IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1266/7/7/16

Victoria House,
Bloomsbury Place,
London WC1A 2EB

20 January 2017

Before:

THE HONOURABLE MR. JUSTICE ROTH
(President)
PROFESSOR COLIN MAYER CBE
CLARE POTTER

(Sitting as a Tribunal in England and Wales)

BETWEEN:

WALTER HUGH MERRICKS CBE Claimant

- v -

MASTERCARD INCORPORATED & ORS Defendant

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info@beverleynunnery.com

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CPO APPLICATION HEARING

THE PRESIDENT: Yes, Mr. Harris?

MR. HARRIS: Sir, good morning. There is just a short housekeeping point for the Tribunal.

THE PRESIDENT: Yes.

MR. HARRIS: I hope that overnight you received a copy of a short note on VOC and quantum calculation.

THE PRESIDENT: Yes. We got that this morning. Thank you. We have read that. Can you just help us: the figures in the Claim Form which you say are, in fact -- include business card use in the VOC --

MR. HARRIS: Yes?

THE PRESIDENT: -- is that because the publicly available data does not distinguish? Because I thought Mr. Dearman was saying that it did, but I may have misunderstood.

MR. HARRIS: No, well, my understanding of what he said was that it is -- we had thought and always proceeded and hence pleaded that it did not, but he said in evidence, and this is why we checked it and we put in the footnote that, in fact he could not do that on the publicly-available data but of course we anticipate being able to do that with the provision of further data.

THE PRESIDENT: Yes. It said that it -- it just it would be helpful to us, you say it can be done after at CPO, but I think at this stage, just to have some sense of the size of the claim, you say -- refer to that footnote in the decision, which was, of course, across the European Union, is that common ground, Mr. Hoskins, that it is a small fraction of the total?

MR. HOSKINS: I think Mr. Cook is on top of this, I will let him answer the question if that is okay.

MR. COOK: Sir, the data is, in fact, publicly available. The Payment Council report that was used by the experts actually includes a number of sections on commercial cards and purchasing cards.

THE PRESIDENT: Does it isolate the different providers, Mastercard, Visa?

MR. COOK: I believe it does, yes. There is data available to do it. I will look at it overnight. I think it is around the order of 5 per cent or so.

THE PRESIDENT: Yes. About 5 per cent. Yes. That gives us a sense of how much. That is helpful.

MR HARRIS: Sir, just to be clear, we have obviously got that report, we have had a look at it, including with our experts, and it does not break it down sufficiently, but what we are very happy to do is try to, at this stage, if this is what you would like, do the best we can with that, but we have taken the view that it does not break it down sufficiently, and then the figure that

is referred to by Mr. Dearman in evidence was 3 per cent, so in any event whether it is 3 per cent or 5 per cent it is a relatively de minimis --

THE PRESIDENT: Well, it just gives us a sense of what it is. Obviously that was figure in the confidential decision which Mastercard knows, because I think it is redacted in the Commission decision.

MR. HARRIS: Yes, Sir.

Sir, the only other point on the note, of course, as you will appreciate, running through this, is this critical feature of the case that people are overcharged wholly irrespective of whether they have a Mastercard or use a Mastercard, or, indeed, I mean, they can be overcharged paying in cash or by cheque. That is effectively the theme that --

THE PRESIDENT: That is why it is 46 million. Yes.

MR. HARRIS: That is right, but that is why it has to work in the way that we set out in the note and in the Claim Form, so I apprehend that that point is clear.

Sir, I have further hard copies if you would like them on the bench. I am about it hand up in any event the short responsive note on the deceased persons, so I have got five copies of that to hand up. Would you like further hard copies of the VOC note, anybody?

THE PRESIDENT: We have got the VOC note. (Handed).

MR. HARRIS: The deceased note is the one I said that I would produce. This issue is, of course, traversed rather fully already in the written pleadings, so this is simply a response to the additional note of Mr. Hoskins.

THE PRESIDENT: Yes. Well, we will not take time reading that now. We will read it afterwards.

MR. HARRIS: Yes. I am grateful.

Sir, those are the housekeeping points.

THE PRESIDENT: Yes. Thank you very much.

So, Mr. Williams, we are back with you.

SUBMISSIONS BY MR. WILLIAMS (Continued)

MR. WILLIAMS: Yes. Good morning, Mr. President. Just to start with a correction and a footnote, the correction; in our skeleton at paragraph 139(b), we have committed the classic error of managing to --

THE PRESIDENT: Just one minute, let us find it. You have got it open no doubt.

MR. WILLIAMS: C14, page 335.

THE PRESIDENT: We do not have it yet. You know what is coming, at least we hope you do, but we do not. 139, page 334?

MR. WILLIAMS: Yes. We have committed the classic editing error of managing to change a negative to a positive so it should say, "Non-legal costs", not, "Legal costs".

THE PRESIDENT: "Other non-legal costs".

MR. WILLIAMS: It should say, "Non-legal costs", and the footnote which is intended, as footnotes might be expected to be, is for your note, rather than for anything -- for the Tribunal to turn up, I think yesterday there was some discussion between the President and myself about recovering the uplift of funding charges under a DBA, and I said that that was not possible. The reference that makes that clear in the Civil Procedure Rules is Rule 44.18, and the Civil Procedure Rules, of course, in this context, are imported into the CAT by Rule 104.

THE PRESIDENT: Is it 44.1 paragraph 8, or 44.18?

MR. WILLIAMS: 44.18, Sir.

THE PRESIDENT: As so often with these rules you cannot quite understand it without looking at other rules.

MR. WILLIAMS: No, quite.

THE PRESIDENT: In sum, what does it say?

MR. WILLIAMS: To say the parties' recoverable costs will be assessed in accordance with Rule 44.3, that is another way of saying that they will be assessed in the usual way, so they are still assessed on a time-based model, and so you do not simply say, "It was perfectly reasonable in this case for me to agree to my solicitor taking a third of my damages so I want an amount equal to that", you actually still look at the solicitors' time charges, and if one wants to be -- for those that follow the ins and outs of the debate before Sir Rupert Jackson when he was preparing his report, that is what was called, "The Ontario model of litigation funding", but I am certainly not suggesting that we get into that.

THE PRESIDENT: Yes.

MR. WILLIAMS: Perhaps I just have some jealousy as to not, myself, having had any Canadian reference to make, so I am pleased to have found one.

THE PRESIDENT: Yes. Well, we do not want to deprive you of that pleasure, and 44.18.2(b) is just saying that that is a cap, is it?

MR. WILLIAMS: That is a cap.

THE PRESIDENT: So you do it in the ordinary way, but if the ordinary way produces, which is unlikely, something that might be more than the percentage, then it is reduced accordingly.

MR. WILLIAMS: Precisely. It’s a bit of a one-way bet.

THE PRESIDENT: Yes.

MR. WILLIAMS: The position in the context of the funding charge in this case, we say is different and stronger because whilst the uplift on the DBA at least can be characterised as a legal cost because it is a charge made by a solicitor, a charge made by an external funder for the return on its speculation of funds is not, as I submitted yesterday, a legal cost at all, it is collateral and non-legal.

Again, without wanting to get into an excessively close debate about the somewhat arcane principles of costs, but a point that is made against us is to say: well, when the defendant says these things are not recoverable, the defendant is talking about things which are not recoverable between the parties, but there is a distinction between that which is very recoverable as legal costs between the parties, and that which is recoverable as legal costs between solicitor and their own client.

Now, let me say immediately that that is a dichotomy which we entirely accept, and it is a very well-established dichotomy, and a success fee, post LASPO, the 2012 Act, is a typical example of something which is a genuine solicitor and client cost but is not recoverable between the parties. That is the uplift.

THE PRESIDENT: That on a conditional fee.

MR. WILLIAMS: Precisely, Sir.

THE PRESIDENT: On a damages-based agreement the percentage is also recoverable between solicitor and client.

MR. WILLIAMS: Importantly, it is amenable to assessment between us and client. If, as a client, you are not happy with your success fee or you are not happy with your percentage, you can go off to the costs judge under Section 70 of the Solicitors Act, and say, "Will you scrutinise this for reasonableness please", but that, in our submission, that is fundamentally distinct from the charge which is made by an external funder which is speculating its money. That is not a legal cost at all. It is not incurred through the aegis of one's solicitor, and it certainly is not amenable to checking by a costs judge, and if it is -- and if, in trying to create this dichotomy which we respectfully say is a false one, the Applicant maintains it, we ask them to say: do they seriously contend that it is open to somebody who has entered into a third party funding agreement to go off to a costs judge and ask him to check it?

Now, firstly, if Mr. Bacon says one rather suspect his funder, who is sitting at the back of the court, would be extremely unhappy to hear it, and, secondly, it would be a point that was entirely without precedent. In our submission, the fact that whatever is third party charges has

got nothing to do with a solicitor, and it is not subject to checking by a costs judge, says very well that it is not a legal cost.

THE PRESIDENT: Well, it could be assessed on the same way as a damages-based agreement, saying, well, the fact that you are a third party does not mean you should get any more. We now have experience in assessing what solicitors get on contingency, what is a reasonable percentage, and that is what we apply.

MR. WILLIAMS: Well, the short answer to that, Sir, is that it might be subject to assessment if Parliament legislated for it subject to assessment, but as matters stand, a costs judge has no jurisdiction to interfere in a contract between a third party funder --

THE PRESIDENT: It would not be interfering with a contract, he would just be saying under the rules of the -- that apply, this is the amount, because you can only get under section 47(c) the amount that the Tribunal ordered. That is the jurisdiction, in just the same way that if it is a conditional fee they will be doing that is. That gives jurisdiction to decide how much out of damages goes. This is quite separate, it seems to me, from your point about what are costs or expenses. You are now talking about a separate point.

