Case No.: 1282/7/7/18, 1289/7/7/18

IN THE COMPETITION APPEAL TRIBUNAL
Victoria House,
Bloomsbury Place,
London WC1A 2EB

4 June 2019

Before:

The Honourable Mr Justice Roth, Dr William Bishop, Professor Stephen Wilks

(Sitting as a Tribunal in England and Wales)

BETWEEN:

UK Trucks Claim Limited
v
Fiat Chrysler Automobiles N.V. and Others

and

Road Haulage Association Limited
v
Man SE and Others

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Hearing– Day 1

Tuesday, 4 June 2019

(10.30 am)

THE PRESIDENT: Morning. As I understand it, the agreement is that today's hearing will concern the arguments about the damages-based agreement point and other matters will be tomorrow, spilling into a third day for probably half a day.

We have had some correspondence about a suggested timetable for today which I think is agreed for the balance of the what are called the general funding issues. I think it is not agreed. There is no one right way of doing that because clearly there are some common issues that relate to both the UKTC and the RHA arrangements, and then there are a lot of particular issues regarding each of them separately.

We think on balance it probably works better if the OEMs, the respondents, make their case on both together, which is what is proposed in the letter from Travers Smith, but we have some slight concerns about the timing there set out which seems rather overweighted towards the respondents, and we would suggest that it should be as follows for tomorrow: that from 10.30 to 3 pm for the respondents, so that is three and a half hours. 3 to 4.30 for RHA UKTC, that is an hour and a half, and then 10.30 to 12.30 on Thursday for RHA

UKTC. So that is another two hours, so that produces three and a half hours each with then an hour for reply between 12.30 and we can sit until 1.30 and hopefully then end. If there is slippage we will need a break for lunch, and if that can be conveyed to, I think, counsel who may be coming for tomorrow who are not here today.

The only other preliminary matter is, can I ask Mr. Thompson, I think, your clients or maybe the funder has exhibited to a witness statement an amended opt out litigation funding agreement, but it is a draft at the moment in our bundle.

Has it been signed?

MR THOMPSON: I pressed the little button but maybe I shouldn't have pressed it, but --

THE PRESIDENT: You should normally.

MR THOMPSON: Mr. Perrin is here.

THE PRESIDENT: If you like you can let us know later if you want to talk to Mr. Perrin over the short adjournment.

MR THOMPSON: Yes.

THE PRESIDENT: I think what we would like to know by tomorrow is whether it has been signed and also that it is the amended opt-out agreement. It makes certain changes to the original version, I think to, as it were, take account of criticisms that were made of the original version and I think we understand the position,

UKTC says the criticisms are not valid, but just to avoid argument you have made certain changes.

Those changes have not been made, however, to the opt-in agreement and so one question, and you can come back to that tomorrow, is: are you prepared to make the same changes to the opt-in agreement? Otherwise, we are going to have argument on those points anyway.

MR THOMPSON: Yes, I think, as it were, the like for like changes would apply equally to the opt-in agreement and I apologise if that was not made clear. There are obviously some specific features of the opt-out agreement by definition which are not the same, but I can make that clear tomorrow, but in principle, yes, the same changes would be made.

THE PRESIDENT: I think it is important, I believe it is Mr. Bacon who will be making the argument tomorrow that he should be aware of that and he does raise it in his skeleton.

MR THOMPSON: There are a number of points where he says in passing it is not clear whether --

THE PRESIDENT: Yes. If something can be done to clarify that overnight.

MR THOMPSON: Yes, I will either speak to Mr. Bacon or else pass it through their solicitors.

THE PRESIDENT: Yes, you can then make the position clear

tomorrow on the agreement.

MR THOMPSON: Yes, I am grateful.

THE PRESIDENT: Thank you very much. Yes, Mr. Thanki.

Submissions by MR THANKI

MR THANKI: So just to run through the appearances so you know who is here on behalf of whom today. I appear with Mr. Williams and Mr. Gregory for DAF. Mr. Kirby for RHA, and then Mr. Thompson, Mr. Aldred, Ms. Ayling and Mr. Cochran, I understand, for UKTC. Mr. Singla appears for Iveco and Mr. Pascoe for MAN.

Sir, I am going to take the skeletons as read. We are operating under, as I have said, an agreed timetable so I will try and use my available time as economically as possible and focus on those aspects which might benefit from elaboration orally.

THE PRESIDENT: Yes.

MR THANKI: Our essential argument is fully developed in the skeleton subject to addressing only a few new points raised by the applicants in their respective skeleton arguments.

As the Tribunal will have seen, DAF's contention is that all the litigation funding agreements or LFAs relied on by the applicants, both opt in and opt out, are damages-based agreements, or DBAs, and are unenforceable.

The point, if we are right, goes to the suitability of RHA and UKTC as class representatives.

As you will have seen, the issue boils down to a short point of statutory construction which turns on section 58AA of The Courts and Legal Services Act 1990, and they refer from time to time to CLSA, read in conjunction with the definition of claims management services in section 4 of the Compensation Act 2006 and section 419A of FSMA 2000.

Given the amendments obviously to the UKTC arrangements, FSMA 2000 may assume greater prominence. Though in our submission there is no material difference between the claims management services definition in each.

The central issue is whether the litigation funding arrangements underpinning the present applications that fall within the scope of claims management services or CMSs, as defined in the legislation. If they do, they are Damages-based agreements or DBAs, and no argument is advanced by the applicants that they comply with the relevant applicable regulations, and in the case of UKTC's opt-out agreement, if this is a DBA, it would be prohibited by section 47C(8) of the Competition Act in any event.

As the Tribunal will have seen, since 2013 all DBAs

are required to comply with the 2013 DBA Regulations, which I will come back to look at in a little bit of detail. Any failure to do so means that they are unenforceable.

If the LFAs are DBAs, it is common ground that they are unenforceable so we will not need to look at the issue of compliance with the 2013 regulations in any detail, but for the Tribunal's note DAF's pleaded case on non-compliance is set out in, first of all, DAF's response to RHA's application, which is at paragraphs 197 to 205, and DAF's objections to UKTC's application which is at paragraphs 97 to 101.

In a nutshell, we say that the cases ranged against DAF, Iveco and MAN are simply not engaged with the statutory definition. RHA and UKTC, we say, essentially try to read around the statutory language rather than confronting it head on. They have not advanced a case which explains why the litigation funding agreements are not DBAs on the basis of the actual statutory definition, in our submission.

Now, I make clear at the outset that we do acknowledge that practice in the field of litigation funding has not generally proceeded on the basis that litigation funding agreements are DBAs. We accept that. We accept that our arguments would, if successful, be,

no doubt, most unwelcome and inconvenient to the litigation funding industry. But we would point out that RHA itself cites evidence that the underlying argument has in fact long been well known in the industry and in that context I will come back to look at Professor Mulheron's article in the Cambridge Law Journal which RHA cites in this context.

But the question for determination in the present case concerns the meaning and effect of the language which Parliament has used, construed objectively in accordance with the normal canons of construction, not the subjective views of the litigation funding industry, nor of any individual commentator, however distinguished they may be.

We cite, at paragraph 11 of our skeleton, the BT Pensions case which shows that the plain language of statutes can often have unforeseen and indeed unintended consequences, and I will come back to look at the BT case in more detail if I have time.

THE PRESIDENT: Yes.

MR THANKI: The point is dealt with in our skeleton.

We also recognise that there may well be policy arguments in favour of a different scheme of regulation but that is a matter for the legislature, obviously not for this Tribunal.

The starting point is perhaps the CAT's rules. I do not need to turn it up, but rule 113 provides that the rules on funding arrangements applicable to proceedings before the Tribunal are those found in The Courts and Legal Services Act 1990, and just the reference for your note is the Purple Book at page 3552.

So the legislative starting point is obviously the 1990 Act, specifically for present purposes section 58AA.

THE PRESIDENT: Yes.

MR THANKI: If we could turn that up. It is in the second authorities bundle at tab 35 and you will see a number of versions there. We might as well start, sir, if I may, with the current version which is at -- if one looks at the bottom of page 43 within tab 35. This is the version currently in force and you will see that DBA, Damages-based agreements, are defined in section 58AA.

DR BISHOP: Just one moment.

MR THANKI: I am sorry, sir.

DR BISHOP: Tab 35.

MR THANKI: I am looking within that at the bottom right-hand corner, page 43.

THE PRESIDENT: We have had various inserts put in in the last 15 minutes. Someone has been bringing new pages.

MR THANKI: Hopefully you should have a paginated version.

THE PRESIDENT: Yes, but Dr. Bishop doesn't seem to have the new insert. This is the third version of tab 35 then. (Handed)

MR THANKI: You should have there version 5 of 5 of section 58AA.

DR BISHOP: I do indeed have a page 43, yes.

THE PRESIDENT: Yes, we have it now I think. Thank you. This is, as you say, it is the version enforced from November 29, 2018.

MR THANKI: This is the current version and the Tribunal will see that Damages-based agreements are defined in subsection (3). I will come back to that in a moment, and we will see, if you turn over the page in subsection (7) that claims management services are to have the meaning as provided in section 419A of FSMA 2000.

If you turn back to version 4, there is no material difference in the text except, can I just ask the Tribunal to note, looking at version 4 on page 41, in the equivalent subsection (7) you will see that claims management services is defined by reference to the 2006 Compensation Act. For present purposes we can simply go back to page 43 and focus on the current version.

Now, just standing back, we say in relation to section 58AA it is not a question, for the purposes of

this Act, of which claims management services are regulated, but which are capable of being regulated as CMSs, i.e. which as a starting point fall within the general definition of claims management services.

The overarching point on the 1990 Act is that any DBA which fails to satisfy the conditions in subsection 58AA(4) is unenforceable, see subsection (2):

"... A Damages-based agreement which does not satisfy the conditions is unenforceable."

So that is the starting point.

THE PRESIDENT: Yes.

MR THANKI: There is no limitation in subsection (2) to any particular type of DBA which is caught by the wide net of that subsection. So, for example, there is no reference to a regulated Damages-based agreement or the like. It is a wide net provided by subsection (2). If it had been the intention of Parliament it would have been easy to qualify subsection (2) with express language to the effect that it was limited, for example, to regulated claims services management, but it does not do that.

Now, if one looks at subsection (3) we can see that DBAs, Damages-based agreements, have essentially two elements. Looking at the subclauses, one can see that the first element is that it is an agreement for the

provision of a particular type of service, one of which is a claims management service.

The second element --

THE PRESIDENT: That is the one you are relying on.

MR THANKI: Indeed, we do not rely on any others.

THE PRESIDENT: No.

MR THANKI: The second element is that the service is provided in return for a payment which is contingent on the success of the claim and calculated by reference to the financial benefit obtained by the recipient. We say each of the funding agreements in issue in the present case provides that in the event of a successful outcome as defined in the agreements to the litigation, a payment has been made to the funder as calculated by reference to the damages obtained.

THE PRESIDENT: Just following that through so I understand the point. You say it is an agreement between a person providing claims management services -- that is the funder; is that right?

MR THANKI: Yes.

THE PRESIDENT: -- and the recipient of those services, so that would be, say, UKTC.

MR THANKI: Indeed.

THE PRESIDENT: The recipient, UKTC; is that right?

MR THANKI: Yes.

THE PRESIDENT: Is to make a payment to a person providing the services, the funder, if the recipient, that is UKTC?

MR THANKI: Yes.

THE PRESIDENT: Obtains a specified financial benefit.

MR THANKI: Yes.

THE PRESIDENT: But the specified financial benefit are the damages.

MR THANKI: Yes, or settlement or --

THE PRESIDENT: But the damages do not go to UKTC. Damages go to the class.

MR THANKI: That is a point --

THE PRESIDENT: The represented person.

MR THANKI: -- we will need to come back to. There is nothing in the agreement which suggests the recipient has received the amount beneficially. UKTC is defined as the claimant in relation to --

THE PRESIDENT: It may be but in terms of a collective action the damages are not the damages of the class representative. The recipient is not receiving -- it is receiving financial benefit because it is getting some costs, but the payment is not determined by reference to the amount of costs. It is determined by reference to the amount of damages, is it not?

MR THANKI: Yes, but it receives it. Whether it receives

it --

THE PRESIDENT: It does not -- it may or may not receive it, but if one goes back to the statute, which I think is in here somewhere, the Competition Act on collective actions, the claims are the claims of the represented person. They are not the claims of the class representative.

MR THANKI: Indeed. If you simply interpose a class representative then all opt out proceedings, all opt out funding agreements would be permissible because you would always have the interposition, or normally have the interposition of a representative who would not necessarily receive the payment beneficially. So, in our submission, there is no requirement that the recipient has to receive the payment beneficially.

THE PRESIDENT: It is not even beneficially because he may not get it at all.

MR THANKI: He may not. But under the funding agreements it is primarily UKTC, and we will see, when we look at the funding agreements, which receives the payment.

THE PRESIDENT: But only on behalf of, not even as a trustee. It might be a conduit.

MR THANKI: I accept when one talks about the specified financial benefit it is not received beneficially.

THE PRESIDENT: Are you not saying we have to read this as

though it says:

"The recipient makes a payment to the person providing the services, if the recipient obtains, either on his own behalf or on behalf of others."

MR THANKI: Because all the Act provides is that he obtains the payment.

THE PRESIDENT: No, he obtains the benefit.

MR THANKI: He obtains the benefit.

THE PRESIDENT: But he does not get a benefit. Just because the money goes through him he is not getting the financial benefit in the way that a claimant is.

MR THANKI: He obtains the financial benefit, in our submission, because if simply having a class representative was sufficient for these purposes, then one would have a position where opt out Damages-based agreements were in fact permissible because normally one would have the interposition of a representative which, in the way you put it to me, would mean that the representative never receives the benefit on his own account.

THE PRESIDENT: Opt-out agreements of course are permissible for -- sorry, Damages-based agreements are permissible for opt in.

MR THANKI: For opt in but not opt out.

THE PRESIDENT: Yes. But the recipient -- the litigation

funder can get a percentage for an opt out. It is the lawyers who cannot get a percentage because the --

MR THANKI: Sir, if the proposition you were putting to me were correct, a Damages-based agreement on an opt out basis would always be possible because under the cover of class representative who does not obtain the benefit beneficially on his own account but on behalf of the class on whose behalf he acts.

THE PRESIDENT: Yes, but these litigation funding agreements with a percentage to the litigation funder is permissible, is it not, for an opt out if it is not a damaged damages-based agreement?

MR THANKI: If it is not a Damages-based agreement. But the simple way round a Damages-based agreement would be to have the interposition of a class representative, if I am wrong.

THE PRESIDENT: But if it were a lawyer, the lawyer getting a percentage, the recipient, the services of the lawyer are provided not to the class representative, they are provided to the members of the class. The client of the lawyer is -- if you are instructing a solicitor, were not -- sorry, Mr. Thompson, Mr. Kirby's instructing solicitor, their client are the class represented members. It is not the class representative. The class representative pays them but their client are the

members of the class.

MR THANKI: In our submission the client would, in that situation, be both, because one's operative instructions would be obtained from the class representative rather than from each individual member of the class.

THE PRESIDENT: The instruction of it is rather like a child bringing proceedings. The child brings proceedings through their next friend, the next friend pays the lawyer and instructs the lawyer, but the client of the lawyer is the child it is not the next friend.

MR THANKI: In our submission to make this regime workable, obtaining a specified financial benefit must mean obtain in any capacity whether it is beneficially or as an agent or representative.

