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4 record.

5 **IN THE COMPETITION**

Case No: 1468/7/7/22

6 **APPEAL**

7 **TRIBUNAL**

8  
9 Salisbury Square House  
10 8 Salisbury Square  
11 London EC4Y 8AP

12 Friday 1<sup>st</sup> March 2024

14 Before:

15  
16 Justin Turner KC  
17 Derek Ridyard  
18 Jane Burgess

19  
20 (Sitting as a Tribunal in England and Wales)

21  
22 BETWEEN:

23  
24  
25 **Mr Justin Gutmann**

**Proposed Class Representative**

26  
27  
28 V

**Proposed Defendants**

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30  
31 **Apple Inc., Apple Distribution International Limited, and Apple Retail**  
32 **UK Limited**

33  
34  
35 **A P P E A R A N C E S**

36  
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38  
39 Nicholas Bacon KC (Instructed by Charles Lyndon Limited) on behalf of Justin Gutmann

40  
41 Lucinda Cunningham (Instructed by Covington & Burling LLP) on behalf of Apple Inc & Ors.

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Friday, 1 March 2024

(10.30 am)

**CHAIR:** Some of you are joining us on the live stream on our website, so I must start, therefore, with a warning: an official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings, and breach of that provision is punishable as contempt of court.

**MR BACON:** A very good morning to you. We both have risen to address you, sir. A very good morning to you and to your learned colleagues.

We are here, obviously, this morning to deal with the three points developed by Apple, and we are in your hands as to who you want to hear from first. Ms Cunningham appears on behalf of Apple and I, obviously, on behalf of the class representatives.

**CHAIR:** Yes. It might be more efficient to hear from Apple first, but if you --

**MR BACON:** Yes. I'm more than -- it makes sense to me --

**CHAIR:** Okay.

**MR BACON:** -- bearing in mind they are almost, in one sense, the objector, as it were.

**CHAIR:** Yes.

**MR BACON:** I can then deal with the points as they arise.

**CHAIR:** Yes. Thank you.

Submissions by MS CUNNINGHAM

**MS CUNNINGHAM:** The Tribunal should have Apple's submissions.

**CHAIR:** Yes, in writing. Yes. Thank you very much.

**MS CUNNINGHAM:** As we say, there are three areas of concern that we have to be aware of.

**CHAIR:** Yes.

**MS CUNNINGHAM:** There are also a number of points that I wish to address you on in light of the PCR's responsive submissions and the recent decisions, because this is the first

1 opportunity that Apple has had to really respond to those points since the  
2 PCR's January submissions.

3 I think it would be useful for us to begin first with the exercise that the Tribunal is carrying out  
4 today, which you can see most succinctly in Gormsen. It may be useful to turn that  
5 up, which is the most recent decision dealing with that. So that is authorities --

6 **CHAIR:** Hold on, just give me a second. I haven't quite got my authorities --

7 **MS CUNNINGHAM:** Tab 17.

8 **CHAIR:** I don't seem to have tab -- oh, yes. Hold on. (Pause)

9 **MS CUNNINGHAM:** 664. Page 664. (Pause)

10 **CHAIR:** Sorry ... 664?

11 **MS CUNNINGHAM:** Yes. (Pause)

12 **CHAIR:** Right. Yes. I am with you. Thank you.

13 **MS CUNNINGHAM:** So, starting with the test at paragraph 34, you will see there are two  
14 sub-headings.

15 So in terms of the funding issues that the Tribunal must consider today, you will note:

16 "... the Tribunal must exercise great care:

17 "(1) First, there is the question of whether - in terms of straightforward allocation - a funder is  
18 taking more from the class than they properly should.

19 "(2) Secondly, there is a danger of perverse incentives arising ... [in terms of] a conflict  
20 between funders' interests and class interests ..."

21 These are the two points, really, that we will be focusing on today in terms of the three  
22 challenges that you will have seen in Apple's submissions.

23 So the first of those is that the mechanisms in the revised LFA for funders to be paid out of  
24 the proceeds ahead of class members are inappropriate and inconsistent with the  
25 regime, particularly section 47C of the Competition Act, which calls into question  
26 Mr Gutmann's suitability.

27 The second challenge that Apple makes in respect of the funding arrangements is that the  
28 funder's return is excessive and disproportionate, and the mechanism has arbitrary

1 effects on the incentives of the funder. That goes to the second limb of that test in  
2 Gormsen.

3 The third point, the third concern, that Apple raises is that the revised LFA creates risks of  
4 conflict of interest between the funder and Mr Gutmann, and between the funder and  
5 the class members, in two ways: first, Mr Gutmann's personal liability if the proceeds  
6 are insufficient to cover the funder's fee; and, secondly, as a result of disproportionate  
7 and excessive return under the LFA.

8 While we have Gormsen open, it would be useful to then refer further down to paragraph 36  
9 of that judgment, where it says that -- well, paragraph 35 we will deal with first.  
10 Essentially, the point here is that:

11 "... questions of costs generally, are controlled by the Tribunal on settlement or judgment, [but]  
12 the Tribunal [must] be astute to ensure that the system ... does not become a 'cash  
13 cow' either for lawyers or for funders."

14 Paragraph 36 goes on to say that:

15 "... there do come some points where funding arrangements contain provisions that are  
16 sufficiently extreme to warrant calling out or ... a blanket refusal to certify."

17 The PCR --

18 **CHAIR:** How do we know something is a cash cow? At what point does -- I mean, my father  
19 would have said that all lawyers are cash cows, because he worked as a labourer.  
20 But, you know, at what point do I decide whether a funder's profits are excessive and  
21 it is a cash cow? How do I even begin to do that?

22 **MS CUNNINGHAM:** So we will come on to that when I look at my second challenge in relation  
23 to the funder's fee.

24 **CHAIR:** Well, just tell me briefly.

25 **MS CUNNINGHAM:** But the headline point is, as Gormsen did in this case, on the face of it,  
26 you look at whether the multiple is, on the face of it, excessive, or at least leads to  
27 a return which seems to be out of all proportion with the proposed exposure that the  
28 funder --

1 **CHAIR:** But how do we know, today -- maybe this has to be looked at in more detail on  
2 another day -- if it is excessive? We have no evidence on the costs and risks that the  
3 funders are having to deal with, and so there is no material for me to say: oh, well,  
4 finger in the air, that looks like they are going to get more than they deserve. I mean,  
5 how do we even begin to address a question like that?

6 **MS CUNNINGHAM:** We will come on to the multiples that apply and you will see the way that  
7 those are structured.

8 **CHAIR:** Yes, we have seen them, but how do we make an assessment as to whether or not  
9 those are excessive, that they're a cash cow?

10 **MS CUNNINGHAM:** Again, in the other cases that I will be coming on to, it is again, on the  
11 face of it, whether or not that multiple is defensible, and that is simply what the Tribunal  
12 went on -- if you see in Gormsen, paragraph 39, it's not about working out the specific  
13 costs at this stage, but it is about looking and seeing if, on the face of it, the multiples  
14 are objectionable. There doesn't seem to be any evidence, for example, before the  
15 court in Gormsen. It was merely a case of looking through and seeing if the  
16 time frames and the trigger points seem to give rise to adverse and perverse  
17 incentives. We will look at those and see if we can also approach it in the same manner  
18 in which the Tribunal in Gormsen approached it.

19 But the main point here really is the point that I am making in terms of the extreme nature and  
20 unusual nature of the provisions that are in the LFA that we have before us today,  
21 which are unusual in the sense that they have not been properly considered or fully  
22 considered by other Tribunals, such as the clause which requires or obliges  
23 Mr Gutmann to pay the funder or seek an order to pay the funder ahead of class  
24 members. That is really the main objection here and the extreme kind of clause that  
25 we take issue with. That is our first challenge.

26 **CHAIR:** Yes. As I understand, you take that as a legal point, as I understand it, in your -- you  
27 say that there is no power to do that. Am I right or am I --

28 **MS CUNNINGHAM:** Exactly, that's right. There is no power.

1 The main problem that we have is the primary mechanisms upon which the LFA is predicated.

2 The whole thing is engineered to put class members at the bottom of the pile.

3 **CHAIR:** Right.

4 **MS CUNNINGHAM:** The funders get paid first under the LFA, and then the whole thing is  
5 engineered around that. It is predicated on things you cannot do under section 47C.

6 **CHAIR:** This will be a question for your opponent in due course. I don't really understand  
7 quite how the priorities would work in practice.

8 **MS CUNNINGHAM:** Yes.

9 **CHAIR:** Because, obviously, there is a supervisory jurisdiction at the end of all this, and if  
10 a priority were to give the funder 100 per cent of the proceeds, it would seem very odd  
11 if this Tribunal didn't have something to say about that.

12 So if you then work on that basis, that it would be very odd if they were getting the entire thing,  
13 then I don't understand how the priorities would work. So if one accepts that we  
14 shouldn't end up in a situation where the funder takes the entire award, or the entire  
15 amount of the damages, then I don't really understand how priorities would work.

16 But that may be -- I don't know if you have any submissions on that.

17 **MS CUNNINGHAM:** Well, my simple point is that those provisions -- and we will come on to  
18 those and I can take you through those and set out how we think that the LFA works,  
19 and maybe it is helpful to do that now, so you have our understanding of how the  
20 priorities agreement works. Let me just find -- and how the obligations are set up.  
21 Because that is the key point here, is that the primary obligation imposed on  
22 Mr Gutmann under the LFA is that the funder gets their slice first, and that is the  
23 obligation that we are considering.

24 So if we go to tab 1 of the core bundle --

25 **CHAIR:** Sorry, I have it printed out separately, the agreement. Which internal page of the  
26 agreement?

1 **MS CUNNINGHAM:** So I have been working off of the one in tab 1. So let's first go to the  
2 obligations on Mr Gutmann. So they are at -- I have this as internal page 14 on  
3 my -- so that is paragraph 10, "Conduct of the Proceedings", and then 10.4.

4 **CHAIR:** I have 10.4, yes, thank you.

5 **MS CUNNINGHAM:** So you'll see it says:

6 "The Solicitor and the Class Representative shall ..."

7 And then you will see subsection (c):

8 "(c) if the court orders any proceeds to be paid by the defendant, apply for an order or approval  
9 from the court that the class representatives' costs, fees and disbursements (including  
10 the funder's return, the drawn down amounts, the success fees, the external costs, the  
11 ATE premiums) will be paid in full from the proceeds prior to the distribution."

12 **CHAIR:** Sure. I mean, that is mechanistically necessary, or at least may be mechanistically  
13 necessary, but that doesn't mean that the Tribunal -- just going back to my  
14 point -- would countenance the entire damages award going to the funder.

15 **MS CUNNINGHAM:** But that mechanism is impossible under section 47C.

16 **CHAIR:** Right, so --

17 **MS CUNNINGHAM:** It is an impossibility in law for that provision to be --

18 **CHAIR:** Yes, you need to develop that --

19 **MS CUNNINGHAM:** Exactly.

20 **CHAIR:** -- because I am not sure we necessarily see that --

21 **MS CUNNINGHAM:** We will go through the provisions and then I will take you to section 47  
22 of that.

23 **CHAIR:** Yes, of course.

24 **MS CUNNINGHAM:** So as we see, we see that.

25 Then at clause 10.4(d) --

26 **CHAIR:** Yes.

1 **MS CUNNINGHAM:** -- you will see that there is a similar provision in relation to settlements,  
2 and the same mechanism applies: apply for an order that the success fees will be paid  
3 in full from the proceeds prior to distribution.

4 **CHAIR:** Yes.

5 **MS CUNNINGHAM:** Then you will see at (g) -- and these are all things that have been added  
6 post-PACCAR -- (g) you will see:

7 "... the Class Representative shall:

8 "... use best endeavours to ensure that any order or approval made by the Tribunal in relation  
9 to the application of proceeds shall be made in accordance with the priorities."

10 **CHAIR:** Yes. Yes.

11 **MS CUNNINGHAM:** The PCR accepts, of course, that Mr Gutmann has this obligation, so  
12 there is no dispute there, but his position is that it doesn't offend against the Act. So it  
13 is a moot point, he accepts, but not one for today.

14 Then we have to go to Schedule 2, so that is at the front of the LFA.

15 **CHAIR:** Yes.

16 **MS CUNNINGHAM:** Again, that is in relation to --

17 **CHAIR:** The material in green, that is --

18 **MS CUNNINGHAM:** The material in green is confidential, as I understand it.

19 **CHAIR:** Confidential to whom?

20 **MS CUNNINGHAM:** To Mr Gutmann.

21 **CHAIR:** To the funder?

22 **MS CUNNINGHAM:** The funder.

23 **CHAIR:** Which?

24 **MR BACON:** It is confidential to the funder.

25 **CHAIR:** Why is it confidential?

26 **MR BACON:** Well, largely, sir, for the same reasons that were developed in Meta recently,  
27 although you will know what the Tribunal indicated about confidentiality in relation to  
28 multiples. We had --

1 **CHAIR:** (Inaudible) have that in mind. Could you --

2 **MR BACON:** Yes, we had the same -- so if you are still in the Meta case.

3 **CHAIR:** Yes. Yes. (Pause)

4 **MR BACON:** You will see in paragraph 39.3 that the --

5 **CHAIR:** Paragraph 39.3?