MR. WILLIAMS: Sir, I think the reason for that is that is through the fault of mine that we are at slightly crossed purposes. I was not, in this context, talking about the point I made yesterday about the intrinsic difficulty for a costs judge, or indeed anyone, in making an assessment under 47(c) in this context, but I was talking about a more general point, just asking in general terms, forgetting about 47(c), in any context, can somebody who has an agreement with a funder whereby the funder says in return for supporting this litigation I am taking a cut, whether that be a percentage of damages or it might simply be an interest rate, the funder might charge interest of 50 per cent a year because it is a very high risk speculation, in those circumstances can you, in those circumstances, go off to a costs judge and say, "Costs judge, please check this funding agreement to see what the funder is charging is reasonable", and the answer to that, in my submission, definitively, is that you cannot do that. Costs judges simply have no jurisdiction. I am simply suggesting that that shows very well that what we are talking about here is not a legal cost. That which you incur with a funder is not a legal cost at all, and therefore it is outside the ambit of the definition of, "Cost", in section 47(c), and, indeed, everywhere else, within the CAT rules, the Civil Procedure Rules, or wherever. Now, what I do want to just spend a few moments on is the concern about, well, how, if this is correct, can these actions be funded going forward? Our submission is that section 47(c) works very well to protect representatives from the costs which they incur in the areas where

it was anticipated to operate. Most simply, it clearly enables the representative if the Tribunal so orders, to recoup the usual shortfall between what you recover from your opponent on a standard basis assessment, and what you actually have to pay your solicitor, but key in this context we also say is that it does mitigate the point the President made to me yesterday of the abolition of the ability to recover your success fee and your insurance premium from the other side, because those things clearly are encompassed within section 47(c), and I will be able to show you the CAT rules specifically envisage that, as did the travaux preparatoires. Of course, I showed you yesterday, and I do not ask you to turn it up again, that the consultation paper specifically anticipated CFA plus ATE funding in this context.

CFA plus ATE funding clearly is, in its nature, a legal cost. A success fee, the uplift, the percentage increase, is the solicitor's charge, an ATE premium was rendered a recoverable disbursement by legislation, and although the regime has since been modified, it remains a recoverable disbursement in certain areas like, for example, asbestos claims and defamation claims. In both these areas one does not have the problem of costs judges being unable to assess them, they can assess them because they are legal costs, in the case of the ATE it is a disbursement, and they also have the skill to assess them because of the direct relationship between, for example, the cost of the premium and the amount of the legal costs and the litigation risk.

It is also worth remembering that success fees are quite strictly regulated in a way that litigation funding more generally is not. They are subject to a cap of 100 per cent of the solicitor's basic charges, so in a case such as this where it is anticipated at the moment the solicitor's basic charges will be in the order -- I think it is -- I cannot be too precise about it because the budget of 19-odd million of course includes disbursements as well, but the solicitor's basic charges, let us say that they are 15 million, a 100 per cent success fee therefore means the most that could be recovered is another £15 million, although the solicitor's basic charges will themselves be controlled for reasonableness and proportionality, again by a process of assessment, and the success fee itself is subject to assessment by the costs judge, and when a costs judge assesses a success fee, if it was even theoretically possible for a costs judge to assess the uplift on a funding arrangement, the costs judge is having to make value judgements about, well, what is a reasonable profit for the solicitor to make out of this transactions. The way success fees are assessed is that there is simply a linear relationship between the risk of the solicitor going unpaid and the amount of the success fee that is allowed.

So, for example -- and the whole idea about success fees is that they are supposed to be revenue neutral.

THE PRESIDENT: How are ATE premiums assessed?

MR. WILLIAMS: Well, Sir, as far as ATE premiums are assessed, they are assessed with reference to the exposure of the insurer to the other side's costs. Again, within the expertise of the costs judge, he knows what a reasonable estimate of the other side's costs are, so he can work out what sort of cover you need, and costs judges are also used to assessing what litigation is. They have to --

THE PRESIDENT: Presumably the insurer is incorporating a profit.

MR. WILLIAMS: The insurer incorporates a profit element.

THE PRESIDENT: Why otherwise, why would it do it? It is not revenue neutral.

MR. WILLIAMS: An insurance premium is not revenue neutral, and of course this is precisely one of the reasons why the old regime was found to be very unsatisfactory because -- but, I mean, one of the differences is that ultimately, because most litigation -- it is more of a problem in bespoke litigation, but it is very easy at this judicial level, if I can respectfully say so, to forget the overwhelming majority of litigation in this country takes place in the fast track in the County Court.

THE PRESIDENT: Yes. For those cases you build-up a body of experience but I imagine that for complex cases --

MR. WILLIAMS: Not just a body of experience, Sir, but also a potentially highly competitive market.

THE PRESIDENT: Yes, but there are also complex commercial cases where -- funded with ATE premiums where I imagine it might be a quite difficult exercise to assess what is a reasonable ATE premium.

MR. WILLIAMS: It is very difficult but at least what one can say in that context is one can point to a direct Parliamentary sanction to reverse a hundred years or more of practice to say, "This is a recoverable expense. It is now a recoverable item of legal cost". What I have already suggested yesterday, there is a deafening silence of --

THE PRESIDENT: You have a point that there is no jurisdiction, and it is not covered -- I understand that, but if there were, the fact that it is difficult and it is a new area, and there is not a lot of experience seems to me that cannot stop it.

MR. WILLIAMS: I quite agree that in isolation that would at best be a jury point, but the point I make about the lack of guidance and the difficulty of the exercise is precisely that both of

those things -- I am simply relying on it as fortifying the wider submission that if something so radical had been intended clear language would be used.

THE PRESIDENT: Yes. Well, we have got this point.

MR. WILLIAMS: You have got that point. I entirely accept that if you take the view that Parliament did intend this, then the fact that I could say, well, it puts an awful burden upon the shoulders of the Tribunal, well, that is like a policeman's lot, sometimes the Tribunal's lot might not be a happy one. I accept that.

THE PRESIDENT: Well, the whole collective actions regime, is put --

MR. WILLIAMS: Precisely, so it always is an intense focus upon what is the jurisdiction.

THE PRESIDENT: Yes.

MR. WILLIAMS: And these are simply indicators as to why we say the claimant is unlikely to be right about the existence of the jurisdiction.

THE PRESIDENT: Yes. Well, I understand.

MR. WILLIAMS: Can I just say that so far as -- I do not want to take up to much time -- so far as the recovery at ATE and success fees are concerned, the CAT rules do specifically countenance that those can still be recovered out of undistributed damages, and the source for that is Rule 113 which is at, for those following in the bundle, at page 106 at tab 13 of D1. Now, again, sir, to make a point that you made earlier, this is one of those sort of extremely compressed provisions that one can only really understand if one follows through a chain of cross-references, if one really wanted to do it properly, so I am proposing to short circuit slightly, but what 113 says is that:

"Subject to section 47(c)(viii) of the Act".

Which is the prohibition on DBAs:

" ... and Rule 93.4 ..."

That is the rule which allows the Tribunal to make awards out of undistributed damages:

"The rules on funding arrangements ...(Reading to the words)... before the Tribunal".

As if that was not already an excessive sequence of cross-references, Part 1 of the Courts and Legal Services Act are the provisions that now say that in most litigation you cannot recover success fees and additional insurance premiums between the parties, so the effect of 113 is to generally say you cannot recover these things, but that is expressly said to be subject to it Rule 93.4.

THE PRESIDENT: So Part 2 of the 1990 Act, that brings in the Jackson --

MR. WILLIAMS: Precisely, and just to show you that extremely quickly, not least because it is in the neighbouring tab, if you go backwards to tab 12.

THE PRESIDENT: Yes. We are not in the bundle.

MR. WILLIAMS: I am so sorry Sir, it is D1, tab 12. You will see that these are citations from LASPO, as you have got that jargon, but you will note that what LASPO is here doing, 44.1, it is amending the Courts and Legal Services Act so that is the statute that we have just seen the cross-reference to, and then if we go over the page, when you are ready, you will see that at subsection, the top of the page, it substitutes in the Courts and Legal Services Act a new subsection 6:

"A costs order made in proceedings ...(Reading to the words)... under a CFA".

It is page 78 of the bundle, Sir, if you are looking for it, at the top.

THE PRESIDENT: I see. Yes.

MR. WILLIAMS: So that is inserted into Part 2 of the Courts and Legal Services Act, and then when you are ready, just to move forward to the next subtab, 12A, there is the equivalent -- there is an equivalent substitution which abolishes the recovery of after-the-event insurance premiums in most proceedings. This, happily, is much easier to find because it is at the top of the extract rather than in the middle of it. Sir, one sees that section 46 of that substitutes in the Courts and Legal Services Act a new 58(c) which says:

"A costs order ...(Reading to the words)... by regulations".

So, through that rather tortuous sequence of cross-references, what you will see, Rule 113 provides for is it imports the general rule into the CAT that you can no longer recover these things, insurance premiums and success fees, but it makes a carve-out for Rule 93.4 which is your power to distribute unallocated damages, so the rule is specifically envisaging, in line with the consultation paper, that there can be a distribution in respect of success fee and after-the-event insurance premium, well-established items of costs.

Again, absolutely no signpost here to suggest that other forms of funding cost, even those non-legal in nature, are recoverable.

THE PRESIDENT: Yes.

MR. WILLIAMS: I would also make a point that rests not on an inclusion in the rules but -- in the legislation -- but something which I say is notable by its absence, whilst Parliament, as we have just seen, has recently legislated to say that you cannot recover success fees, you cannot recover after the event premiums, Parliament has not legislated to say you cannot recover the costs of third party funding, and the reason Parliament has not legislated to say that is because

it has never, ever been the case that you can recover third party funding, so legislation to abolish its recovery simply has not been necessary. That, again, in my submission, makes it clear that it is not a species of legal costs.

THE PRESIDENT: Yes.

MR. WILLIAMS: Now, as you will have divined, it is our case that the meaning of, "Costs", in this context is clear, and it does not justify resort to extraneous materials, in particular Hansard. It does not satisfy *Pepper v Heart* but it is the claimant who is referring to some extraneous material, so that it is just the opinion of Professor Mulheron, rather than anything that we would say with the greatest respect to that eminent commentator and (Inaudible) could be described as authoritative in a strict sense, but if one actually does -- if, against us, one takes a view that the matter -- the position -- is obscure, so one can resort to extraneous materials, we do say that the extraneous material that is most clearly on the point is a ministerial statement which is in Bundle D4, but again, we submit it makes it absolutely clear that what Parliament had in mind in this context was allowing the representative to recoup success fees and insurance premiums, no suggestion at all of other funding, so it is Bundle D4, 55(d).

THE PRESIDENT: Page 1628. Is it?

MR. WILLIAMS: Yes, and moving forward, if I may, to 1628V, and in the right-hand column -- this is the committee session from the Consumer Rights Bill and it is here that the amendment which introduced section 47(c) -- what is now 47(c) 5 and 6 was introduced and the Minister, the Parliamentary Undersecretary is Jenny Willot and if one looks on the right-hand side you see Jenny Willot, about a quarter of the way down:

> "I beg to move ...(Reading to the words)... subsection 5(a)".

