS KREISBERGER: The next point on my list is the litigation budget. Now, Mr Carpenter told you, and I'm quoting him, that all of the content of the budget is entirely spurious. That's an extreme position because I've shown you that the litigation budget gives you the hourly breakdown by fee earner. Now, let me develop why the litigation budget, as disclosed, is highly informative in relation to the questions which arise for determination on certification.

Let me take it in stages.

Mr Carpenter said it doesn't tell you the sums which the funder will pay, and my response to that is that is not a question to which you need to know the answer. He said you can't even break that down by phase.

Mr Carpenter hasn't explained why this information would assist him. Let me be very clear. He wants to see the deposit premium, and once he's got hold of the deposit premium, he can work out, can reverse engineer, how much funding there is for legal costs and disbursements. He can work out that global figure simply by deducting the amount of the deposit premium from the £11.29 million.

He cannot at that stage work out what is funded for each phase, and he hasn't asked

for that. So the position is he's accepted he doesn't need to know what is funded for each phase.

What the deposit premium will give him is the overall funded amount for legal costs and disbursements. And to that we say: why does that help him at all? As the Tribunal held in *Kent*, you don't need to know what is funded in relation to each phase. Equally, it's not informative to know how much risk the lawyers take on in relation to each phase. What is informative -- and therefore, it's wrong to describe this budget as entirely spurious -- what is highly informative is the hourly breakdown. So you've got time costs, essentially. Lawyers' hours, shall we call it, for every phase.

So when the Tribunal asks itself, is this budget sufficient and appropriate for these proceedings, it knows exactly how many hours are budgeted for each of the lawyers in each phase. It has that information. All that it doesn't know is how much risk is the lawyer taking on for each phase, and that's not relevant to the assessment, and that's specifically upheld in *Kent*.

As for what is funded in relation to each phase, well, Mr Carpenter hasn't asked for it, so it seems to be common ground that that doesn't assist the analysis.

Mr Carpenter also said he wanted to know what the funded amount was because that will tell him what is the real work being done. I'm afraid I don't follow the submission, with respect to my learned friend. The real work being done, as one of the people doing that real work, are the hours. That feels pretty real. That's the real work, and the extent to which each lawyer bears risk of being paid, that doesn't tell you about how much work they're doing, it's simply what goes into the bank balance.

So I am unable to follow that submission, I'm afraid. The work is the hours.

THE CHAIRMAN: You say we can see all those hours from the budget?

MS KREISBERGER: Yes, you can see all those hours from the budget. And I should just observe that there's nothing in the CAT Rules that prescribes what should be in the budget. Mr Carpenter came close to suggesting that there's some pro forma budget which we've failed to comply with. On the contrary, this is actually a very detailed budget and the CPR budget would be in this form as well, so it's a standard approach. But as I say, the key point is that you've got the hourly breakdown.

The separate question, as I said in opening, which arises, is: what's the total funded amount? And you've got that too.

I was going to move on then to the specific redactions.

Dealing with the deposit premium first, and I would like, Madam, to answer a question you put to me this morning. What is it about the premia that are tactically sensitive? Now, insurers give consideration, of course, before extending ATE cover, and they take legal advice before they do so, as one would assume to be the case. And they can take that advice from the law firm, so in this case, Hausfeld, and they may also take independent advice, or some combination of one or other or both.

So they take that advice before they agree to extend cover and set their premia. The amount of the deposit premium is useful information. Let me posit a highly hypothetical example to make the point.

In this case, not hypothetically, as you know, there is £10 million of cover in place. Let's hypothesise that the deposit premium across the five insurers is £10 million. That would be pretty revealing of what the insurer thought about the case. Compare that to a deposit premium of £500,000 for £10 million worth of cover. These will give strong indications of the assessment of risk, conducted by the insurer, based on the legal advice, which they will have

sought before engaging in the agreement.

So that is the nature. I will come back to the five insurer point in a moment, if I may, but that is the nature of the sensitivity. Madam, you put to me: well, look, everyone has brought this case, so does this tell you anything more about merits than the mere fact that the case has got off the ground? So my specific submission on that is, yes, it can tell you an awful lot, depending on, particularly, premium relative -- deposit premium specifically, relative to level of cover.

Now, you also asked me quite correctly, if I can paraphrase your question: well, what mischief could be made of this information by Google? What's the problem? Let me posit one problem, one way in which they could gain the system to the disadvantage of the class, the consumers, and that is by making a low ball settlement offer. So in other words, this knowledge could really frame the settlement negotiations, particularly in two respects: quantum, amount of any settlement offer, and timing. And that could give rise to prejudice to the class.