6 **MR BACON:** 39.3, that --

7 **CHAIR:** Just give me a second.

8 Yes.

9 **MR BACON:** That the Tribunal there expressly referred to multipliers that were advanced  
10 before the Tribunal in an earlier agreement. It was that earlier agreement which  
11 caused the Tribunal to be concerned, given the multipliers ranged from 6 to 14, as set  
12 out in 39.3.

13 In the course of discussions about whether or not the Tribunal should refer to those multiples  
14 which were confidential, in a confidential bundle, as they are today, the Tribunal took  
15 the view that it didn't think that they were.

16 **CHAIR:** Right.

17 **MR BACON:** So obviously today's bundle has been prepared in the light of the position prior  
18 to Meta.

19 **CHAIR:** So you are --

20 **MR BACON:** But I --

21 **CHAIR:** So as I understand, you are not defending this strongly.

22 **MR BACON:** Well, I am not sure I can say that. I act, obviously, for the Class Representative.

23 **CHAIR:** Yes, yes.

24 **MR BACON:** The funder -- who, I have to say, has been very co-operative in this -- is here,  
25 but I had to say the same thing to the Tribunal in Meta, that I don't act for the funder.

26 **CHAIR:** No, of course.

27 **MR BACON:** And one has to -- you know, it has its own interests in this matter. They are  
28 marked confidential and I would invite the Tribunal to respect that.

1 The reason for it, sir, as you would understand, is that this is a very competitive market, which  
2 we will say in due course is relevant to the question of reasonableness, and there is  
3 a real sense of commercial sensitivity to the arrangements that have been put in place  
4 in these cases, and certainly --

5 **CHAIR:** Mr Bacon, it is of course very important that there is a competitive market, because  
6 prices will come down.

7 **MR BACON:** Yes.

8 **CHAIR:** And the best way to facilitate that is, of course, if information is in the public domain.

9 **MR BACON:** Yes.

10 **CHAIR:** So I am not sure the fact it is a competitive market is necessarily a point in the  
11 funder's favour.

12 **MR BACON:** There is obviously a limit to what I can say.

13 **CHAIR:** Of course, and I appreciate the funder is not here.

14 So what I'm minded to do on this is, if you are not making any submissions -- I am obviously  
15 particularly interested in Schedule 2 and Schedule 3 at the moment.

16 **MR BACON:** Yes.

17 **CHAIR:** If, from your client's perspective, you are not objecting to it being referred to in a  
18 judgment, I think probably the appropriate thing, if the funder is in court, is they have  
19 seven days to write to the Tribunal and make any submissions as to why these should  
20 remain confidential.

21 **MR BACON:** Yes.

22 **CHAIR:** And then, in the light of whatever they say --

23 **MR BACON:** That is, if I may say so, an entirely fair solution to the problem.

24 **CHAIR:** Very good.

25 Ms Cunningham, I do apologise for interrupting you.

26 **MS CUNNINGHAM:** No, no, no problem.

27 **CHAIR:** It was just helpful to clear that up. But we won't read out the green numbers  
28 (overspeaking) --

1 **MS CUNNINGHAM:** Yes. I will do my best not to refer to it, but I will refer you to the relevant  
2 passages.

3 **CHAIR:** Yes.

4 **MS CUNNINGHAM:** So, first of all, we are on Schedule 2. The top part of that, you will see,  
5 is not highlighted in green, so we can refer to that.

6 At Clause 5.1 of this agreement, the parties agreed --

7 **CHAIR:** Yes. We have looked at this.

8 **MS CUNNINGHAM:** You have looked at that.

9 So, obviously, that is the obligation. Any proceeds received by Mr Gutmann, the following  
10 amounts will be paid: so the drawn down, the reasonable external costs and the  
11 funder's return. We will look at the calculation of the funder's return after I have dealt  
12 with the point about clause 7.

13 **CHAIR:** Okay. There are two separate points.

14 **MS CUNNINGHAM:** Exactly, there are two separate points.

15 **CHAIR:** One is whether the funder can get their return out of the damages --

16 **MS CUNNINGHAM:** Yes.

17 **CHAIR:** -- as opposed to the undistributed damages, whether they can get it out of the  
18 damages, and then there is the second point on priorities, and they are two distinct  
19 points.

20 **MS CUNNINGHAM:** Yes.

21 **CHAIR:** You are nodding. I see you agree.

22 **MS CUNNINGHAM:** Yes, yes.

23 **CHAIR:** I think we are particularly interested in the first one. As I have said, I'm not sure, in  
24 practice, how the waterfall priorities would matter, because I think that is going to fall  
25 within the supervision of the CAT when we get to the end of the litigation, but --

26 **MS CUNNINGHAM:** Well, as I will show you, the priorities do matter, in the sense that there  
27 is already a priorities waterfall built into section 47C. So, essentially --

28 **CHAIR:** Well, that requires us first dealing with section 47.

1 **MS CUNNINGHAM:** Exactly, to deal with that, but first of all, the first point, whether you can  
2 pay out of proceeds, whether you can get a payment out of proceeds, and for that we  
3 will need to look at the relevant statute.

4 **CHAIR:** Yes.

5 **MS CUNNINGHAM:** So I can take it, then, that you have read schedule 3 and you understand  
6 how that operates, first of all.

7 **CHAIR:** Yes, yes.

8 **MS CUNNINGHAM:** And we will deal with the finer points of that after I develop my points on  
9 section 47C.

10 **CHAIR:** That is very kind. Thank you.

11 **MS CUNNINGHAM:** So let's then turn up the authorities bundle, tab 18.

12 **CHAIR:** Could you give me a page number?

13 **MS CUNNINGHAM:** Page number 675. (Pause)

14 **CHAIR:** We are with you. Yes.

15 **MS CUNNINGHAM:** So you will see here that is section 47C(3). You will see:  
16 "Where the Tribunal makes an award of damages in opt-out collective proceedings [as these  
17 are], the Tribunal must make an order providing for the damages to be paid on behalf  
18 of the represented persons to -  
19 "(a) the representative, or  
20 "(b) such [other] person ..."

21 So that is the first part. The damages will be paid, if there are any, to Mr Gutmann.  
22 Then you will see subsection (5):  
23 "Subject to subsection (6), where the Tribunal makes an award of damages in opt-out  
24 collective proceedings, any damages not claimed by the represented persons within a  
25 specified period must be paid to ... charity ..."

26 Then, obviously, the rest of it is about prescription as to which charity that will be.

1 So that is the position. First of all, the damages will be paid to Mr Gutmann, they will be  
2 distributed in accordance with that; and then, secondly, if there aren't any -- if there are  
3 remaining undistributed damages, they must go to charity.

4 That is subject to subsection (6), which we will see over the page:

5 "In a case within subsection (5) the Tribunal may order that all or part of any damages not  
6 claimed by the represented persons within a specified period is instead to be paid to  
7 the representative in respect of all or part of the costs or expenses incurred by the  
8 representative ..."

9 **CHAIR:** So 47C(3), the fact that the damages are paid to the representative doesn't mean  
10 that the representative -- isn't expressly saying the representative can't then pass them  
11 on to the funder.

12 **MS CUNNINGHAM:** Well, they can't because they need an order to do that, and the Tribunal  
13 may only do that in respect of damages not claimed by subsection (6).

14 **CHAIR:** Why? So subsection (6) gives us a power for the unclaimed damages to be used for  
15 those purposes, and the important thing being they are not being given back to the  
16 losing defendant; they are being used constructively, one might put it that way. So (6)  
17 doesn't say what cannot be done, it is just giving the Tribunal a power. So I would like  
18 your submission on that.

19 And then going back to 47(3)(a), I have asked you the question about why the representative  
20 can't then pass a fee on to the funder. But what about (b), (3)(b)? Why couldn't the  
21 Tribunal make an order that the funder be paid under (3)(b)?

22 **MS CUNNINGHAM:** So it is useful to consider how subsection (6) came into being in the first  
23 place, and also how the court has subsequently interpreted 47C.

24 **CHAIR:** Of course, yes. We need to look at the cases.

25 **MS CUNNINGHAM:** So we will have a look at the cases. But on your point about why is  
26 section 47(6) and (3) in there, the whole point of the damages and the collective regime  
27 is that compensation is made to class members in the first instance.

28 **CHAIR:** Right.

1 **MS CUNNINGHAM:** So the entire regime is predicated on that basis. It was only when  
2 considering the Consumer Rights Act, schedule 8, in Parliament, that the section,  
3 subsection (6), was introduced, because there needed to be a way in which the funder  
4 was actually able to get its fee, otherwise -- and this was introduced by amendment,  
5 by proposal.

6 **CHAIR:** Right.

7 **MS CUNNINGHAM:** It may be useful to go to the Professor Rachael Mulheron Article that I  
8 added to the authorities bundle to see that, to see just the lay of the land and the  
9 reason why this was introduced in the first place.

10 **CHAIR:** Give me a page number?

11 **MS CUNNINGHAM:** So that is at tab 21, page 696, that starts.

12 **CHAIR:** All right. I have no 696. My bundle ends at 695. So I may not have seen this.

13 **MS CUNNINGHAM:** In the authorities? You may have the older electronic bundle.

14 **CHAIR:** Do you have a hard copy you could hand up? Or hard copies. (Pause)

15 Okay. Which bit did you want to go to?

16 **MS CUNNINGHAM:** So we will go to page 712. That is under the heading "5".

17 **CHAIR:** You will have to give us the internal page number.

18 **MS CUNNINGHAM:** Internal page 307.

19 You will see the heading on 307, halfway down the page, "5. The UK response to the  
20 conundrum: how should a funder be recompensed" --

21 **CHAIR:** Yes. I know what you mean.

22 **MS CUNNINGHAM:** So here Professor Rachael Mulheron was discussing, in response to  
23 how class actions are calibrated in other jurisdictions, how the funder shall be paid.

24 First, you will note here, it says:

25 "The option was open to the drafters of schedule 8 to the Consumer Rights Bill ..."

26 So this was before the Consumer Rights Act 2015 came in:

27 "... to permit a statutory authorisation to entitle a funder to recover its success fee as a charge  
28 upon aggregated damages awards or settlement sum."

1 Then if you turn over the page, you will see:

2 "Secondly, the compensatory principle has underpinned the policy of class action reform in  
3 England as a fundamental premise, in that primary beneficiaries of such actions are  
4 those aggrieved parties for whose benefit the action was brought."

5 So that is my point there about the whole regime is designed to put the class members at the  
6 top of the priorities waterfall, not after the funder.

7 **CHAIR:** Yes. But as I say, I want to keep distinct the priority waterfall from whether there is  
8 a power to award the funder out of the damages, out of the damages which potentially  
9 could be claimed.

10 **MS CUNNINGHAM:** Then you will see, if we carry on, you will see the discussion that deals  
11 with this point:

12 "In any event, during the passage of ..."

13 **CHAIR:** Sorry, where are you?

14 **MS CUNNINGHAM:** So about halfway down the page:

15 "In any event ..."

16 **CHAIR:** Oh, yes, I beg your pardon.

17 **MS CUNNINGHAM:** "... during the passage of schedule 8 through the House of Commons,  
18 the UK legislature saw fit to include, by way of amendment to the bill, the following  
19 proposed section 47C(6) [which is what we have just been looking at] to deal with this  
20 point about how funders are paid.

21 ""The Tribunal may order that all or any part ..."

22 And that is exactly the same as the final part of subsection (6) that we have been looking at.

23 She goes on to say:

24 "Hence, where the CAT so ordered, the success fee charged by a funder under the LFA would  
25 amount to a cost or expense and, hence, constitute a second charge on the damages  
26 award, the first charge comprising the individual claims for damages by the class  
27 members."

28 Then it goes on to say:

1 "Given the low-value nature of many claims in price fixing cases, [et cetera,] it is foreshadowed  
2 that the take-up rate of those class members coming forward to claim their individual  
3 compensation would fall well short of the 100 per cent."

4 And that is a feature all the regimes.

5 Then over the page, she goes on to say:

6 "Hence, the second charge would attach to that unclaimed sum. If there were insufficient  
7 funds left to pay for all the cost of expenses after claiming class members came  
8 forward, then the funder might be out of pocket for some of its success fee if it could  
9 not recover that shortfall from some other source, such as the representative claimant  
10 with whom the funder had entered into the LFA."

11 So first of all going to Mr Gutmann for that. Of course, my learned friend makes the point that  
12 Mr Gutmann's liability is limited to the proceeds, and I will deal with that separately.

13 But it says:

14 "However, were the CAT to not have made an order for the payment of representative costs  
15 and expenses incurred, then the unclaimed sum in its entirety would be paid to the  
16 charity."

17 **CHAIR:** But the statute doesn't say -- the statute could have been drafted to say: look, you  
18 know, the funder is only entitled to payment out of undistributed damages, and it  
19 doesn't say that.

20 **MS CUNNINGHAM:** But there isn't any power in there to order the costs to be  
21 provided -- costs incurred by the class representative to be provided to anyone else.

22 **CHAIR:** Well, you haven't addressed me yet on the other provisions. Subparagraph (3)(b)  
23 says you can go to any other person. But the alternative is it is just the class  
24 representative is agreeing to pay the funder, and you are paying the money to the class  
25 representative, so is the class representative not entitled to pay his bills?