Well, subsection 5(a) is what is now subsection 6. The note is:

> "It allows the ...(Reading to the words)... representative".

Then, "The Minister says" -- can I just pause whilst the Tribunal reads what the Minister says?

THE PRESIDENT: Yes.

MR. WILLIAMS: We would really just make three points out of this. Firstly, if this is admissible because the court finds there is obscurity in the plain terms of the legislation, this is a statement by a Minister promoting the Bill in respect of an amendment which is made without further debate or dissention, so it is, we would submit, an authoritative indication of Parliament's intentions, and what are their intentions? Firstly, the Minister consistently refers to legal costs, and she talks about success fees and after-the-event insurance premiums,

nothing whatsoever to suggest an expectation that the speculation of funds by a third party funder could be rewarded out of unallocated damages.

THE PRESIDENT: Yes. She says the claimant's costs which could include.

MR. WILLIAMS: Yes. I certainly accept that it does not say it cannot include the costs of third party funding, but again, when one recalls how great a departure that would be from precedent, and in contrast to success fees and ATE, one could at least say, "Well, there is a very well-travelled path here of these things being recoverable costs", a complete silence in terms of something which has never been a recoverable cost at all, in our submission --

THE PRESIDENT: Well, I think you have made that point.

MR. WILLIAMS: I am obliged. I have two short points to make at the end about the adverse costs covering conflict of interest, but just before I leave third party funding I do just want to make this clear if I may; it is not Mastercard's intention to pronounce any sort of anathema against third party funding in the context of opt out group actions, and certainly it is not our case that opt out group actions are stifled if third party funding is not available.

You have seen that CFA and ATE was always specifically envisaged as being the driver of litigation in this area, and we respectfully remind the Tribunal that even in this relatively nascent area of practice, we have already seen a substantial matter financed in the traditional way, the now traditional way, by CFAs and ATE, and that’s the mobility scooters case, and we give a reference, I do not ask you to turn it up, but it is at paragraph 148 of our skeleton and footnote 65 gives a little bit of background on that.

As many in this hearing room know very well, group litigation orders in the High Court have seen many mass claims of a consumer nature, for example relating to defective surgical implants and also claims relating to poor working conditions, claims relating to pollution, those have been brought on a massive scale quite satisfactorily on CFAs plus ATE, and I showed you yesterday the case of *Motto*, you may remember, Lord Neuberger which I told you was the largest cost claim ever, that is a case where the costs were many, many multiples of even those which Quinn Emanuel is proposing, over £100 million, and that was a case that solicitors were willing to bring on a CFA.

We would also ask rhetorically, and we only ask it because the point is put against us, well, if they are right this is strangling prospective actions in their cradle, one only has to ask rhetorically, really, what sort of precedent does the structure of the agreement in this case really set? Because as the funder itself recognises, it is really taking a double jeopardy. It is not taking the usual jeopardy of backing a case and losing, but it also then has to go on, and it

takes the jeopardy of having to persuade this Tribunal to release to it hundreds of millions of pounds, potentially billions of pounds of unclaimed damages, in preference to releasing them to the charity. Now, I accept this funder --

THE PRESIDENT: Well, it is taking the other risk of unclaimed funds.

MR. WILLIAMS: Precisely.

Now, this funder has been extremely bold, as it said, Sir, itself, in taking that risk, but on our side of the court, or our side of the Tribunal, there is at least a scepticism as to really how attractive such an arrangement we set by multiple uncertainties is going to be to other funders, but there it is.

So, Sir, that is why we say the arrangement does not work, and I have been some time on it. It reduces, really, to two propositions, the representative has not incurred anything, but if he has incurred something it is not a legal cost.

Now, the subordinate points, the limit on the fund to cover adverse costs, I do not ask the Tribunal to turn it up because I am exceeding my allocation, and also I think everybody is now familiar with it, it is clause 2.2 of the agreement, there is a cap of £10 million and unlike some of the other provisions within the fund there is no flexibility to reallocate funds to or away from that. It is a ring-fenced solitary fund to meet adverse costs.

Now, Sir, you already, if I can respectfully say so, repeatedly made the point to my learned friend Mr. Harris yesterday about third party disclosure costs, and it is important again, without turning it up, it would be common ground that 2.2 is not just concerned that the £10 million is not just concerned with the costs of my client, it is the costs of the defendant or third parties, so that is the fund from which everything has to be met, and you already have the point, because if I can respectfully say, Sir, because you made it repeatedly, is not just about the cost of applying for the disclosure but it is also the cost of holding the third parties harmless in costs from giving it, and the costs are potentially huge because there may be thousands of merchants and certainly many, many hundreds of thousands --

THE PRESIDENT: Well, they are not envisaging making thousands of third party applications. You might be talking about a dozen or something.

MR. WILLIAMS: Even if there were a dozen the volume of documents in respect of the major retailers, as you know, Sir, could be very large.

Now, in this respect, you, Sir, kept putting a question to Mr. Harris which, if I can respectfully say, Sir, I am not sure that he quite understood. Let me say immediately before he reaches for Thor's axe, that he perhaps did not -- we say respectfully he did not quite understand it, not

because it was above his pay grade but because it was very much below it, which is the minutiae of a cost budget.

Mr. Harris' client's cost budget sets out the costs which his client expects to pay its own advisers. It does not contain any provision for third party costs. If it contained provision for third party costs it would contain provision for my costs and it emphatically does not, so it is not within their budget, and we say that when you add this unbudgeted expense, so what, with the best will in the world and switching from Norse mythology to Greek mythology is that the hugely protean shape of this litigation which seems to have been a developing feast throughout the three days is the court cannot have any confidence that although £10 million is a large sum, that there is sufficient headroom to cover both the reasonable costs of my client if this goes all the way to a contested hearing, and/or the third party costs, and on that basis we say there is not satisfactory provision to cover the defendants' costs.

Clearly, if we have got to this stage of the argument I have already failed on my earlier points, and so this might be the sort of point which you think is not necessarily an absolute before but it is a point that needs revisiting. That is a matter for the Tribunal, but what we do say is in its current form a simple ring-fence, £10 million to recover -- to cover all adverse costs -- mine and third party's -- is insufficient, and certainly, if it is not fatal, the Applicant should be required to show there is provision to meet all of my client's reasonable costs and the reasonable costs of third parties.

That just leaves, lastly, the points we make about conflict. I am going to deal with those very shortly. Firstly, because --

THE PRESIDENT: Well, just pausing there a moment, I understand the point made. Have we had any estimate of what your client says their costs might be?

MR. WILLIAMS: Well, the answer to that is -- I think sums might have, from time to time, been mentioned but you have not had a formal estimate. As we see it, for us to attempt to estimate our costs as this collective action is currently being presented really would be an exercise in blancmange wrestling.

THE PRESIDENT: Yes. It is just because if we are to say, well, it looks -- there is a serious risk that £10 million is not enough, one wants some basis on which to arrive at that conclusion. I mean, is it because we look at the Applicant's budget and say yours should be the same, not the same but of a similar measure, their answer to that is, well, Mastercard has already been involved in a lot of litigation so it has incurred a lot of consideration of pass-through already, whereas they are starting from scratch.

MR. WILLIAMS: Sir, the position of my clients has been that it would not be prudent and potentially prejudicial, as their advisers we felt it potentially prejudicial to our client, Mastercard, to prepare a budget at this stage which could be -- could, in due course, be used to criticise us if exceeded in circumstances where we do not feel that we have any visibility over the ultimate shape of this litigation --

THE PRESIDENT: I fully understand that, sorry to interrupt you, I fully understand but it just makes it slightly difficult to reach a view that -- 10 million, as you say, is a lot of money. Equally, this is a very large -- if it went ahead -- large, complex, wide-ranging litigation, but to reach any view saying, well, that is likely to be inadequate, it is hard to do that without any assistance.

MR. WILLIAMS: I appreciate that you might think this is a side step, but I would say it is inadequate merely in its inflexibility. It is clear that we are here confronted with litigation which is a moveable feast and if the funder wants to make £135 million plus out of it, it jolly well ought to be saying, "We will meet the entirety of the defendants' reasonable costs come what may". It has chosen, instead, to put on an arbitrary 10 million cap, which it has got no idea whether it is satisfactory or not. It does not really seem to have any idea of what its own costs are, but to the extent one can look at it at all, we would say there would be at least some expectation -- you might expect Mastercard's costs as a defendant perhaps to be perhaps slightly lower than the claimant's costs but the claimant's costs are almost double the 10 million. The 10 million is not exclusively ours, it is shared with all the third parties, and we have every reason to suppose, having listened to the submissions over the last few days, that the claimant's costs are going to get higher rather than lower, so we would say on any view the mere inflexibility is what is objectionable.

THE PRESIDENT: Yes. I see.

MR. WILLIAMS: Is that satisfactory, Sir, before I move on?

THE PRESIDENT: I understand that.

MR. WILLIAMS: So far as conflict is concerned, it is dealt with in our skeleton between paragraphs 153 and 160. We recognise it is largely a matter for the Tribunal, and we also have very much in mind a well-known comment of Lord Mustill's that courts may take a measured if not sceptical regard when defendants start expressing concern about the rights of claimants, and we recognise that, but it is really just two points that we flag. We do say here that the arrangement -- I mean, it is potentially an impediment to settlement simply because the sums are so great, and as I showed you yesterday, section 47(c)(vi) is only engaged to

allow the Tribunal to impose an award out of unallocated damages if the matter goes to a contested hearing, and the difficulty may arise where a settlement that is reasonable vis-à-vis the participating claimants, could founder upon the Applicant's contractual obligation to secure the payment of the total investment return out of undistributed damages. It would require Mastercard to agree to potentially a billion pounds or more being deducted from undistributed damages where, as you know, one of the principal incentives for settlement under the opt-out scheme is that if you settle, the undistributed damages can revert to the defendant, and the only other point we make, and it is made at some length in the skeleton and I am not going to flesh it out but I simply say it to remind you, is we also say that there is a disincentive to maximising the distribution of damages because the representative needs to ensure, and uses its best endeavours to ensure, that the funder gets its return, and I think Mr. Harris picked himself up on it on Wednesday because he realised that what he said was not quite right, but it nevertheless escaped him before he could suppress it. He said, "The last thing we want is a massive pot of undistributed damages". Well, with respect, the funder who sits not very far behind him would emphatically disagree with that proposition.

THE PRESIDENT: Well, whether the funder agrees or not, Mr. Harris is speaking for his client.