THE PRESIDENT: That is not what it says. If we are looking at the ordinary language, and I think your case is we should look at the ordinary language in its ordinary meaning.

MR THANKI: Yes.

THE PRESIDENT: We have to read in "obtains in any capacity". You want to insert those words.

MR THANKI: Yes.

THE PRESIDENT: We need to insert those words to achieve -- that is right, is it not?

MR THANKI: If one has to achieve the aim of the Act, but in

our submission the plain language is "receives a specified financial benefit" means receives the specified financial benefit calculated by reference to the amount of the financial benefit obtained.

THE PRESIDENT: Normally receiving a benefit means you have it for yourself, not for somebody else, not as a caretaker. It is a rather odd way, it seems to me, of saying you receive a benefit if you just get money you have to pass on to somebody else. That is not a benefit.

MR THANKI: It says "obtains a specified financial benefit", and we say the effect of the funding agreements in these actions is that the class representative obtains a specified financial benefit, whether the extent to which it then has to be distributed onwards does not change the fundamental meaning of "obtaining a specified financial benefit".

THE PRESIDENT: If you give me £100 which I have to give to Dr. Bishop, the idea that I am getting a benefit is a bit of a stretch, it seems to me. Dr. Bishop is getting a financial benefit.

MR THANKI: You are contractually entitled to obtain a specified financial benefit. The fact that there is then the ability to pass that -- there is a requirement to pass that on does not change the fundamental meaning

of the Act, in my submission.

THE PRESIDENT: It seems to me you are stretching the meaning of the Act, but on its ordinary language or the language we have there. I mean, it is --

MR THANKI: But if we are wrong --

THE PRESIDENT: Because the financial benefit is the damages clearly because of subsection (a)(ii). That is your submission.

MR THANKI: It is.

THE PRESIDENT: And it is "obtains in any capacity".

MR THANKI: In any capacity.

THE PRESIDENT: "Obtains in any capacity, whether for itself or for another person."

MR THANKI: Indeed.

THE PRESIDENT: Of course in the normal case, not a collective action, the claimant is the person who gets the damages, but it is the peculiar feature of collective action, but of course this regime was there when collective actions were introduced and so when Parliament -- and there is some reference to a Minister in Parliament saying we recognise litigation funding might fund these cases, they would know this definition in the way it is phrased.

MR THANKI: The way in which the prohibition on opt-out agreements is inserted into the Competition Act. An

easy way round that prohibition would be for all Damages-based agreements to have the interposition of a class representative.

THE PRESIDENT: Only if the client was the class representative and not the represented persons, because the advocacy, the recipient of the advocacy or litigation services would be the class representative not the represented persons.

MR THANKI: It would just apply across the board to all the defined types of claims, benefits and services, either as a lawyer or --

THE PRESIDENT: A lawyer would be advocacy services or litigation services, would it not, it would be under the other head? I think we have your point. (Pause)

Yes, that is how you say it should be read. We understand that.

MR THANKI: Yes.

THE PRESIDENT: Where do we go now?

MR THANKI: We have seen that the current version of section 58AA of the 1990 Act refers to the definition in FSMA 2000, section 419A. Perhaps we can turn to that in tab 37 of the same bundle.

THE PRESIDENT: Yes.

MR THANKI: If we go to the final couple of pages, see section 419A set out, we will see that the definition of

claims management services provides that:

"1. In this Act claims management services means advice or other services in relation to the making of a claim."

And in subsection (1) under services, is defined as including, and you will see the categories set out there: (a) financial services or assistance and (b) legal representation, (c) referring or introducing one person to another, and (d) making enquiries; and then the qualification at the end:

"But giving or preparing to give evidence whether or not expert evidence is not by itself a claims management service."

And we say one sees that advice and other services in relation to the making of a claim in subsection (1) is extremely broad language. Even advice is not perhaps claims management in common parlance, so we see an expansive definition from the outset. Other services defined in (2)(1) sees it is not intended to be an exhaustive list, hence the reference to "includes".

Most of what is in (2) would not constitute claims management services in common parlance, we would say: financial services, financial assistance, referrals, enquiries. It is obviously not right to read this provision as only applying to services that could

typically be regarded as claims management absent the definition because that would be to ignore the statutory definition.

THE PRESIDENT: Yes.

MR THANKI: The exclusion at the end after (d) is indicative of the breadth of the basic definition. The regulation of claims management activities is dealt with elsewhere in the Act. We set out the references in paragraph 73 of our skeleton, but one can see an example at the next page, section 419B which provides "The Treasury may by order make provision as to the circumstances in which a person is or is not to be treated as carrying on a regulated claims management activity."

What is most important for present purposes is that other services in relation to the making of a claim includes financial services and financial assistance.

Perhaps briefly we can just touch on the Compensation Act 2006, the definition is not materially different, but we have dealt with this in our skeleton in some detail.

If one goes back to tab 30 one sees from, if one goes to the -- towards the end of this tab one should have version 1 of 3, if the Tribunal has that.

THE PRESIDENT: Is it paginated at the bottom?

MR THANKI: No, it is not, I am afraid.

THE PRESIDENT: Yes.

MR THANKI: If one goes to the pages you should have at the top of the left-hand page version 1 of 3.

THE PRESIDENT: Yes.

MR THANKI: You will see that this Act attempts to facilitate the regulation of claims management services with the categories of claims management services to be regulated to be specified later by a statutory instrument.

Claims management services are defined in section 4(2)(b):

"Claims management services means advice or other services in relation to the making of a claim ..."

And further defined in 4(3). One sees a similar definition of provisions to the one we have just seen in FSMA 2000.

Regulated claim management services are defined in 4(2)(e):

"The Services are regulated if they are of a kind prescribed by order of the Secretary of State, or provided in cases or circumstances of a kind prescribed by order of the Secretary of State."

THE PRESIDENT: So they are a subset of all claims.

MR THANKI: Exactly. We see that the 2006 Act addresses the subject matter in two parts. First, by defining claims

management services in 4(2)(b) and 4(3) and secondly by explaining which services are to be regarded as regulated.

And we see the same wide definition as in FSMA 2000, and we say it was set deliberately wide because it is creating a scope to regulate a range of services to the extent that the executive thought such regulation to be necessary.

We see again services were similarly defined to include provision of financial services or assistance.

Even Professor Mulheron accepts that the funder unquestioningly provides financial assistance to a litigant, and I will take you to her article in a moment but the reference, for the Tribunal's note, is the second authorities bundle, tab 53 at page 11, article in the CLJ.

And without turning it up, one sees from UKTC's skeleton at paragraph 10(c), they say that investment funding provided by Yarcombe pursuant to the UKTC LFAs could be classified as the supply of a form of financial service to UKTC, paragraph 10(c) of Mr. Thompson's skeleton.

THE PRESIDENT: Yes. For financial assistance.

MR THANKI: For financial assistance, indeed.

As a result in our submission the litigation funding

services are unambiguously caught within the definition of claims management services. They are, on any view, "other services" within the meaning of the 2006 Act and FSMA 2000, and specifically financial services or assistance provided in relation to the making of a claim. In our submission this brings the services within the ambit of the 1990 Courts and Legal Services Act if the funding agreements fall within the definition of Damages-based agreements.

And that is entirely separate from the question of which claims management services were later chosen for regulation. The breadth of regulated claims services could be narrow or broad depending on the order of the Secretary of State.

So one sees that the definition under the 2006 Act has two aspects. First of all, claims management services, and secondly, which claims management services are to be regulated. For present purposes we are only interested in the former.

As a matter of fact the Secretary of State has chosen by order to regulate only a limited number of claims management services in particular spheres, for example personal injury and criminal injuries compensation which relate to particular types of service, for example, advertising for claimants and,

without turning it up, the reference for the Tribunal's note is Statutory Instrument 3319 of 2006 which is at tab 46 of the second authorities bundle.

A further statutory instrument was made pursuant to section 6 in the 2006 Act which is Statutory Instrument 209 of 2007 which is at tab 45, and that is specifically exempted persons, who would otherwise be dual regulated, from claims management services regulation.

Just for the Tribunal's note, the 2013 regulations, which we will come back to in a moment, were amended in 2018 and the only material change is that the definition of client refers to section 419A of FSMA 2000 rather than the 2006 Act.

THE PRESIDENT: The reason for the change from the cross-reference to section 4 of the 2006 Act to the 419A of the FSMA is because of the move of the regulator; is that right?

MR THANKI: Yes, and where one finds the definition of claims management services.

THE PRESIDENT: Yes.

MR THANKI: So it is inherent in the scheme of section 4 of the 2006 Act that not all claims management services are or will be regulated claims management services, and in contrast the cross-reference in section 58AA(7) we saw

is only to the definition of claims management services in section 4 of the 2006 Act or section 419A of FSMA 2000, and not to the subset of such services which are or are not to be regulated.

In our submission these points are fatal to RHA's argument that the real issue is whether the funders are providing regulated claims management services. If litigation funding is a claims management service, with the consequences of a non-compliance set out in the 1990s Courts and Legal Services Act, the question then is whether the other elements of section 58AA(3) of the 1990 Act are satisfied, i.e. is the financial assistance provided in return for a payment which is contingent on the success of the claim calculated by reference to the financial benefit obtained by the recipient? We will come back to that point.

Just in that context perhaps we can just look at the funding arrangements. In summary, sir, we say that agreements fall within the ambit of section 58AA(3) because the payments to be made are contingent on the receipt of specified benefits. The payments are calculated by reference to the benefit received.

If we can skate through the relevant agreements as quickly as possible. The RHA agreement one finds in volume 2 behind tab 32.

THE PRESIDENT: I think we have a better copy at 32A.

MR THANKI: Indeed, the signed version you will see immediately behind tab 32 and the better copy is behind 32A, and we will use that version.

THE PRESIDENT: Yes.

MR THANKI: I am obliged. Then, if we go to page 883 one sees recital D, which I would ask the Tribunal to glance at. (Pause)

Then at 4.1 on page 884 one sees the definition of applicable contingency fee percentage. One sees:

"The applicable percentage between 5% and 30% calculated by reference to the amount of the balance of all claim proceeds."

One sees a reference to a schedule which we will look at. A copy of RHA percentage returns etc, and the pdf file referred to.

Then if we go to page 885 one sees the definition of claim proceeds, if the Tribunal could glance at. (Pause)

Then on the same page, definition of contingency fee. On 887, one sees the definitions of reasonable cost sums, and then the definition of recovery by reference to recovery of the claim proceeds. Then if we go to clause 2.1 one sees the agreement to fund. Perhaps the Tribunal could just glance at clause 2.1.

(Pause)

3.1 deals with payment terms and interest, which we do not need to dwell on.

Perhaps one could just look at the schedule at page 906 which deals with the tranches of committed funds, just so that the Tribunal can see where it is.

(Pause)

Then finally, behind tab 33 one sees the schedule of returns, the funder percentage set out. You see it starts where net claim proceeds are at £1 million with a funder return of 30%. If one goes right through to the end of the tab at page 998 one sees that it reduces to -- over different proceeds, to 5%. As we saw in the body of the agreement a moment ago.

That is the RHA agreement. Then if we could look briefly at the UKTC opt-in agreement. This is bundle 1, tab 7. If the Tribunal has that.

THE PRESIDENT: Yes.

MR THANKI: This is the UKTC opt-in agreement. One sees the definition of funder and claimant referred to in the schedule at page 165, and you will see if one keeps one's finger in 413 and goes to 165 you will see the funder is defined as Yarcombe Limited in paragraph 1.1. The claimant is defined as Penframe Limited which is a previous name for UKTC.

THE PRESIDENT: Yes.

MR THANKI: The claimant is defined by reference to UKTC. You will see recital B going back to page 143:

"The Claimant considers that it is in its best interests to enter into this agreement in order to provide funding to pursue the claims."

At page 144 I just ask the Tribunal to note the definitions of funder's fee is set out in schedule 2, which we will come back to, and funder's outlay, and then proceeds are defined at page 146, halfway down, and then at page 147, the definition of success. If I could ask the Tribunal just to note that includes settlement as well as the judgment in favour of the claimant.

Then at page 149, if I could ask the Tribunal just to note paragraphs 2.5 and 2.6 provides the consideration for the claimant being funded in the way the agreement provides for.

Then could we please go to clause 10. Page 156, clause 10.1 provides for the claimant's agreement to pay or to procure payment of the funder's fee in the event of success. Clause 10.1.

On the same page, equally the situation that pertains where there is no success as defined in the proceedings.

At schedule 1 we have seen, and then if the Tribunal

could please go to schedule 2 at page 167, schedule 2 at page 167 provides for the calculation of the funder's fee. It is a less complicated table than the RHA one we saw but a similar principle with proceeds defined and the funder percentage return provided for.

THE PRESIDENT: Yes.

MR THANKI: Then we can put that bundle away and go, please, to the draft UKTC updated opt out funding agreement which is bundle 3, tab 51. (Pause)

Again, if one goes to page 1552 you will see a similar definition to that we have just seen of the funder and the claimant, and schedule 1 at page 1573 provides that again the funder is Yarcombe and the claimant is UK Trucks Claim Limited.

Similarly, recital B, going back to page 1552, is similar to the opt-in agreement we looked at a moment ago. If you go, please, to page 1558.

THE PRESIDENT: The claims are defined, are they not, as the claims to which the proceedings relate? That is the claims of the represented class members.

MR THANKI: Yes. One sees similar definitions at page 1553, funder's fee and funder's outlay. Page 1556, proceeds and success, and then clause 2.2 and 2.3, the consideration provided is spelt out.

Then if we go, please, to clause 10 at page 1565.

Clause 10.1, success in the proceedings, and the obligation we see in 10.1 is obviously defined in a slightly more complicated way than in the agreement we have just looked at. And I will come back to the significance of that in due course.

One can see from 10.1 that the obligation to pay is qualified in the sense that the fee can be reduced if the Tribunal so orders, but, in our submission, the basic obligation is to pay a fee calculated by reference to the damages recovered.

Clause 13, similarly defines the impact if there is no success defined in the proceedings.

Schedule 1 I have referred to at page 1573, and then schedule 2, page 1575, again we see a similar calculation by reference to proceeds and the funder percentage depending on the proceeds recovered.

So standing back, all the funding agreements we have looked at involve an obligation to pay a percentage of the damages which is contingent on recovery of damages, including by way of settlement.

Now, to understand the legislative scheme one would need to trace through various legislative developments over a long period of time, some 15 years or so. We have done that fairly fully in our skeleton argument. I will only need to turn up a few references where

relevant to the argument.

THE PRESIDENT: Yes. That was very clear in your skeleton.

MR THANKI: I am obliged, and I will hand up a document which sets out where you can find the various statutory changes in the bundle, which I hope will be helpful.

Various submissions have been made by the parties on the relevant principles of statutory construction. It is common ground, at least, that the starting point is to look at the language of the statutory provision being interpreted, and is there room for argument about what it means, and we say not when one looks at the definition of claims management services.

What we say both sets of applicants have done in this case is to focus on what they say is the natural meaning of management services, and then say that litigation funding or services does not equate to managing the claim. But in our submission that approach ignores the statutory definition. We have seen other types of activities caught by the definition and they are not ones which one would typically associate with management services.

THE PRESIDENT: Yes, you have shown us that.

MR THANKI: Just in this context it may be useful just to turn up a section of Bennion, and it is the second authorities bundle.

THE PRESIDENT: We can put away bundle 3.

MR THANKI: You can put away bundle 3 and you only need the authorities bundles I think now and largely the second authorities bundle, I think.