26 **MS CUNNINGHAM:** If we also deal further in the article, that comes on to deal with the point  
27 that -- so if we go on to page 310, this is the point about -- and the point you are  
28 making, sir, is that there is conflicting -- there is a conflicting position here between the

1 class representatives' interest and -- well, and the funder and the claiming class  
2 members. So if you see:

3 "Thirdly, and to reiterate, when balancing conflicting policy viewpoints of which parties should  
4 obtain full compensation, the claiming class members, the funder, the government's  
5 view was clearly in favour of the former. It would follow from section 46C that the  
6 claiming class members would not forego any of their damages recovery [any of the  
7 damages recovery] to pay for the funder's success fee. The funder could not take  
8 a percentage from the class members' damages because it would not have a contract  
9 with any of them. The funder would be restricted from claiming its success fee from  
10 the unclaimed pot."

11 Then she goes to distinguish it from other regimes.

12 **CHAIR:** I mean, this is her opinion, but the question is: is this right? Just reading it out doesn't  
13 make it -- I mean, it is not legal authority.

14 **MS CUNNINGHAM:** Well, then we will deal with how the legal authorities then apply this.  
15 This interpretation is consistent with the Tribunal's position in relation to how the  
16 payment worked.

17 **CHAIR:** I am aware there have been statements that funders will be paid from undistributed  
18 damages. One can see --

19 **MS CUNNINGHAM:** Must --

20 **CHAIR:** Well, the "must" we will come back to. But I don't see this point having been  
21 addressed head on, as to whether or not there is a power for them to be compensated  
22 out of damages, whether that is impermissible as a matter of law and whether the  
23 Tribunal has to step in to stop that happening, and that is what I have not been able to  
24 find so far.

25 If you want to direct me to an authority that supports that position ...

26 **MS CUNNINGHAM:** Yes. So let's deal with the first, then. So this was considered in Merricks,  
27 and that can be seen at page 90 of the authorities bundle.

28 **CHAIR:** Just remind me, which court are we in here?

1 **MS CUNNINGHAM:** This is the Tribunal's judgment.

2 **CHAIR:** Sorry, because I can't -- because you're going to the middle of a case --

3 **MS CUNNINGHAM:** So 47 is the start.

4 **CHAIR:** And what date is this?

5 **MS CUNNINGHAM:** This is 2017.

6 **CHAIR:** Oh, this is -- yes, okay. Mr Justice Roth as Chair.

7 **MS CUNNINGHAM:** Mr Justice Roth.

8 **CHAIR:** Yes, I have looked at this.

9 **MS CUNNINGHAM:** So you will see that this was a slightly different position. So this was  
10 different to our case in that Mr Gutmann has an obligation to pay the funder. Here,  
11 there was a slightly interesting provision which essentially meant that it was not a cost  
12 incurred by the applicant, so not a cost incurred by the class representative.

13 Now, if the point is correct that the funder could just be paid pursuant to the subsection (b)  
14 that we looked at, then the Tribunal wouldn't have needed to go into any of the detail  
15 that we are looking at here about whether it was a cost incurred or not because, in fact,  
16 the Tribunal would be able to make an order, as you are saying, for the class  
17 representative to pay the funder directly, rather than having to demonstrate it is a cost  
18 or expense.

19 So, here, the Tribunal looked at -- essentially, the submission on behalf of Mastercard was  
20 that, because the obligation wasn't a direct one on the class representative, it couldn't  
21 be considered to be a cost incurred and, therefore, the Tribunal wouldn't, in practicality,  
22 be able to make an order under subsection (6) of 47C. That was the concern in this  
23 case.

24 As you will see, this is developed from paragraph 118, and this is the point that I made about  
25 there being no obligation to make a payment, and then you will see at the bottom of  
26 that paragraph here that the primary position is that the payment goes to the charity  
27 and, therefore, section 47(5) would therefore apply, so you see that at the bottom of  
28 paragraph 118.

1 Then you will see paragraph 120:

2 "We accept that sect 47C(6) ... should be given a purposive construction to further the effective  
3 operation of the collective proceedings regime introduced by Parliament. However,  
4 such a purposive approach has limits and cannot do violence to the language of the  
5 statute. We do not see how ..."

6 That is the obligation we are talking about in the LFA in that case:

7 "... can be viewed as an obligation on the Applicant to pay the fee of the funder and thus come  
8 within the ambit of sect 47C(6), even if broadly interpreted."

9 Now, if what you are saying is correct, sir, there wouldn't be a need to get into whether or not  
10 it was a cost incurred in section 47(6) because you would be able to make the order  
11 under subsection (b) and the Tribunal wouldn't have needed to go through this analysis  
12 in order to get to that position.

13 So then you will see the reasoning there in paragraph 121. In present form --

14 **CHAIR:** But subsection (b) is not addressed. I mean, obviously the court is dealing with the  
15 arguments that have been canvassed by the parties. As I understand it here, the court  
16 doesn't directly deal with the question of whether it is legitimate to make a payment out  
17 of the potentially claim damages. It is simply not addressed.

18 I understand the point that, had that been in the Tribunal's mind, a lot of this analysis may  
19 have been unnecessary, but that is as far as it goes, isn't that the case?

20 **MS CUNNINGHAM:** This was enough of a concern here for the Tribunal to consider that they  
21 wouldn't authorise the applicant as the class representative, and then, faced with that,  
22 you will see in paragraph 122 that the PCR agreed to amend the LFA, subject to it  
23 recovering out of the "unclaimed damages". That is where we get the unclaimed  
24 damages, because obviously the Tribunal must have had in mind that it is not possible  
25 for the funder to recover its fee in any other way. That's the whole point of  
26 section 47C(6). Why would you need that provision at all if there was any concern  
27 about how the funder was going to be paid? There wouldn't be a need for that

1 provision at all if you could simply have recourse through subsection (3)(b). There  
2 would be no need for subsection (6).

3 **CHAIR:** Well, maybe there is an overlap there. What do you say (3)(b) is about, then?

4 **MS CUNNINGHAM:** (3)(b) is about, essentially, a matter of -- I think, perhaps, substitution.

5 If, for example, there is another class representative, or another person charged with  
6 distribution to class members perhaps, even if it is sent to the solicitors directly, rather  
7 than the class representative, perhaps, another person it sees fit, to order those  
8 damages to, or a collective fund of some sort, depending on the distribution  
9 arrangements. There could be a provision that practically --

10 **CHAIR:** You are cantering through these very quickly. I think at least some of them you could  
11 say: well, you wouldn't need it. So if there was another member of the class, you just  
12 amend and put them in the class, or amend the -- I mean, they are not even detailed  
13 in the proceedings. I don't know what -- you wouldn't necessarily need a statutory  
14 provision.

15 I mean, in the materials we have looked at, there is no indication of what that power is for. It  
16 is not dealt with in the article that you have drawn to my attention.

17 **MS CUNNINGHAM:** The other authority, just so I complete the point about the Tribunal's  
18 interpretation and analysis, which you will have already seen in my skeleton, is the UK  
19 Trucks Claim Limited case, which is also in the bundle. Let me just get the reference  
20 for you. That is tab 4 --

21 **CHAIR:** Give me a page number?

22 **MS CUNNINGHAM:** -- page number 122. Here, the nature and adequacy of the funding  
23 arrangements were being discussed in paragraph 46. Then you will see at the bottom  
24 of that paragraph here that there is an application by UKTC in the alternative, ie for opt  
25 in and opt out, and slightly different agreements reflecting the --

26 **CHAIR:** Sorry, you are going too quickly. I apologise.

27 **MS CUNNINGHAM:** So paragraph 46.

28 **CHAIR:** Yes. Yes.

1 **MS CUNNINGHAM:** You will see the final sentence, "Because".

2 **CHAIR:** Yes.

3 **MS CUNNINGHAM:** "Because UKTC makes its application in the alternative for an opt-out or  
4 opt-in CPO, it has slightly different agreements for these two possibilities [ie paying for  
5 ATE], reflecting the statutory restriction regarding costs recovery for [opt-in and]  
6 opt-out ... (Pursuant to s. 47C(5)-(6) ... in the opt-out case, the CFA success fee and  
7 litigation funder's remuneration can be paid only out of unclaimed damages ...)"

8 And then refers back to the Merricks judgment that we have been considering.

9 **CHAIR:** Sorry, because we jump in the middle of these cases on the electronic bundles, which  
10 case is this?

11 **MS CUNNINGHAM:** This is the UKTC funding judgment of 2019, Mr Justice Roth as well.

12 **CHAIR:** Okay. So it is CAT. Yes. (Pause)

13 Thank you. There is also something in PACCAR as well, isn't there, on this? Paragraph 90,  
14 I think.

15 **MS CUNNINGHAM:** Exactly. Yes, I am going to come to on to that.

16 **CHAIR:** We have looked at that.

17 I accept your submission that there are repeated references, in cases like that, to damages  
18 being paid out of unclaimed -- sorry, a fee being paid out of unclaimed damages.

19 **MS CUNNINGHAM:** Yes.

20 **CHAIR:** But the difficulty is the point doesn't seem to have been argued that there may be  
21 alternative ways of paying the funder. That is the case, isn't it? That has not been  
22 argued. Whether it is through subsection (b) or whether it is through a contractual  
23 mechanism via the class representative, that has just not been argued.

24 **MS CUNNINGHAM:** Not fully argued, no. But it is useful to look at that. I don't know if you  
25 are referring to paragraph 98 of Lord Sales --

26 **CHAIR:** Sorry, 98, is it? Yes.

27 **MS CUNNINGHAM:** Let's turn it up to complete the point. That is page 472.

28 **CHAIR:** Yes. Sorry, it was 98 I had in mind.

1 **MS CUNNINGHAM:** Yes, 98.

2 **CHAIR:** We have looked at that. Yes.

3 **MS CUNNINGHAM:** Again, that refers back to the paragraphs that we have been considering  
4 in the Merricks judgment.

5 **CHAIR:** Oh, that is the same Merricks one. Yes.

6 **MS CUNNINGHAM:** Yes. You'll see there it says that by virtue of the Competition Act, the  
7 funder of opt-out proceedings always takes the risk that all of the damages recovered  
8 will be distributed to members, with the result there will be nothing left to pay.

9 **CHAIR:** How would it work? I appreciate in many cases there's undistributed damages, but  
10 as the world becomes more sophisticated, one can envisage systems where you  
11 distribute damages via maybe a credit to somebody's phone bill or some account  
12 somewhere, and there might actually be very little left. You say in those  
13 circumstances, that is just tough luck on the funder?

14 **MS CUNNINGHAM:** That is tough luck, and that is how the regime is designed. As we saw  
15 from the article, you know, the low take-up rate is almost an assumption built into the  
16 regime. You know, if, for example, 100 per cent of class members do decide to claim  
17 their fee or, as you say, it gets credited to them or whatever and there is nothing left  
18 over, then that is the risk that the funders take.

19 **CHAIR:** You say, but then the effect on the industry -- if I can call it an industry -- is that prices  
20 go up, because funders are then faced with double jeopardy: they have the  
21 jeopardy -- or triple jeopardy, if you like. They have the jeopardy of not winning the  
22 case, that uncertainty; then they have an uncertainty at the size of the damages  
23 awarded; third, they then have another uncertainty of the fact there may not be enough  
24 undistributed damages, or that the Tribunal may seek to strike down on the basis it is  
25 a cash cow or something is unfair. If you add those three uncertainties together, the  
26 effect isn't that the litigation funders get poorer; the effect is the litigation funding gets  
27 more expensive, surely.

1 **MS CUNNINGHAM:** It is not clear. I suppose I don't have any evidence to suggest one way  
2 or the other as to what the effect of that will be, but just looking at the statute and  
3 looking at the way it has been interpreted and the purpose, giving a purposive  
4 approach to the regime, that is a risk that has already been considered and built into  
5 that by allowing for the costs and expenses to be recovered under subsection (6), if  
6 there are any.

7 The other position is that it goes to charity. So the government was anticipating that there  
8 may be unclaimed damages, so therefore has a provision in there for the rest to go to  
9 charity or for a part of it to be claimed by the funder. Perhaps if the regime is so  
10 successful, then, you know, they may have to reconsider whether that is an appropriate  
11 waterfall, which is already built in, but we are not really at that position yet, because  
12 that is not how the regime was built.

13 That is my submission on that.

14 **CHAIR:** We have the point on the power, which we understand.

15 **MS CUNNINGHAM:** That is also -- I don't think we need to go to it -- as you will have seen,  
16 replicated in the Tribunal's Rules as well.

17 **CHAIR:** Yes.

18 **MS CUNNINGHAM:** So that is kind of a read-across through from section 47C to give the  
19 power.

20 I take the point there is no express prohibition, but when read with the purposive approach,  
21 that doesn't get you very far, given that class members' interests are at the highest.

22 So then I can move on to my -- a related point in relation to the structure of the obligations on  
23 Mr Gutmann, which raises another concern that Apple has as to the liability. So the  
24 point about proceeds, we have dealt with, about whether that can come out of the pot.  
25 But also the secondary point about: well, what happens if there aren't enough  
26 proceeds? Who then pays?

27 Our position on clause 5.1 -- and it may be useful to look at that again.

28 **CHAIR:** Yes.

1 **MS CUNNINGHAM:** That is page 14 of tab 1.