MR. WILLIAMS: Yes, but his client also has contractual obligations to the funder, and if the funder thinks the litigation is not commercially viable because the undistributed pot is not going to be big enough, the funder can pull the plug.

THE PRESIDENT: Yes. Well, we have got the point.

MR. WILLIAMS: Sir, those are my submissions, unless I can assist the Tribunal further.

THE PRESIDENT: Thank you. I know that we have not been going very long but it might be a sensible moment, logically, to take a break, rather than later on.

(11.16 am) (Short break)

(11.27 am)

THE PRESIDENT: Yes Mr. Bacon?

SUBMISSIONS BY MR. BACON

MR. BACON: May it please you, Sir, Mr. President and the Tribunal members, may I begin with the process of apology for the inconvenience I may have caused in terms of listing -- I am very grateful.

There are two key points with respect, it seems to me, that I need to deal with. These are: the fees that are to be charged by the litigation funders fees, costs, expenses, within the meaning or rubric of either the Act or the 2015 rules, and, secondly, whether they are incurred, and I

will deal very, very briefly with the conflict and quantum points that have been raised, subject to prompts from you, Sir.

Now, the first question, we say plainly that if you were to ask the litigant who has had their claim funded through third party funding where the funder, unlike these cases, takes, say, 30 per cent of their damages, and you ask the litigant, the consumer outside court who has been successful in his or her claim, "What did it cost you", he or she would say, "30 per cent of my damages".

It is not appropriate, with respect to Mr. Williams's submissions, to refer to 18th, 19th century cases in determining the modern question about what it is costing litigants in these proceedings, and I will come to the detail of that in a moment.

Plainly, the costs that are incurred by litigants through either the instruction of lawyers, solicitors, experts, third party funders, are costs on any view. They are plainly, alternatively, fees that are incurred by litigants. It is against that broad background, with respect, that we must consider this new jurisdiction in this court against the background where policy has developed nationally, such that funders are a recognised, and indeed, many will say, crucial player in this field as well as others.

I make -- that brings me on to the short policy point. You were taken by Mr. Williams to one extract of Hansard which, if I may say so, I am not going to ask you to read that bit again but I will ask you to read another one in a moment, but any reading of that we would submit actually supports our case. Sir, you were alive to the fact that the passage refers to the description of possible examples of the nature of the costs that would be recoverable under these provisions. It is not, on any view, excluding the recovery of third party funder costs.

THE PRESIDENT: I can tell you we did not think it was very helpful one way or the other, really.

MR. BACON: In, but the next extract which I ask you to put in the bundle but my learned friend did not refer you to, tab 55 --

THE PRESIDENT: Well, we start, really, with the question of whether we get into Hansard at all, don't we, when looking at the statute?

MR. BACON: We do, but can I just ask you, even if it is *de bene esse*, to just turn to it, Sir? The relevant page is at Volume 4 of 11 --

THE PRESIDENT: Sorry?

MR. BACON: D4, tab 11, and Mr. Williams took you to page 1628V.

THE PRESIDENT: Just a moment. It is tab 55?

MR. BACON: 55D.

THE PRESIDENT: So D4, 55D?
MR. BACON: 4 of 11, 55D.
THE PRESIDENT: At page?
MR. BACON: You were taken to page 1628V --
THE PRESIDENT: Yes.
MR. BACON: -- which was an extract from March 2014.
THE PRESIDENT: Yes.
MR. BACON: Matters developed in the development of the Bill, and in November there was a specific amendment sought to prohibit the use of third party funding in these cases, which is the next --
THE PRESIDENT: 55E?
MR. BACON: Correct. It is page 1628X, where the then Parliamentary Undersecretary for Business and Innovation, Baroness Neville-Rolfe, pointed out that:

> "The amendments to prohibit the use of third party litigation in collective action cases is appropriate ...(Reading to the words)... costs".

THE PRESIDENT: Sorry, I am trying to -- what did you mean by, "Third party litigation"?
MR. BACON: Yes.
THE PRESIDENT: Did she mean --
MR. BACON: Third party litigation funding agreements. It is by reference to the passage above, so we are talking about third party funding agreements. They were seeking to add into the exemptions of the DBA ban, third party funding litigation agreements. Do you see that, Sir, at the top of the page?
THE PRESIDENT: Yes.
MR. BACON: That amendment was rejected.
THE PRESIDENT: So it probably should read, "Use of third party litigation funding in collective action cases".
MR. BACON: Yes, it should do, but it is clearly a reference to third party funding as a concept, so a third party funder.

You see what the response was:

> "Careful thought had been given to it ...(Reading to the words)... ensure redress for consumers".

Now, in my submission, therefore, it is hardly surprising that there is no express -- as Mr. Williams seeks to develop -- inclusion of third party funded costs as being legal costs. The

passage of the Bill demonstrates that Parliament was accepting the need for third party funders involved, it seems to us that necessarily involves the fact that it would cost something. Third party funding is not free, and the promulgation of the subsequent rules accommodates, therefore, the recovery of such costs.

THE PRESIDENT: Yes. We do not have the amendment that was proposed by Baroness Noakes.

MR. BACON: No, but it was an amendment to specifically prohibit the use of funding agreements, third party funding agreements, along the lines that had been sought and secured in respect of DBAs, so it seems to us that is an important matter for you to have regard to, if, as you quite rightly observed, Sir, there is some ambiguity in the language that has been used in the rules, and we say there is not.

So we can put away, for the moment, Volume 4.

The point we make that Mr. Williams sought to contend that because DBAs were outlawed, which involves a charge on the damages recovered, he sought to develop the point yesterday afternoon that it necessarily follows, surely, the same principle would apply to third party funders, but for the reasons I have developed a moment ago that is not a good point, or, indeed, a point that can be made out, given the acceptance by Parliament of the need for third party funders, and the quite separate outlawing of DBAs, but not third party funding costs.

If I may say so, the beauty of the proposals which the Tribunal is considering is that the cohort that the consumers, with whom we are all clearly concerned, retain 100 per cent of their damages. It entirely respects the compensation principle and meets the policy of the Act.

Now, the early observation you made, Sir, yesterday, was that, of course, we are not considering at this point, whether an Order will be made. It is a matter of discretion at the end of the case. The question for you, Sir, is one of jurisdiction.

Now, the authority to which my learned friend appears to place most weight is a case heard in May 1884 called *Chorley*. They place their objection on jurisdiction on that case.

Now that case, I am not going to take you back to it, but the headnote of that case on any reading tells us that it is a case about a solicitor wishing to recover from an opponent to litigation his own time costs in representing himself in litigation. I mean, it has absolutely nothing to do with the jurisdiction of a Tribunal or court in -- over sums that may or may not be deducted from damages. It is just simply irrelevant, and I make the obvious point, it is so obvious it perhaps need not be made, in 1884 litigation funding was not even in its infancy, of the kind that we are now seeing develop.

THE PRESIDENT: Well, of course the facts are utterly different. It was relied on not because of the facts, but because what is the meaning to the statutory phrase, "Costs or expenses".

MR. BACON: Yes.

THE PRESIDENT: That is what we have to interpret, and what was said is that there is -- whether rightly or wrongly I do not know, it is not a field that I have your experience in -- that the interpretation of costs is that what started in *Chorley* has been followed ever since in interpreting the phrase, "Costs", when found in statutory provisions dealing with the jurisdiction to award costs.

MR. BACON: Yes. I appreciate that that was a reason for referring to the authority, but I made the point a moment ago that the statute to which the court was there concerned was a statute about the recovery of interpartes costs in 1884. The rules to which we are concerned, in my submission, with respect, cannot and should not be interpreted by reference to statutory provisions that were in place in the late 19th century. They have to be interpreted against the modern backdrop of this jurisdiction, and, indeed, as I said a moment ago, Parliament's evident intention.

So the case is of no assistance at all. I am going to come to the language used in the rules at the moment, but that is an answer to that.

You see the argument on the meaning of, "Costs", that has been developed, as it was pursued in the skeleton, is about what does, "Costs", mean as between the parties. That is the large part of the argument that has been developed. It is a *Chorley* argument, which is what are the recoverable interpartes rules relating to costs. *Motto* was the other case that was referred to by my learned friend, a case in which the Leigh Day sought to recover from the defendant, Trafigura, the costs incurred by Leigh Day in setting up the conditional fee arrangement, and they were so-called funding costs, they were internal funding costs, so it is about what was recoverable from an opponent by way of costs, not whether it was a cost in the sense in which this Tribunal is concerned, namely a cost that could be deducted from a client's damages.

THE PRESIDENT: Are there not also authorities on solicitor and own client costs?

MR. BACON: No.

THE PRESIDENT: None?

MR. BACON: No. Because there is no question -- well, certainly in *Motto*, for example, if you read the passages that my learned friend took you to and doubtless you will, in fact, Lord Neuberger refused to allow the funding costs on the grounds that the solicitors were not even solicitors of the clients at the time the work was done, as you will see, so there the solicitors

could not charge the clients, but assuming funding work is undertaken by solicitors post-retainer, of course clients could be charged the costs relating to funding. I mean, a very good example --

THE PRESIDENT: In that example, yes. What I am saying is you said these authorities are distinguishable because they deal with interpartes costs. What I am asking you: are there no other cases which have considered -- because there are challenges to solicitors' own costs, of course, as you know, and where clients have said no, that these are not properly recoverable by you from me, I am not your client, and you are entitled to your costs but these are not part of your -- are there not cases which has the meaning of costs whereas it is between solicitor and own client.

MR. BACON: There is a large body of jurisprudence relating to solicitor and client cost disputes.

THE PRESIDENT: Yes.

MR. BACON: There is no authority that I am aware of yet that deals with, and I disagree with my learned friend, with respect, that deals with the charges that a solicitor may make to a client for funding -- putting in place funding arrangements for this kind or for funding the case themselves which is becoming a much more common aspect of this modern society, where solicitors themselves are funding costs, the two examples I can give are that within the CFA regime solicitors charge within the success fee very often a percentage to reflect the funding of the cost, in other words, the delay to the solicitor in receiving their money within the success fee there was a charge for that, and that is an accepted solicitor and client liability, absolutely accepted, not recoverable from the opponent, it was not ever, but it is, indeed, chargeable to a client.

Likewise, if the success fee of a solicitor included the notional costs of funding disbursements, for example, which solicitors are now allowed to do, that would be a charge that would be levied as part of the overall solicitors' fees within the success fee.

THE PRESIDENT: Yes.