If one goes, please, to tab 52 one sees a number of extracts from Bennion relied on by the parties for different propositions, but if we could go to page 15, and you should have there a section on statutory definitions, section 18.1.

THE PRESIDENT: Yes.

MR THANKI: At the bottom of the page under paragraph 1:

"A term used in an Act must be construed in accordance with any statutory definition that applies to it."

If we go over to page, page 16, under "Comments":

"Statutory definitions are a common feature in legislation that are typically used for one or more of the following purposes:

"1, to clarify or avoid potential doubt as to the meaning of a term, and;

"2, to enlarge or narrow the natural meaning of a term."

If one looks just below the bullets:

"From the viewpoint of the interpreter the main distinction which needs to be drawn which is between

exhaustive definitions which displace the natural meaning of the defined term and inclusive or exclusive definitions which modify the natural meaning of the defined term."

Then if we could go on, please, to page 20, section 18.3 deals with inclusive and exclusive definitions. One sees a third of the way down under 18.3:

"Inclusive and exclusive definitions:

"1. An inclusive definition modifies the natural meaning of the defined term by enlarging it or clarifying potential doubt about what is covered. This kind of definition typically takes the form of 'X includes' ..."

Which is what we see in the definition of claims management services.

"An exclusive definition modifies a natural meaning of the defined term by narrowing it or by clarifying potential doubt about what is excluded. This kind of definition typically takes the form of 'X does not include'."

And we see an element of that in the definition of claims management services which we looked at a moment ago.

"3. What inclusive and exclusive definitions have in

common is that they specify matters that are or are not to be treated as caught by the defined term but otherwise leave the natural meaning of the term intact."

Then if we go to the bottom of that page:

"An inclusive definition typically takes the form 'X includes'. As Lord Watson explained in the Dilworth v Commissioner of Stamps case the word 'includes' is used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute. When it is so used these words or phrases must be construed as comprehending not only such things as they signify of what is their natural import but also those things which the interpretation clause declares that they shall include."

I think that is all I wanted to show you from that part of Bennion which if, there is time, I will come back to some other sections in the context of some of the arguments that the applicants run.

Just pausing there. UKTC suggests that if our argument is right about which advance funds which help support litigation might be said to provide a claims management service, paragraph 10(c) of their skeleton. Our response to that is to say that a bank would generally provide a loan on general terms at a specified rate of interest. The funders in the present case are

to provide funding whose terms are intimately bound up with the progress and outcome of the litigation. Hence the funders do and a bank would generally not provide their services in relation to a making of a claim, as specified in section 4 of the 2006 Compensation Act and section 419A of FSMA 2000.

It is unlikely that a bank loan would be similarly structured to the types of litigation funding agreements we have just looked at, but if it were we do not shy away from the submission that a bank might be capable of providing a claims management service within the statutory definition. It would all depend on the terms of its funding.

As I said a moment ago, we accept that the statutory definition of claims management services is broader than what might ordinarily be understood by the concept of claims management. But the law is replete with expansive or enlarging definitions, and I was not going to take you to these but just to give you some examples of that without turning them up. Section 219 of the Enterprise Act, page 207 of the Purple Book, "action" is defined as to include commission, for example, "goods" are defined as to include buildings, ships, hovercraft and aircraft, and then section 59 of the Competition Act, page 67 of the Purple Book, "premises"

is defined to include means of transport.

One can see all sorts of definitions in statutory provisions which enlarge the natural meaning of the words used in the statute.

As I said, the legislative history has been mapped out in our skeleton in paragraphs 13 to 43. In terms of the key milestones could I just hand up a document where we have tried to cross-reference to the authorities bundle.

THE PRESIDENT: The applicants have got this?

MR THANKI: I believe so.

THE PRESIDENT: Could you provide them the copies.

MR THANKI: Indeed, I apologise. (Handed)

It is not controversial; it is simply cross-references to the bundles.

One sees the key milestones are -- in our submission, some non-milestones -- have been set out. The Compensation Act 2006 came into force in December 2006. Section 58AA of the Courts and Legal Services Act 1990 was introduced in 2009 by section 154 of the Coroners and Justice Act 2009. That is at the second authorities bundle, tab 34. We do not need to turn it up.

THE PRESIDENT: Sorry, which section of the Coroners Act?

MR THOMPSON: Section 154 of the Coroners and Justice Act

2009 introduced section 58AA.

Now, a point we do emphasise is that section 58B, upon which both applicants rely heavily, has never been inserted into the Courts and Legal Services Act 1990. If one takes up the second authorities bundle at tab 29, if one goes to this, behind this tab about three pages in you should see section 28.

THE PRESIDENT: Yes.

MR THANKI: The text of section 58B was set out in section 28 of the Access to Justice Act 1999, which provided for the insertion of section 58B.

THE PRESIDENT: That point, just so I understand it, we have not got to Damages-based agreements at all.

MR THANKI: No.

THE PRESIDENT: They were not allowed, I think. You have conditional fee agreements which is 58 and 58A.

MR THANKI: Yes.

THE PRESIDENT: And then you have in the drafting of the Access to Justice Act, or indeed in the -- not just the drafting, in the Act, provision for introduction of a statutory section on litigation funding.

MR THANKI: Indeed. Our point on this is that section 28 which provided for the introduction of section 58 has never been brought into force by statutory instrument, and therefore never inserted into the Courts and Legal

Services Act 1990. You see section 28 provides the text and then section 108, if one goes over a page, provides for the coming into force of the various sections we have just glanced through by statutory instrument. You see that from section 108.1.

If one goes on, please, to tab 39.

THE PRESIDENT: And sections 58 and 58A were brought into force when?

MR THANKI: Yes, if we go to tab 39 you will see. So here you have the commencement of provisions in the Access to Justice Act statutory instrument and it provides that the following provisions of the Act will come into force on 1 April 2000.

If you look at (b) in part 2, sections 27, 29 and 30, but, as the Tribunal will note, there is no reference to section 28, which provided for section 58B and section 28 has never been brought into force.

THE PRESIDENT: Never repealed.

MR THANKI: Section -- the relevant part of the Access to Justice Act has not been repealed either, so far as I am aware.

In our submission, what one gets from this is that the test from the putative section 58B is irrelevant to the construction of the Courts and Legal Services Act 1990 because it was never inserted into the 1990 Act.

THE PRESIDENT: But it was there, as it were, on the statute book not brought into force at the time when section 58AA was being drafted.

MR THANKI: Yes, I would accept that it is there on the statute book, but we would say it is of no relevance to interpreting the Courts and Legal Services Act because it was never inserted into the Act.

THE PRESIDENT: Is there anything in anywhere on what -- any authority discussing like Bennion what --

MR THANKI: No, we have scoured the provisions. I do not think either side has come up with anything specific from either Bennion or other works such as Cross.

THE PRESIDENT: Yes. We need to take a break for the relevant --

MR THANKI: I was going to go on to respond to various counter arguments advanced by UKTC and RHA so this will be a natural moment.

THE PRESIDENT: Shall we take five minutes.

(11.45 am)

(A short break)

(11.58 am)

MR THANKI: Sir, I was going to turn to some of the counter arguments that are advanced by the applicants.

THE PRESIDENT: Yes.

MR THANKI: We address these in our skeleton at paragraphs

44 to 97, just to outline our response and try and pick up some new arguments advanced by the applicants on the way. First of all, the novelty of the argument advanced by DAF. Both UKTC and RHA rely on the novelty of the argument advanced by DAF as a point against us. That is not in fact true as Professor Mulheron's article says in the article in the Cambridge Law Journal. However much she dislikes the argument she adverts to the fact that it has been made in the past. I think she points to various conferences at which the point was advanced.

THE PRESIDENT: Yes.

MR THANKI: The applicants note that there is no reported decision where a litigation funding agreement has been found or has been argued to be a Damages-based agreement, and similarly, both make the point that of the OEMs only DAF, MAN and Iveco advance the Damages-based agreement argument.

Our short responses to those points are as follows:

First of all, nothing can be deduced from the fact that the argument has not previously been tested and was not raised in *Merricks*. Nothing can be deduced from the identity and number of the parties advancing the --

THE PRESIDENT: Which is either a good argument or a bad argument.

MR THANKI: Exactly. And nor, should I add, can anything be deduced from the identity of the advocate being instructed to run the argument, a point which RHA in particular seem to attach significance to. Ultimately it is a point of statutory construction as to which the Tribunal will have to decide whether we are right or wrong.

THE PRESIDENT: It may not be, I do not know, but it occurs to me there might not be the same incentive to run the argument in ordinary litigation.

MR THANKI: Yes, it may not make a difference.

THE PRESIDENT: Because the litigation funder would not want to run it and their client would not want to run it --

MR THANKI: Yes, exactly.

THE PRESIDENT: -- that you have here.

MR THANKI: The second point made against us is by reference to the policymaker's intentions. It is said that the Jackson report does not evince an intention to regulate litigation funding agreements.

But contrary to what UKTC suggest, DAF's argument does not entail "full regulation of litigation funding". It would simply entail regulation of certain aspects of certain types of agreements, i.e. Damages-based agreements that litigation funders might seek to rely on. The intention of Parliament in this regard is to be

discerned primarily from the language of the statute, and we say that reliance on the Jackson report is entirely anachronistic.

Section 4(2) of the Compensation Act 2006 which first defined claims management services was enacted in July 2006. That definition was adopted in the context of DBA Regulation in November 2009, as I have mentioned, by the Coroners and Justice Act 2009 which inserted section 58AA into the 1990 Act.

But this statutory scheme was in place before the publication of the Jackson report in December 2009 and before the steps taken by the Association of Litigation Funders to regulate litigation funding on a voluntary basis. RHA, in our submission, are simply wrong to assert that DBAs were introduced following the Jackson report, as they say in paragraph 16.

In any event, the Jackson report does not constitute a judicial decision on the question before the Tribunal.

The learned professor's article is at the second authorities bundle at tab 53. In the interests of time I am not going to be able to take you through all of the relevant passages but can I just show you where the points are made. Behind tab 53.

THE PRESIDENT: Yes.

MR THANKI: The relevant section begins at page 9, looking

at the numbers on top of the page. Section 5 deals with the impact of Damages-based agreements and third party funding. You will see that two-thirds of the way down it says:

"Whether a Litigation Funding Agreement was a damages-based agreement, and this article strongly contends that it is not, it has been unwelcome, and entirely unnecessary, distraction for the Third Party Funding industry."

Just to outline what she deals with without taking you through all of this in the interests of time, top of page 10, second paragraph she deals with the query having arisen in the legal marketplace as to whether the funder's LFA is a DBA etc, and if it were it would have important consequences.

Then section B she deals with the reason for the question arising, the fact of the consequences.

In C she sets out the argument effectively and then she deals with whether a funder is providing litigation services. Then more importantly, for the present argument, page 11, second paragraph down she says:

"Alternatively, is a funder providing claims management services within the meaning of the DBA definitions? This term according to the 1990 Act section 58AA(7) has the same meaning as part 2 of the

Compensation Act."

"Moving to part 2 of the 2006 Act --"

THE PRESIDENT: That is basically your argument, is it not?

MR THANKI: Yes, you see in the third paragraph she says -- refers to the provision of financial services or assistance:

"... of course a funder unquestionably provides financial assistance to a litigator."

THE PRESIDENT: Yes.

MR THANKI: And then you will see the reason she gives for disagreeing with the DBA argument for the rest of that page, going down to -- if I can invite the Tribunal to read it in due course.

Then over the page at page 12, for avoiding room for uncertainty she proposes a statutory amendment, section D, which as the Tribunal will know has not in fact ever been made.

THE PRESIDENT: She relies on the section 58B point.

MR THANKI: She does, yes. And you have our submissions on why that is irrelevant.

THE PRESIDENT: Yes, you have addressed that.

MR THANKI: You will have seen or you will see that the professor refers to various working parties that took place in 2011 and 2012. The short point is that was long after the introduction of the relevant legislation

and hence another anachronistic argument, in our submission.

Other anachronistic documents relied on, in our submission, by RHA, include the Brady review of the case management regulations which dates from 2016, and the Government's 2018 consultation response on transferring claims management regulation to the FCA which, as I say, is from 2018.

The next point argued against us is the consequences argument. It is said by RHA that litigation funding is a feature of modern litigation which has the approval of the courts subject to control of the common law. Of course we accept that basic proposition, but in our submission it is also subject to the control of applicable statute law.

DAF's argument does not preclude litigation funding but it ensures that Damages-based litigation funding complies with the relevant legislation, and it follows Parliament's intention to preclude that DBAs, in opt out collective proceedings. See our skeleton at paragraph 60.

THE PRESIDENT: So no litigation funding of this sort for opt out.

MR THANKI: For opt out. If it is a DBA.

The fact that the funding sector has not until now

1 considered itself to be covered by the regulation of
2 DBAs is no guide to the correct statutory
3 interpretation. The inclusion of litigation funding
4 agreements within the statutory scope of DBA Regulation
5 does not frustrate access to justice.
6 Even in relation to opt out claims,
7 damages-based agreements would be permitted provided the
8 terms of the -- in respect of opt in claims,
9 damages-based agreements would be permitted provided the
10 terms of the DBA Regulations are satisfied.
11 THE PRESIDENT: But not for opt out.
12 MR THANKI: Not for opt out. For opt out the
13 unenforceability of DBA does not prevent litigation
14 funding from taking place at all, but such funding would
15 need to be calculated other than by reference to the
16 amount of damages ultimately recoverable.
17 THE PRESIDENT: Which is the usual model for litigation
18 funding.
19 MR THANKI: It could reflect a specified rate of return on
20 the investment on the sums invested, for example.
21 THE PRESIDENT: Yes, that is the section 58B model.
22 MR THANKI: Yes, and without turning it up, in the interests
23 of time, the point is effectively accepted by UKTC at
24 paragraph 33 of its skeleton where it submits that the
25 impact of our argument is academic because another

funding model could be adopted.

We say it is not a matter of precluding litigation funding in this sphere, rather circumscribing the funding models which would be permissible.

In our skeleton at 61 to 66 we address the Parliamentary debates around the introduction of the Consumer Rights Bill of 2014, and we say, in summary, that the same anachronistic problem arises for the applicants in relying on that material. It does not really help the construction of the Act.

THE PRESIDENT: That is on the assumption they thought that section 58AA covered litigation funding agreements.

MR THANKI: Yes. I have already dealt with the suggestion that the scope of the DBA regime is restricted to regulated claims management services, and, in short, that is not what the relevant parts of the 1990 Act say, and we make the point in our skeleton at paragraph 71 that if that had been the intention it would have been very easy to say so expressly.

THE PRESIDENT: Yes, we have read all that.

MR THANKI: I am obliged. In our submission section 58AA should be interpreted on its own terms and not read down by reference to either subsequent materials and certainly not read down by reference to what we would submit is the non-existent section 58B.

THE PRESIDENT: It is not non-existent. It is there.

MR THANKI: It is not inserted into the --

THE PRESIDENT: It is not in force.

MR THANKI: It is not in force and it was never inserted into the Courts and Legal Services Act 1990.

The DBA Regulations 2013 are also relied on by the applicants, and perhaps we should just turn those up which is the second authorities bundle, tab 49. Behind tab 49 you will find the original version of the 2013 Damages-based agreement regulations. The only change which is material is that the reference to the Compensation Act and the definition of "client" in 1(2) was changed to FSMA 419A, so we can look at the original text for present purposes.