2 **CHAIR:** Yes.

3 **MS CUNNINGHAM:** You may have it separately. That is internal page 10. You will see there  
4 that Mr Gutmann has -- in the event -- so this is clause 5.1.

5 **CHAIR:** Yes. We have read that.

6 **MS CUNNINGHAM:** Receive any proceeds, the following amounts will be payable, and the  
7 final sentence there:  
8 "... and the class representative will be liable to pay these amounts."  
9 Of course, my learned friend says this is subject to the priorities agreement, and his  
10 submission is that the liability of Mr Gutmann is limited to the proceeds.  
11 If we turn up schedule 3, it is the priority waterfall. I don't need to read that out because you  
12 have read it already, but there is nothing in there, as far as I can see, that limits  
13 Mr Gutmann's liability to the proceeds.  
14 So if, for example, the proceeds are £100, and the funder's fees is more than that --

15 **CHAIR:** Why is that of concern to you, particularly?

16 **MS CUNNINGHAM:** This is of concern to me --

17 **CHAIR:** I understand why that may be of concern to Mr Gutmann.

18 **MS CUNNINGHAM:** -- because it raises a point about whether or not this agreement is a  
19 damages-based agreement.

20 **CHAIR:** Right.

21 **MS CUNNINGHAM:** Because the upshot is -- our primary position is that this creates  
22 a conflict between the class, and I will go on to develop that. But given that we are  
23 considering how this mechanically works in terms of the proceeds and who pays what,  
24 Mr Gutmann, on the face of it, has an unlimited liability. My learned friend in response  
25 has said: well, no, that is limited to the proceeds. Then the proceeds are acting as  
26 a natural cap on the funder's return. Then the argument that the LFA constitutes  
27 a damages-based agreement, for the same reasons as have been argued in *Kent* and

1 Sony, ie the return is determined by reference to the financial benefit, comes into play,  
2 and I don't think that point has really been considered.

3 **CHAIR:** Sorry, say that last bit again. I get the point about the cap.

4 **MS CUNNINGHAM:** The cap.

5 **CHAIR:** And that was raised in Sony and was rejected as (overspeaking) --

6 **MS CUNNINGHAM:** And Kent, and was rejected, but for which both Sony and Apple have  
7 been granted permission to appeal on.

8 **CHAIR:** Right.

9 **MS CUNNINGHAM:** So we will put down a marker that --

10 **CHAIR:** You want to reserve that point on --

11 **MS CUNNINGHAM:** At that point we put down a marker and say -- you know, there are two  
12 outcomes in relation to clause 5.1. Either -- our primary position is that it creates  
13 a conflict of interest, because there is an unlimited liability in terms of Mr Gutmann,  
14 and that is how we construe it.

15 **CHAIR:** Just help me with that. So why is it a conflict? If there is no cap, there is an unlimited  
16 liability, and then there is a conflict between Mr Gutmann and the class, you say?

17 **MS CUNNINGHAM:** Yes, because Mr Gutmann will want to ensure he is not on the hook and  
18 it will come out of the proceeds, which is relevant to the point we have been discussing,  
19 rather than him having to pay. So it may be that the whole thing is designed to ensure  
20 that Mr Gutmann is not on the hook, and actually if the funder can be paid first, then  
21 Mr Gutmann doesn't have any liability for the funder's fee. That is the way that the  
22 agreement, as we have been discussing, has been predicated.

23 Then the second point, that if the PCR is right that the funder's return is limited to proceeds --

24 **CHAIR:** Then it's a cap.

25 **MS CUNNINGHAM:** -- then it is a cap. Either way, we think there are difficulties. We are  
26 concerned that, irrespective of whether Apple raises this or not, it is something the  
27 Tribunal must consider as part of its gatekeeper function.

1 But anticipating that if the Tribunal disagrees with us, applying the reasoning of *Sony* and  
2 recently in *Kent v Apple*, and finds that the cap doesn't operate in this way, then  
3 obviously Apple seeks permission to appeal on the same basis. Given the uncertainty  
4 that this type of arrangement creates and for the same reasons, it is right that this  
5 issue, and the issue we have been discussing about the construction of section 47C,  
6 should be considered at a higher level --

7 **CHAIR:** Do we know when that appeal is due to be heard yet? Have we got a date?

8 **MS CUNNINGHAM:** I don't think it has been listed.

9 **CHAIR:** There is no reason why this couldn't catch up.

10 **MS CUNNINGHAM:** Yes, there's no reason at all. It is the same point, it's a very short point,  
11 it's a discrete point, and could be captured together with the section 47C point that we  
12 have been discussing, given that it is all relevant in terms of -- it is not something that  
13 can wait until distribution. If these agreements are being designed and predicated on  
14 there being a power under section 47C, then that issue needs to be dealt with now,  
15 rather than down the line, where we will have various agreements constructed on this  
16 basis, which actually are a practical impossibility and also a legal impossibility.

17 So, in my submission, these two issues together --

18 **CHAIR:** Let's assume for present purposes -- and this has not been decided  
19 absolutely -- suppose we were against you and your substantive points.

20 **MS CUNNINGHAM:** Yes.

21 **CHAIR:** With you on the fact the Court of Appeal are looking at this and this really ought to  
22 go along. In terms of what happens in the interim, is really my question: can the case  
23 progress on the current funding agreement, or whatever amended funding agreement  
24 we end up with?

25 **MS CUNNINGHAM:** In my submission, the authorisation provisions would prohibit if -- in  
26 terms of there being a suitable class representative. Obviously all of this goes to that.

27 **CHAIR:** Yes. This is on the assumption that we are against you, so we say the funding  
28 arrangements are suitable. We then certify. We give permission on these relatively

1 narrow grounds. As a practical matter, will that result in -- will you be saying the  
2 litigation should be stayed or would you be saying parties should carry on for the time  
3 being?

4 **MS CUNNINGHAM:** Let me just take instructions.

5 **CHAIR:** Well, you take instructions in due course. I will give you a few minutes to think about  
6 it. (Pause)

7 **MS CUNNINGHAM:** The point being made is this is really not one of Apple's concern, it is  
8 more of the class representative, and if they want to proceed with potentially  
9 an agreement which is not a possibility.

10 **CHAIR:** Yes. Understood. Yes.

11 What other points did you want to address me on?

12 **MS CUNNINGHAM:** So the second challenge is in relation to the funder's return.

13 **CHAIR:** Yes. So just run through that briefly.

14 **MS CUNNINGHAM:** Yes.

15 So we have already looked at the test that the Tribunal must apply in Gormsen.

16 If we then turn up the -- if we go through the actual multiples now, so you can see how this is  
17 calibrated. So that is schedule 2.

18 **CHAIR:** Yes. I have the figures.

19 **MS CUNNINGHAM:** So our understanding is -- and my learned friend will correct me if I am  
20 wrong -- we are already at stage 5 of the multipliers. So you will see that, in table 1,  
21 from the end of stage 4 -- on our calculation, the end of stage 4 was  
22 22 November 2023.

23 **CHAIR:** Sorry. What I haven't got in mind is how I work out the stages. Where do I get that  
24 from?

25 **MS CUNNINGHAM:** If you look at table 1 --

26 **CHAIR:** Yes, I can see the stages, but how do I know how the stages are defined?

1 **MS CUNNINGHAM:** So if you look at stage 1, for example, from the relationship  
2 agreement -- it is the only date we are not aware of, what the relationship agreement  
3 was. But if we take the latest possible date, ie until the issuance of proceedings --

4 **CHAIR:** Oh, I see. They are straightforward counting months?

5 **MS CUNNINGHAM:** Straightforward -- yes. So we know the issuance of proceedings was  
6 17 June, so then the end of stage 1 was 17 June, and then you can track that all the  
7 way through. Based on the -- the first CMC was 22 November, so then that takes you  
8 to stage 3. The end of stage 2 was 22 November. Then until the award of the CPO  
9 or expiry of six months, so the six months expired on 22 May and so on. That brings  
10 us to stage 5, so we are already at the highest level of multiple. So you can see what  
11 that is. Obviously I can't say in open session what that amounts to, in terms of the fee,  
12 without going into private session, but I think the Tribunal can do its own calculations  
13 as to that, and you will see that is obviously a significant amount.

14 Then just to flag to the Tribunal that that is just the funder's return.

15 **CHAIR:** Okay. But today -- and possibly at the end of these proceedings we may be able to  
16 say other things, but as of today, how can we possibly say that is not an appropriate  
17 figure?

18 **MS CUNNINGHAM:** If you consider the Tribunal has looked in other cases at the various  
19 rachets that apply. In this case, the rachets are, as we can see, largely irrelevant,  
20 because we have already reached the highest stage.

21 **CHAIR:** Okay. Fine.

22 **MS CUNNINGHAM:** And the other authorities that have considered this, the Tribunal takes  
23 a view as to whether or not those increments are appropriate, steep, et cetera --

24 **CHAIR:** As you say, the increments are behind us now, and the increments are, increment  
25 by increment, relatively small. But the fact is we are at stage 5, you say, and as  
26 a multiplier -- and I think I can say in open court it is not 100 times. As a multiplier, are  
27 we really in a position today to say that that is inappropriate? I mean, the other

1 multipliers are water under the bridge in terms of whether they should have stepped  
2 up more slowly or more quickly. The fact is, that is where we are.

3 **MS CUNNINGHAM:** We are at the highest level of the multiple, as you say. Then in addition,  
4 it is worth noting, just so the Tribunal has the information, you will see at the end of the  
5 table underneath, there is also provision for that committed capital to increase over  
6 time, depending -- for each 100,000 of additional funding --

7 **CHAIR:** Yes.

8 **MS CUNNINGHAM:** -- the funder's term will increase. So that is obviously in addition to the  
9 committed capital, which is -- I think I'm allowed to say, because it is not  
10 highlighted -- the committed capital amount which is in schedule 1. So that is in  
11 addition to that. So the funder will get the drawn down amount, the funder's return,  
12 and then any additional funding will be calculated at the rate you see there, which has  
13 the potential to increase it over time beyond the multiples to a degree that is not entirely  
14 clear, given the additional amount of funding cannot be estimated at this point.

15 In other words, on the additional funding point, the funder has the ability to arbitrarily increase  
16 the amount of funding over time, whether or not they are needed, or actually drawn  
17 down, which seems to, in our submission, go against the requirements in the governing  
18 principles of the CAT and Rule 4 about ensuring that cases are dealt with justly.

19 It is also possible under this arrangement for the funder to receive a windfall, in effect, without  
20 having to actually have expended the costs, because the funder's return -- we could,  
21 for example -- at this point, the funder could have or be due a significant sum under  
22 the return, but have not actually -- the PCR may not have drawn down much of the  
23 committed capital put forward.

24 **CHAIR:** I mean, these points you are making, all the points you have made up until now -- of  
25 course it is perfectly proper for you to make them -- do any of them prejudice Apple?  
26 Obviously the fact that this litigation is taking place is a concern, but are there any  
27 submissions you have that this directly impacts Apple's position?

28 **MS CUNNINGHAM:** It is simply our submission that it is part of the gatekeeper function.

1 **CHAIR:** Yes. Understood.

2 **MS CUNNINGHAM:** Obviously, this plainly points against the cost-benefit analysis that the  
3 Tribunal has to carry out in considering whether or not these proceedings should go  
4 ahead. Particularly where every aspect of this claim is highly speculative at best, there  
5 is every chance that the Tribunal will award nothing, and the promise of these types of  
6 multipliers in relation to that sort of case doesn't seem to be justified with the cost and  
7 benefits --

8 **CHAIR:** If we award nothing, you will have been -- yes. Okay. All right. I will deal with that --

9 **MS CUNNINGHAM:** For those reasons, we say that you must not certify on that basis.

10 **CHAIR:** Was there anything else you (overspeaking)?

11 **MS CUNNINGHAM:** My final point, I think, was my challenge 3, which we have already  
12 considered as part of points 1 and 2 in terms of the perverse interest, so I don't think it  
13 is necessary to deal with that in any more detail.

14 Unless the Tribunal has anything further, those are my submissions.

15 **CHAIR:** Very helpful, Ms Cunningham. I appreciate it.

16

17 Submissions by MR BACON

18 **MR BACON:** May it please you, sir. May I deal with the two points, then.

19 One is the question of whether or not the Tribunal should not certify the case based on  
20 provisions contained within the LFA, more particularly the waterfall arrangements,  
21 which provide, as one alternative for remuneration for the funder, payment from the  
22 awarded damages as opposed to the uncollected damages. I put it that way because  
23 it is very important that I remind the Tribunal, with respect, of the terms of schedule 3.

24 **CHAIR:** Yes.

25 **MR BACON:** Because, you know, I am sitting here listening to my learned friend, sort of,  
26 lining up an appeal on the question of whether or not the litigation funding agreement  
27 can provide for the class representative to apply at some subsequent future time,

1           namely on distribution, for an order that the damages be paid and then deducted to  
2           pay the funders.

3 Schedule 3 legislates for two options. Priority is waterfall number 1. It legislates for  
4           a circumstance in which the Tribunal does actually approve the deduction other than  
5           from stakeholder proceeds. We know that stakeholder proceeds is defined as  
6           recovered costs and uncollected damages. So that is priorities 1, waterfall 1, is really:  
7           can the funder be paid from the damages.

