IN THE COMPETITION APPEAL TRIBUNAL

Case No:1266/7/7/16

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 19th– Friday 21st February 2025

Before:

The Honorable Mr Justice Roth
Hodge Malek KC
Professor Rachael Mulheron KC

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Walter Hugh Merricks CBE

Class Representative

- and –

Mastercard Incorporated and Others

Defendants

- and –

(1) Innsworth Capital Limited
(2) The Access to Justice Foundation

Intervening Parties

A P P E A R AN C E S

Mark Brealey KC on behalf of Walter Hugh Merricks CBE (Instructed by Willkie Farr & Gallagher (UK) LLP)

Sonia Tolaney KC, Matthew Cook KC and Owain Draper on behalf of Mastercard (Instructed by Freshfields LLP)

Charles Béar KC and Bibek Mukherjee on behalf of Insworth Capital Limited (Instructed by Akin Gump LLP)

(10.53 am)

Open Session

Reply submissions by MS TOLANEY

MS TOLANEY: The first point I wanted to address was the one that Mr Béar made yesterday, just before I left I think at about 12 noon. There has been no lack of candour on the part of Mastercard in relation to the indemnity, and there was a suggestion yesterday that there had been, which is why I am addressing it.

THE CHAIRMAN: Yes.

MS TOLANEY: I have two points on this. The first is that the indemnity is a term of the settlement agreement which has been presented to the Tribunal for approval. There is therefore absolutely no secrecy about it.

The position is explained in a recital and then set out in detail in the body of the agreement. So first of all it is in recital J of the settlement agreement, which is at {NC-AB1/5/3}, and you have seen that, and then the substantive terms are at clauses 9.1 and 9.2, which is in the same document but at page 7 {NC-AB1/5/7}.

It was suggested yesterday by Mr Béar that the indemnity was a condition of the settlement and that the Tribunal had not been told that. That argument, with respect, was very hard to follow because the indemnity

is a term of the agreement, so it is part of the settlement agreement, and it has plainly not been hidden, as I said.

THE CHAIRMAN: I think what was being said -- not that there is any hiding of the indemnity, but that it was not clear that it was a requirement for Mr Merricks, on his part, to agree to the settlement that there would be an indemnity and, if that had not been offered, he would not have signed.

MS TOLANEY: Well, can I --

THE CHAIRMAN: Which is a different thing to saying that it is there in the --

MS TOLANEY: Can I first of all address that point, but also tell you that the timing of the point is completely wrong. I will come on to that.

THE CHAIRMAN: That is the point, as I understood it.

MS TOLANEY: Well, indeed, but that is what I am pressing back against. Because to say that he would not have signed it without it suggests that there is some secrecy about it, but you can see that it is one of the terms of the settlement agreement he signed. So it follows that he would not have signed it without it because it is one of the bases on which he entered into the settlement. It is in the recitals, a precursor to the agreement, and then the detail is a term of the actual agreement, so of

course it is part and parcel of the settlement.

The second point is that as well as being there in plain language in the settlement agreement itself, the indemnity and the circumstances in which Mr Merricks felt he needed it are explained first in his witness statement served in support of the application, which is his fourth witness statement at paragraphs 56 to 58. The reference for that, for your note, is {NC-AB2/1/26}.

It is also explained in Mr Sansom's eighth statement at paragraphs 4.13 to paragraph 4.16. That is in the confidential bundle, so please do not put it on screen, but the reference for your note is MC-AB3/1/48.

Now, I cannot comment on anything that may have been said when I was not in the room, but as far as Mastercard is concerned, based on the material --

THE CHAIRMAN: Nothing was said about the 10 million indemnity.

MS TOLANEY: So there is nothing to the point, for the reasons I have explained.

Now, what my learned friend I think was trying to reach for was something very different, which is I think that what he was trying to suggest, although it was not said expressly, was that the indemnity provided an inducement to settle at 200 million and so put Mr Merricks in a conflict that vitiated, or at least

undermined in some way, his independent judgment as Class Representative. Now, that suggestion is wrong for two reasons.

The first reason is that the argument is completely hopeless in light of the chronology of events. So, as Mr Béar recognised, Mr Merricks raised the possibility of an indemnity on 20 November. Mastercard had already offered the 200 million six days earlier, and Mr Merricks had, prior to 20 November, formed his own assessment that the £200 million settlement offer made by Mastercard was one he should accept in the best interests of the Class.