MR. BACON: So the notion that we are concerned with here is: can clients be charged funding costs, the answer is absolutely they can. What is new about this is that this regime anticipates that, in our submission, on an interpretation of the rules, the Tribunal being permitted to deduct from damages that have not been collected any costs, fees and expenses, and we say, for the reasons that we have developed, that that must include the funding costs that are associated with funding the case generally, but specifically the litigation funders' fees, subject to the court's ultimate approval as to what is a reasonable amount to recover.

So, now, the Mastercard position just needs to be exposed just for one moment. They, in their arguments, in their response at paragraph 184, you do not need to turn it up but the reference is C115, say that this arrangement that has been put in place is very different to the sort of arrangements we are used to seeing, namely that the funder does take a percentage of the client's damages. That is the traditional, if I may say so -- "Traditional", is probably not the right word given its embryonic nature -- but that is the usual position. They say that in principle the law would permit damages to be deducted by reference to the funding costs, but they say where damages are not collected but are awarded that is not possible that is the essence, that is really what they are saying when you boil it down to its logical argument, and there is no conceivable justification for that difference.

THE PRESIDENT: When you say, "Where damages are collected but not awarded" --

MR. BACON: They are awarded not collected.

THE PRESIDENT: They are awarded --

MR. BACON: They are awarded but not collected.

THE PRESIDENT: Yes.

MR. BACON: What, conceivably, is different? Why cannot a funder be paid out of the damages in those circumstances?

THE PRESIDENT: Where damages are awarded ...

MR. BACON: Which is the position under the Act, under the Rules, damages are awarded as part of the Tribunal's award, a proportion is collected by the due claimant, there is some left over. Those damages, in my submission, plainly can be used to defray the funder's fees.

THE PRESIDENT: Yes. Right.

MR. BACON: Now, the laudable distinction that -- the benefits of the arrangements we have is that the funder gets no part of the distributed damages, as I said in the opening, and you already have this point, Sir, but if all of the damages are distributed, the funder gets nothing.

THE PRESIDENT: Yes.

MR. BACON: It is a structure that has been put in place in accordance with the statutory stream, and I am going to come to that in a moment, to ensure that the interests of the class claimant are put ahead of the funder, and it is difficult, in those circumstances, to see what legitimate complaint Mastercard can really have.

The rules --

THE PRESIDENT: The traditional, or perhaps as you say not traditional because it is too new, but the usual arrangement is, well, of course, the party being funded makes the agreement with the funder.

MR. BACON: Yes.

THE PRESIDENT: The difference here being that the class being funded by its very nature is not involved in making the agreement.

MR. BACON: Well that is right.

THE PRESIDENT: That is why all these restrictions apply, including settlements having to be approved because normally the client decides whether the settlement is a good one or not. Here there is an absent class which has to be protected. That is why all these protections come into play and that is why the usual funding agreement is just not possible.

MR. BACON: It is not possible. It is the tied relationship problem which the Australian courts have been grappling with, with very little success, that in order to have an opt out system you cannot have contractual tie was millions of claimants. The costs involved --

THE PRESIDENT: That is obvious.

MR. BACON: So have you have to come up with a different solution. That is what this whole arrangement, with respect to Mastercard, does. So could I just quickly turn to the rules and just draw out our key points? It is Volume 1 -- D1, tab 13.

Now, I am starting with the rules as opposed to the Act which reasons which hopefully are become clear. I was going to ask you to turn to page 101 which is the meaning of, "Costs".

THE PRESIDENT: Will you just give us the Rule number?

MR. BACON: It is Rule 104.

THE PRESIDENT: Yes. We have got the Rules loose.

MR. BACON: Of course. Sorry Sir. It is Rule 104.

It does seem to us important that this -- as the heading shows -- this rule is defining an element of what is recoverable under the Act, and Rule 93 we shall see in a moment. This provision at 104 says:

"For the purposes of these rules ...(Reading to the words)... England and Wales".

Now, that whole section is dealing, on the face of it, with the interpartes jurisdiction of the Tribunal to make orders for costs. You see that from paragraph 2:

"The Tribunal may ...(Reading to the words)... part of the proceedings".

It sets out in subrule 4, paragraph 4, the factors that the court will take into account in making that award, and then it talks, in paragraph 5, of the ability of the Tribunal to assess those costs,

either by the President or by detailed assessment, so it is the power of the -- paragraph 6 -- it is the power, or the jurisdiction of the Tribunal to direct a party to the Tribunal to reimburse the other in respect of costs. That is what it is dealing with.

Rule 93, which for the bundle-users it is page 92, Rule 93 is dealing with something very different. Rule 93 is dealing with, as we know, the distribution of the damages award, and the jurisdiction, the quite separate jurisdiction under Rule 93.4 and .5, that:

> "The Tribunal may make an Order directing that all or part of any of the undistributed damages is paid to the Class Representative in respect of all or part of any costs [as defined in Rule 104] fees or disbursements incurred by the class".

So, the simple point that I make here as a matter of statutory construction, is that fees or disbursements fall outside the purposes of this rule, outside the definition of costs under Rule 104, as, indeed, it must, because we know that under Rule 93, even Mastercard can see things like success fees and ATE insurance would be recoverable as an expense from the damages.

"Fee", is not defined in the rules.

Now, the other aspect of, while we are in it, this particular rule, Rule 93, is subrule 5 where the Tribunal will see a reference to the discretion it may have in determining the amount to be paid in respect of costs, fees or disbursements, and may direct that any such amount be determined by a costs judge.

Now, there is a difference in the language being used here, deliberately between Rule 104, as I took you to, Rule 104.5 refers to a detailed assessment as being a process of assessment of interpartes costs, a phrase we are all familiar with, and this new process of is a determination which is bestowed upon the Tribunal to undertake an exercise as to how much of what, in what proportion, whatever it may be, of the damages should be subject to deduction, uncollected damages should be deducted. That is a determination, and it is different, it seems to us, to a detailed assessment of costs, which was a different process anticipated by Rule 104, which brings me neatly on to the point of competence.

The suggestion, with the greatest of respect to my learned friend that the Tribunal is not competent to determine the sum that may or may not be payable back to a funder is a poor one, to say the least.

First, the rules themselves, if you accept my statutory construction approach, the rules themselves provide that it is the Tribunal who may determine that sum, so no question of competency can conceivably arise. You are directed by Parliament to do it.

Secondly, not an expert in this field as others are, I dare say the questions that the Tribunal will face as regards the calculation of loss and all the other difficulties that the defendants themselves say arise here are going to be far more complex and difficult than the question of determining at the end of the case, as we anticipate there will be, the question of how much of the uncollected damages should be paid out to the funders.

Now, Mr. Williams impressed upon you the fact that you just do not have the competence to do it, politely put, but Sir Philip Otton in the *Essar* case did precisely this. The *Essar* case, which I will take you to in a moment, was an arbitration where, under the Arbitration Act, he awarded, as part of the costs, the costs of the third party funder. The entire costs of the third party funder. He heard evidence, short evidence about what the market rates were for third party funding costs. It is not going to be a difficult exercise. They will say it is too much, whoever wishes to make representations, they will say it is fair and reasonable. The Tribunal will decide.

Similarly, in the Commercial Court we have referred in our written response reply to the E&E cost case which is, for your note, Volume 3 of 11, so D3 -- it may be of assistance to turn it up, actually. It is Volume 3, tab 44. This is a well-known authority regarding the ability of a party to recover within proceedings the cost to the party of putting up bank guarantees, so funding in respect of security provided in a charter dispute, and there was an expense incurred in maintaining the guarantee which you will see from -- on page 1077 of the bundle, the last paragraph sets out the factual -- short factual background to the point.

The judge had held at first instance that the costs of the guarantee and of maintaining it of were and incident to the counterclaim and therefore recoverable as part of the costs, so not as damages but as costs.

THE PRESIDENT: This was interpartes costs?

MR. BACON: Interpartes costs. An important observation, if I may say so, Sir, because it is an interpartes. You are not even looking at the solicitor and client situation here. The relevant passages of the judgment of Lord Justice Longmore who gave the judgment of the court, start at page 1088. In fact it is Sir Mark Waller who goes into the background in terms of the statutory jurisdiction, where you will see that paragraph 37, Lord Justice Longmore agrees with Sir Mark Waller over the costs of the guarantee, and then in paragraph 39 he devotes the large part of his judgment to an analysis of rules relating to costs between the parties going back to 1885, the 1875 Judiciary Act, right through to the modern day including the 1979 Supreme Court Practice, section 51 of the Senior Courts Act, paragraph 51 of the judgment

you will be reasonably familiar with, and in the end, between paragraphs 51 and 57, held that the award for costs would include the costs of providing the guarantee as costs of the action. I left it for the costs judge -- directed for the costs judge to determine what the reasonable sum was, but the principle there has stood the test of time. You see it very often developed in security for costs applications where the court may require a party to put up security, the costs of putting up the security, and therefore effectively funding the case, are recoverable.

THE PRESIDENT: The expression, "Incidental to the proceedings", which they are grappling with, where is that taken from?

MR. BACON: That is taken from section 51 because that is the statutory jurisdiction to award costs, paragraph 51 of the judgment. But of course, as you rightly observed a moment ago, we are, here, concerned with a jurisdiction which is unshackled by section 51 and the interpartes rules relating to costs. This is a new jurisdiction, but my point is that if you could award it between the parties, it would be a very surprising consequence if you could not award it as between solicitor and client, which is effectively what is going on here.

While we are in authorities, could I take you it the *Essar* case? Because, with respect to Mastercard, they, in a very short paragraph, play down the importance of this case. They do so for good reason, they know that it is an unhelpful authority. It is in Volume 4, and it is tab 51. It is an appeal before His Honour Judge Waxman sitting as a judge of the High Court in September of last year, so it is a recent authority, grappling with the recoverability in arbitration proceedings of the costs of funding.

Now, the key provisions of the Arbitration Act to which you will have regard are set out at page 1564 and following, and right at the bottom of the page of 1564 appears section 61 which the Tribunal -- section 61.2:

"The Tribunal shall award costs on the general principle".

Over the page there is a defining section, section 59, which defines costs for the purposes of an Arbitration Act. Different Act but you will see the relevance of this in a moment.

References to the cost of arbitration are arbitrators' fees and expenses:

"The fees and expenses or any arbitral institution concerned..."

And then (c):

"The legal or other costs of the parties".

Sir Philip Otton held at first instance that -- paragraph 22 cites paragraph 84 of his decision, that the cost of funding which was 300 per cent of the sum advanced --

THE PRESIDENT: Did you say at first instance? He was the arbitrator?