We say that the reliance placed by the applicants on these regulations in support of their argument suffers from the obvious flaw that secondary legislation cannot be used to read down the scope of the existing primary legislation. A point we make at paragraphs 95 to 96 of the skeleton, but just looking at the regulations one sees various definitions set out. "The Act" is a reference to the 1990 Act. Definition of "client" refers to claims management services as defined in the 2006 Compensation Act, and then subsequently changed to FSMA, 419A. "Costs" you see defined, and then "payment"

is defined. You will see payment is defined by reference to the amount the client agrees to pay the representative, and, in our submission, when one looks at the funding agreements one can see that the client would certainly include UKTC and RHA.

THE PRESIDENT: It is so defined in the agreement but that does not bind us from statutory construction.

MR THANKI: No, but certainly --

THE PRESIDENT: We have to look at the substance.

MR THANKI: But it is obvious that the class representative would ordinarily be classified as a client of the legal representative in any given situation.

THE PRESIDENT: If you take a minor you would not normally say that the next friend is the client. The duty of the lawyer is to the minor, not to the next friend.

MR THANKI: One could see that the minor would be a client.

THE PRESIDENT: Would be "the" client.

MR THANKI: Would be "a" client, but there is nothing which would be inconsistent with that to say that the representative was also the client of the lawyer in question, or also the client of the case management company providing financial assistance.

THE PRESIDENT: The lawyer has to act in the best interests of its client.

MR THANKI: Yes, I accept that.

THE PRESIDENT: That would have to be the child not the next friend, and if there is any conflict it is the child, and equally, the lawyers here have to act in the best interests of the class members, not the class representative. One of the matters we have to consider is whether there was any potential that the class representative could influence things for its own benefit and not for the benefit of the real client.

MR THANKI: Yes.

THE PRESIDENT: I am not sure about that. It is an odd word, "representative", to use for a litigation funder, is it not?

MR THANKI: Yes, it is. I will come back to that in a second.

THE PRESIDENT: I know it is defined but it is just the definition says what it says.

MR THANKI: One sees -- yes, and I will come back to that. One sees that the preceding 2010 regulations are revoked. Then at 3 is the core requirements of an agreement in respect of all Damages-based agreements. Perhaps the Tribunal could just glance through 3A and then (c).

THE PRESIDENT: Yes.

MR THANKI: Then 4(1) deals with claimants in relation to costs. 4(2) is not relevant for present purposes,

dealing with personal injuries. And then (3):

"In any other claim or proceedings to which this regulation applies, a damages-based agreement must not provide for payment above an amount which, including VAT, is equal to 50% of the sums ultimately recovered by the client."

Sir, you made reference to the slightly odd definition of "representative" in the definitional section, and certain references in the regulations certainly work more naturally if one is thinking about the representative as a solicitor, for example, when it comes to looking at the definition of costs. But what we do say is that representative is defined very broadly, presumably it would have been very difficult and unwieldy to draft the legislation in a way which differentiated between various types of representatives and other service providers. As you will have seen, the regulation specifically cross-refers to the Compensation Act 2006 and then subsequently to FSMA 2000. Certain regulations one sees such as 4(3) are highly pertinent to funders. Nothing in the DBA Regulations is unworkable if the representative is a funder.

THE PRESIDENT: Yes.

MR THANKI: Various principles of statutory interpretation

are raised by UKTC at paragraph 19 of its skeleton. I do not believe there are any serious issues of principle between the parties. Perhaps it would be useful just for the Tribunal to have in front of it UKTC's skeleton at paragraph 19.

THE PRESIDENT: Yes.

MR THANKI: It is really the application of the principle in paragraph 20 where the debate centres around. Just looking at the principles set out by UKTC, to read the legislation in context, point (a), we say if the funding meets the definition of DBA, and the short point is that litigation funding is caught, and nothing in DAF's argument does violence to the context; (b) is having regard to the consequences. We deal with this in our skeleton at paragraph 60, and I think I have made the point really in this context, that one should not assume, as UKTC does, that if the DBA Regulations apply that the consequences should be regarded as "adverse".

The DBA Regulations were enacted to circumscribe agreements falling within its scope by certain rules which Parliament thought would be beneficial. The application of the DBA Regulations would lead to improved transparency and claimant protection in opt in funding. For opt out funding only Damages-based funding is prohibited but it is still open to the funders to

fund on some other basis, as we have discussed, such as a rate of return on the funder's investment.

In this context can I, without turning it up, refer the Tribunal, please, to Bennion. The extracts are at the second authorities bundle behind tab 52, at pages 4 through to 6, and what the learned editors of Bennion say is that reference to the consequences can rarely change the interpretation of an enactment if the grammatical meaning is unambiguous.

We say the statute here is clear, there is really no difficulty in interpreting financial services or assistance in relation to the making of a claim.

That is Bennion principally at page 6 of the extract behind tab 52.

THE PRESIDENT: You say they can rarely change.

MR THANKI: Rarely.

THE PRESIDENT: When can they?

MR THANKI: If the consequences are regarded as absurd, generally.

THE PRESIDENT: Yes.

MR THANKI: Then that is the next point which you see at (c):

"Presumption that absurd result is not intended."

The short point here is that there is nothing inherently absurd in applying the words "financial

services or assistance" in relation to the making of a claim to litigation funders. You have our points on the definitions in FSMA 2000, and the 2006 Act.

We say that funders must be the obvious persons targeted by the words "financial services or assistance" in those Acts.

It is a high threshold to say that an Act has absurd consequences and again, without turning it up, the reference is Bennion pages 9 to 13.

Thirdly, (d) is to read the instrument as a whole. The Tribunal has our point on section 58B.

(e) the general gives way to the specific. This is assuming section 58B has some relevance to construction. In our submission section 58AA and section 58B, the draft 58B, are not general and specific. We deal with this in our skeleton at paragraphs 83 to 88. The short point is that the specific provision relied on, i.e. the draft text of 58B is simply not in force.

THE PRESIDENT: Yes.

MR THANKI: Which is no reason not to apply the test under the general provision in 58AA. If the draft text of the putative 58B is at all relevant, we would refer the Tribunal to Bennion section 21.4 and it is pages 29 through to 30. What is said there is that the principle relied on does not apply where instead of a specific

provision and a more general provision there are simply provisions with overlapping aims and overlapping applications.

THE PRESIDENT: Which begs the question whether they are overlapping or not.

MR THANKI: We say the DBA provisions in section 58AA are simply a species of funding which is covered by 58AA. The fact that there was a separate provision more generally applicable to litigation funders does not mean that if something falls within the definition of DBA within 58AA it is somehow not intended to be caught, if 58B existed. They would simply have overlapping application.

THE PRESIDENT: I am trying to understand that. If you look at 58B which is at tab 35, page 47.

MR THANKI: Yes.

THE PRESIDENT: The definition of litigation funding agreement is in subsection (2). Right.

MR THANKI: Yes.

THE PRESIDENT: These agreements would meet that definition, would they not?

MR THANKI: Yes.

THE PRESIDENT: Then if they meet that definition then you have subsection (3)(a) with (e) which means that the remuneration of the funder must be an amount calculated

by reference to the expenditure not by reference to the damages.

MR THANKI: Yes.

THE PRESIDENT: There would not be an overlap because if this was in force, and of course we have your point that it is not, these are litigation funding agreements, they have to satisfy (e), they cannot get into AA, 58AA because that is prohibited. They have to be of this kind.

MR THANKI: Yes.

THE PRESIDENT: So there is no overlap.

MR THANKI: If one goes back to (1), they shall not be unenforceable by reason only of it being a litigation funding agreement.

THE PRESIDENT: No, if it satisfies these --

MR THANKI: Yes.

THE PRESIDENT: But it has to -- to be enforceable it has to satisfy subsection (3).

MR THANKI: But if it is a Damages-based agreement then this does not envisage in 58B(3) because the sum is calculated by reference to anticipated expenditure.

THE PRESIDENT: Yes, it does not allow a damages claim but it is a litigation funding agreement, so you would not have damages-based litigation funding. They would be prohibited.

MR THANKI: Yes. But if something was a Damages-based agreement, whoever is providing it whether it is a litigation funder or someone else, if it does fall within the definition of Damages-based agreement within 58AA then the rules around 58AA apply.

THE PRESIDENT: Then why wouldn't subsection (2) apply, 58B? It is a litigation funding agreement.

MR THANKI: There is nothing which would preclude a litigation funding agreement also being a Damages-based agreement, is the short point, falling within 58AA, in which case it would have to comply with the rules in 58AA. 58B would obviously bite on the litigation funding agreement. The agreements in this case would be unenforceable if 58B was in place in any event.

THE PRESIDENT: Yes, that is what I mean. But even if they satisfied the DBA Regulations they would be unenforceable, would they not?

MR THANKI: Yes.

THE PRESIDENT: Because they would fall within 58B.

MR THANKI: They overlap in the sense that this applies a stricter test, but where this has never been enacted there is no reason why --

THE PRESIDENT: Of course if it is not -- I take your point it has not been enacted. I am looking at it as if it

had been and you are saying it overlaps, if it had been, unless one reads in subsection (1) "shall not be unenforceable ..."

MR THANKI: By reason of it only being a litigation funding agreement.

THE PRESIDENT: But the assumption must be -- it is a slightly convoluted way of expressing it, but the intention must be that if it does not satisfy the conditions in subsection (3) then it will be unenforceable.

MR THANKI: It does not have an equivalent provision to subsection (2) of 58AA which provides that a Damages-based agreement which does not satisfy various conditions is unenforceable.

THE PRESIDENT: But if that does not follow, what is the bite of these conditions? If you do not have to satisfy them to be unenforceable what is the point of them?

MR THANKI: One may have to imply those words.

THE PRESIDENT: Yes.

MR THANKI: The short point is that there is, in circumstances where 58B is not enacted, there is nothing which prevents 58AA biting.

THE PRESIDENT: That is your overriding point. We have that point.

MR THANKI: The final point, if I may, I have dealt with the

point which the Tribunal raised with me at the outset in relation to the specified financial benefit.

THE PRESIDENT: Yes.

MR THANKI: I will come back to that in reply if necessary, but I think I have made the points I wanted to make at the outset.

Then can I just finally deal with the UKTC argument at paragraphs 30 to 31 of its submissions. If you look at paragraph 30, the point that is made is that payment is not determined by reference to the amount of the financial benefit obtained for the purposes of section 58AA because the funder's receipt of money is contingent on there being sufficient funds and the Tribunal ordering such sums to be paid, for example under section 47C(6) of the Competition Act.

Our short point is that there are some conditions but the fact that there are some conditions on Yarcombe being paid does not mean that the payment is not determined by reference to the amount of the financial benefit obtained within the meaning of the 1990 Act. It just means that there are some circumstances where Yarcombe might not obtain the benefit.

But as a matter of contract the amount is still determined by reference to the proceeds because it permits the funder to be paid all of the unclaimed

damages.

At paragraph 31(c) one sees that UKTC somewhat misquotes the statutory regime, subparagraph (c) at the bottom of page 14 talks about:

"(ii) Subject to the discretion of the Tribunal. They will not be determined by the amount of the financial benefit obtained."

That is to misquote the statute which makes reference not "by the amount" but "by reference to the amount of financial benefit obtained."

When one looks at the litigation funding agreement one can see that the amounts ultimately payable are by reference to those amounts.

I am just within my allotted time.

THE PRESIDENT: Thank you. Mr. Kirby, who goes first?

Submissions by MR KIRBY

MR KIRBY: I think it is me going first.

My learned friend is quite correct and indeed the point was made by you also, sir, that the fact that for the past 20 years it has not been suggested that litigation funding agreements are in any form a DBA does not mean that that argument cannot be run. But it is part of our submission that we have had a period of 20 years of litigation funding. We have had a period of six years of DBAs, a little longer in relation to

employment matters.

Just as a matter of interest, the separate position in relation to employment claims is because, somewhat bizarrely, employment claims in the employment tribunal were always regarded as non-contentious business. So it is difficult in fact if you ever go into an employment tribunal to imagine a more contentious venue, but it was always regarded as non-contentious business, hence the fact that DBAs were available in relation to employment matters.

The fact that the courts, the Civil Justice Council, litigation funders etc have all proceeded on the basis that they are not subject to the DBA Regulations is not an answer to my learned friend's argument, but it is a point that can be raised as to how come the rest of us have got it wrong for so long.

To answer a point that you, sir, raised earlier, which was perhaps that there is not the same incentive to challenge in other venues, of course there would be from those who have the benefit of litigation funding because if at the end of a successful claim they were required to pay their 20%, 30%, 40%, whatever it was, many millions, they could say, it turns out I do not have to pay you because this litigation funding agreement is unenforceable.

I fully accept that my learned friend's argument is either a good one or a bad one, but hitherto it would appear that everyone has proceeded on the basis that it is a bad one.

I want to, because my learned friend has made the point on a number of occasions, deal with the point made by my learned friend that much of our submissions are anachronistic because they refer to subsequent legislation or subsequent regulations rather than looking at what the position was in 2006. Because in construing section 4 of the Competition Act we do say that one should look at the context --

THE PRESIDENT: Compensation Act.

MR KIRBY: I had to actually do a find and correct in my notes in relation to that and I keep making the mistake and I do apologise, section 4 of the Compensation Act, that one needs to look at the context and consider the context of that being brought in.

Looking along the front row here we may not all be regular visitors or may not have been regular visitors in the past to the knock about world of fast track PI claims in the county court, maybe one or two of us may have been but not all of us, and the introduction of the Compensation Act in 2006 was against the background of the well known collapse, for instance, of Claims Direct

as well as The Accident Group.

In the authorities bundle a copy of the decision with regard to the Claims Direct proceedings has been inserted. The only reason why I asked it to be put in there is in order for the Tribunal to get some idea as to the particular background and context.

THE PRESIDENT: What is the name of it?

MR KIRBY: Forgive me, I am just trying to dig out the ... C*laims Direct Test Cases*. I think it has gone in at 3B, so volume 1, 3B.

This decision is primarily concerned with certain elements of costs that had been determined by the senior costs judge, Master Hurst, then made its way to the Court of Appeal, and one of the main issues in it is in fact with regard to insurance premiums.

Claims Direct, as you will see from paragraph 4 of the decision setting out the facts was set up in the mid to late 90s to provide claims handling services. You will see they attracted clients through national advertising. Claims managers visited likely clients in their homes. The services embraced by the scheme included helping claimants to have access to members of panels of solicitors, medical experts, obtaining advice from counsel, generally guiding them through to the conclusion of their claims. This package of services

did not include any insurance element.

What then happened is that insurance became a very important part of claims management services, because when the insurance premium became recoverable as part of costs there was then an incentive to encourage claimants, clients, to take out an ATE policy, because in taking out that ATE policy the person who has introduced them to the policy will then obtain a significant commission.

And the premiums therefore that were payable were greatly, or perhaps that is too high a word, were significantly inflated by reason of the commissions that were then being paid to the claims management companies.

One can see the description of that. I am not going to go all the way through it but between paragraphs 9 and 12. Then there is a reference from 13 onwards to the new Claims Direct business model.

Then if I can take you to paragraph 14 you will see that from Claims Direct's viewpoint, the new scheme, so this is the new scheme they have introduced with particular ATE policy and the commission that they are going to receive in relation to it, in paragraph 14:

"In Claims Direct's viewpoint the new scheme achieved the purpose of replacing one source of cash, (the 30% share of any damages recovered by a claimant),

with another, (the £1,312.50 "premium"), with the added benefit that this cash flow was now achieved at the outset of each claim, rather than its end."