MR MALEK: What is the precise date that you were told that?

MS TOLANEY: We were told that on I think 20 November, but we -- the position is -- and I will develop this, because it is obvious what happened. He had formed his assessment that it should be accepted, and there was no indemnity with that offer. The offer made on the 14th did not contain an indemnity. So at that stage we know, in between the 14th and the 20th, he made the decision that to settle for 200 million was in the best interests of the Class with no possible conflict of interest.

It is clear that he informed the Funder of this view some time after the offer was made on 14 November and said to the Funder that he proposed to accept the offer,

and the reason we can be sure about this, Mr Malek, is that it was Mr Merricks' decision to accept the offer that triggered the dispute between the Funder and Mr Merricks.

We have not seen any of the internal documents but we infer that this happened at least a few days before Mr Merricks notified Mastercard that he was, in principle, willing to accept the offer on 20 November, and by that time we know that the Funder had informed Mr Merricks that it was bringing a claim against him in an arbitration, including a claim against him personally in damages.

MR MALEK: So when he said he was minded to accept, presumably that is through Willkie Farr, and that was, what, in a conversation on 20 March -- 20 November?

MS TOLANEY: No, he wrote to us on 20 November.

MR MALEK: This is the letter, is it?

MS TOLANEY: The letter, and you were shown that by Mr Béar, but in between we know that the dispute arose with the Funder.

Sorry, I am being told it was a conversation. I thought it was a letter, it was a conversation, you are right.

MR MALEK: That is what I thought, so there is a conversation. So that is the first time you are told

Mr Merricks is minded to accept, and in the same conversation he is saying "I want an indemnity".

MS TOLANEY: We are just going to check that. There is no evidence of that.

MR MALEK: I am asking. I would like to know, that is all.

MS TOLANEY: Yes. I am told that is right.

MR MALEK: It is the same conversation. Thank you.

MS TOLANEY: Just pausing there, and that question gives rise to the critical point, which is the obvious purpose of the Funder informing Mr Merricks that it was bringing a claim against him in arbitration, which happened before the 20th, was to stop Mr Merricks accepting an offer that he had independently concluded without any conflict of interest was in the best interests of the Class, and the point I would just like you to focus on is that -- and I am going to develop this -- the conflict was created by the Funder, and it is quite rum therefore for the Funder now to seek to rely on a conflict it created.

MR MALEK: But the thing is, as I have said before, you can have a conflict for good reasons, for bad reasons, understandable reasons, reasons that you could never fathom out, but the fact is if you are in a conflict then we have to look at the ramifications, irrespective of whose fault it is.

MS TOLANEY: Well, there are two points, sir, and you will be particularly on top of this. The first question is to identify what the conflict is.

MR MALEK: Correct, yes.

MS TOLANEY: The second is to identify the ramifications. So on their case it is not actually clear what the conflict they say is, because they are suggesting that the conflict essentially is that Mr Merricks was somehow compelled to accept a lower offer than he should have done because he was offered the 10 million indemnity, but it is Mr Merricks' decision that he wants to accept the 200 million in the best interests of the Class that leads to the Funder having the dispute that then gives rise to the 10 million.

So there is no conflict in the best interests of the Class at all because Mr Merricks had already made that decision, which is why the Funder then challenges the decision and it leads to the dispute with the Funder. If Mr Merricks had not indicated that he thought that was a good offer, the dispute would never have arisen.

THE CHAIRMAN: Can I just clarify something that you said in answer to Mr Malek's rather important question about when the indemnity was raised. Do you have the -- I have to be careful because there are two versions of this bundle, and I have got one version, so this -- I do

not think that I am referring to anything ... well, I might be.

As I understand it, on the evening of 20 November, Mr Merricks, presumably through his solicitors, told Mastercard through Freshfields that he was minded in principle to accept the offer, but he told them that there is the non-binding KC process and he expected it to be triggered, and therefore in the light of that he would not accept it and in fact he asked them to hold it open pending the KC process.

That is my understanding of what happened on the 20th, and there was no reference to an indemnity -- because there had been -- in that conversation. That is what -- unless you tell me that is wrong. That is my understanding.