MR. BACON: He was the arbitrator, yes, from which the appeal was taken. It was a challenge -- there was a challenge to this decision before the High Court which failed.

THE PRESIDENT: Yes. They sought to set aside his award. Yes. I see.

MR. BACON: Yes they did. This arrangement was a litigation funding agreement, 300 per cent of the sum advanced or 35 per cent of the damages recovered, and the purpose of taking you, Sir, to paragraphs 22, 23 and 24 is that you will see there is reference there to the evidence that was placed before the arbitrator, justifying the reasonableness of the arrangements, which I think the -- the claimant, I think we would anticipate the Tribunal would be engaged in on a determination under Rule 93.

THE PRESIDENT: Yes.

MR. BACON: Then the judge, on appeal, dealt with the appeal in respect of costs at paragraph 50 and onwards of the judgment, which is page 1569.

Now, again, this is a case about the interpartes recovery of costs in an arbitration.

THE PRESIDENT: Yes.

MR. BACON: The reason why the authority is helpful particularly is because the court accepted this submission that costs within Civil Procedure Rules were not -- did not bind the arbitration as to the meaning of other costs within the Arbitration Act, section 59 and the words, "Other costs", was held to include the costs of funding. The judge had no difficulty in accepting that the costs to the litigant included the costs of funding the claim. It is a simple point but it provides reinforcement to the submissions we make in terms of interpreting the word, "Fees", in Rule 93, and costs.

It is as well to point out that the court, on appeal, had regard to the decisions of international arbitrators around the world which recognised that in Tribunals, costs of funding were being allowed in other jurisdictions. There was an ICC Commission report in 2015.

The ICC report, top of page 1571, really reflects, if I may say so, some degree of mirroring, the approach that would be taken, and is taken under the 2015 Rules.

So, as a matter of logic, language and context, His Honour Judge Waxman held that, "Other costs", include the costs of obtaining litigation funding, paragraph 68.

Sir, they are, subject to one point, really, my submissions on the Act and the Rules.

I have referred to, and, indeed, adopted, some of the arguments which have been developed by Professor Mulheron which -- you have been referred to the article, I would ask you not to turn it up but I would, in your own time, do so. It is a most helpful article by an experienced player in this field.

THE PRESIDENT: Can you just give us the reference?

MR. BACON: I will take you to it. It is D7.

THE PRESIDENT: Tab 67?

MR. BACON: Correct.

Now, if you could have your hand placed at the beginning of the article, and also keep it open, but go to page 2958, footnote 1, Professor Mulheron, I shared her membership, as it is, of the Civil Justice Council of England and Wales, but she was also a member of -- I was part of a working party on contingency fees -- but she was also a member, I was not, of the then current member of the working party that drafted the rules of which this Tribunal is now concerned. She makes it clear that the views she expresses in this paper are personal, but I just bring that to your attention, Sir.

She, in her article, in a most thorough way, draws out the difficulty which other jurisdictions, Canada, Australia and the US, has faced in putting together and shaping a statutory regime which permits opt-out proceedings to be funded by third party funders with ability of the third party funder to take a share of the recoveries without offending the compensation principle. That is what her article is about, and her conclusion is that the amendments made to the Consumer Rights Bill under Schedule 8 and the 47(c)(vi), achieve that very purpose.

Could I then turn to the question of incurment of costs?

For this we will need to turn to the litigation funding agreement, which I have in the core bundle at tab 8. Mr. Williams took you to some of the provisions of this agreement. The important terms are those contained firstly on page 244, the definition term, and starting with the transferred undistributed proceeds rights, which means:

> "Subject to an order of the CAT, that seller will use best endeavours to obtain ...(Reading to the words)... payable to purchaser".

THE PRESIDENT: Sorry, you are where?

MR. BACON: I do apologise Sir, "Transferred undistributed proceeds rights", definition on page 244, see reference to the word, "Payable", in the course of that definition. That is payable to the purchaser.

THE PRESIDENT: The purchaser is the funder.

MR. BACON: Correct.

THE PRESIDENT: Yes.

MR. BACON: Under, "Undistributed proceeds", it means:

"Proceeds that are not distributed ...(Reading to the words)... including cash value thereof".

So again, the reference to, "Pay", seems to us to be significant.

Now, of course, this arrangement is designed to deliberately, with a view to ensuring that the funder is remunerated pursuant to its terms, without the Applicant having the personal obligation to pay the full funding costs absent an Order being made by the Tribunal. It could be achieved in different ways. The agreement could equally have provided that the seller could accept a liability to pay the commitment amount limited to such commitment amount that is awarded by the Tribunal pursuant to 93. That would be another way of doing it. There would be no argument, in those circumstances, that it would not be an incurred expense.

You may well know, Sir, that certainly in the context of conditional fee and ATE, they are all largely set up on the premise that the client never pays anything, so they are set up on the basis that the client will have a liability for such sum -- this is under the former regime when they were recoverable --

THE PRESIDENT: Yes.

MR. BACON: -- such sum as recovered by way of success fees from the opponent, so this is one of the problems with the whole regime, placing the expense of litigation on the losing defendant, including the expense of funding it through the success fee.

So Mr. Williams will accept, I know he will, that the law recognises that a client can incur a cost, even if he does not pay it, and even if the liability is limited to the amount that the court awards the opponent to pay is, we would say here, that the Tribunal orders should be paid from the damages.

THE PRESIDENT: But he incurs the cost because it is still subject to that proviso and condition. It is his personal liability.

MR. BACON: Yes. Absolutely. There is no question it is incurred. It is a technical point that is being taken against us.

THE PRESIDENT: In the example you have given it is the personal liability of the client to pay.

MR. BACON: It is, is subject -- it is very circular. It is a circular arrangement under which the client will have to pay such sum as is recovered. Well, that is really what is going on here, the substance of what is going on here.

As I say, the agreement could quite easily provide, and I dare say it can be amended if we have to -- make that clear, that the Applicant's liability to pay the commitment amount is a liability on him, subject to such sums as are awarded by the Tribunal under Rule 93.

THE PRESIDENT: That is not what it says at the moment.

MR. BACON: No, no, but that is certainly -- I have got instructions that they are happy to -- for that to be expressly said, but the reason I got to that was overnight, Sir, was that that was the effect, as I submit, of the agreement, that he, the Applicant, has an obligation through the definition clauses to which I have taken you, to pay the undistributed proceeds -- from the undistributed proceeds --

THE PRESIDENT: The definition clauses are just definitions.

MR. BACON: They are, but they are important. The drafting of the agreement is such that -- you get a lot from the definitions clauses, including -- sorry to interrupt, Sir -- including within the definition: express reference to the seller's liability to pay the purchaser, odd as that may be, it is reflected in the definition clauses.

THE PRESIDENT: Well, where is -- I am just trying to see where is, "Transferred undistributed rights"? Where is that picked up in the actual obligations, in the agreement?

MR. BACON: Sir, at the top of page 245 within the unredacted, so to speak, section:

"In consideration of the commitments".

Starting above that, "Seller agrees".

THE PRESIDENT: Sorry, 245?

MR. BACON: Towards the top of the page in the unmarked section.

THE PRESIDENT: "Seller agrees that purchaser is not acquiring"?

MR. BACON: Correct:

"But in consideration of the commitment seller ...(Reading to the words)... any encumbrance".

Now, in my submission --

THE PRESIDENT: But those are the transferred costs rights.

MR. BACON: They are the transferred costs rights.

THE PRESIDENT: I see, then it says:

" ... and agrees to use best endeavours ..."

MR. BACON: To ensure the purchaser obtains the full benefit. That, in my submission, sufficiently discharges the notion of incurring costs for the purposes of being able to recover them under the rules.

The Applicant is a party to the agreement. It is the Applicant who is giving the premise in return for the consideration provided by the purchaser to fund the case, that he agrees to convey, sale, assign, however it may be, the transfer of costs rights. That is in incurring, in

effect, the liability with which we are concerned. It is the definitions reveal, it is a liability to pay, and I dare say others would have drafted this differently, but the point is that is the sums which will be sought from the damages and transferred to the purchaser are incurred by the seller.

THE PRESIDENT: How does that fit with 2.5(b)? It is a very cumbersome agreement.

MR. BACON: Yes, but that fits -- it fits with it -- sorry:

"In the event that litigation is successful ...(Reading to the words)... to purchaser".

That is consistent --

THE PRESIDENT: The liability, it is to use best endeavours to get the Order.

MR. BACON: Well, it is a combination of using best endeavours, and then, having done so, making the payment.

THE PRESIDENT: Once he has got it and he pays it over.

MR. BACON: The two go hand-in-hand. Over the page, Sir, you will see letter F, there is an express reference there to the obligation to make a timely payment. Do you see that? So that is a combination, again.

THE PRESIDENT: Sorry, you are in?

MR. BACON: Top of page 247, letter F:

"If seller defaults in the timely payment of the total investment return".

THE PRESIDENT: Yes. Once he has provided it, it has got to be paid over quickly.

MR. BACON: Yes. That is effectively reflecting, with respect to the argument, the fact that he has incurred it, because it would not be his to pay, otherwise.

THE PRESIDENT: You say that Mr. Merricks and the other party to this agreement, the funder, are prepared to amend it so as to provide that Mr. Merricks, in the event of success or settlement, will pay such sum as may be recovered from the CAT.

MR. BACON: Yes. It was a point I took overnight. As I see this point, Sir, with respect, it is a drafting point. The notion that the entire case collapses on some fairly esoteric point on what is meant by, "incurred", would, to say the least, be a surprise.

THE PRESIDENT: I think it would be helpful to have that agreed draft.

MR. BACON: I can see that.

THE PRESIDENT: Because, as you say, anyone thinks very carefully about incurring a liability, any individual, for many millions of pounds, and Mr. Merricks is not here today. I am sure you are saying it on instructions nonetheless. I think that would be helpful to receive next week.

MR. BACON: Yes. We can do that, Sir. As I say, it would really reflect and crystallise --

THE PRESIDENT: Because whatever our ruling on the other parts of the case, whichever way it goes, I think we ought to address this because it would be of interest to people --

MR. BACON: Yes, I entirely accept that, and obviously in a certain stage any --

THE PRESIDENT: Yes. So if you could produce an amendment that both parties agree on?

MR. BACON: Yes.

THE PRESIDENT: You have indicated what it will say because obviously Mr. Williams has to address it, or must have the chance of addressing it.