You will see a reference to binding authority being given with regard to the issue of insurance, and then at paragraph 16, there is reference to a customer's loan. So that loan is in relation to the taking out of the policy.

Also, in the somewhat Wild West days of claims management at that time in fact claims management companies and indeed solicitors would actually offer sums of money for claims. They were either paying referral fees between themselves or would actually offer sums of money to clients: bring your claim here and we will pay up-front £500.

That is part of the background and the context in which the Government then sought to introduce the compensation bill. The policy statement issued with regard to the compensation bill can be found in authorities bundle 2 at 55A. This was the then Department of Constitutional Affairs, a policy statement with regard to the Compensation Bill that then became the Compensation Act.

THE PRESIDENT: Yes.

MR KIRBY: You will see at page 3:

"The Compensation Bill will provide the framework for the statutory regulation of claims management services. The bill provides for the regulation of the activity of providing claims management services and those carrying out the activity would need to be either authorised, subject to exemption, subject to temporary waivers, or be an individual who is not doing it during the course of their business."

Over the page, again, the background, so again, I rely on this with regard to context, and in order to show that our submissions are not anachronistic. It gives the background with regard to the development of the claims management industry and the access to justice, obviously the elimination of legal aid, and then the introduction of CFAs, legal expenses and insurance, and then the next, second paragraph:

"Claims managers ..."

This is what claims managers do:

"Claims managers gather cases either by advertising or direct approach. The claims manager then either acts for the client to pursue a claim or as an intermediary between the claimant and the lawyers who may represent them. Claims managers make money from several sources: referral fees from solicitors, commission on auxiliary services, after-the-event insurance and sometimes from

loans to the client."

The "Why regulate now?", second line down:

"While the report rebutted the idea of a compensation culture (and made the point that claims have fallen in recent years), they recommended that, to safeguard genuine claims and provide reassurance for consumers, the industry should be regulated."

When one looks at the heading "Regulatory structure", the second paragraph:

"Claims management services are defined as advice or other services in relation to the making of a claim."

Then it is a very wide definition of "claim".

And:

"The definition of the clause is wide to ensure that all areas where there is a risk to consumers from commercial claims management companies can be captured, and there is no risk of loopholes.

"The prohibition in clause 2(1) of the bill is limited to regulated claims management services and services are regulated only if they are of a kind prescribed by order of the Secretary of State."

It then set out what was anticipated to be the sort of areas in which regulation would be required. One can see that they are clearly very much consumer-Damages-based: personal injury, housing

disrepair, employment, criminal injuries compensation and mis-selling of financial products.

It looks like at that time it was all about endowment mis-selling, whereas obviously now it is all about PPI. You only have to drive, as I did at the weekend, with your commercial radio station on, to be bombarded every time there is an advert break with an advert for PPI and getting your claims in by I think it is August of this year.

We are all familiar with that traditional sense of claims management. As is said below those examples:

"Claims management services will only be covered by the regulator, therefore, if they relate to claims of these types."

Then the final paragraph:

"Before making an order under clause 2(2)(e) the Secretary of State must consult with the Office of Fair Trading and anyone else who he considers will have an interest."

So the background to the introduction of the Compensation Act were the concerns over claims management companies, and included within the concerns about claims management companies was the fact that they were making loans, and they were arranging for ATE insurance from which they were taking a significant

commission.

When my learned friend said towards the end of his submissions that one could see that litigation funding was ideally suited and covered by financial assistance and services, that is not, in our submission, what was envisaged at all in 2006 and it is not what was intended to be covered at all when one looks at the context for the passing of the Act.

When one then looks at the definition, and my learned friend has taken you through very fairly and very thoroughly, and in particular in the skeleton argument through the legislative steps, there is simply no need for me to do that or to repeat any of that. What, though, you do have to consider is that context and background when construing the definitions that is then in section 4.

I would like to go to section 4. Obviously we have seen it on a number of occasions and it is at divider 30 in my bundle.

The first point to make is that in fact the DBA Regulations refer to the definition at section 4(2)(b) of the Compensation Act, and of course 4(2)(b) just says:

"Claims management services means advice or other services in relation to the making of a claim."

Obviously my learned friend needs to also rely on section 4(3) in order to expand the definition of services or rather to give examples of what services includes.

So (3) says:

"A reference to the provision of services includes, in particular, a reference to the provision of financial services or assistance."

It is not limited to that. So we do have the situation where any service, on my learned friend's broad construction of this, any service in relation to the making of a claim would be a claims management service.

My learned friend took up the example given by UKTC of a bank --

THE PRESIDENT: When you say "any service --"

MR KIRBY: Because it says:

"Claims management services means advice or other services in relation to the making of a claim.

And:

"A reference to the provision of services includes in particular a reference to ..."

So it includes it, but it is not limited to that.

THE PRESIDENT: No, but anything that is not within (i) to (iv), you would decide whether it is within the

inclusive definition on the sort of *ejusdem generis* construction, would you not, whatever the vernacular equivalent is of the Latin, applying the same approach. It does not mean any service, it is not the taxi that takes you to your solicitor to make a claim, for example. That is a service but that is not a claims management service just because it helps you make your claim because it takes you to your solicitor's office.

MR KIRBY: On a broad construction it would include --

THE PRESIDENT: I mean a sensible construction.

MR KIRBY: It would not be a sensible construction but that is in fact part of our submission, that actually if you are to take the broad submission and construction advanced by my learned friend that actually you do end up with those absurd examples. So --

THE PRESIDENT: You might if you were trying to bring in other services that are not specified, and he bases himself entirely on subsection (1) and says this is financial assistance, never mind how broad services might extend. But he says, on any view, this litigation funder is giving financial assistance in relation to the making of a claim.

MR KIRBY: Let me then deal with that particular subparagraph, so the financial assistance.

If a person uses a credit card to pay a court fee in

relation to a housing disrepair claim, then in our submission that could be caught by financial assistance in relation to the making of a claim. They are getting financial assistance from the credit card company to pay the court fee, or perhaps it is to pay the solicitors, pay counsel. My learned friend said yes, but it is unlikely, he was dealing with the example of a bank, he said it is unlikely for instance that the bank would then be paid by reference to the outcome. I agree, but that is not the point, because the point is if that was in relation to a housing disrepair claim then suddenly the credit card company would be providing claims management services of a regulated nature, and therefore would have to pay an annual fee in relation to its regulation and would be subject to regulation.

THE PRESIDENT: Just explain that to us because we have not gone into that. The regulated -- those claims management services which are regulated include services in connection with a housing claim. Is that the point?

MR KIRBY: I took you just a few moments ago to the sort of claims that were envisaged before the bill was actually passed, and a housing claim is a type of claim that is covered now by way of a regulated claims management service.

THE PRESIDENT: That is under?

MR KIRBY: That is under --

THE PRESIDENT: -- a statutory instrument.

MR KIRBY: A statutory instrument.

THE PRESIDENT: Made under subsection (2)(e).

MR KIRBY: Yes, so personal injury, housing, criminal injuries compensation, some of the financial services flank are regulated claims management services, or rather are the sort of cases where you have to be regulated.

THE PRESIDENT: Yes, I see.

MR KIRBY: So the point I was seeking to make is if you have paid your solicitor, your claims management company, or the court by a credit card, then you have had financial assistance from that credit card company with regard to the making of the claim, and the fact that the credit card company or the bank loan is not being paid by reference to the amount recovered in the proceedings is irrelevant.

THE PRESIDENT: That only comes in when you are looking at Damages-based agreements. It is nothing to do with this.

MR KIRBY: Absolutely, but, sir, the point I am seeking to make is that if you have a very broad construction of this, then it would encompass a vast number of unintended persons within it. The fact that they may

not have entered into anything like the Damages-based agreement is neither here nor there, because the issue is whether they were carrying out claims management services, because if they were in relation to particular types of claims they would have to be regulated. They would be under the regulator. They would be paying an annual fee in order to be a regulated claims management services company.

So focusing on the litigation finance, the LFA in this case in relation to this type of claim is itself -- I will start that sentence again. Focusing on an LFA in this sort of claim in fact is missing the point of the impact of the Compensation Act and what it is intended to cover. And that is why we say, on this point I will finish, that when construing the provision of financial services or assistance it has to be providing financial assistance or services within the context of claims management in the way in which, prior to its demise companies such as Claims Direct, they were providing and perhaps it might be said abusing the provision of financial services and making loans to clients, again as referred to in the policy statement in March 2006 produced prior to the passing of the Compensation Act.

Would that be a convenient moment?

THE PRESIDENT: Yes, I just wanted to -- we have -- and do

the explanatory notes help at all?

MR KIRBY: I was -- the explanatory note to?

THE PRESIDENT: To this Act we are looking at, to the Compensation Act. We have got them here.

MR KIRBY: We do have them. They are in divider 30.

THE PRESIDENT: You can come back to that at 2 o'clock.

MR KIRBY: I am quite happy to.

THE PRESIDENT: If there is anything there that --

MR KIRBY: There is some useful material in that, yes.

MR THOMPSON: It just so happens that fits in with a point I was going to raise, I was not sure when to do it, but the explanatory memorandum to the implementing regulations are also, in my submission, relevant, and they do not appear to have crept into the authorities, so could I add them to tab 46 of the authorities?

THE PRESIDENT: Yes, do you want to hand them up to the --

MR THOMPSON: I do not know how many copies the Tribunal wants, but there are three to start with.

THE PRESIDENT: We can make a few more. Yes, it is important to give a copy always to the transcribers.

MR THOMPSON: Yes, we will certainly do that.

THE PRESIDENT: Very well, 2 o'clock.

(1.02 pm)

(Luncheon Adjournment)

(2.00 pm)

THE PRESIDENT: Yes, Mr. Kirby.

MR KIRBY: I wonder if I can take the Tribunal to the explanatory notes, the Compensation Act and that is at divider 30, again, in the second volume of authorities. You see from the overview on page 1 that -- this is at paragraph 5 -- the Act is divided into three parts and obviously we are concerned with part 2. Part 2 "Claims management services". Part 2 contains provisions relating to the regulation of claims management services. But then if we go over to page 4, we get the background to the introduction of part 2. Paragraph 28:

"The Better Regulation Task Force report: Better Routes to Redress published in May 2004 found that the 'compensation culture' is a myth but that it is a damaging myth that needs to be tackled. The BRTF identified the activities of claims intermediaries as contributing to a 'have a go culture' and recommended that claims intermediaries should be subject to statutory regulation, if self-regulation did not work."

Can I just interject on that point which is to contrast the position with regard to claims management companies and third party funders. So section 58B which I will come to in due course was introduced to provide regulation of third party funding agreements, litigation funding agreements, but then, over 20 years, has not

been brought into force because third party funders have been allowed to self-regulate, and that appears to have worked so that there has apparently been no need to introduce 58B, in contrast to the position with regard to claims management companies.

If we then turn to the commentary sections on page 5. This is dealing with section 4:

"This section prohibits the provision of regulated claims management services by those who are not authorised, exempted from authorisation or subject to a waiver, or an individual acting otherwise than in the course of business."

Skipping down into paragraph 34 in the middle of that paragraph:

"This subsection also defines claims management services as "advice or other services in relation to the making of a claim". The claim may be for compensation, restitution, repayment or other remedy or relief or in respect of loss or damage or an obligation -- whether pursued through the courts or by other means."

It gives examples including the financial ombudsman and mis-selling of financial products:

"Only those claims management services that the Secretary of State prescribes by order under section 4(2)(e) will be subject to regulation."

Then subsection (3) gives examples -- this is paragraph 35 -- of activities which constitute the provision of services where they are connected with a claim.

The list, which is not exhaustive includes financial services, for example assisting with the purchase of insurance or loans, legal representation, for example acting on a claimant's behalf in pursuing a claim, referring or introducing one person to another, for example, referring a claim to a solicitor and making enquiries.

Now, there is there the reference, for example, assisting with the purchase of insurance or loans. In our submission that must be the assisting with the purchase of insurance or loans as part of the claims management activities.

The examples that were given in the Claims Direct cases and in the policy statement of the fact that claims management companies were receiving income from various sources, including commissions from ATE policies and making loans to clients with regard to the purchase of such policies.

There is nothing else that I wish to draw your attention to in that commentary. Can I take you to tab 59 in the same bundle which is some of the -- an

extract from Hansard. Bridget Prentice was the Parliamentary Under-Secretary of State for constitutional affairs.

THE PRESIDENT: Do we know what date this is?

MR KIRBY: I was going to say yes, but -- yes, I only get this from the index to our bundles, but 8 June 2006, someone says it is at the bottom as well. Indeed it is, thank you.

So the Under-Secretary of State near the bottom hole punch says:

"Part 2 of the bill sets out a scheme to regulate claims management services. Some very reputable claims management companies provide a good service but consumers are too often exploited by firms who provide a bad service and encourage false claims. I cannot name them but apparently about 500 companies operate in England and Wales. They are not subject to regulation and many of them abuse the system."

Can I go over to the page where there is a long passage by the minister, and the second paragraph down:

"The practices we want to stamp out fall into three main areas. The first is the encouragement of frivolous claims, by raising false hopes about the compensation available, through high pressure marketing techniques."

"Secondly, consumers are misled about the options

for funding their claim; in some cases, companies do not let them know there is a free alternative and, in others, they sell inappropriate additional services, such as loans to fund insurance premiums."

"Thirdly, we want to protect consumers against poor-quality advice where claims managers act directly for them."

Then an example is given of a woman who apparently borrowed money from the claims management company and ended up having to repay a lot of money.

Then over the page, again, the minister, the passage in the bottom half:

"We want to capture people who abuse the system and who do not give consumers all the information they need to make a clear and considered decision."

You will see a question was then asked by, or an interjection by Mr. Kevan Jones:

"Does my honorary friend agree that it is important that claims handlers who sell after-the-event insurance should be caught by the regulation?"

And the minister replies:

"I shall not comment on the individual company that my honorary friend mentions, I do not know the details, but it is right to point out that it is scandalous, and a scam, when people think that their case is being made

on the basis of their understanding of no win, no fee, but discover that because they signed up for an insurance premium they are paying back large amounts over a long period to companies that make large profits as a result."

MR THANKI: If Mr. Kirby is moving on from that document can I ask the Tribunal to look at the question by Mr. Philip Hollobone to which my learned friend referred to Bridget Prentice's answer.

THE PRESIDENT: National Accident Helpline, that one?

MR THANKI: Yes.

MR KIRBY: "National Accident Helpline is based in my constituency and has a strong reputation in the field. The company has pointed out that the definition of financial services or assistance in clause 3(3) is far too broad and could capture such groups as before-the-event insurers, liability insurers and individuals passing on claims to solicitors. The company feels that the minister should provide more clarity about who the Government actually want to be caught by that mechanism."

THE PRESIDENT: Thank you.

MR KIRBY: We say that that is the context and the background to the introduction of the Compensation Act, and those are the mischiefs that were being addressed by

the Compensation Act. We do say that the existence of section 58B of the Act, CLSA, is relevant.

THE PRESIDENT: Are you moving on to that point?

MR KIRBY: I am moving on to that point.

THE PRESIDENT: Yes.

MR KIRBY: Actually before I do, perhaps I could just summarise therefore what we say with regard to how financial assistance and advice should be construed.

We say that financial assistance and advice should be construed within the context of claims management in the making of a claim. So a claims management company that advises with regard to ATE, that that's all part and parcel of the claims management. That what the Government was seeking to do and how the Act should be construed is that the particular example given, which is included within the definition, namely financial advice and assistance, should be financial advice and assistance in the context of a claims management company's activities, because that is where the concern was, and that is what needed to be tackled because apparently self-regulation had not been successful.