8 It is --

9 **CHAIR:** Just -- sorry.

10 **MR BACON:** Sorry.

11 **CHAIR:** My head spins a bit when I look at this.

12 **MR BACON:** They are double -- they are negatives within the drafting.

13 **CHAIR:** One can envisage if you are successful at trial --

14 **MR BACON:** Yes.

15 **CHAIR:** -- you will get a proportion, if not all, your costs.

16 **MR BACON:** Costs.

17 **CHAIR:** And those will be awarded to PCR.

18 **MR BACON:** The class representative.

19 **CHAIR:** The class representative. And then the question is whether it is appropriate for the  
20           class representative to pass those straight back to the funder. That is one question.

21 **MR BACON:** Yes. The way in which the litigation funding agreement operates is an  
22           obligation -- an intended desired mechanism, as, sir, you put it -- to ensure that the  
23           issue is ventilated before the court as to how the class representative, and whether the  
24           class representative, can pay the funder directly out of the damages or not.

25 **CHAIR:** Yes. But, sorry, just to look at it horizontally, rather than vertically.

26 **MR BACON:** Yes.

27 **CHAIR:** So you have obviously the two elements that the funder is getting back nominally.

28           Maybe more elements. But one is --

1 **MR BACON:** Costs.

2 **CHAIR:** -- the money they have already paid out.

3 **MR BACON:** Yes.

4 **CHAIR:** And secondly is their profit element.

5 **MR BACON:** Indeed.

6 **CHAIR:** And it may not be profit, but (overspeaking) --

7 **MR BACON:** Yes, their return, yes.

8 **CHAIR:** Their return.

9 **MR BACON:** Some of -- so the --

10 **CHAIR:** And the case -- there may be different -- one may be more persuasive than the  
11 other --

12 **MR BACON:** Yes.

13 **CHAIR:** -- but the case -- I mean, if they forked out X million to fight the litigation and you  
14 have been successful and you have recovered Y million, it would seem odd if they  
15 were not to get that back.

16 **MR BACON:** Well, quite. You would expect that would follow.

17 **CHAIR:** Yes. But also -- right, yes. Then the question is: you may have the difference  
18 between X and Y, and --

19 **MR BACON:** The shortfall.

20 **CHAIR:** -- their margin as well.

21 **MR BACON:** Yes. There is a shortfall in what they have spent from -- I mean, it may be you  
22 win and get your damages, but the Tribunal say you don't get 100 per cent of your  
23 costs. There's a shortfall in costs.

24 **CHAIR:** Yes.

25 **MR BACON:** All of these scenarios -- and there are doubtless many others that one could  
26 speculate upon -- are likely to arise at the point at which questions of distribution -- well,  
27 they will arise at the point at which distribution arises.

1 So the purpose of the litigation funding agreement is to install a contractual mechanism to  
2 enable that question to be answered, whilst at the same time protecting the class  
3 representative. That is the purpose of this agreement.

4 **CHAIR:** If there isn't an agreement as to priorities, what would happen then?

5 **MR BACON:** As you have indicated, sir, one questions the need for a priorities agreement in  
6 circumstances where the agreement itself effectively hands over the question of what  
7 will happen to the Tribunal and takes it outside of a contractual relationship. But the  
8 purpose of the LFA is to set the structure, so as to --

9 **CHAIR:** I appreciate that. I am just trying to examine the powers of this Tribunal.

10 **MR BACON:** Yes.

11 **CHAIR:** Let's assume you didn't have an agreement on priorities.

12 **MR BACON:** Yes.

13 **CHAIR:** When it gets to the end of the proceedings, what can the Tribunal do? The Tribunal  
14 can make an order that there be payment of costs and damages to the PCR -- to the  
15 class representative, rather, by then. What else can the Tribunal --

16 **MR BACON:** Well, the Tribunal would be entitled to exercise its jurisdiction over the damages  
17 to ensure that the fair, just outcome is achieved for the class.

18 **CHAIR:** Could it make an order that payment be made to the funder?

19 **MR BACON:** Absolutely. Absolutely it could.

20 **CHAIR:** Under what statute?

21 **MR BACON:** We would submit that is available under section 47. It anticipates the Tribunal  
22 being involved in the making of orders. For example, one example is out of the  
23 undistributed damages. It would be odd if the court didn't have jurisdiction to make  
24 orders --

25 **CHAIR:** That power is clearly there.

26 **MR BACON:** Yes.

27 **CHAIR:** But otherwise it might be out of -- I mean, that is going to have a huge effect on  
28 timing, potentially, because there comes a point at which you know you have

1 undistributed damages, which will be much later than when the judgment is handed  
2 down.

3 **MR BACON:** Yes. But, sorry --

4 **CHAIR:** So the power to make an award -- so there is a power, clearly, under 47C(b) --

5 **MR BACON:** Yes.

6 **CHAIR:** -- to make an award out of undistributed damages. What do you say about (2)(b), I  
7 think, is it --

8 **MR BACON:** We say that power in relation to undistributed damages is not determinative or  
9 limiting in terms of what the Tribunal's jurisdiction is over the damages and its  
10 distribution. Indeed, to the contrary; it is an example of a permissive provision which  
11 permits the Tribunal to make orders out of undistributed damages. It says that they  
12 can be utilised to repay shortfalls in relation to costs and expenses and the balance  
13 goes to charity. So there is -- as you indicated, sir, its principal purpose is to ensure  
14 we all know where the money goes if there is money left over. It is not left hanging  
15 and, indeed, doesn't need to be paid back to the defendant. That's its principal  
16 purpose. But in so expressing that permissive provision, it is not undermining the  
17 Tribunal's jurisdiction under 47 to make orders for payment to anybody that it considers  
18 appropriate in the interest of the class.

19 **CHAIR:** And the power to make payments to anybody, whether it is costs or the profit  
20 element --

21 **MR BACON:** Yes.

22 **CHAIR:** -- comes from where?

23 **MR BACON:** Section 47.

24 **CHAIR:** Which bit of 47? 47C(2)(b)?

25 **MR BACON:** (2)(b).

26 **CHAIR:** Yes, okay.

27 **MR BACON:** Sorry, it is 47C(3)(b).

28 **CHAIR:** Sorry, let me bring it up.

1 **MR BACON:** Page 605.

2 **CHAIR:** 605.

3 **MR BACON:** So it has obviously engaged in the process --

4 **CHAIR:** Sorry, (3)(b), I meant. Not (2)(b).

5 **MR BACON:** (3).

6 So it is a very broad provision, but it clearly dictates that the Tribunal has to make an order  
7 providing for the damages to be paid to somebody. (3)(a) says -- this is on behalf of  
8 the class, obviously -- payment is made on behalf of the class to the representative or  
9 such person other than the represented person the Tribunal thinks fit.

10 **CHAIR:** But -- yes. I mean, if there wasn't an agreement, the Tribunal would then have to  
11 engage in an exercise as to what is fit.

12 **MR BACON:** What is fit, exactly so. So at least the benefit of the LFA and the agreement is  
13 that it identifies the likely persons that are going to be the subject of distribution at that  
14 stage. It would be most -- you know, there is obviously a commercial desirability of  
15 having litigation funding agreements which impose mechanisms to enable these  
16 questions to be determined. That is what the waterfalls are doing.

17 I mean, I had this interesting discussion with the court in Meta. The same point can be said  
18 about the multiples, for example, in the LFA. In one sense, there is a sterile debate  
19 about approval which is being sought here, because ultimately it falls upon the  
20 Tribunal. As all of the cases have accepted, I don't think there is a single authority  
21 referred to anywhere that does not accept the proposition that it is at the end of the  
22 case, on questions of distribution, that the question of how much can be repaid to  
23 a funder, how much the lawyers should be paid, in other words what deduction should  
24 be made from the recoveries, can really only properly be considered. But they are all  
25 accepting it is considered.

26 **CHAIR:** But it's all very -- I mean, it is difficult, isn't it? To some extent, it is just kicking the  
27 can down the road because --

28 **MR BACON:** There is a reason for it. You are right about that, but --

1 **CHAIR:** I mean, there are some things that the Tribunal, at the end of proceedings, will be in  
2 a better position on.

3 **MR BACON:** Indeed.

4 **CHAIR:** And proportionality and how costs are being spent -- and so proportionality, because  
5 there will be an award of damages which will say: well, the costs are X per cent of that,  
6 so that's --

7 **MR BACON:** Exactly. At the end, you know what the figures are.

8 **CHAIR:** You know what the figures are. But in terms of how profitable, whether it is a cash  
9 cow --

10 **MR BACON:** Again, you know what the figures are.

11 **CHAIR:** Well, you --

12 **MR BACON:** That's the point.

13 **CHAIR:** That requires some looking at the internal profitability of the funder to know whether  
14 it is a cash cow or not.

15 **MR BACON:** So my learned friend didn't take you to -- in Merricks, the first Merricks, which  
16 she did take you to, there is a passage, I think it is 116 of the judgment, where we had  
17 this -- in the course of that hearing, Mr Justice Roth considered the very point that you  
18 are considering now.

19 **CHAIR:** Yes.

20 **MR BACON:** How do we go about dealing with this?

21 **CHAIR:** Yes. I have read this.

22 **MR BACON:** I think it's 116, where he said: well, we are able to do it, we have experience  
23 and we are able to do it, but also we can have experts, if necessary, to give evidence  
24 about the market.

25 Now, that is exactly what happened. I don't (inaudible), but that did happen in the ATE sort of  
26 world, when courts were being invited to make decisions about what a recoverable  
27 premium should be. It doesn't happen now because they are not recoverable. There

1 was a body of jurisprudence which supported the proposition that the court could hear  
2 expert evidence on the market.

3 **CHAIR:** So how long --

4 **MR BACON:** And the Court of Appeal -- the senior courts were adhering to that approach.

5 Mr Justice Roth, at least as evident from paragraph, I think, 116, he similarly took that view.

6 **CHAIR:** Why don't we do that then in ordinary costs? Why don't we investigate the charging  
7 structures of city law firms?

8 **MR BACON:** Well, it does sometimes happen, but very rarely. The answer to the question  
9 on that one is that the courts have taken the view that they're not in any need to hear  
10 expert evidence on it because the courts are familiar with the arrangements and they  
11 are in a position themselves better placed to judge reasonableness or otherwise of  
12 a solicitor's retainer. Judges, courts, Tribunals deal with the assessment of costs, as  
13 it were, on a daily basis, so they don't have that lack of expertise. That is the answer,  
14 I think, to your question there.

15 **CHAIR:** Whether familiarity and expertise are the same thing is another matter.

16 **MR BACON:** Well, that may be right. But you do get some cases where actually the court  
17 does enquire into the nature of retainers. It is pretty rare, but it does happen.

18 Certainly it seems to my mind that all of the authorities, right from the beginning of this  
19 embryonic opt-out process, have all accepted the proposition, and I would indeed invite  
20 you to follow that approach, namely that questions about reasonableness and  
21 proportionality and whether or not a multiple is the right multiple, are all best dealt with  
22 at the end. It is not a kicking down the can -- I mean, it has the effect of kicking down  
23 the can, but I don't accept it is kicking down the can in the sense that we are all being  
24 lazy and don't want to deal with it.

25 **CHAIR:** No, no.

26 **MR BACON:** There is actually a real reason for postponing it.

27 **CHAIR:** But it does create more uncertainty for the funders.

28 **MR BACON:** It creates uncertainty for funders, and I --

1 **CHAIR:** And uncertainty means the prices go up.

2 **MR BACON:** The uncertainty -- certainly there is a risk, you know, to funders, that if they don't  
3 know what they are going to receive, then they may build that into their equation. I  
4 mean, that is speculation, but I can see that being a valid point.

5 But they are funding these cases -- I don't speak for them, obviously, but in my own  
6 experience -- on the basis that it won't be until the end that they actually know how  
7 much they are going to receive. So, as Mr Justice Roth said in Merricks, that is part of  
8 the reasons why we can't be too restrictive about these agreements, because --

9 **CHAIR:** But why do you need to have these -- okay. First of all, you accept the point that the  
10 liability of Mr Gutmann is limited to the total proceeds?

11 **MR BACON:** Yes. So this point -- it is really quite irritating, this, because the original LFA  
12 contained a cap that they won't exceed -- you can see it has been deleted.

13 **CHAIR:** Yes.

14 **MR BACON:** Apple then contend, as they do in Kent, that that cap renders the entire  
15 agreement -- not that it is unfair or unreasonable, but renders it all unenforceable  
16 because of PACCAR.

17 So one purpose of the amendment was to remove the cap, which we have done. But it is  
18 clear from both waterfall 1 and waterfall 2 that payment can only ever be made to the  
19 funders from proceeds. That is clear by definition. The idea, we would submit, that  
20 where an LFA provides for payment to be made back to the funder from proceeds, that  
21 somehow is a damages-based agreement, is absurd.

22 **CHAIR:** On the priorities, you accept that there is a complete discretion at the end of these  
23 proceedings for this Tribunal to rearrange the priorities.

24 **MR BACON:** Yes. Indeed. Absolutely. And they are both -- as I was saying in the course of  
25 the submissions I was making, there are two priority waterfalls reflecting the possibility  
26 that the Tribunal doesn't accept the submission that the funds can be paid from the  
27 damages -- by saying "funds", the funder -- so that then the waterfall that applies will  
28 be a different one.