MR. BACON: I mean, we will -- as I say, I do not want my submission overnight to undermine the argument. I do say that all that is doing is reflecting the substance of what has been agreed.

THE PRESIDENT: Yes. We have got the point.

MR. BACON: Just returning very quickly, then -- it is now 12.30 -- to the two other points. One is the extent of the funding, the 10 million point. On that, Sir, you anticipated my objection at this point, it is simply not good enough for Mastercard to instruct its counsel to say, "10 million is not enough", without a signed budget placed before the Tribunal. I mean, it is speculation of an unacceptable kind.

For the reasons which we have developed in our responses, we say that 10 million should and ought to be adequate to cover the adverse costs under the -- within this claim, pointing out in the footnote to our submissions, the points that you have already seeked upon, Mastercard, and its lawyers, counsel, as I understand it, have been engaged for many, many years, up to 14 years in this species of claim, they are far more advanced than our side are. We will be incurring more costs than they will be incurring, Mr. Williams accepted that as I understood his submission.

Our costs, our budget, has been carefully put together and the 10 million proposal in respect of adverse cost cover reflects the work on our side as to what the expectation would be going forward. It is a matter of impression at the end of the day for you, Sir, but we would submit that the 10 million that is provided by this funder in respect of potential adverse costs orders is well enough, and should not provide any basis to undermine at this stage of the proceedings the granting of the Applicant's application.

On the conflict issue --

THE PRESIDENT: Just a moment. (Pause)

You need not address us on conflict.

MR. BACON: I think, therefore, Sir, subject to any other questions or observations you may have of me, which of course I will happily oblige, they are my submissions.

THE PRESIDENT: Yes. Thank you.

SUBMISSIONS IN REPLY BY MR. WILLIAMS

Well, Mr. Williams, I think on any view there are some additional cases referred to, and so -- plus there is the proposal that Mr. Merricks would be happy to amend in the way suggested, so on any view you would be entitled to respond to that, whichever order we adopt.

MR. WILLIAMS: I am grateful. I understand from speaking to Mr. Bacon last night there is not to be an unseemly scramble to have the last word in any event, and of course if Mr. Bacon wants to make a few footnotes to whatever it is I say, we are not going to prevent that.

THE PRESIDENT: Yes.

MR. WILLIAMS: If I can start, also, with the further citation from Hansard which I didn't mention, the reason for that, I am afraid, is the prosaic one is that for whatever reason it was not in my bundle and so I did not know about it, so if I could be permitted to deal with that?

THE PRESIDENT: Yes.

MR. WILLIAMS: That was about an amendment which was wishing to ban third party funding entirely in this context in the same way as DBAs are banned, and it throws no light at all upon the intended ambit of the jurisdiction to allocate undistributed damages in respect of costs, and in particular whether that means costs in the Clapham Omnibus sense that Mr. Bacon started with, or whether it means costs in the established sense of legal costs and that is the point that the Tribunal, as it knows, needs to decide, and, in any event, we say that this is not a *Pepper v Hart* case anyway, but if it is a *Pepper v Hart* case then really a discussion as to a totally different amendment with a totally different purpose does not help in any way.

So far as the -- my learned friend's remarks about the London and Scottish case are concerned, he made the traditional objection one always makes to cases which are old, which is somewhat invidious in a common-law system based on precedent, but it is a well-known advocate's technique. We simply say, as we have already said in our skeleton, that that is case, for which it is not the specific learning in respect of how litigants in person were treated in -- around the time of Queen Victoria's Golden Jubilee, but the wider sense of what legal costs mean is consistently cited to this day, and there is a footnote in our skeleton where we give some examples of that, as recently as a case in 2016, it is note 53 at page 329 of the core bundle.

THE PRESIDENT: Yes.

MR. WILLIAMS: I appreciate it may seem a slightly glib exercise, but just out of interest whilst Mr. Bacon was conducting his critique, we quickly looked on Westlaw and I saw that in my lifetime alone which is still -- I mean, it is not as short as I would like it, but it is still a relatively short lifetime, it is a case which has been applied eleven times, multiple times since the introduction of the CPR, it is still cited in the White Book, so in our submission it still throws a lot of light on what the conventional meaning of, "Costs", means, and it throws back on the question of which I venture the Tribunal is now extremely -- and can now see very easily, as to whether, in this context, costs has its conventional meaning or if it has a wider meaning and that, of course, is the very point which the Tribunal needs to decide.

Mr. Bacon then took you to the different language of the rules, and he contrasted Rule 104 and Rule 94. This is something which we pre-empted in our skeleton and really, our principal riposte is the elementary one, that for whatever the reason why the rules use somewhat different terminology in 93-104, the Rules cannot override the statute from which they derive their vires, and the statute, as I showed you yesterday, and as Mr. Bacon did not dispute, uses the established terminology of costs or expenses, one being the English, Welsh, Irish term and the other being the Scottish term, and we say it must follow from that that for whatever reason, the possibly different hand that wrote Rule 93 which has a much shorter history than Rule 104 which was transposed over from the 2003 Rules, for whatever reason the draftsperson decided to unpick the term, "Costs", it cannot have expanded its meaning beyond the statute. So I appreciate it is an obvious point.

The simple explanation may very well be that, "Costs", is used in two senses. There is the compendious sense which we see in the CPR rate. It includes disbursements and expenses and so forth, but it is also often used, and by lawyers, to refer to solicitor's profit costs and disbursements and expenses and so on are treated differently, so we say it is of no greater significance than that. There has simply been an unpicking by a draftsman with perhaps a slightly different technique.

I do reiterate, and without wanting to repeat myself, it is significant, however, that, as I have shown you, there is a clear signpost in the rules at Rule 113 to the CAT statutory instrument that creates the Rules intending success fees and after-the-event insurance premiums to be recoverable under 47(c)(vi) and Rule 93. There is no such signpost in respect of funding costs, notwithstanding the total novelty of such costs being recoverable under any jurisdiction.

So far as that is concerned there was a very short debate between the President and Mr. Bacon as to, well, is there law about what solicitor and costs are as compared to interpartes costs, and Mr. Bacon said, well, things are developing, you do now see solicitors funding cases and so on, it is perfectly possible that could be treated as legal costs, I am quite happy to grant, for the purposes of today's argument, that that might be right, but what we are here dealing with is not what solicitors are charging, it is what a third party funder is charging for speculating its own funds. In our submission in no sense can that be characterised as, "Legal costs".

I suggested what I hope is a neat test in my main submission of just asking, well, if it is a legal cost it must be amenable to assessment between solicitor and client and I actually put down -- almost put down a gauntlet to Mr. Bacon to say is it seriously his case that a funding agreement which the client enters into with a funder directly, no connection to a solicitor, is it seriously his case that that is amenable to assessment by a costs judge so that if borrower and lender agree a price, a costs judge with no statutory jurisdiction has been identified, can come along and say, "Oh, the price is too high". Mr. Bacon did not rise to that challenge for the simple reason that he cannot. It is not a legal cost. In our submission it again makes it a binary preoccupation for the learned Tribunal, and does costs in this context mean more than legal costs in the conventional sense, and then you have my points as to why it does not, and if that was not right, why there would be signposts and so on.

THE PRESIDENT: Sorry to interrupt you, costs judges, they did assess ATE insurance premiums, presumably sometimes, but it used to, when it was recoverable, when it was interpartes, whether they would now, I do not know. It is probably cleared with the client before you start the case.

MR. WILLIAMS: Well, the answer is we live in -- it is a hybridised system. There are certain areas where section 20 -- forgive me for being -- you will appreciate I and Mr. Bacon have an unhealthy interest in these things -- section 29 of the Access to Justice Act, now mostly repealed, just provided that this is a species of legal costs. That, in a sense, was its fact.

THE PRESIDENT: It was deemed to be a legal cost.

MR. WILLIAMS: Yes, and they continued to enjoy a half-life in the context of things like mesothelioma claims and defamation, as I have said.

Sir, so far as the costs case is concerned, in our submission that is not a case which is about litigation funding at all, I do not ask you to turn it up unless you wish to, but what that was about was proceedings were issued; as part of the proceedings, one of the remedies that was sought was the arrest of a ship, in order to avoid the arrest of the ship, the claimant -- I am so

sorry -- the defendant executed a guarantee which was satisfactory to the claimant, so it is not about a species of funding litigation at all.

In one sense you could see how it could be said, well, if you are getting proceedings to arrest a ship, then the guarantee that you put in place to agree that the proceedings in that sense can be circumvented because the arrest is no longer required can be treated as part of the costs of the litigation, but in fact the distinction is not even as simple as that, because when you look at the authority you actually see, and it is recited at paragraph 43 for your note, at common-law the position in the 19th century in a judgment of Sir James Hannen the President of the Admiralty Division in those days was that this was not a recoverable cost at common-law, and that was reversed by a change to the rules of the Supreme Court, and what the case was actually about is the rules of the Supreme Court then after about a hundred years that change vanished, and the argument was, well, does the vanishing indicate a repeal of this, so it ceased it be a recoverable item of costs, or has it simply become such an entrenched thing that can be recovered, its repeal is simply a question of deregulation, because under the old rules it was limited to a 1 per cent -- you could only recover 1 per cent of the value of the guarantee, so if the guarantee was for a million pounds, you could recover £10,000, and the court decide that the repeal was a question of deregulation, but it really has nothing to do with the points with which we are seized.

So far as the *Essar* case is concerned, I am not going to bore you with the dispute in the costs world as to whether it is right at all. The short answer for present purposes is we would submit it is a case which is categorically against Mr. Bacon, because that is a case where, if it is right, a novel conclusion was reached because of a very clear statutory signpost, but it was not concerned with legal costs in the conventional sense, because the statute said, "Legal or other costs".

Now, again, if Section 47(c) contains something to make it clear, it meant more than legal costs, then, clearly, I would have the metaphorical rug pulled from under me, but in contrast to the situation in *Essar*, there is not such a provision.

Can I then come on to Professor Mulheron's article? I think this and the funding agreement are the only two things that I am going to invite you to turn up before I sit down, so just to remind you of that, I think it is Bundle 6 or 7. Tab 67. 7. I do apologise, I am afraid I have filleted my bundle into a more portable core bundle.

THE PRESIDENT: You do not have to apologise for that. I wish we could do the same. 67, yes.

MR. WILLIAMS: I just wanted to show you two extracts. Page 2951.