To include third party funding where the third party funder has no role in the management of the claim is not what was intended and is not what should come within a proper construction of that clause, this section

rather.

I gave the example earlier of the credit card company, related but perhaps even more pertinent. If a funding agreement, or rather if a third party funder provides claims management services, then the funder in, for instance, the Merricks case would also be caught. But more interestingly, I simply put it out there, the funder in the Merricks case would also have to be regulated because if it was providing claims management services, it would be providing claims management services in relation to claims in relation to financial services, which is one of the areas that is covered by regulation.

It may be, I do not know who the funder is, I do not know for certain who the funder is, and it may be that they are regulated by some other body which means there is a dual regulation problem, but I use that as the example, that if the construction put forward on behalf of DAF is correct, then third party funders not only would have to comply with the damages-based agreements Regulations, but may also have to seek authority to be registered with the FCA for the purposes of providing claims management services.

So, as I say, we say the advice and the assistance has to be tied in with the management. A third party

funder does not manage a claim, because if a third party funder did manage a claim, it is likely or may well have stepped over the line between lawful third party funding and the old arguments about Champerty and maintenance.

One of the arguments, for instance, in *Excalibur* in the Court of Appeal, which is in the bundle, was the extent to which third party funders should be reviewing rigorously the steps that are being taken in the litigation, and whether there was a danger that if third party funders were required or expected to do that, one of the concerns was, would they then step into too much control in the sense of management and therefore fall foul of the law in relation to Champerty and maintenance, and the Court of Appeal said that someone who in fact complied with the ALF code of conduct, there would be little danger of that. As it happens in that case the funders were not members of the Association of Litigation Funders.

But there remains that distinction between a third party funder who is on the right side of the line and a third party funder who could be the wrong side of the line so far as Champerty and maintenance is concerned. Were a third party funder to actually manage a claim, to be involved in the management of the claim, there would be that danger of it having stepped over the line.

Can I move on to the 58B point?

THE PRESIDENT: Yes.

MR KIRBY: 58B in various versions is at divider 35. Sorry, there is only one version of 58B. It is the other sections where there are various versions. 58B comes in the last three pages, I hope, of that section.

The first point I wish to make is this: it was said by my learned friend that this does not form part of the Courts and Legal Services Act. It does. It was inserted, but it has not been brought into force and there is a difference. So it is inserted into the Act.

THE PRESIDENT: I think the point, sorry to interrupt you, but I think the point being made was that the Access to Justice Act section 28 which was to insert it has not itself been brought into force. So it has not been inserted. That is the way I understood it and Mr. Thanki is nodding, so if one goes to --

MR KIRBY: 29.

THE PRESIDENT: Was it 29? Thank you. Tab 29 where you have section 28 of the Access to Justice Act, and this is not paginated but it is somewhere within tab 29, section 28 says:

"In the Courts and Legal Services Act after section 58A insert ..."

And there is 58B.

But this section 28 itself has not been brought into force and therefore 58B, although it is there, has never made it into the 1990 Act.

MR KIRBY: Then please forgive me because that additional subtlety I think had passed me by, and if that is correct, the point I would make in relation to it is it is still a section which has been passed with regard to the regulation of litigation funding agreements.

THE PRESIDENT: Yes.

MR KIRBY: It indicates that Parliament considered 20 years ago the regulation of third party funding, for 20 years has decided not to bring it into force, whether by bringing into force section 28 and then bringing into force section 58B, or at all, and what we say my learned friend is seeking to do is to bring in through a back door an argument that third party funding and litigation funding agreements are regulated under a provision that was never aimed, as we have seen from the context of the background, that was never aimed at third party funding. And that, therefore, to construe 58AA as including a litigation funder is -- I have been accused of being anachronistic or our submissions being anachronistic. Those submissions, as I say, do not bear any relation to the background to the introduction of that section.

The regulations, the self-regulation of the third

party funding industry is a matter that -- and I accept that the Jackson report came after the 2006 Act, but the self-regulation of the third party funding industry through the Association of Litigation Funders is something that was recommended by Sir Rupert, recommended a particular code, recommended changes to that code. Those recommendations were all implemented, and members, and I accept that not all third party funders are members, but members of the Association of Litigation of Funders abide by that code, and as a result of the continuing application and use of that code there has been no need, we submit, to introduce or bring into force section 58B.

I have dealt with the background and the context to the Compensation Act and the definition there. I have dealt with section 58B in terms of its existence and the need -- the fact that it has not been needed to be introduced because of self-regulation. What I need to deal with is to move on to deal with whether the change, whether the claims management services have to be regulated.

I accept that claims management services could be broader than regulated claims management services, but we do say that the reference to part 2 of the Compensation Act is a reference to regulated claims

management services. That is what part 2 was dealing with.

THE PRESIDENT: If you are right on your construction of the Compensation Act, it does not matter because they are not management services.

MR KIRBY: My primary point -- indeed that point would not matter at all because our primary point is this is simply not claims management services, because the provision of the financial advice and assistance does not relate to any form of management involved in the making of a claim.

THE PRESIDENT: Yes.

MR KIRBY: It is the funding of a claim not the management of the making of a claim.

THE PRESIDENT: Yes.

MR KIRBY: It has to be remembered that claims management companies often take the claim from the very beginning to the very end. They do not necessarily pass it on to solicitors. They do not necessarily involve court proceedings. They are there, they manage the whole claim. If litigation is required they should be passing it on to the solicitors because they are probably not authorised to conduct litigation. But the claims management companies are involved from start to finish in a number of matters, and that start to finish may

include selling the client ATE, it may involve providing them with a loan. Before it was banned, it may include advancing them a sum in respect of their ultimate likely recovery.

So the argument with regard to regulation only matters if you are against me with regard to our primary submission with regard to the proper construction.

THE PRESIDENT: Yes, can I just ask you, was litigation funding very relevant to employment claims?

MR KIRBY: No is the short answer, I think. Employment claims -- sorry, I am probably going to end up giving evidence here.

THE PRESIDENT: We have a lot of background on costs, so ...

MR KIRBY: As I mentioned earlier -- because this was something which had slightly confused me earlier.

I think my learned friend said that contingency fees were not introduced pursuant to the Jackson report. They were in relation to litigation and contentious business. That is why I drew the Tribunal's attention to employment cases because under the Solicitors Code of Conduct at that time, claims in the employment tribunal were regarded as non-contentious. But I am not suggesting that litigation funding was involved in them because obviously in the employment tribunal they are often very small, just a few thousand pounds. But what

you had was claims management companies or advisers, or whatever they wanted to call themselves, running claims in the employment tribunal for a share of whatever was recovered. So I will run your unfair dismissal claim, for which the average award may have been £2,000 or £3,000, and I will take a third of what you recover. But no, I do not suggest for one moment that third party funders were interested in employment claims.

THE PRESIDENT: Is that where the DBA provision first came in?

MR KIRBY: Yes.

THE PRESIDENT: With the read across to section 4.

MR KIRBY: Yes.

THE PRESIDENT: Then that section 58A was broadened.

MR KIRBY: Yes. When DBAs, contingency fees, whatever they were called, back in the 90s were being used in employment cases, as I say, they were being used because it was regarded as non-contentious business and therefore solicitors were allowed to do it. Other representatives were also able to do it because in the employment tribunal you did not have to be a solicitor in order to conduct the advocacy, or a barrister, and therefore when the first set of regulations were introduced, which were limited to employment cases, it was clearly aimed at those companies, outfits, who were

there taking a share of employees' compensation in relation to their unfair dismissal, discrimination etc. It was not aimed in any way at third party funding.

THE PRESIDENT: Yes.

MR KIRBY: We say that that is -- that also can assist the Tribunal in its construction of the reference to section 4 because that would not have been intended at all for a £2,000 or £3,000 claim to be a reference to any form of third party funding.

There is a point I want to draw attention to in the regulations themselves. I take my learned friend's point that secondary legislation cannot be used necessarily to interpret the primary legislation, but again, I think it assists with regard to -- it reflects what we say is the proper construction.

The regulations are at divider 49.

THE PRESIDENT: These are the DBA Regulations.

MR KIRBY: The DBA Regulations. It is actually to take up a point, that, you, sir, made when noting the definition of "representative" and how in a sense that is not -- it may have been a difficult word for them to have chosen, but not in itself an obvious word to use for a third party funder. We would say in addition to that point, the "client" is also an odd word to use when one sees the definition of client, because:

"'Client' means the person who has instructed the representative to provide advocacy services, litigation services or claims management services, and is liable to make a payment for those services."

Someone like the RHA does not instruct a third party funder to provide funding. It goes and requests and asks for it and makes an application, but certainly does not instruct in the way in which a client would instruct a firm of solicitors or an advocate or someone who is going to bring the claim on its behalf.

This also ties in with the fact that litigation funding is not part of the management of the claim or the making of the claim. The litigation funding is to fund the litigation that others will manage and which it will simply fund in accordance with the terms of its funding agreement which will not involve management, because to involve management would be to run the risk of, in any event, being a Champertous agreement.

THE PRESIDENT: Yes.

MR KIRBY: Just to summarise that point and I am coming to the end of my submissions, financial assistance and financial services may be part of claims management services, but if that financial assistance or those financial services are not given within the context of claims management services, then they will not amount to

claims management services.

We have referred to the consequences of the DAF construction, and again we accept that that of itself is not the answer to the point, but we do say that constructions that lead to what we say are absurd results, and constructions that lead to consequences that are not those which were clearly envisaged by the Government when it introduced the Compensation Act, that that is something that you can take into account.

Sir, those are the points I wish to make without impinging on Mr. Thompson's time.

THE PRESIDENT: Yes, just one moment. (Pause) Thank you very much, Mr. Kirby. Yes, Mr. Thompson.

Submissions by MR THOMPSON

MR THOMPSON: Can I just make sure I have my relevant microphones turned on. Is that all right? Yes, thank you.

I will do my best not to overlap with Mr. Kirby's submissions which I adopt insofar as they bear on my client's case.

THE PRESIDENT: Yes.

MR THOMPSON: I think this matter was originally described as a preliminary issue, but I think technically it is probably not a preliminary issue because there have not been agreed facts for the purposes of the determination,

but in my submission there are two broad legal issues.

First of all, what might be called an *in personam* argument, are litigation funders providers of claims management services within the scope of section 419A(1) and (2)(a) of FSMA, which one might say is providing litigation funding, a form of financial services falling within the scope of section 419A (2)(a), and then what might be called an *in rem* argument or an argument of substance: do the funding of agreements between UKTC and Yarcombe fall within the scope of section 58AA(3)(a)(i) and (ii), and we say the answer to the first question is no, litigation funders are not providers of claims management services, and at least insofar as it concerns our opt out LFA, we say the answer is no to that as well, and we obviously heard the exchange between the President and Mr. Thanki towards the start, and that raises a question about whether UKTC falls within the scope of the section 58AA regime at all.

As a preliminary comment we would say that there was a considerable artificiality about this debate. In addition to the points made by Mr. Kirby, I note that this objection, if it were considered by the Tribunal to be meritorious, could in principle be addressed by a restructuring of the funding agreements either to

comply with the terms of the DBA regs or by arranging for a funder's fee that was not Damages-based on a share of the proceeds. However, as both Mr. Perrin and Mr. Purslow explained, that would be entirely contrary to the system of litigation funding that has developed in the UK over the past 20 years, reflected in the Association of Litigation Funders code of conduct and contrary to the policy endorsed not only by Lord Justice Jackson in his review, but by the Court of Appeal and this tribunal in the *Excalibur* and *Merricks* judgments.

So first of all, we say that litigation funders are not providers of claims management services, and we adopt and endorse the RHA's account that the purpose of the legislation and the essential absurdity of the DAF argument, and we also say the anachronism point is not in fact valid, that this is a matter that has been under scrutiny by Parliament over the past 20 years in the context of Lord Justice Jackson's review, and the adoption of the ALF code, and so far as this case is concerned, the adoption to the Consumer Rights Act 2015, and most recently the amendments to the Financial Services and Markets Act 2018.

So Parliament can be taken to have been fully aware of both the litigation funding DBA and claims management

regimes but has done nothing to address the anomaly which Mr. Bankim Thanki's submissions entail, although I do not think he seriously contends that anyone as a matter of policy or purpose has ever accepted the approach he suggests.

If we take the three different strands in turn, we say first of all that the history of regulation of claims management services makes it quite clear, for the reasons Mr. Kirby has given, that the Parliamentary intention was to adopt consumer protection measures to address complaints about the conduct of unregulated claims intermediaries. That is the expression that is used in the preparatory materials. The unscrupulous conduct of such operators was clearly the mischief that this new regulatory regime was intended to address. It was not part of the legislative intention to regulate the funders of such intermediaries. For example, if Claims Direct had borrowed money from Barclays Bank or NatWest there is nothing to suggest that Parliament intended to regulate Barclays or NatWest.

One particular concern was to address the mischief of the unregulated provision of loans and insurance products by such businesses in the wider context of claims management, and Mr. Kirby has taken you to paragraphs 28 to 30 and 35 of the explanatory notes for

the 2006 Act which are at tab 30 of the second bundle of authorities which make the legislative intention abundantly clear. Without taking up time, the same picture emerges from the explanatory memorandum to the 2006 orders which gave effect to the Act, and in particular paragraph 7.1 and 7.4.

THE PRESIDENT: Yes, which you handed up to us.

MR THOMPSON: Yes. It may be worth just looking briefly at that and at the order itself. That is at tab 46. If one looks at the order itself, I do not know whether the Tribunal has it in front or behind the memorandum, but if one turns to the second page of the order, I do not know if it is section or article 4(2) you will see the types of service that was provided for. So:

"Advertising for persons who may have a cause of action, advising a claimant or a potential claimant in relation to his claim, referring details of a claim or claimant to another person, investigating or commissioning the investigation of the circumstances, merits or foundation of a claim, and representation of a claimant whether in writing or orally, and regardless of the tribunal, body or person to or before which or whom the representation is made."

So in my submission that is a sort of classic claims management activity and that was the target of

Mr. Perrin's evidence where he said we do not do any of this sort of thing.

THE PRESIDENT: These are the regulated ones. It is right to say, as Mr. Thanki put it, that is a subset of a broader category of claims management services.

MR THOMPSON: Absolutely. If one looks at the policy background that is described at paragraph 7.1 of the explanatory memorandum and the description of claims management businesses:

"Claims management businesses gather cases either by advertising or by direct approach. They then act either directly for the client in pursuing a claim, or as an intermediary between the claimant and a legal professional or insurer. Claims management businesses make money from several sources, from referral fees, from solicitors, from commission on auxiliary services, from the sale of after-the-event insurance and sometimes from loans to their clients."

So that is a clear explanation of the mischief which obviously has some similarities to the Claims Direct saga which Mr. Kirby showed you this morning.

THE PRESIDENT: Yes.

MR THOMPSON: Then in terms of the order itself the explanation is at 7.6:

"The definition of claims management services in the

Act is wide to allow new areas to be brought within the scope of regulation where problems arise, and for areas to be removed from scope where problems subside. The intention is that the regulation be applied initially in the areas where there is the greatest potential for consumer detriment. The Scope Order specifies the activities that will be regulated. The activities are those characteristically provided by claims management companies and have been described in such a way as to ensure that similar services provided outside the area of the claims management industry are not inadvertently regulated as claims management services."