(Pause)

What we really want to know is this: there is the letter of 29 November from Willkie Farr to Freshfields, the without prejudice letter, where Willkie Farr says that Mr Merricks, having taken legal advice, will accept the offer subject to one condition, and that is when the question of the indemnity is put on paper. What we are not clear on is whether the raising of the request for the indemnity in that letter of the 29th had already been discussed and agreed before that letter was

written.
MS TOLANEY: We are checking the exact chronology, sir.
While that is being checked, sir, can I go back to the position and then I will be able to give you chapter and verse on it.
Right, I am being told that it was first raised by Willkie Farr to Freshfields on 23 November.
THE CHAIRMAN: On the 23rd. In a telephone call?
MS TOLANEY: In a telephone call. You are right, sir, that the -- it had been thought it was the 20th. That has been checked. They were wrong to suggest that. The first conversation was about the KC process that you saw on the 20th. This was raised on the 23rd.
MR MALEK: So you are saying that the question of having any cover for this was first raised on the 23rd in a phone call, and the first time he said he is minded to accept, that was a phone call on the 20th?
MS TOLANEY: Correct.
MR MALEK: I presume Freshfields have attendance notes of those calls?
MS TOLANEY: Internally, yes, and that is what they have just been trying to check now, and that can be confirmed if it needs to be, and I am sure Mr -- Willkie Farr would confirm that.
MR MALEK: Those internal notes, they are not going to be

privileged vis-à-vis the Tribunal, because you have waived privilege on all of this vis-à-vis the Tribunal. Against third parties I fully accept there is no waiver, but for the Tribunal clearly there is.
MS TOLANEY: That is right.
So, sir, can I just -- the timing, completely consistent with the submissions I have made, and even better in a sense, Mr Béar accepted in the course of his submissions, which was Day 2, page 43, lines 20 to page 44 line 1, that his point about a conflict would not be relevant to the reasonableness of a settlement if there could be shown to be some good reason why the conflict was not material to the agreement of 200 million.
Now, the chronology alone we say makes it clear that the indemnity and conflict could not have been material because it comes after the event of Mr Merricks' decision that the 200 million was in the best interests of the Class.
MR MALEK: But that decision does not -- it is not a settlement. The moment he entered into the settlement agreement, he had the benefit of this indemnity, and I think Mr Béar's point is that at that moment he has a conflict of interest, and I think that is the relevant date because --

MS TOLANEY: Right.
MR MALEK: Because he could have changed his mind, he could have decided "I am not going to settle at all".
MS TOLANEY: Yes.
MR MALEK: But this is -- look, it may be this is a blind alley, because at the end of the day you may agree the point I put before, that this does not invalidate the settlement in itself.
MS TOLANEY: Exactly.
MR MALEK: But it does mean that we have to look at things with perhaps a bit more scrutiny than ordinarily, even though we like to scrutinise these things properly, as you can see. I do not see this as a knock-out blow, but I do see it as something that is material in the approach that we take in assessing the evidence and on obviously coming to a view on the ultimate issue.
MS TOLANEY: Well, sir, can I put it this way. The Tribunal has to scrutinise everything that arises, and no doubt you would say to me, "Well, this does not arise in every case, so it requires scrutiny because of the arguments that have been made".
MR MALEK: Yes, it is unusual.
MS TOLANEY: It is unusual. Mr Béar has, with respect, taken up an extraordinary amount of the hearing time raising these objections, and of course the Tribunal has

to --
MR MALEK: He is fully entitled to, and I am very pleased that he is doing that.
MS TOLANEY: Exactly. I am not criticising that, what I am saying is the Tribunal naturally does have to engage on it. But as a matter of rigorous analysis, the word "conflict" has been used, and the first question is when is it suggested the conflict arose and what did it invalidate?
Now, the point I am making to you is it was presented I think rather across the board, that the conflict just sort of nebulously invalidated both Mr Merricks' assessments, the reasonableness of the settlement and the agreement. What I am saying to you is that the chronology makes it plain that it was the decision that 200 million was a good amount, which was then notified to the Funder that created the dispute leading to the 10 million.
So what you follow from that is the assessment of the settlement sum of 200 million as an assessment by Mr Merricks, as being in the best interests of the Class, cannot have been tainted because that assessment, put the settlement agreement to one side, the assessment of it and his analysis as to what was in the best interests of the Class was done without any question of

indemnities or disputes.

It was the decision to tell the Funder, who then says "No, that is not good enough", that crystallises the dispute, and it is the Funder's decision to bring the arbitration that generates the conflict of interest after Mr Merricks has said "I want to settle at 200 million".