One is speculating but one is necessarily dealing in risk and risk profile here.

So there is material potential harm.

THE CHAIRMAN: Just explain to me how the timing issue arises?

MS KREISBERGER: Well, broadly, when they might make a settlement offer to ensure maximum spend, for instance. So if Google saw that the premium was £10 million, hypothetically, they know that the insurer has taken a dim view, they have given the cover but they wanted their money at the outset, they could say: well, we'll low ball it, we'll get the class rep to incur maximum costs before we make any settlement. So, again, one is hypothesising, but just to make these points concrete, these can have real impacts on settlement.

THE CHAIRMAN: Yes.

MS KREISBERGER: My submission is a risk is sufficient to skew matters, and it's not

a risk that should be taken, where the interests of the class are at stake. An opponent should not have this kind of information, particularly in a CPO brought on behalf of a class of consumers.

Madam, that was addressing the point which you raised. I then wanted to turn to the point which Mr Carpenter raised, which is that: well, don't worry, because whatever the general position, here there are five insurers, so it's not going to tell you anything. That's also incorrect. Let me set that out for you.

The five insurers' positions are all aligned, which means, in summary, they each pay a share of the adverse costs, and in exchange, or cover -- rather, a share of the adverse costs -- and in exchange, they would receive the same share of the premium. So I can illustrate that with numbers but the point is that the risk analysis is effectively the same across all the five insurers because the same deal had been struck in terms of risk rewards.

So it's not right to say that there are five separate deals. So, as I say, just to illustrate it with some figures, again hypothetical. Suppose there are three insurers -- here we have five but suppose there are three insurers. Each have a 10 percent share. They pay 10 percent of the adverse costs. They each receive 10 percent of the deposit and contingent premia. Or you might have, again hypothetically, two insurers. Each have a 35 percent share. They pay 35 percent of adverse costs, they receive 35 percent of the premia.

So it's correct to look at the global, the cumulative, deposit premium, the overall amount, and that will give insight into the view on merits, which in turn, gives a tactical advantage in the way that I've set out.

THE CHAIRMAN: Thank you.

MS KREISBERGER: Then, if I may move to deferred fees, and I want it to be -- I think you have well in mind, Madam, that the sensitivity around disclosing the deposit

premium is not just the deposit premium per se, but also because it reveals the deferred element.

THE CHAIRMAN: Yes.

MS KREISBERGER: But I just want to be absolutely clear as to my submission. Precisely the same points apply in relation to the deferred fees as applied to the deposit premium, as I have just set out.

So it reveals an assessment of merits and appetite for risk which goes well beyond the mere bringing of the claim. It's risk and reward.

And the tactical, the precise tactical advantage which could be derived by the other side is in relation to settlement pressure, which is brought to bear, thereby disadvantaging, potentially disadvantaging, the class, not advancing the interests of the class.

Mr Carpenter said how much you dice and slice, as it were, between individuals, that would be revealing, but just giving the overall amount is not revealing. I hope you have my submission on that. How you dice and slice a deferred element between members of the team is not revealing. That's just internal structuring of the deferred element. It doesn't tell you about overall risk appetite, it's just internal structuring. It's the deferred number that matters.

THE CHAIRMAN: Yes, we have that point, thank you.

MS KREISBERGER: I am grateful. I was then going to turn to the priorities deed, and the question there of relevance and sensitivity. Now, Mr Carpenter said, in relation to this point, at the outset of his submissions, these allocations could be at the expense of class members. That is incorrect, that is wrong. I hope I've been clear that by the time you get to the waterfall, the class members' interests have been satisfied, extinguished, if you like. It is just not right to say that payments under the waterfall are capable of prejudicing the class. They're

not, because of the way in which stakeholder proceeds are defined and the way in which the Rules themselves provide for payments out of undistributed damages, ie, post-distribution.

Now, in relation to the priorities deed, Mr Carpenter made a number of points. First of all, on the sensitivity of the priorities deed, we do maintain that it could inform the approach to settlement on the other side. So we do maintain that it is, potentially, tactically sensitive. Now, of course, one is speculating, but for instance, it would tell Google who's last in the queue to be paid, and that might inform their approach to settlement. It's not necessarily appropriate now to speculate in all the ways that could be exploited, because you have my submission that it's the risk of exploitation in the context of settlement, so we do say it's tactically sensitive.

Mr Carpenter then said -- and, sorry, just on sensitivity, as I addressed you in opening, it is also commercially sensitive vis-à-vis other law firms. RPC is a law firm, a market participant, as I described at the outset. So the priorities deed is commercially sensitive vis-à-vis RPC and so creates problems if it's disclosed into the ring. Commercial sensitivity will not have been protected in that case.