Before one gets to page 2951, like Mr. Bacon I would respectfully pay tribute to the thoroughness of the Professor's survey of the approach to funding conundrums of -- in different jurisdictions, and then at page 2951 she gets to her understanding of the United Kingdom's response, and she discusses section 47(c)(vi), and then the discussion begins three paragraphs up from the bottom of the page. She says:

"In any event during the passage ...(Reading to the words)... damages awarded".

Now, that is what she says. With the greatest of respect to her, that is simply a statement of opinion which encapsulates the very point which the Tribunal has to decide, but again, with great respect for her, she does not give any explanation at all, no transparency in her reasoning, as to why, in this context, costs or expenses encompasses more than traditional legal cost, but encompasses the funder's success fee, and, again, without in any sense intending to retreat from the compliments which I gave with appropriate deference a few moments ago, this lack of transparency is all the more difficult to understand if one looks back to page 2946.

Now, at page 2946, in the second paragraph she quotes the Federal Court of Australia Act which says:

"If, on an application ...(Reading to the words)... reasonably incurred", and so on:

"It may order ...(Reading to the words)... damages awarded".

So it is a drafting technique that was used in Australia, and she goes on to explain why she considers that unsatisfactory. If one drops down three paragraphs to the paragraph beginning, "However, section 33(z)(j)(ii), she says:

"Does not assist ...(Reading to the words)... in relation to the class action".

This is at page 2946.

THE PRESIDENT: Yes.

MR. WILLIAMS: So, then, I was referring to the fifth paragraph that begins, "However section 33(z)(j)(ii)", it does not assist for two reasons, second sentence:

"First, it is difficult to perceive ...(Reading to the words)... scope of the provision".

So at page 2946 she is saying, when discussing Australia, well, a success fee charged by a funder is not part of the costs of the class action, and then at 2951 in the other citation I gave, she says without explaining why, that:

"However, in the context of a 1998 Act ...(Reading to the words)... funder's success fee".

She simply does not explain the provenance of that opinion. In our respectful submission, notwithstanding the great interest which anyone must pay to anything that Professor Mulheron says in matters of civil procedure generally and in this area in particular is really is not a passage of assistance.

Sir, that, then, finally takes me on to the funding agreement. If I can deal firstly with how it is presently drafted, we respectfully say that Mr. Bacon's submissions simply do not meet the point. It is telling, though, he spent most of his time inhabiting the definitions, but the obligations are provided for by section 2.5 as I think you yourself, Sir, pointed out in your intervention. That is at C8, page 246.

THE PRESIDENT: I mean, in a way, section 2.1 is also an obligation, is it not? That last:

"In consideration of the commitment ...(Reading to the words)... best", there is an overlap, but it does seem to me that that sentence, that is also an obligation, is it not?

MR. WILLIAMS: Well, it is an obligation to procure, to use best endeavours to procure an Order from the CAT, but what we do say is that it is not -- and clearly, if the claimant --

THE PRESIDENT: It is pretty similar, really, to 2.5(b), is it not?

MR. WILLIAMS: Yes, and the effect of 2.5(c) and 2.5(f) which was referred to, all these are predicated upon the claimant first having an active obligation to procure an award from the CAT, which is not a liability which the claimant has incurred.

Now, clearly, if such an Order is made and the money is not paid to the funder directly but comes into Mr. Merricks's hands, then in those circumstances he has an obligation -- an immediate obligation to account, and that was the obligation which Mr. Bacon was identifying, but, with respect, that does not help him, because the money only comes into his hands in the first place to create the obligation to account if he has first been able to persuade the Tribunal to make an Order because he has incurred a liability, and he does not incur a liability.

Now, Mr. Bacon says that, well, that can be cured by a drafting amendment. Well, we can only meet the case with which we are confronted, and why want to complain excessively about what seems to be a further helping of blancmange in this respect, but it is obviously unsatisfactory that this is dreamt up overnight without even a form of words, but what Mr. Bacon appears to say is that one can create through drafting a completely circular arrangement whereby there is an obligation that arises in the event that the Tribunal makes an award. I mean that in itself just looks like a different sort of obligation to account, and does

give rise to a logical circularity that the Tribunal could only make an award if the liability has been incurred.

Now, Mr. Bacon does say, well, in the context of CFAs there was a mechanism whereby a CFA could -- and put that sort of circular obligation upon a claimant, and that was effective, and he is right about that, and so his prediction that I would agree with him was a correct prediction, but he missed out one very important point: that resulted from an Act of Parliament. Parliament specifically provided that, as it were -- it took the Sword of Alexander and sliced the Gordian knot of this logical circle. Parliament said you could do that and to this day that was provision in the Civil Procedure Rules that say there is no difficulty -- you can recover costs if you have a CFA that makes your liability contingent on prior recovery from the defendant.

In these circumstances there is no such equivalent --

THE PRESIDENT: What is that statutory provision?

MR. WILLIAMS: I will ask Mr. Mallalieu, and he will be turning it up.

MR. BACON: If you have the White Book Volume 1, if you turn to page 1247 you will see the Civil Procedure Rule which contains the provision to which I referred, which is Rule 44.1(iii). It is the last paragraph on page 1247:

"Where advocacy or litigation services ...(Reading to the words)... 44-47".

THE PRESIDENT: I see, notwithstanding that the client is liable to pay, only to the extent that sums are recovered.

MR. BACON: Yes.

MR. WILLIAMS: Yes. That, clearly, is something that has been introduced by statutory instrument and it is a statutory instrument that was promulgated under section 31 of the Access to Justice Act which is not in the bundle which abrogated the indemnity principle in order to allow that arrangement to work juristically.

The simple point here is that we have a different enabling statute which simply uses the conventional language of contract. You can be held harmless from costs -- brackets, question mark, legal costs or more, whatever that means -- the representative can be held harmless for costs where he has incurred them and there is nothing in this context to suggest that incurred -- it is enough for incurred to have a completely notional meaning.

In this case, the logical circle has not been severed in the way it has been elsewhere.

THE PRESIDENT: Well, I was going to say that if you wanted to, when a draft is submitted, you would have a right to comment on it, but it may be that with commendable speed you have

been able to do so already, because this seems to be your main point, this that is covered in a particular way, and it is clearly that kind of arrangement that is envisaged.

MR. WILLIAMS: Yes. What I would say to that is, firstly, forgive me for a generalised bellyache, they have been on notice for this point for some time and it is unsatisfactory. Clearly we would like the facility to comment on it, whether it is necessary, we can only decide once we see it.

THE PRESIDENT: Yes, but what you say is that that works there because it has been expressly covered.

MR. WILLIAMS: Precisely.

THE PRESIDENT: This statute, I do not know what section 31 of the Access to Justice Act says --

MR. WILLIAMS: It could well be in Volume 2 of the White Book.

Mr. Mallalieu reminds me that the way that the Access to Justice Act works is that that section amends the Senior Courts Act which certainly is in the White Book. It is section 51.2 of the Senior Courts Act, if you are -- I keep nearly saying, "Your Lordship" -- if you, Sir, turn that up. I do not know if somebody in court can give the --

THE PRESIDENT: Section 51.2. It is a long -- 51.2 --

MR. WILLIAMS: Sir, it should be:

"Without prejudice ..."

THE PRESIDENT: " ... such rules may make provision ...(Reading to the words)... awarded to a party in respect of the cost to be paid by him to such representative is not limited to what would have been payable by him to them if he had not been awarded costs".

I think that is the --

MR. WILLIAMS: That is the provision which section 31 imports, that we say cuts a circle which otherwise is not cuttable. You will notice that even in this context this is all about what is payable to legal representatives, solicitors and counsel. It is not about what is payable to commercial funders in terms that there is speculation.

THE PRESIDENT: Yes, but that is a separate point.

MR. WILLIAMS: It is indeed. Sir, those are my submissions.

THE PRESIDENT: Yes, is there anything, Mr. Bacon, you want in two minutes to say in response to that?

MR. BACON: Well, Sir, in terms of even if we make the proposal we are advancing, that would take us very little, in terms of seeking approval or agreement from Mastercard, in which case I wonder whether we should simply just press on with my arguments as they were developed,

namely that under the agreement there is a liability, and you have my arguments on that. There is no point in me putting together a draft which is simply going to be said, "That does not work".

The agreement -- and that is point 1. Second point is that this objection, of course I am not relying upon CPR44.1, I am just giving an example of where the law has recognised that a liability can be incurred even though the client does not pay anything. That is the analogy which I would seek to present to you in interpreting what is meant by, "Incurred", under 2015 rules. That is all.

My offer was designed to assist but it is not going to assist, I can sense that, and subject to instructions, we would probably prefer a decision from the Tribunal on the current wording, if we can have some proviso that if it is found to be unacceptable we will have to work our way through it, but that is the ...

THE PRESIDENT: Yes.

MR. BACON: There is no point me foreshadowing a point that I do not necessarily have in reach.

THE PRESIDENT: We have not reached our decision, we have literally just heard the arguments, so the fact that it does not satisfy the respondent, well, you may say, whatever you say will not satisfy the respondent does not mean it will not satisfy the Tribunal and I cannot anticipate you how we might come out.

MR. BACON: Sorry to interrupt you Sir, but I was being instructed as you spoke. We will put forward some alternative wording and send to the Tribunal.

THE PRESIDENT: I think it would be useful and probably helpful generally.

MR. BACON: Yes.

THE PRESIDENT: If you can do that by the end of next week, and, Mr. Williams, if you want any comments on that, by the middle of the week after.

MR. WILLIAMS: Very good Sir, thank you.

THE PRESIDENT: I think we have got the points on that.

MR. BACON: There was one small point which is not technically by way of reply so it may not be a point of concern to you but it was a point made by Mr. Williams about settlement, if there is a settlement the funder could be paid. I disagree with that. Collective settlements.

THE PRESIDENT: Yes.

MR. BACON: Just in one minute, we would say that a collective settlement would require the approval of the Tribunal, the settlement on our side would demand effectively a mirror image proposal in respect of the funder's costs as would be applicable under the Tribunal's direction,

and in the event that that was not agreed, we would not have a settlement. If it was agreed we would seek approval and the court would make the Order, so it is all capable of being resolved.

THE PRESIDENT: Yes. I do not see that problem. Well, thank you for your submissions. Thank you all for keeping to time, and thank you, and the large teams behind you, for the very considerable work that has gone into preparing this case. It is obviously an important case. We will take time to consider it. You will be informed in due course when we are in a position to give our judgment. I have to say it will not be extremely soon because there is a lot going on here at the moment and we have to deal with that as well. Thank you all very much.