The explanation here is that there is a clear explanation of the nature of claims management, and then the memorandum says that these activities, the ones I showed you, are those characteristically to be provided by claims management companies. That is why I took you, the Tribunal, to those provisions, because they confirm the nature of the mischief that this regime was intended to address.

We did add one more case to the bundle but I think given the fact that Mr. Kirby has taken you to the Claims Direct judgment I do not need to go to it. The case I refer to is Jones v Wrexham where there is a description of the activities of a different claims

management company, in particular at paragraphs 4 and 8 of that judgment which is at tab, I will tell you the tab in a moment. Ms. Ayling will tell me in a second.

We say that not only was that the intention of the legislator when this regime was adopted in 2006, but it clearly continues to be the Parliamentary intention and remained that when the 2018 order was made and one sees that from the explanatory memorandum to that order which is at tab 51 of bundle A2. This brings the matter up to date with a memorandum adopted, or rather the order adopted last year and I think entering into force in April of this year. The explanation for the policy background is at pages 2 and 3 of the explanatory memorandum, tab 51. Again, at 7.1 the description:

"Claims management companies, CMCs, are businesses which provide advice or other services in relation to the making of a compensation claim."

Then there is a description of how many businesses there are. And then:

"As explained at paragraph 14 of the Explanatory Notes to the 2018 Act, evidence of malpractice in the sector had led to distrust by consumers in CMCs, with 76% of the public having reported that they are not confident that CMCs tell the truth to their customers."

It is very much the same concern as there was in

2006.

Then at paragraph 7.4 there is a description not only of the types of sectors which are to be regulated but also the types of activity one sees in the bullet points, and they are very much the same types of activities that were characteristic of claims management companies in 2006, so seeking out, referring and identifying claims, and then advising, investigating and representing in relation to the different categories of claims.

Those matters were then the subject of regulation by way of amendment of the 2001 order, and one finds the detail of that in the rest of the tab. I am sorry, I have the reference wrong there. The amendment is in the previous tab which amends the Financial Services and Markets Act 2000 Regulated Activities Order 2001 with effect from 1 January 2009. That is at tab 50, and a number of specific regulations are introduced. If you turn into the tab, at about 11, you find 89G which describes a number of characteristic activities of claims management companies under the heading "Seeking out, referrals and identification of claims or potential claims". Then after that there is 89H, I, J, K, L and M which deal with the --

THE PRESIDENT: Sorry, I have lost you.

MR THOMPSON: Sorry, I am perhaps taking it too quickly.
THE PRESIDENT: It is just, I have lost the reference.
MR THOMPSON: Tab 50. If you turn to the back of it you should find 89W and if you then turn forward you will eventually come to 89G.
THE PRESIDENT: I see, yes.
MR THOMPSON: That is a generic set of activities which are then said to apply to the six categories in 89G too, and these correspond to the first point about the explanatory memorandum we were just looking at. So there are a number of activities which apply to all these activities or types of claim.

If one then turns through 89H and so on there are specific types of conduct, advice, investigation and representation in relation to particular types of claim.

It is perhaps a somewhat elaborate regime but the only point I am making is that the target or mischief does not appear to have changed very much from 2006 to 2018, and it is focused on activities of exactly the same kind as were of concern in 2006.

THE PRESIDENT: Yes.
MR THOMPSON: That is, as it were, claims management and we would say that from 2006 to 2019 Parliament has evinced the same concern about consumer protection, and possibly unscrupulous conduct, including in relation to insurance

and loans and matters of that kind.

Secondly, if one turns to DBAs, the regulation of Damages-based agreements took a different course with a system of regulation evolving over time to dictate the form of such agreements, enabling initially, in non-contentious areas, solicitors, barristers and claims management companies to act for clients on the basis that they would take a share of the proceeds of litigation, subject to the regulatory regime introduced under section 58AA.

The statutory regime at issue there started with the regulation of employment law claims, which had previously been unregulated, as Mr. Kirby has explained, but it has now been expanded to form a general scheme of regulation providing for this form of remuneration of advocates, solicitors and claims management companies under specific statutory conditions, and one finds that in tab 34 of the second bundle of authorities, but I do not think we need to go back to that.

Then third and finally, the regulation of litigation funding took a completely different course. In 1999, several years before the regulation of claims intermediaries provided for in the Compensation Act 2006, Parliament had made statutory provision for a specific system of litigation funding

that has never in fact been brought into force.

Mr. Thanki has the point that, as it were, it has doubly not been brought into force but in my submission that does not really take you any further because if the Government wanted to it could no doubt find the strength to find two statutory instruments and not one and bring it into force, but it has not done that.

Instead, a market for litigation funding was allowed to evolve under a system of self-regulation, initially in accordance with the common law and then, in the last ten years or so, pursuant to a non-statutory code specifically endorsed by Lord Justice Jackson in his review, and without going into the detail of it, the approach is well described by Lord Justice Jackson, if I may respectfully say so, in his review, which is at tab 57 and in a speech at tab 58.

THE PRESIDENT: Yes, shall we look at that? We have not done that.

MR THOMPSON: Yes, certainly.

At 57 we have the chapters, first of all on third party funding and then on, if I remember rightly, contingency fees. The third party funding chapter starts with an introduction and culminates with a number of recommendations, the first of which is recommending a satisfactory voluntary code, and the two particular

conditions that there should be capital adequacy and appropriate restrictions on funder's ability to withdraw support for ongoing litigation.

The second question is whether there should be statutory regulation, and he says that should be revisited at a later stage.

The third one is that third party funders should potentially be liable for the full amount of adverse costs, subject to the discretion of the judge. Given the expertise in this room I think this is probably in the area of the Arkin cap, but we do not think we need to worry about that today.

Then at the next tab is a speech that Lord Justice Jackson gave in November 2011 where he essentially commends the proposal for a non-statutory regime for third party funding and he exhibits a draft code of conduct for litigation funding which I think had just been published on that day. In particular, at page 7 of the speech one sees the code and in particular the second paragraph of the code provides at 2(a) and (b) for the return to the funder being Damages-based on a share of the proceeds if the claim is successful as defined in the LFA.

I think it is that approach that Mr. Purslow and Mr. Perrin find particularly surprising when set against

the DAF argument today, but that has always been the basis on which third party funding would proceed and everyone has always understood that, and I do not think Mr. Thanki denies it.

THE PRESIDENT: Sir Rupert Jackson in his lecture does not refer to the expanded section 58AA as having any relevance to this at all, does he?

MR THOMPSON: I am sure that is correct.

THE PRESIDENT: Because he reviews what has happened since he has last looked at this.

MR THOMPSON: Yes, I think that is --

THE PRESIDENT: If he thought that section 58AA on Damages-based agreements now has affected litigation funding and what could be done and what cannot, on what could be done in terms of percentage of proceeds, one would have expected him to say so.

MR THOMPSON: Indeed. I think that is what I was getting at where the anachronism point, I think, rather hits the buffers, because it is clear that if anyone was thinking about all these questions it was Lord Justice Jackson, and I think Mr. Thanki just has to say that this was one of a series of inexplicable misunderstandings of what he says is the clear wording of the legislation.

I should perhaps say that the actual codes in their 2011 and 2018 form are at the back of the bundle at

tab 64 and 65. The November 11 one I assume is the same as the one exhibited to Lord Justice Jackson's speech, and the relevant provision is paragraph 2 on the second page of that at tab 64. Then the later version from January 2018 --

THE PRESIDENT: Yes, is also 65.

MR THOMPSON: -- is somewhat more elaborate but the provision then is at 2.5. Again, that does not seem to have been adopted with any trepidation that it might be unenforceable for the reasons that Mr. Thanki has suggested.

In summary, on the development we would say that the first and second systems of regulation, so claims management and Damages-based agreements, they have a significant overlap, but the third, litigation funding, is a common law system of self-regulation pursuant to a code that has developed independently of both. In that context we say that the RHA submission has its force despite the fact that litigation funding is an established aspect of major commercial litigation in the UK, it has never been found or apparently previously argued that the restrictive rules that apply to Damages-based agreements, in relation to legal representation, apply to funders of such litigation. On the contrary, it is apparent from the Jackson review

that litigation funding was deliberately treated quite separately from Damages-based agreements, and that litigation funders were never considered to be representatives of their clients, and a return based on the share of the proceeds of the litigation was always recognised as a core element of litigation funding. And one sees that in the code in both 2011 and 2018 form, and, for good measure, Mr. Perrin gives evidence to that effect in his fourth witness statement at paragraph 9, and you will recall that he is both chair of Calunius but also chair of the Association of Litigation Funders. That is at tab 55 of the third bundle.

So that is all by way of context. We would submit that the focus of the expression "claims management" is a clear one. Lawyers are often accused of saying things which are clear but perhaps tautologous, and we say claims management concerns the management of claims as defined in section 419A(3), although we draw attention to the alternative term "claims intermediary" which we have seen in the explanatory memorandum at tab 31, paragraphs 28 to 30.

We say that section 419A(2) gives examples of types of claims management services that are captured by the legislation. It does not mean that all conduct of these types is automatically caught by the regime, whether or

not that conduct falls within the scope of the expression "claims management", or the mischief that the legislation was intended to address. That is true both of 419A(1) and of 419A(2). I do not know if it would be helpful to turn up the legislation at this point.

THE PRESIDENT: Where do you want us to go?

MR THOMPSON: In the Financial Services and Markets Act as amended.

THE PRESIDENT: Tab 37.

MR THOMPSON: Which is at tab 37. As I understand it, Mr. Thanki's construction point is a very simple and black and white point, but in my submission it proves too much, because if it were right then 49A(1):

THE PRESIDENT: 419A(1).

MR THOMPSON: Yes.

"Claims management services is defined as advice or other services in relation to the making of a claim."

If he were right about that, then "other services" is a very broad expression and there would be a question of whether or not, for example, photocopying services or even food services in relation to the making of a claim were caught because he gives no weight to the concept of claims management.

THE PRESIDENT: We have had this argument from Mr. Kirby, I think.

MR THOMPSON: Yes. The same point in relation to financial services, that he gives no weight to the concept of claims management.

THE PRESIDENT: Yes, as I say, I think you are now repeating Mr. Kirby's point.

MR THOMPSON: Likewise, he does not point to any activity of Calunius or Yarcombe, or for that matter Therium, other than funding, that could be regarded as that of a claims manager or intermediary or falling within the intended mischief of the legislation, and I think something we have not looked at that the litigation funding agreements themselves make it clear, that it is UKTC and its legal representatives, not Yarcombe, that has the conduct of the litigation. You see that in tab 50 of the bundle, for example, which I think is worth looking at.

THE PRESIDENT: There is no requirement of the code.

MR THOMPSON: I am sorry. That the funder should not have conduct of the litigation?

THE PRESIDENT: Yes.

MR THOMPSON: Indeed it is, but it is also a requirement of the contract.

THE PRESIDENT: Yes.

MR THOMPSON: For example, at tab, I think I said tab 50 but it is also tab 51.

THE PRESIDENT: You want us to look at the funding agreements?

MR THOMPSON: Yes, it is paragraph 4.1.

THE PRESIDENT: But they are in a different bundle.

MR THOMPSON: It is in bundle 3.

THE PRESIDENT: We have to go to that.

MR THOMPSON: Tab 51. Page 1560. 4.1. It is, as it were, the contractual implementation of the Excalibur case that the funder has no conduct of the litigation but it is entitled to have knowledge of the litigation. One sees that:

"... nothing in this agreement shall oblige the claimant to take any step which may prejudice the conduct of the proceedings and in particular the maintenance of privilege..."

Then the claimant's first obligation under 4.1.1 is:

"... to take all actions which are appropriate for conducting the Proceedings and furthering and successfully pursuing the Claims with the due care and diligence of a prudent class representative..."

So it is clear that the conduct of the litigation and the representative role is performed by UKTC and not by Calunius or Yarcombe.

There is a point of some significance which Mr. Thanki quite correctly points out that you cannot in

itself use secondary legislation as a guide to construction of primary legislation, but what you can do is use it as a guide to the Parliamentary intention. One sees that in the *Factortame* case which has some similarities to this one. It is at tab 12 of the first authorities bundle. That is a case where Grant Thornton had performed certain services as chartered accountants on the basis that it would receive 8% of the final settlement, and the question was whether or not that was a regulated contingency fee and therefore unenforceable, and the Court of Appeal found that it was not, so it had some similarities to the present case.

So far as this point is concerned I was simply referring the Tribunal to page 406, paragraph 47 where the Court of Appeal is trying to construe primary legislation, and in doing that it makes reference to secondary legislation and in particular the Conditional Fee Agreement Regulations 1995. It is page 406 of the judgment. It refers to the definition of legal representative and says:

"The term 'legal representative' is appropriate to describe a person conducting the litigation or exercising rights of audience on behalf of the litigant..." but not, as it is said, Grant Thornton.

Then at the bottom it says:

"While provisions in a statutory instrument cannot alter the meaning of the primary legislation under which they are made, it seem to us legitimate to refer to them as confirming what appears to be the legislative intention of the provisions of the primary legislation."

In my submission that is both correct and eminently good sense and relevant to the present case. There are a series of points that flow out of that by reference to the different statutory instruments that have been adopted in this case. First of all, the types of activity that are regulated as claims management are consistent with both Mr. Kirby and my submissions as regards a Parliamentary intention of the definition of claims management services but that strongly confirms the approach that we have suggested.

Secondly, when one looks at the DBA Regulations themselves we would say that they are clearly directed at the types of legal or quasi-legal representative roles in litigation, and that is true of both the 2010 and the 2013 versions of the regulations, and also the definition of costs and expenses of such representatives is entirely characteristic of the types of costs incurred by solicitors, barristers and claims management companies in the conduct of litigation or

quasi-litigation of the kind discussed this morning.

None of those definitions, either of claims management services or of the types of conduct regulated under the DBA Regulations, reflects anything resembling the investment role of a litigation funder. To put it in summary, Yarcombe is clearly not the representative of UKTC or of individual MPCs, members of the proposed class, and does not provide claims management services of any of the kinds envisaged either in the explanatory materials or the secondary legislation giving effect to the primary regime.

Finally, on the construction point, Mr. Thanki referred to paragraphs 19 and 20 of our skeleton argument and I will not repeat those points. We set out our case on the Bennion issues in four subpoints on page 10 of our skeleton, paragraph 20, by reference to the context, the consequences, absurdity and the need to look at the legislative scheme as a whole.

THE PRESIDENT: Yes.

MR THOMPSON: Of those points, in my submission the most important is the context and the mischief that the legislation was intended to address. In my submission Mr. Kirby and I have given the Tribunal really comprehensive and overwhelming evidence that the mischief was nothing to do with litigation funding but

everything to do with the management of claims on behalf of consumers.

There is another construction point hidden away in Bennion which I would take the Tribunal to, if I may. That is at bundle 2 of the authorities, tab 52. At the clip I have it is at page 23, section 18.6 where the principle is that the defined term may itself colour the meaning of definition and the comment, by reference to a judgment of Lord Hoffmann, is:

"Whatever definition is given to a term, the natural meaning of the term is likely to exert some influence over the way the definition is understood and applied by the court."

Then it said:

"This is sometimes called the potency of the term defined."

As Lord Hoffmann said in *MacDonald*:

"a definition may give the words a meaning different from their ordinary meaning. But that does not mean that the choice of words adopted by Parliament is to be wholly ignored. If the terms of the definition are ambiguous, the choice of the term to be defined may throw some light on what they mean."

Likewise, at 18.7, if that is -- I will pass on that. The point I am making is that, in my submission,

this principle confirms the point I was making before, that it is not just any old services but it is claims management services.