But in any event, it's not of any relevance to Google or the Tribunal, for the reasons I have set out, because of the order of events.

Now, Mr Carpenter, staying with this point that this priorities deed might work at the expense of class members, and you might think Google is not best placed to make submissions on the best interests of class members, but nonetheless, it is not right to say that it could give rise to inappropriate incentives, I think that was the formulation. Hausfeld will, of course, act in line with its professional obligations, and Ms Coll's obligations to advance the best interests of the class. This is subject to stringent, stringent, supervision by the Tribunal and shouldn't

form any part of your assessment, with respect.

Then, Mr Carpenter took you to three clauses in the LFA, and I think it would be helpful just to turn them up. That was clause 3.18 -- my mistake, it's the ATE policy, so we are in tab 8. His overriding submission was that Hausfeld has relied on the priorities deed and so they're entitled to see it.

With respect, Madam, this mischaracterises the position. Clauses 3.18, which Mr Carpenter took you to, and 5.4 -- I will give you the right one ... and 3.16. Just so you have it for your note. They each refer to the priorities deed. What they say is that --

THE CHAIRMAN: I think it's 3.16.1, isn't it, just for the transcript?

MS KREISBERGER: 3.16.1, that's correct. I'm grateful, Madam. 3.16.1 and 5.4.

THE CHAIRMAN: Yes.

MS KREISBERGER: Each of those refer to the priorities deed. Now, the priorities deed, as I've explained, governs the waterfall in relation to cost orders and amounts paid, as authorised by the Tribunal, out of undistributed damages. And that's the definition of stakeholder proceeds.

So each of these clauses, and I would invite the Tribunal to read them at leisure, as it were, but their terms are very clear. They govern the handling of stakeholder proceeds. That is why each of them refers to being in accordance with the priorities deed, subject to the terms of the priorities deed.

I gave the court an assurance today that that is the position and that the priorities deed relates to stakeholder proceeds, as defined in the LFA. That was in my submissions this morning.

THE CHAIRMAN: Yes.

MS KREISBERGER: We also set that out in the skeleton. I believe it's in the correspondence as well. So Google have the benefit of those three sets of

assurances, but it's still not happy.

THE CHAIRMAN: I think they say: we hear what you say but we cannot see it for ourselves.

MS KREISBERGER: The suggestion that they are entitled to see the entirety of the priorities deed, because they won't accept what we say is the case, is an extraordinary position to take, Madam.

THE CHAIRMAN: Does Appendix 3 refer to stakeholder proceeds then? I mean, is it possible to produce a redacted version of it that discloses that wording?

MS KREISBERGER: Let me just take instructions. I think it can be done quite simply by providing a couple of clauses in the priorities deed, which I can tell you, Madam, will make good the point that the priorities deed relates to stakeholder proceeds, as required by the Rules, essentially. This is not free form drafting. Let me come back to you on whether we can disclose a couple of provisions -- I think that could be done. Somewhat unfortunate that one is being asked to do that, but if that would cut through this issue, then we will look to see if that's possible.

THE CHAIRMAN: Yes, I think it might be helpful if you could let us know if it was because it might assist our determination as to whether or not the entire part needs to be redacted.

(Pause)

MS KREISBERGER: It can be done into the ring. It can be done. So there's some consternation that the request is being made, despite the assurances given, but it can be done by unredacting a provision or two. Possibly one -- one or two provisions. So that will be done into the ring, simply to make good that point.

THE CHAIRMAN: Thank you, that's helpful. Obviously, we have asked you to think on your feet but if you want to think about how that can effectively be done, you

may need a little bit of time to do that.

MS KREISBERGER: I would be grateful for that, Madam. I think it will be, simply: here is a clause into the ring, once the ring has been ordered.

THE CHAIRMAN: Thank you.

MS KREISBERGER: The final point on the shopping list of Google's demands are success fees. One might observe, Madam, that these are rather far-fetched submissions when one gets to this category.

Google seem to be alleging potential malpractice here.

THE CHAIRMAN: I don't think the Tribunal will take that particularly as realistic.

MS KREISBERGER: I'm grateful for that. I won't then labour the point. So I would simply observe success fees are not something to which the CAT need have regard to in its assessment. I think you have that point. And Google is really seeking to overturn an established approach. That established approach is that CFAs are explicitly sanctioned under the regime. They are lawful and regarded as advantageous for pursuing the objectives of the CPO regime. By contrast, DBAs are not lawful. And as I pointed out in opening, there's a statutory cap, so there's a framework for what can be done in relation to CFAs. Just picking up on Professor Waterson's point, the plan for distribution is carefully scrutinised by the Tribunal, so all the protections are in place.