1 **CHAIR:** And as currently -- so there is no presumption in --

2 **MR BACON:** No.

3 **CHAIR:** Right. So why do you need --

4 **MR BACON:** Well --

5 **CHAIR:** Why do you need the priorities?

6 **MR BACON:** Because there is a -- in relation to -- were the Tribunal to decide that the funder

7 could only receive its return from the undistributed damages, there is a very slightly

8 higher return built into the multiple to make that distinction. Because of course -- so

9 you see that from --

10 **CHAIR:** Show me that.

11 **MR BACON:** If you look at the multiples table, table 2 --

12 **CHAIR:** Yes.

13 **MR BACON:** -- it is a very slight increase, but there is an increase.

14 **CHAIR:** Sorry, but table 2 is -- I may be misunderstanding that.

15 "If the court does not approve payment of the representative's costs, fees and disbursements,

16 other than from stakeholder proceeds ..."

17 **MR BACON:** So that's from damages. So number 1, funder's return -- are you looking at

18 schedule 2, sir, so we're on the same page?

19 **CHAIR:** Okay, so -- sorry. So fees includes the profit element?

20 **MR BACON:** Yes.

21 **CHAIR:** Yes. All right. Understood. Okay.

22 **MR BACON:** Yes.

23 **CHAIR:** So:

24 "If the court does not approve ... other than from stakeholder ..."

25 Sorry, I just need to remind --

26 **MS CUNNINGHAM:** Funder's return is the key.

27 "The funder's return is calculated in accordance with ..."

28 And then there is a table setting out the return.

1 **CHAIR:** Hold on, let me just have a look. Would you give me a moment, sorry. **(Pause)**  
2 I see.  
3 **MR BACON:** You will see there is a very small increase --  
4 **CHAIR:** Sorry, I have been misreading that. Right. Yes.  
5 **MR BACON:** So we need that -- I mean, ultimately, with respect, you are right. I mean, one  
6 can say: why do we need an LFA at all, let alone a priorities agreement? But of course  
7 you need something --  
8 **CHAIR:** I can see you need an LFA. It's the priorities are unclear to me.  
9 **MR BACON:** Well, you need that --  
10 **CHAIR:** Because the assumption -- I mean, this litigation will have been unsuccessful for you  
11 in the event that you do not recover the expenditure. Same for all litigants.  
12 **MR BACON:** Yes.  
13 **CHAIR:** So it is proceeding on the basis that -- and unsuccessful to the funder as well -- there  
14 will be significantly more money in the pot than is required to go back to the funder.  
15 **MR BACON:** Yes, that's right.  
16 **CHAIR:** So the whole need for priorities seem to be based on an assumption that the litigation  
17 has not been successful, commercially.  
18 **MR BACON:** It seeks to address that so there is at least a contractual obligation for the class  
19 representative to tell the Tribunal, "Well, this is what I have agreed".  
20 **CHAIR:** And if it is unsuccessful --  
21 **MR BACON:** Yes.  
22 **CHAIR:** -- then one might say the risks should be borne by the funder --  
23 **MR BACON:** If it is unsuccessful --  
24 **CHAIR:** -- to a greater or lesser extent. I mean, it will have been commercially unsuccessful  
25 if it hasn't earned enough money to go back to the funder.  
26 **MR BACON:** Yes. But in either scenario, with respect, sir, it would be rather unconventional  
27 not to have an agreed structure as to the obligations, the mechanics, of ensuring that  
28 the right questions to satisfy the funder's return are being raised by the Tribunal to

1 enable those issues to be determined. That is really what the effect of a waterfall  
2 agreement is, so that the lawyers understand their position, the funders now  
3 understand their position, the class representative understands their position, and the  
4 Tribunal --

5 **CHAIR:** Understands the position in the event that things go wrong. It is not --

6 **MR BACON:** Well, it depends --

7 **CHAIR:** Priorities don't arise if the litigation is commercially successful.

8 **MR BACON:** It depends what one means by commercial -- yes, I mean, if there is a recovery  
9 of --

10 **CHAIR:** If you have recovered more than you --

11 **MR BACON:** If everybody recovers more than they have spent, I agree with you. But we  
12 have to legislate for all eventualities.

13 **CHAIR:** If the litigation has been unsuccessful, it is kind of odd that the funder should be  
14 getting a profit out of it.

15 **MR BACON:** Sorry, sir, to come back on another point, you still need -- even if there's a -- so  
16 it is a bit of a chicken and egg, because in order for you to understand whether or not  
17 there has been sufficient recovery to ensure that everybody has been paid, you need  
18 to have a contractual obligation setting what the liabilities are.

19 **CHAIR:** You get that from schedule 2.

20 **MR BACON:** Well, you get it from -- exactly. But that --

21 **CHAIR:** I'm just saying, why -- schedule 3 seems to be trying to put the funder in a position  
22 beneficial to it in circumstances where the litigation has been unsuccessful.

23 **MR BACON:** Well, I understand how it can be seen that way, but it is actually a genuine  
24 attempt to ensure, if it has been commercially unsuccessful -- and I am not sure, I will  
25 need to think about it, that is the right starting point -- that there is a mechanism to  
26 enable the Tribunal to distribute the damages so as to respect the contractual  
27 entitlement of the funder under schedule 2. That is what it is about.

28 **CHAIR:** You accept there is no presumption and there will be a complete discretion for the --

1 **MR BACON:** Well, exactly.

2 **CHAIR:** -- Tribunal to determine the priorities?

3 **MR BACON:** The waterfall, I would respectfully suggest, makes that abundantly clear with  
4 the amendments. It is all subject to the court's overriding jurisdiction and discretion,  
5 and that is reiterated in clause 5.3 of the agreement.

6 So 5.3, you have been taken to it already, but you will see that it is all dependent on what the  
7 CAT -- so that is the protection for the class representative, who I act for. Very  
8 important provision. Also, what you haven't been taken to, I think, is clause 10.4, which  
9 reinforces this mechanism concept that either the solicitor -- the solicitor and the class  
10 representative will take steps to achieve recovery of proceeds and to -- in support of  
11 either waterfall 1 or waterfall 2.

12 **CHAIR:** Sorry, where are you reading?

13 **MR BACON:** So clause 10.4:

14 "Take all reasonable steps to achieve the authorisation of the class representative ..."

15 What we are doing now on certification, and:

16 "If the court orders any proceeds to be paid by the defendant, apply for an order ..."

17 This is 10.4(c).

18 **CHAIR:** Yes. I am with you. All right.

19 **MR BACON:** You see "and/or (d)". So it is both. So it is not seeking to prioritise either option  
20 at this stage.

21 **CHAIR:** What do you say about the authorities which say that payment will have to come out  
22 of undistributed --

23 **MR BACON:** Well, very quickly.

24 So in Merricks, the issue wasn't -- what is said by Mr Justice Roth is clearly obiter, because  
25 the issue in that case wasn't -- the litigation funding agreement did not seek to -- and  
26 the class representative did not seek an order, either contractually within the LFA or  
27 from the Tribunal, that the damages should be paid other than from undistributed  
28 damages.

1 The issue -- my learned friend misunderstood, with respect to her, what was going on in that  
2 case. The issue in that case was whether the class representative had a liability to  
3 pay the funder, such that the class representative could recover the funding sums by  
4 way of costs, expenses and disbursements. That is why we had to -- we volunteered  
5 to change the agreement to make sure that there was a liability.

6 **CHAIR:** Can we have a five-minute break?

7 **MR BACON:** Of course.

8 **CHAIR:** Sorry, I didn't mean to stop you mid-flow, but having stopped you mid-flow ...

9 **MR BACON:** Of course.

10 **CHAIR:** Five minutes, and we will come back to the authorities.

11 **(12.03 pm)**

12 (A short break)

13 **(12.11 pm)**

14 **CHAIR:** Right. Sorry. We were doing -- we were talking about the authorities.

15 **MR BACON:** Thank you, sir. Yes. Just in connection with the authorities.

16 I am happy to go through them in more detail, but in summary -- and I know you have had  
17 a chance to look at all the authorities -- in Merricks number 1, there is a reference that  
18 has been referred to by my learned friend, Mr Justice Roth's judgment, about damages  
19 being payable in opt-out cases only from the uncollected damages. That wasn't  
20 actually an issue that was engaged in the case. As I say, in that case, the funder was  
21 only looking to the undistributed damages. That was the terms of the agreement.

22 The issue in the case --

23 **CHAIR:** That is stated clearly, is it, that --

24 **MR BACON:** Let me just -- sorry, my computer ... **(Pause)**

25 That was factually the position.

26 **CHAIR:** Are you doing that from recollection?

27 **MR BACON:** I am doing that from recollection. Let me see if I can find the ... **(Pause)**

28 **CHAIR:** What page was it?

1 **MR BACON:** Tab 3 of the authorities bundle.

2 **CHAIR:** Page?

3 **MR BACON:** The authority is found on page 47, but the relevant -- I'm just trying to think  
4 whether there is a section in here that deals with -- the authorisation points are section  
5 E, which is page 82.

6 I am just looking very quickly to see whether there is a --

7 **CHAIR:** One of the problems with coming to this subject relatively fresh, one of the problems  
8 with a lot of these cases is they don't actually set out enough of the agreements.

9 **MR BACON:** Absolutely. There is a danger there, obviously, with then seeking to -- just let  
10 me ... **(Pause)**

11 Yes. Paragraph 104 gives you a little insight into the fact, because ...

12 So 103, Mastercard were submitting:

13 "... there is no basis under the statute on which the Tribunal could order that the 'Total  
14 Investment Return' [the funder's return] is paid to the funder as envisaged by sects 2.1  
15 and 2.5(b) [L]FA [the funding agreement] ...

16 "There is, in our view, an element of self-fulfilment by Mastercard in advancing this submission.  
17 Although sect 2.5(a) FA provides that the Applicant is to 'seek approval' from the  
18 Tribunal of the Funding Agreement and all other related documents, including  
19 expressly a 'Litigation Counsel Letter' between the Applicant and his solicitors relating  
20 to the payment of the Undistributed Proceeds to the funder ..."

21 Do you see that? That supports my certain recollection that the agreement itself was one  
22 under which the funder only looked to the payment of undistributed damages to the  
23 funder.

24 **CHAIR:** Yes. Okay.

25 **MR BACON:** And, therefore, one can't take really anything from that case on this topic as to  
26 whether or not an agreement which provides --

27 **CHAIR:** Clearly the Tribunal were contemplating, as a general matter, and they have some  
28 more general language, that a funder always takes the risk. Isn't that (overspeaking) --

1 **MR BACON:** Yes, yes. No, quite. I do accept that. As I have said in my skeleton, it is a moot  
2 point. I totally accept that. But it is one that hasn't been decided --

3 **CHAIR:** No one has squared up to it and decided it.

4 **MR BACON:** No, that is the position.

5 The closest one gets to it is an authority referred to by both of us, certainly by me, the decision  
6 of Lord Justice Green in the Court of Appeal in the BT case, which is worth having  
7 a look at.

8 **CHAIR:** Yes, yes.

9 **MR BACON:** Because I think of all the cases -- I would certainly submit that of all the cases --

10 **CHAIR:** Just give me the page number.

11 **MR BACON:** It is tab 8. Page 380 is the start of the judgment.

12 **CHAIR:** Give me the bit that you're relying on.

13 **MR BACON:** The actual paragraph/page number you need to be looking at is page 349,  
14 which was quite interesting because it aligns with the observations you were making,  
15 sir, about --

16 **CHAIR:** Which paragraph?

17 **MR BACON:** It is paragraph 96 through to 99. It was in the context of account credits. I will  
18 let you read it first, sir, then I'll come back to make my submissions. 99 is the key.

19 (Pause)

20 It is in the context of an account credit, but in this case --

21 **CHAIR:** Can you explain the account credit?

22 **MR BACON:** The proposal was that damages could be distributed by reference to credits  
23 given by BT in phone bills.

24 **CHAIR:** Oh, okay. Yes. All right. That makes sense. Yes.

25 **MR BACON:** You raised this in the course of argument with my learned friend. I mean, in  
26 these sorts of tech cases, I would suggest that you may well end up in a world where,  
27 with the sophistication that we have these days of modern technology and apps and  
28 phones and so on, you could foresee a situation where, if Apple were required to pay

1 damages to an opt-out class, there could be a mechanism under which those monies  
2 are distributed through a simple press-button app-type mechanism. Indeed, within that  
3 structure, the class themselves, the individuals, could accept a deduction being made  
4 to their damages if they agree to it.

5 You see, the point -- the difference between opt-in and opt-out and the submissions that are  
6 being made by reference to undistributed damages at least stems in part, maybe  
7 wholly, from the concern that you can deduct damages if you have an agreement from  
8 the claimant to deduct them, but it is difficult to deduct anything from damages if you  
9 don't have an agreement, because the damages belong to the class.

10 But my reading of the Le Patourel case is that, actually, there could well be a scenario under  
11 which the class come to accept a deduction -- there is no reason why they  
12 couldn't -- through the distribution mechanism, and then you don't have any difficulty  
13 with an agreement.