THE PRESIDENT: Yes, thank you.

MR THOMPSON: Then the second point which we address and which I will not take up time on because particularly the President is very familiar with it, is the issues of policy that were identified by the Tribunal itself in the Merricks case in the context of section 47C(6) which we develop at paragraphs 21 to 29 of our skeleton argument. We would say that particularly in relation to our opt-out agreement, the UKTC LFA was deliberately drafted to reflect the Tribunal's guidance, particularly clause 10.1, so it would be a curious irony if an opt-out agreement deliberately drafted to conform to the guidance of the Tribunal in the only prior case, in some way rendered that agreement unenforceable. We would say that that, at the level of policy, would be a curious outcome.

Could I then finally touch on what I have called the *in rem* issue, the substance of the question, and in particular the question of whether the opt out LFA, the UKTC opt out LFA is a DBA in any event. In that respect, one might contrast it with, for example, an agreement whereby I or Weightmans entered into an

agreement whereby we would take, for example, 1% of every successful claim on an opt out basis which would be debarred by section 47C(8).

We submit at paragraphs 29 to 31, the UKTC LFA do not readily fit within the statutory definition of DBAs because UKTC, which is the recipient of funding from Yarcombe, the hypothetical claims management services, will not receive any specified financial benefit, and the funder's fee bears no relationship to any such benefit.

UKTC is a special purpose vehicle whose sole purpose is to obtain and distribute damages on behalf of the claimants that it has been established to represent, after which it will wind itself up, and that is described in clear terms by Sir Roger Kaye at paragraphs 9 to 10 and 20 of his first witness statement which is at the second tab of bundle 1.

And it goes further than that, even if the wording of section 58AA can be construed to apply to the situation of the funding of a class action and a class representative such as UKTC, and to the concept of proceeds as defined in the UKTC LFAs, we would submit that it clearly does not apply to the terms of 10.1 and schedule 2 to the opt out LFA drafted to reflect the approach of the Tribunal in Merricks, paragraphs 123 and

127 at tab 13, pages 45 and 47.

We say the effect of this agreement is to make any funder's fee under the UKTC opt out LFA subject to a double contingency or condition. First of all, the existence of unclaimed damages after all claims have been paid in accordance with the direction of the Tribunal, and secondly, the making of an order for such payment pursuant to section 47C(6).

So the effect of this is that the funder's fee provided for by schedule 2 is effectively a cap on the amount that the funder can receive. The amount that the funder will receive is not determined by reference to the amount of the financial benefit obtained, either by UKTC or by any individual claimant or indeed by the claimants collectively.

At the level of policy the situation is quite different in that, on the assumption that the opt out claim succeeds and a pot of money is received, then each individual claimant will receive the full amount of his or her entitlement, or its entitlement, subject to the exhaustion of the pot of money. So it is a quite different issue from the policy perspective from the type of simple case I was suggesting where I or Weightmans say we will take, for example, 1% of every successful individual claim.

We say, as such it raises quite different issues of policy from a standard DBA given that every individual claimant will be entitled to full recovery without reference to the funder's fee. It is only if there is a surplus after all claims have been paid out that the funder will be entitled to its fee pursuant to section 47C(6). As we understand it, that was also the case in Merricks where the Tribunal found that the funder's fee in that litigation could be discharged through recovery out of the unclaimed damages at paragraph 127 of the judgment.

Those are the points I wanted to make. Can I just check if anyone else wants me to say anything?

THE PRESIDENT: Yes.

MR THOMPSON: Those are our submissions.

THE PRESIDENT: Yes, thank you. We will take a short break. Ten minutes.

(3.28 pm)

(A short break)

(3.40 pm)

THE PRESIDENT: Mr. Singla, is there anything you wish to say?

MR SINGLA: No, nothing, sir.

THE PRESIDENT: And Mr. Pascoe?

MR PASCOE: Nothing.

THE PRESIDENT: Yes, Mr. Thanki.

Reply submissions by MR THANKI

MR THANKI: Sir, if I may I was just going to deal with the policy statement, if I may --

THE PRESIDENT: Yes.

MR THANKI: -- which Mr. Kirby referred to at authorities bundle 2, tab 55A. If the Tribunal has that, if we could begin at page 5. Under the heading "Regulatory structure" one sees in the second paragraph that what is said in this document on 2 March 2006 is that:

"Claims management services are defined as 'advice or other services in relation to the making of a claim'."

Then the next paragraph begins by saying:

"The definition in the clause is wide to ensure that all areas where there is a risk to consumers from commercial claims management companies can be captured and there is no risk of loopholes."

If you look below the bullets, it says:

"If a particular concern started to emerge about another sector, the flexibility of the order making power would allow for action to bring the sector within the scope of the regulation quickly."

One sees a wide definition of claims management services and that was deliberate to enable flexibility

in the order-making power. I need to draw a distinction between the very broad scope of the enabling legislation which our argument relies on and any secondary legislation made pursuant to that enabling power.

Just to complete this, if one goes to page 8, one sees exemptions. You see there the definition in the second line:

"The definition of claims management services was intentionally drawn wide to ensure there were no loopholes that unscrupulous companies could use to evade regulation. The effect of such wide definition is that it will capture all those providing claims management services".

That is obviously a reference to claims management services as defined in the Act.

Types of services, if one goes to page 12. If the Tribunal could just read that paragraph under "Types of service" below the halfway line on the page. (Pause)

THE PRESIDENT: Yes.

MR THANKI: One sees that the whole purpose was to capture an incredibly wide range of services from whole service providers to providers of individual services which would not necessarily cover the whole gamut of claims management as might be understood.

The explanatory memorandum which Mr. Thompson

referred to, just briefly if one goes back to -- I do not know where the Tribunal has that, but it was handed up loose, explanatory memorandum to the secondary legislation made in 2006.

THE PRESIDENT: I think it is actually in our bundles.

MR THANKI: 46, I am told. I am grateful.

THE PRESIDENT: Yes, 46.

MR THANKI: That really picks up the same point as the policy statement at paragraph 7.6:

"The definition of claims management services in the Act is wide to allow new areas to be brought within the scope of regulation where problems arise, and for areas to be removed from scope where problems subside."

You see further on down that paragraph:

... services "have been" described in such a way as to ensure that similar services provided outside the area of the claims management industry are not inadvertently regulated as claims management services."

So one sees the distinction between the broad enabling legislation, which is what we rely on, and secondary legislation made under the statute.

Then Mr. Kirby made a number of references to the definition of claims management services in the 2006 Act, and it was really an argument for absurdity that any service in relation -- any service which might

be loosely connected to a claim would be caught. We do not accept that that can be right because we do accept that claims management services as used in the Act provides an anchor as extended by the definition provided in the Act.

So taking a taxi to the court would not render the taxi driver a provider of a claims management service. It is neither caught by the expansive definition in the Act nor what would ordinarily be understood by claims management services. Equally using a credit card to pay for services would not be caught, still less would they be caught by the definition of Damages-based agreements.

THE PRESIDENT: But using the credit card to pay it would not be caught because?

MR THANKI: Because it would not be a service provided in relation to the making of a claim.

THE PRESIDENT: But if it is paying for the court fee --

MR THANKI: It might be a financial assistance or service, but it would not be in relation to the making of a claim because it is neither -- it would not be caught by the notion of claims management service which provides the anchor for the definition.

THE PRESIDENT: What do you mean by "anchor"?

MR THANKI: Anything which assists the management of a claim would not be caught by the definition within the

2006 Act or FSMA. It has to be a service which is provided with the intention of assisting in the making of a claim. The distinction is between what it ends up being used for and the basic nature of the service provided.

THE PRESIDENT: The provider must have that intention, is that what you are saying?

MR THANKI: Yes, otherwise it is not a service provided in relation to the making of a claim.

THE PRESIDENT: Suppose someone goes to the bank and says, "I want to bring this claim because I think I have been unlawfully dismissed, but I really need the money to recover the costs," and they seek a loan from the bank for the purposes of funding their claim. Would that be financial assistance in connection with the making of a claim?

MR THANKI: Yes, it could be. What it would not then be is a Damages-based agreement.

THE PRESIDENT: But if it is a claim within a sphere which is regulated the bank would have to be a regulated claims management service provider.

MR THANKI: If it were in a sphere that was regulated one can see that would be the logical consequence, yes.

THE PRESIDENT: That would be quite a sweeping consequence, would it not?

MR THANKI: If you go to the bank and say, "I want a loan in order to bring this claim," one can see it falls within the definition of claims management service, but it would not be a Damages-based agreement unless the bank's recovery --

THE PRESIDENT: It might come in the regulation of the claim.

MR THANKI: Yes, I would have to accept that. That is a consequence of the broad definition.

THE PRESIDENT: Yes, yes, thank you. I see the taxi point.

MR THANKI: Then so far as the point that Mr. Thompson made about litigation funders not being providers of claims management services, the short answer to that is that the focus of the legislation is on the function of the provider of the service, not his status.

Then I just wanted to pick up a point that Mr. Thompson made on Bennion, tab 52 of the second authorities bundle.

THE PRESIDENT: Yes.

MR THANKI: The new passages which have been inserted overnight that Mr. Thompson referred to.

THE PRESIDENT: Page 23, I think.

MR THANKI: Page 23. Reference was made to the natural meaning of the term being likely to exert some influence over the way the definition is understood.

Then if one actually looks at the speech of Lord Hoffmann one sees an extract of, he does say specifically:

"If the terms of the definition are ambiguous, the choice of the term to be defined may throw some light on what they mean."

The Tribunal has our submission that there is no ambiguity in the definition of CMS used in the relevant statutes. So we say this principle has no application.

Then if you go over the page in the same section to pages 24 and 25, "Unexpected meaning" at the bottom of page 24:

"Despite what is said above, the fact that a definition produces a result that is surprising, having regard to the natural meaning of the term that is defined, does not of itself mean that the clear meaning should be rejected. It does however invite caution."

Then at the top of the next page to *Dunsby v BBC*:

"It was held that a film studio was a factory for the purposes of the Factories Act since articles, namely films, were made there."

Then:

"In *Savoy Hotel* it was held that Savoy Hotel was a shop for the purposes of the Shops Act

1892, which defined shop to include licensed public houses and refreshment houses of any kind."

One can see that whilst reference may be had to the natural meaning one still has to give way to the natural meaning of the term being defined, one still has to have regard to any extended meaning given by the statutory definition.

Can I come back to a point which the Tribunal put to me during opening submissions, and there are really two propositions which the President put to me. First of all, that the services, at least where they are legal services, are provided to the class members and not to the representatives. The second point, the second proposition was that the specified benefit is received by the class members and not by the class representative.

In our submission the logic of those propositions is that the rules might apply differently to conventional proceedings and to representative proceedings.

As to the first proposition, services being provided to class members, the statutory language requires consideration of the persons who are parties to the agreement. If one just goes back to section 58AA(3), tab 35, page 43. It is in subsection (3), if you have that, sir:

"Damages ..."

Subsection (3):

"A Damages-based agreement is an agreement between a person providing advocacy services, litigation services, or claims management services, and the recipient of those services which provides that ..."

Then one sees the reference to the first (a)(i):

"The recipient is to make a payment to the person providing the services if the recipient obtains a specified financial benefit ..."

Etc, and (ii):

"The amount of that payment is to be determined by reference."

THE PRESIDENT: Yes.

MR THANKI: We say that this language cannot be read to limit the applicability of the rules to where the recipient is the ultimate beneficiary of the services being provided.

In this case both class representatives have engaged lawyers and funders. On an opt out basis it can only ever be the class representative who has an agreement as the class members are unascertained. In UKTC's case both funding agreements are agreements between the funder and the class representative, both the opt in and the opt out. In RHA's case, on the other hand, the

funding agreement is also made with those who opt in.

So RHA and the underlying claimants are parties to the funding agreement. In reality, these things can only work on the basis that it is the class representative who gives instructions to the lawyer and who functionally relates to the funder and enters into -- negotiates and enters into the funding agreement rather than the multitude of class members.

As to the second proposition, specified benefit as received by the class members and not by the class representative, the language obtains a specified benefit in the Act. In our submission it does not require the benefit to be obtained for oneself. We say it does no violence to the ordinary language for that wording to cover benefits obtained in representative proceedings where the benefit is obtained for other people.

By contrast, to construe the wording narrowly to cover only obtaining a benefit for oneself would deprive the statutory protections of force in representative proceedings.

In favour of DAF's submission, if the Tribunal's two propositions were right there would be two consequences.

First, in our submission it would be arbitrary whether the protections applied depending on the structure of the agreement. So the RHA funding

agreement is an agreement with both the representative and the claimants who opt in for the provision of funding. On the propositions put to DAF by the Tribunal, the RHA funding agreement would still be a DBA on our case, under both limbs of 58AA(3).

By contrast, the UKTC opt-in agreement does not include the claimants as parties. Instead they provide authority to UKTC to conduct proceedings and comply with the terms of the funding agreement.

The references, without turning them up, are bundle 1, tab 3, clauses 5.1.1 and clause 5.1.3. That is the opt-in agreement.

This gives rise to the arbitrary application of important statutory protections depending on the structure of the agreements, DAF would submit.

Similarly, it would be surprising if the applicability of the protections were determined by whether the damages are paid direct to the class members or to them via their class representatives or potentially via the lawyers. Nor can it matter, in our submission, who in practice transfers the sums to the service provider.

The second consequence, in our submission, is that the protections provided by the regulation of DBAs would break down for all representative proceedings, including

those under section 47B of the Competition Act. This would be the case even though, as was demonstrably the legislature's intention, that those protections should continue to apply.

That is also clear from the Competition Act 1998, section 47C(8). It deals with opt out proceedings.

This can be tested with reference to litigation and advocacy services where it is common ground that such services fall within the scope of statutory protections. The Tribunal suggested that legal services might be distinguishable because lawyers owe professional duties to the represented persons. In our submission, there is no basis on which the statute can be read to treat lawyers and other service providers differently. For an opt-out agreement the unascertained class is incapable of entering into an agreement, whether with lawyers or otherwise. If the proposition were right, the protection would never apply to an opt-out DBA for any service, whether legal or claims management as defined.

The protections, in our submission, would also breakdown for opt in proceedings because agreements can be structured so that the claimant as recipient of the damages is never a party to the agreement for the provision of the service in question. Regardless of how the applicant's agreements or their legal advisers work

at the moment it would be easy to draft around this.

In any event, we say that UKTC's funding agreements require both one, provision of funding services to the class representative, and two, the funder to be paid with reference to a benefit obtained by the class representative.

Just to give the Tribunal the references. UKTC's opt in LFA, I took you to these in opening, but defines "Proceeds" as the total amount paid to the claimant or to the claimant's order. And that is volume 1, tab 7, page 146. As you will recall, UKTC is defined as "The Claimant".

UKTC's opt out LFA defines "Success" as "an order to pay any sum of money to the claimant." Volume 1, tab 18, page 387, and defines "Proceeds" as "the total amount of damages paid by the defendants in relation to the claims."

Again, UKTC is defined as "The Claimant" in the opt out LFA.

For RHA, volume 2, tab 32, the class members who opt in are a party to the agreement so, in our submission, the issue does not arise.

Unless there is anything else I can assist the Tribunal with that is all I wish to say by way of reply.

THE PRESIDENT: Thank you very much. Thank you all and we

will continue for the rest of these issues, but not the Damages-based agreement issues, at 10.30 tomorrow morning.

(4.08 pm)

(The hearing adjourned to Wednesday, 5 June 2019 at 10.30 am)

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