Just for your note, the relevant provision which goes to Professor Waterson's point is Rule 78(3)(c)(i).

THE CHAIRMAN: Thank you.

(Pause)

MS KREISBERGER: That was all I was proposing to say on the redactions, unless the Tribunal has any further questions for me.

MR FRAZER: Nothing from me, thank you.

THE CHAIRMAN: Nothing from me either, and Mr Waterson is shaking his head.

MS KREISBERGER: I am reminded that I think I should just set out Ms Coll's position on the point that Mr Carpenter made, somewhat surprisingly, in relation to clause 7.6, which I had understood was settled. He raised a concern that this hadn't been unredacted sooner.

Now, let me just say this: the concern on the part of Ms Coll was that it is -- now, I need to be a little careful because this has gone into the ring, so I can't refer to the terms ... let me just say this -- I am just -- thank you for your indulgence, I just want to be careful that I don't stray into inappropriate territory.

Let me just say this: Google raised the question of seeing the remaining wording rather than just the threshold, on 7 January, in correspondence. So this has not been in play for a long time, so it's inappropriate for Mr Carpenter to take a point on this.

There is a genuine concern that this information is sensitive, and that is why it's being disclosed into the confidentiality ring. So we would reject any criticism from Google as to the way in which this has been done. That's for the record.

THE CHAIRMAN: Yes.

MS KREISBERGER: Then that does bring me to the funder's statement. That can be done, that will be done. I understand that Google have asked for the statement by 31 January. They have changed their position, I should say. I had been led to believe they wanted it by 7 February, I think it was, 6(b) of Google's draft order, but, as I've explained, and been at some pains to explain, this case is on all fours with the *Kent* ruling in all relevant respects, and, as Mr Carpenter commented, it's been done in *Kent*, we can do it here. So it will be done by 31 January.

THE CHAIRMAN: Thank you.

MS KREISBERGER: At the same time, a statement will be prepared from Hausfeld, which will deal with the 44.3 issue. That's the linkage point. Mr Carpenter took you to -- yes, it's 44.3 of our skeleton, page 17 at tab 2. The summary there is an accurate summary of the position. Mr Carpenter's wasn't, but I think you have the point. But we will address the source of that in evidence from Hausfeld.

So that will address Google's point on that.

THE CHAIRMAN: So that deals with the further information, and that's the same date, 31 January?

MS KREISBERGER: Same date, 31 January, yes.

THE CHAIRMAN: Thank you, that's very helpful.

So I think it won't come as a surprise to say that we'll be reserving our judgment on the issue of confidentiality, so we'll have to reflect that in the terms of the draft order.

I am very grateful for the detailed submissions that you've made and we will give it due consideration, very conscious of the fact we haven't got an awful lot of time before you will want to know our decision, so we will try and get to it as soon as we can.

Shall we turn to the terms of the draft order. Is there anything else I need to be thinking about as a matter of substance, rather than the draft order?

MS KREISBERGER: Not from my side, Madam.

MR HOLMES: Nor from us, Madam.

THE CHAIRMAN: Thank you. So if we've all got the draft order -- and thank you very much for agreeing this because it has made things a lot more straightforward -- I am just looking through the recitals ...

I don't think I need to make it subject to a form of order, but in relation to the

confidentiality request, I am quite conscious that I said -- I had slightly pressed you on this, in particular in relation to the redactions that you were going to unredact, or at least tell us -- or tell the Proposed Defendants the content of Appendix 3. So I am wondering about the best way of doing that. Whether it might be better to do it in terms of a letter to the Tribunal, either setting out the provisions which you feel that can be seen in relation to Appendix 3, or an unredacted version, which I anticipate would have quite a lot of black in it but might have some clauses unredacted. I'm wondering what sort of timeframe you would need to do that, because that may inform our deliberations on the confidentiality ruling.

MS KREISBERGER: I think taking it in stages, the first point is we need to set up the confidentiality ring because disclosure of that would be into the ring.

THE CHAIRMAN: I think we can probably make an order in short order on that because we have looked at the proposed confidentiality ring and I don't think any of us have an issue with it. So I think the Tribunal would be content to make an order in those terms and we could do that quickly.

MS KREISBERGER: And then on that basis, I don't think there's a timing issue, as it were. We can simply disclose those provisions in the ordinary way into the confidentiality ring, so it will be a document that's essentially redacted, with a provision or two unredacted.