14 This is why I would say with some force, I hope, that to try this point, to determine this point in  
15 isolation, in abstract --

16 **CHAIR:** Why do you need an agreement -- the class representative is making all sorts of  
17 decisions on behalf of the class --

18 **MR BACON:** Yes. Well, it may be --

19 **CHAIR:** -- throughout the litigation, without the express agreement of the class.

20 **MR BACON:** I accept that. That is one other option. I mean, I am sort of going to the lowest  
21 common denominator, the worst-case scenario --

22 **CHAIR:** No, no, sure.

23 **MR BACON:** -- that we even have to go and get authority from the individual members of the  
24 class. That is actually not that difficult to achieve if you have an app that says,  
25 "Mr Bacon, I am pleased to say you are a member of an opt-out class arrangement,  
26 you are going to get a refund from Apple. Would you like the refund? Tick box 'Yes'.  
27 Are you happy to deduct 2 per cent or 3 per cent from" -- whatever. You can see  
28 different scenarios. I don't know.

1 **CHAIR:** I mean, when they make you give 25 pence to charity, I always refuse in principle.

2 **MR BACON:** It may be that some do.

3 **CHAIR:** I am sure if I was a litigant, and I was told I had an option of not paying money to the  
4 lawyers, I would --

5 **MR BACON:** That is, as I say, the worst-case scenario. It is not beyond the wit of man that  
6 there could be agreement subsequently to the damages becoming awarded. That is  
7 point 1.

8 **CHAIR:** Yes.

9 **MR BACON:** Secondly, as you indicate, the class representative him or herself would be in  
10 a position at that distribution stage to agree on behalf of the class that there should be  
11 a deduction.

12 So there is a real danger in the Tribunal being asked to determine the legitimacy of  
13 an arrangement of this kind now, in isolation and in abstract. It is not a question of --

14 **CHAIR:** I mean, there are two separate things. There is what is fair and just in all the  
15 circumstances, but also if there is a power, and the point is being made that there is  
16 no power to award out of damages that we need to square up to.

17 **MR BACON:** But we submit that the question of whether or not -- the authorities today don't  
18 say there isn't a power.

19 **CHAIR:** No. I think Ms Cunningham accepted it has not been decided.

20 **MR BACON:** Yes. In fact, you know, the decision of the BT case suggests that there could  
21 well be a power, and it is quite interesting. The court there refers to 46C as being the  
22 rubric under which the Tribunal would have the jurisdiction to make these sort of  
23 orders, in answer to your earlier enquiry as to: what is the jurisdiction?

24 **CHAIR:** Under 47C(3)(b) presumably.

25 **MR BACON:** I think that is right. Certainly the reference there is to 47C. So the courts -- I  
26 mean, I am not saying now in the event that I ever argue it in the future what our case  
27 is on it, but you can see 47C, the court's supervisory jurisdiction over the claim as  
28 a whole, the court's case management jurisdiction, these are all matters --

1 **CHAIR:** What about 104, have I got that right?

2 **MR BACON:** 104 deals with the costs between --

3 **CHAIR:** That is inter partes?

4 **MR BACON:** -- the parties. It would be quite a surprising outcome, I think, if the Tribunal got  
5 to the point and the conclusion that actually it did not have any jurisdiction over the  
6 management and distribution of damages in a case such as this. That would be quite  
7 a surprising --

8 **CHAIR:** What about the article?

9 **MR BACON:** So, again, the article. I have the greatest of respect for Professor Mulheron.  
10 As you probably know, she and I, we work together on these sorts of matters. But, I  
11 have to say, with respect to her --

12 **CHAIR:** You just think she is wrong?

13 **MR BACON:** She is wrong.

14 **CHAIR:** What about the intention, the legislative intention?

15 **MR BACON:** Well, just returning to her and just returning to her article. If I could be  
16 respectfully critical of it. She accepts that there would be a second charge on the  
17 damages and then she leaps to the conclusion that the second charge only applies to  
18 undistributed damages. That is where the reasoning in her thinking, I think, falls apart  
19 because she does accept earlier that the damages as a whole are subject to a second  
20 charge in favour of the funders. I struggle to see how section 47 says anywhere  
21 expressly, because it doesn't, thou shalt not deduct from the damages the funder's  
22 fees.

23 We know that Parliament is very clear when it wishes parties, Tribunals, players within this  
24 field not to do things. It says so. For example, you can't enter into a DBA in an opt-out  
25 case; the Act says thou shalt not do so. I would submit it was very dangerous to start  
26 interpreting that section as being some mandatory prohibition when Parliament tends  
27 to make itself clear when it is making mandatory prohibitions.

1 This, as I say in my skeleton, the reference to the undistributed damages being payable is a  
2 permissive provision which one commonly sees in legislation.

3 So that is the answer to that. Can I just deal with this? We are on this side concerned about  
4 having -- my learned friend has ventilated the possibility of an appeal. The question  
5 for this Tribunal is whether or not the proceedings should be certified, taking into  
6 account the terms of this litigation funding agreement.

7 The issues going to the Court of Appeal obviously all go to PACCAR questions, about whether  
8 it is enforceable or not. These are not PACCAR points, first of all. They are not  
9 PACCAR points.

10 **CHAIR:** This is an important, certainly the power point and indeed the cap point, which is a  
11 PACCAR point.

12 **MR BACON:** Yes. It is. I agree with that.

13 **CHAIR:** I mean, it is an important point which is undecided and there are obiter paragraphs  
14 both in the Supreme Court and from this Tribunal which certainly give the impression  
15 that it would come out of undistributed damages. But there is nothing to stop us, so if  
16 we were to disagree with those or to qualify those statements or clarify those  
17 statements, there would be a case for it going to the Court of Appeal. Plainly, that  
18 would not stop us certifying on this basis, but we'd --

19 **MR BACON:** No. Well, that's the key. This is not a point that should unravel the certification  
20 process. I mean, that would be --

21 **CHAIR:** There will be a funding agreement that we are content with and we have formed the  
22 view that it is --

23 **MR BACON:** And from the class representative point of view, of course, because the two  
24 options within the LFA are there, it is a somewhat sterile issue.

25 **CHAIR:** Yes.

26 **MR BACON:** I do make the point that any determination of this must be looked at in the  
27 context, I think, of what might happen on distribution. I do submit that is a relevant  
28 matter.

1 Can I just say, before just wrapping up this point, that in Sony --

2 **CHAIR:** Can I just, before I forget. In Sony has that been stayed or not, in the Court of  
3 Appeal? And the other cases that are going?

4 **MR BACON:** I don't think they have been stayed. I don't believe they have been stayed.

5 **CHAIR:** Which ones are going?

6 **MR BACON:** Sony is going on appeal on the PACCAR cap point.

7 **CHAIR:** Yes. Which other one is going? There is another one, at least one other.

8 **MR BACON:** The CICC case, I think. Is that not --

9 **MS CUNNINGHAM:** No, Kent.

10 **MR BACON:** It is just Kent, on the cap?

11 **MS CUNNINGHAM:** And ratchet.

12 **MR BACON:** Sorry?

13 **MS CUNNINGHAM:** And on the ratchet point.

14 **MR BACON:** On the ratchet point. What, in Kent?

15 **MS CUNNINGHAM:** In Kent.

16 **MR BACON:** Yes.

17 **CHAIR:** Has there been a refusal to certify a stay on any of those proceedings? No.

18 **MR BACON:** Can I just say, in relation to Sony, as I set out in the skeleton, that was  
19 an agreement. A different funder, but that funder also had the two option deduction  
20 from damages or undistributed damages, depending on what -- and that has been  
21 certified.

22 **CHAIR:** Yes.

23 **MR BACON:** There was no --

24 **CHAIR:** Again, part of the problem is the agreement is not properly set out in the decision.

25 **MR BACON:** Well, what you do have, you do have the waterfall though. You do see the two.

26 **CHAIR:** You do see the two.

27 **MR BACON:** I cut and pasted that.

28 **CHAIR:** Yes. Again, this point does not seem to have really been --

1 **MR BACON:** No, I accept it does not appear to have been an issue that was engaged. The  
2 defendants in that case did not take issue with that mechanism.

3 **CHAIR:** Yes.

4 **MS CUNNINGHAM:** They only took issue insofar as it was a conflict. But the section 47C  
5 point was not argued.

6 **MR BACON:** No. Exactly. So the issue was not engaged. Still less, the Tribunal itself did  
7 not have a concern. It sometimes does. We have been in these cases where you get  
8 a sidewinder from the Tribunal saying: well, everybody has looked at this particular bit,  
9 but they have not looked at this. It is not as though that has jumped off the page to  
10 anybody hitherto, which I pray in aid in support of our general approach.  
11 I think that is probably the substantive point, the deduction point. You have my safeguard  
12 points.

13 **CHAIR:** The cap. You say there is effectively a cap -- [overspeaking].

14 **MR BACON:** Yes, there is.

15 **CHAIR:** -- money available.

16 **MR BACON:** Yes. I would not want to use the word cap.

17 **CHAIR:** No.

18 **MR BACON:** Because otherwise they are going to say: well, you have got a PACCAR cap  
19 you are fixing your recovery by reference to.

20 **CHAIR:** Yes.

21 **MR BACON:** But it is implicit in the terms of the agreement that the damages, the proceeds,  
22 are the source.

23 **CHAIR:** You are not going to be taking Mr Gutmann's house and his caravan and --

24 **MR BACON:** Quite so. We would submit, with respect, that the idea that an agreement,  
25 whether it be a litigation funding agreement or a conditional fee agreement or any other  
26 agreement that says, you know, I am looking to the proceeds for payment. That is not  
27 a DBA. It happens all the time with conditional fee agreements. It is a bad point.

1 We have amended it because we don't want to get dragged into an argument about PACCAR  
2 on caps. But if we do that, we then face a different argument, albeit not a PACCAR  
3 one.

4 **CHAIR:** Yes.

5 **MR BACON:** The different argument is there is some sort of conflict. But that, with respect,  
6 I don't think is really being pursued this morning.

7 **CHAIR:** Well, the position is you say the obligations of the class representative end with the  
8 amount of money that [overspeaking] in the litigation.

9 **MR BACON:** They do. They do. There is the overall protections that I have referred to in the  
10 skeleton that are on steroids in this agreement: that nothing is payable by this class  
11 representative, unless the Tribunal approves.

12 **CHAIR:** Yes. Sure.

13 **MR BACON:** Which, with respect to Mr Gutmann and other class representatives, is key so  
14 that they can sleep at night. The idea there is some conflict arising between the class  
15 and the class representatives with such a framework is bemusing, with respect.

16 So that deals with that. Insofar as the quantum, this is not, with respect, my learned friend's  
17 best point. So you have my points about the difficulties the Tribunal has now in making  
18 rulings as to whether or not a particular multiple is a fair and reasonable multiple.

19 **CHAIR:** I understand Ms Cunningham to press that was on its face --

20 **MR BACON:** But you look at the multiple in this case --

21 **CHAIR:** And the ratchet, are we already on stage 5?

22 **MR BACON:** We are on stage 5. But it is a very modest -- I mean, compared to what the  
23 Tribunal has certified in the past.

24 **CHAIR:** Yes.

25 **MR BACON:** I have lots, if I needed to, lots to say about that. That is a very modest return,  
26 given what you see.

27 **CHAIR:** I think the term is "relatively modest".

1 **MR BACON:** Relatively modest. Indeed. Relatively modest to what you see in other cases  
2 and what has been certified in other cases. So nothing really comes from that.  
3 I do say, just because these applications seem to be becoming more popular. I mean, the  
4 idea that a respondent to these proceedings can come along and say that the returns  
5 are all unacceptable and create risk, without any evidence whatsoever. I mean, it is  
6 literally a submission. It is not the way that these matters should be properly advanced,  
7 with respect.

8 **CHAIR:** I understand.

9 **MR BACON:** I think, sir, that probably deals with my --

10 **CHAIR:** I mean, let's assume that they were, on its face, unreasonable. Let's assume.

11 **MR BACON:** Yes.

12 **CHAIR:** 100 times, as an example. Should the Tribunal be refusing to certify at this stage or  
13 should the Tribunal be saying: well, I will deal with all that at the end of the litigation.

14 **MR BACON:** Well, no. I think the way the Tribunal has worked through it, sensibly if I may  
15 say so, to date is to say as they did in Meta, for example and also there was another  
16 one where they said the Tribunal made it clear that it would be sensible for you to go  
17 back and reconsider this and come back with a revised version in advance of  
18 certification in that period where there is usually always a period of reflection in the  
19 light of the Tribunal's observation during the course of the certification hearing before  
20 judgment. That is what happened in the Meta case. The Tribunal, as one of your  
21 learned members will recall, was concerned about the --

22 **CHAIR:** That was pre-PACCAR?

23 **MR BACON:** No. It was after PACCAR. It was very recent.

24 **CHAIR:** Okay.

25 **MR BACON:** Where the Tribunal was clearly concerned about the level of multiples and they  
26 are in the judgment. There are 14 -- I think it went up to 14 times. It wasn't long before  
27 the Tribunal expressed its concern, knowing that the funder in that case was not

1 represented but was in court. The helpful message was imparted to the funder and  
2 they came back with a revised version, which found comfort with the Tribunal.

3 So that is the way the Tribunal and certainly Mr Justice Roth in Merricks, when we had this  
4 about whether or not the class representative had a liability for the funding terms under  
5 the LFA, such that he could recover them as costs. That was dealt with, well, before  
6 we certify you can come back with an amendment to make that good. That is what  
7 happened.