THE CHAIRMAN: So the original appendix will go in with some black -- yes, that's very sensible.

And we need a version of -- is it the litigation funding agreement with the wording of clause 7.6? That will need to be disclosed as well.

I am just being reminded that for the -- the Tribunal will order the confidentiality ring in the terms that are proposed but to formalise the order, we will need it in a Word

version, if that can be arranged.

MS KREISBERGER: Of course.

THE CHAIRMAN: So if you could advise the Tribunal when those two documents, clause 7.6 and the appendix 3, will be disclosed -- or will you provide a copy to the Tribunal?

MS KREISBERGER: I would suggest within 24 hours of the ring being ordered, we could provide those documents.

THE CHAIRMAN: Thank you. So does that deal with the recitals? We can remove the square brackets because we will be reserving our decision, as I have indicated.

MR HOLMES: Madam, sorry to interrupt, can I just check, the other materials that the PCR has agreed to disclose in correspondence, they will also come over, presumably, within 24 hours? I can see my learned friend nodding. Is that right?

MS KREISBERGER: The ...

MR HOLMES: There were a number of unredactions that were offered in correspondence prior to the hearing, which have not yet been disclosed.

MS KREISBERGER: Yes, I can confirm that.

MR HOLMES: I'm grateful.

THE CHAIRMAN: Thank you. So anything else on the recitals? Unless we want -- do we want to put in the further information as an undertaking in the recital? Which is the witness statement dealing with the funding and the 44.3 issue. Would an undertaking be appropriate for that, rather than making an order?

MR HOLMES: For our part, that seems sensible. We could probably confer and come up with some wording for the Tribunal, if that's convenient.

THE CHAIRMAN: Yes, that would be helpful.

MS KREISBERGER: I had in mind that in *Kent*, it was ordered, so we have no objection to it being ordered in this context.

THE CHAIRMAN: Perfect. Then I can ask you to come up with an appropriate form of wording for that then.

MR HOLMES: That's already in our draft order, I think, so it will be easy to carry it across.

THE CHAIRMAN: Thank you. Then there's -- just galloping through the order -- the forum has been dealt with, in paragraph 1, "*CPO […to] be treated as proceedings in England and Wales*", and *"the publication of the CPO Application in accordance with the terms of a notice approved by the Tribunal.*" We have all reviewed the notice and we are content with its terms. I wonder how would we do this? Do we attach the notice to this order?

MR HOLMES: Again, that seems sensible from our perspective. It could simply be an annex or a schedule to the order.

THE CHAIRMAN: Ms Kreisberger is looking concerned.

MS KREISBERGER: That's not the usual approach. We have no particular objection. We are very grateful for your endorsement of that. It's normally simply ordered and the notice is in the bundle, as it were. We are in your hands on that.

THE CHAIRMAN: I find the wording of the order, "*publicise the CPO Application in accordance with the terms of a notice approved by the Tribunal.*" It doesn't say which version is approved, does it, or the date on which it was done?

MR HOLMES: Yes. It seems sensible. We have all seen it, haven't we, and it would be an easy matter to schedule it, to put the matter beyond doubt.

THE CHAIRMAN: Yes, I don't think there's any objection to that course, and forgive me for not realising this wasn't how it's normally done. I don't know if my fellow panel members have any input on that.

MR HOLMES: We don't have any objection.

MR FRAZER: If it's going to be separate, it could be "to be approved", rather than "approved", but otherwise, let's put it in the schedule.

THE CHAIRMAN: Yes, let's schedule it to the order, then everyone knows what the form is. Then the confidentiality ring we've dealt with.

Responses and replies. The timing for that, I think, all works.

The objections ... yes, that gives plenty of time to any potential class members.

And the timetable up to the hearing itself, yes, I think that's all agreeable as well.

So I think we should have covered everything we need to cover today and, as I say, thanks to your efforts over the weekend. The practicalities of actually dealing with the conduct of the hearing and the timetable running up to it, have been actually dealt with.

Is there anything else that we need to deal with today?

MS KREISBERGER: Madam, if I might just take a moment.

THE CHAIRMAN: Yes.

(Pause)

MS KREISBERGER: Madam, nothing further from me.

THE CHAIRMAN: Thank you. So will the parties draw up an order and send it over to --

MS KREISBERGER: We will.

THE CHAIRMAN: And thank you very much for your detailed submissions, very much appreciated. As I say, we will let you have our ruling as soon as we can. I'm grateful. Thank you.

(3.53 pm)

(The CMC concluded)

1

2

3

Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
…	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?