8 So that is the way the Tribunal has been dealing with these matters to date. My submission  
9 is --

10 **CHAIR:** You are making submissions to me, which I understand the force in them. But, look,  
11 all this, you're going to be in a far better position to have a look at this at the end.

12 **MR BACON:** All of the authorities say that: Sony, Meta. Even in Meta --

13 **CHAIR:** But you say it is only in exceptional circumstances --

14 **MR BACON:** I think the words used by --

15 **CHAIR:** [Overspeaking] problems or --

16 **MR BACON:** Yes. I think the words used in the Meta case were it was a jump off the page  
17 type point, wasn't it?

18 **CHAIR:** Okay. Yes. It was something like that.

19 **MR BACON:** I can't remember the expression. Maybe the expression might be helpful for  
20 you in your judgment. Let me just turn it up.

21 **CHAIR:** Give me a page number.

22 **MR BACON:** Just bear with me. **(Pause)**

23 Yes. Page 665, the way that the chair expressed himself there. This was a case which  
24 required "calling out" at paragraph 37. He accepted the proposition that paragraph 35,  
25 the point was made by Bacon for the PCR and in substance we agree with it:

26 "... the return to the funder, and questions of costs generally, are controlled by the Tribunal on  
27 settlement or judgment, and the Tribunal will be astute to ensure that a system

1 intended to further access to justice does exactly that, and does not become a 'cash  
2 cow' either for lawyers or for funders.

3 "That being said, there do come points where funding arrangements contain provisions that  
4 are sufficiently extreme to warrant calling out or in extremis a blanket refusal to certify."

5 With respect, we would not disagree with that. I mean, that probably is one way of dealing  
6 with the matter, going forward, if you accept that broad proposition. I mean, if  
7 something was so obviously unpalatable, given the jurisdiction, given the requirements  
8 on certification, it may be so unpalatable that certification would be refused. But there  
9 are lots of graduations and grades before you get to that point. It is a matter for the  
10 sense of the good judgment of the Tribunal.

11 **CHAIR:** And the reason why the agreements -- I understand Apple's, but this is a more basic  
12 question -- I understand that Apple's position needs to be protected and that is done  
13 through the ATE insurance, as I understand.

14 **MR BACON:** Yes.

15 **CHAIR:** Then, of course, it wasn't PACCAR, but why does the court need to be concerned  
16 with the legality of the agreement? Is it the risk the funders may pull out?

17 **MR BACON:** Yes, it is that. It is that, but it is also there is an obligation, obviously, under the  
18 Act when certifying to ensure that the class representative is good for the money on  
19 adverse costs, but also can fund its own costs. But also can effectively fund its own  
20 costs. That it has that ability.

21 **CHAIR:** Right. But it has the money upfront, as is here. You have the money already from  
22 the funders.

23 **MR BACON:** Yes.

24 **CHAIR:** The funders have difficulty enforcing it at the end, why --

25 **MR BACON:** Well, the answer to your question [overspeaking] if the funding agreement is  
26 unenforceable, then the class representative really needs to know that, because the  
27 class representative won't have funding to pursue their claim, potentially, if there is  
28 a finding that it is unenforceable. All sorts of complications would arise down the line.

1 That is a very different proposition from one which I think, sir, you are contemplating, which I  
2 agree with, which is where it might have excessive -- I'm not saying this agreement  
3 does -- but maybe there is a concern that it is excessive or there is this, that and the  
4 other, why does it really matter?

5 It doesn't really matter unless there is something in the agreement that is so extreme that it  
6 calls into question whether the case should be certified.

7 I think that will depend upon things like, you know, a very, very, very high multiple.

8 **CHAIR:** But, again, a very high multiple can be sorted out --

9 **MR BACON:** Well, I made this point to the Tribunal, as your colleague will remember. My  
10 main point was it is an interesting debate about what is a reasonable return, but it is  
11 actually quite a sterile one. Because until you get to the end, the liability of the class  
12 representative is limited to what the Tribunal decides is appropriate at the end, so we  
13 could spend hours and hours going through why it might not be reasonable, but it is  
14 not going to be helpful to anybody at this stage.

15 I maintain that position in this case, as in my skeleton, much as I did in the other case. It's just  
16 that in Meta, the answer that was given by the chair was: well, you are right, Mr Bacon,  
17 but we don't want to be seen to be sending signals, which I understand.

18 **CHAIR:** Yes. Yes. That is a point. Yes.

19 **MR BACON:** Technically, it is a slightly different point. But that is why we ended up reviewing  
20 it and putting in a further agreement.

21 So I think probably, unless -- if I can just turn my back for a moment. Thank you very much,  
22 indeed.

23 **CHAIR:** Ms Cunningham.

24

25 Reply submissions by MS CUNNINGHAM

26 **MS CUNNINGHAM:** I have three points by way of reply; very short. The first is just to say I  
27 think my learned friend suggested that the cap point is not a PACCAR one. It is  
28 a PACCAR point and you will see that --

1 **CHAIR:** Given his position now that the cap is available. The cap is --

2 **MS CUNNINGHAM:** The cap, it is a natural cap now.

3 **CHAIR:** It is a natural cap.

4 **MS CUNNINGHAM:** It is a natural cap now, which is the point that is going to the

5 Court of Appeal in Sony and in Kent.

6 **CHAIR:** Is it a natural cap in Sony?

7 **MS CUNNINGHAM:** Yes, in both of those cases.

8 **CHAIR:** Okay.

9 **MS CUNNINGHAM:** Yes. It is a natural cap. So that point still stands. So it is a PACCAR

10 point and that point is going to the Court of Appeal. That is the short point there.

11 My second point is in relation to my learned friend's point about section 47C(3)(b) allowing for

12 a payment to the funder. I think it is useful to actually bring that section up again, just

13 to appreciate the finer details of that provision.

14 So that, again, is page 675 within the authorities bundle. It is important not to gloss over the

15 precise wording in the statute, in subsection (3).

16 **CHAIR:** Yes.

17 **MS CUNNINGHAM:** So it says in subsection (3) that the damages must be paid out on behalf

18 of -- so this is the key point, two points -- "must make an order" and "on behalf of

19 represented persons". The short submission is here how can it be said to be on behalf

20 of a represented person if it goes to the funder?

21 Then this is supported -- the payment is simply supposed to go to the --

22 **CHAIR:** I mean, the reality is litigation isn't free, so it has to be paid for and they are parties

23 to the litigation. Why would that fall outside that wording?

24 **MS CUNNINGHAM:** It is not up to the class representative to do as he wishes in respect of

25 the proceeds. It has to be "on behalf of the represented persons". So the whole point

26 of this provision is that the payment is to the PCR, in effect to hold on trust -- or anyone

27 else to hold on trust -- for the distribution to the class members only.

28 **CHAIR:** What is (3)(b) doing then?

1 **MS CUNNINGHAM:** The point of (b) is just perhaps for it to go to some other person, perhaps  
2 for a distribution or claims management company to hold that money and they  
3 distribute it out. So some other person as they see fit is just really identifying if there  
4 is, for example, a better mechanism for distribution. So a separate company or --

5 **CHAIR:** An administrative provision?

6 **MS CUNNINGHAM:** Exactly. So using it to pay the funder would not be a correct use of on  
7 behalf of represented persons. Then this is also --

8 **CHAIR:** It is never going to be paid to the funder, is it? It obviously can be paid to the bank  
9 of which he has an account.

10 **MS CUNNINGHAM:** But, again, it is --

11 **CHAIR:** If he says or she -- he, in this case -- says, "Pay it into a client account at the solicitors"  
12 are you saying that would fall outside the provision?

13 **MS CUNNINGHAM:** But then obviously the only ability to do that is under subsection (6), that  
14 you may order to someone else.

15 **CHAIR:** Right.

16 **MS CUNNINGHAM:** So there is already provision for that. The class representative can't do  
17 what he sees fit with the money; can't just send it on to the funder.

18 In addition, Mr Gutmann, or any class representative, has obligations to act in the best  
19 interests of the class which then obviously raises my second point about: well, how  
20 can this be said to be in the best interests of the class if it is, in his discretion, going to  
21 the funder or at least applying for an order that it goes to the funder first? That  
22 obviously places the class representative's interests second.

23 Then, finally, just to complete that point, this is also supported in subsection (5) where, again,  
24 the clause itself refers to damages not claimed by represented persons. So, again,  
25 the statute only permits under (3) and (5) that it be paid to represented or on behalf of  
26 represented persons, then they must go to charity, if not to someone else under (6).  
27 So that is my point on that.

1 Then my third and final point is that my learned friend took you to the provisions in the LFA  
2 clause 10.4 and 10.4(c) which is the one where Mr Gutmann is obliged -- we can bring  
3 that up again, if that assists.

4 **CHAIR:** Yes.

5 **MS CUNNINGHAM:** That is clause 10.4, which I believe is on page 13 of your copy.

6 **CHAIR:** Sorry. Yes. Okay, I am with you now. Yes.

7 **MS CUNNINGHAM:** So the subsection 10.4(c) that obliges Mr Gutmann to seek an order that  
8 the funder be paid first, how can my learned friend suggest that that is in the best  
9 interests of the class? In my submission, it is plainly not, because it places the funder's  
10 interests ahead of the class members, that the primary position under the LFA is that  
11 he seek an order that the funder is paid first.

12 **CHAIR:** I mean, if the fee is fair, why is it not appropriate that the funder gets their money  
13 first? I mean, that seems to be the nature of litigation, that solicitors are to get paid,  
14 lawyers have to get paid and they have to -- you know. The idea that they only get it  
15 as a secondary matter would seem odd.

16 **MS CUNNINGHAM:** The reason is --

17 **CHAIR:** Why is it any different for a funding agreement?

18 I understand if the fee is excessive, that is a different matter, but if the fees are reasonable.

19 **MS CUNNINGHAM:** But if there is not enough to go around the class at all, you're saying that  
20 the funder takes the fee first, and that's it, then the class members just don't get  
21 anything.

22 **CHAIR:** But why should the -- no, that is taking it to extremes. But why should the class  
23 members assume they should get 100 per cent back and someone else will pay for  
24 their litigation?

25 **MS CUNNINGHAM:** In my submission, the point is that the represented persons get the  
26 damages. It is their claim. It is brought on behalf of them by the class representative.  
27 Therefore, if there is a damages award, then they should be able to be paid that.

1 **CHAIR:** In any other walk of litigation, certainly civil litigation, if a party comes to court they  
2 have to pay their lawyers and very, very rarely will it be that the recovered costs cover  
3 all those costs. So in any litigation, you always know part of your damages at the end  
4 of it are going to have to be spent on legal fees.

5 The submission -- and I have seen it from time to time -- is that there is a presumption in this  
6 walk of life, these opt-out classes, that that shouldn't apply at all. They should be  
7 entirely different and if you are in an opt-out class, you are entitled to absolutely  
8 100 per cent of your award and you shouldn't be having to fork out anything to the  
9 funder or to the lawyers or anyone else.

10 I don't know why that is necessarily the case. That article seems to be making a similar point.  
11 I am not sure of the reason why opt-out litigants should be in a different position to  
12 other litigants.

13 **MS CUNNINGHAM:** But in ordinary litigation, the costs are paid for by that litigant. But the  
14 funder, if that was funded, wouldn't necessarily get a piece of the damages there.  
15 Recourse would still be to the claimant.

16 **CHAIR:** But costs have to come out of something. Costs are rarely 100 per cent paid by the  
17 other party; very rarely. Let's assume even if you are very successful, it is only 55 per  
18 cent, or something like that. There is a remainder of 45 per cent that the litigator has  
19 to pay out of their damages by way of costs. That is in a successful piece of litigation.  
20 You just hope your damages are way in excess of the 45 per cent you have to meet  
21 on the costs.

22 The point that is made in the article and that you have been making very persuasively is: look,  
23 it cannot be right to take money away from the class members. There is something  
24 prima facie wrong about that and that is just what I was testing, by looking at other  
25 areas of litigation.

26 **MS CUNNINGHAM:** In my submission, having a mechanism which requires the class  
27 representative to seek that type of arrangement means that the Tribunal will have to  
28 inevitably step in at distribution stage and sort all of this out.

1 Now, that is not the way that these proceedings are designed to run. They are designed to  
2 be run where the class representative takes the decisions on behalf of a whole opt-out  
3 class who have no say in how the litigation is funded at all.

4 Mr Gutmann makes those decisions on behalf of the class and, supposedly, in the best  
5 interests of the class. The class members then have no right to say, "Well, no, we  
6 don't want the damages to go to the funder first, actually. We would like them to be  
7 distributed on a different basis".

8 Mr Gutmann, obviously, is obliged to ensure that they are distributed in accordance with the  
9 funder's wishes. What happens to the wishes of the class members? That means the  
10 Tribunal has to step in and exercise some sort of additional best interests jurisdiction  
11 that should lie with the class representative. That is my submission on that.

12 Unless you have any other -- those are my submissions.

13 **CHAIR:** Thank you very much.

14 Right. We will consider our judgment and communicate it in due course.

15 **MR BACON:** Thank you very much, indeed, sir.

16 **MS CUNNINGHAM:** Thank you.

17 **(12.52 pm)**

18 **(The hearing adjourned)**

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