Far from the 10 million creating a conflict, what we suggest is it in fact helped Mr Merricks neutralise the conflict created by the Funder because he had already concluded what was in the best interests of the Class. If he had not actually -- contrary to Mr Béar's submission, if he had not actually gone ahead with what he had concluded was in the best interests of the Class, there would have been a conflict, because he would have been protecting his own interests in not agreeing the amount that he had decided was in the best interests of the Class, and he would have then been in a conflict situation because he would have been avoiding an arbitration and risking personal loss to himself.

What he did was enter into the agreement that he thought was in the best interests of the Class, notwithstanding the pressure from the Funder, and the 10 million gave him the ability to do that and to say "I put my own interests to one side, it is protected as

much as I can get, I am acting in the best interests of the Class", and it would be quite rum if a Funder could create a conflict by threatening to sue the Class Representative, which is what they have done, and then come to court and say "Aha, let us unwind the agreement".

If they are right -- this is the final point, because this comes from a question you asked, is there a conflict today. If they are right that there is a conflict, this has to be decertified, because the Class Representative cannot carry on if they are right, and then the claim needs to be decertified, the idea that it could carry on.

So in a sense they need to be careful what they wish for, because it is not a conflict on the part of Mr Merricks in his discharge of his duties to the Class, it is a conflict between him and the Funder because he is pursuing the best interests of the Class.

So, sir, can I then also address one final point, which is that it was suggested that Mastercard's willingness to provide an indemnity capped at 10 million shows that there is at least another £10 million available for the settlement. That is not right. The indemnity is not a cash sum. Mastercard anticipated it would not ultimately have to provide anything like that

sum because the arbitration would go nowhere, and you have evidence on that from Mr Sansom in his ninth statement at paragraph 4.10.

In fact, the Funder accepts themselves that the arbitration will at least largely fall away as a result of this application, whichever way it goes. The reference for that is paragraph 71 of Mr Garrard's statement which is {NC-IBA/2/20}. Therefore, the willingness to provide an indemnity with which only, I understand it, approximately £70,000 of which has in fact been incurred, and it is now suggested by both sides the arbitration will not happen, does not show anything of the sort. It is not a cash sum and it would only be there for a purpose that largely seems to have gone away.

So that I think deals with the conflict point.

More generally -- this is my second topic -- on the matter of candour, just to be clear about this, every other settlement approval process of which Mastercard is aware, to date, has been on the basis of no privileged material being produced, whether legal advice or without prejudice privilege.

Here, because Mastercard was very aware of the specific circumstances, they went into both types of privileged material. They did not anticipate at the

time the application was made that the Tribunal would want to go through, blow by blow, every step of the negotiations, but rather provided what was thought to be the key salient detail in compliance with Mastercard's duties of which they have been well aware.

As matters turned out, the Funder has taken the approach blow by blow, but that relates to the Funder's dealings with Mr Merricks and their internal correspondence and dispute, to which we were not privy, and goes to, we would suggest, different issues. But for our part we have been entirely forthcoming and have absolutely nothing to hide and have put forward everything we understood to be relevant, but of course if the Tribunal wishes to see anything else, such as the attendance notes that have been mentioned, Mastercard will of course provide it. It has done its best to come to the Tribunal openly and candidly, far more so than it thought it would need to.

MR MALEK: I would not expect any less.

MS TOLANEY: Thank you very much, sir.

Can I turn then to my third topic, which is a topic which is really at the heart of Mr Béar's submissions, which is that the UK MIF claim should have been given some value, the hypothetical counterfactuals, the pass-on, should have been given more value.

The starting point is that the Funder has not in fact demonstrated to the Tribunal that the UK MIF claim has any real merit, or any way round the evidential difficulties that Mr Merricks and Mastercard have identified. Nor has the Funder made any attempt to answer our points about the quantum of that claim being very limited, even if it were to succeed, and indeed despite complaining about the absence of an independent report, in the three months that the Funder has had since it decided to oppose this settlement, the only legal analysis it has itself produced is from a report of somebody who is not in fact an independent expert, Mr Humphries. Just to pause there, it has not really been said -- although it has been addressed in skeletons -- Mr Humphries signed multiple statements of truth in other proceedings --

THE CHAIRMAN: Yes, we have seen that.

MS TOLANEY: -- in relation to zero pass-on. Now, that is not mentioned anywhere in his report, which is rather surprising, but notably even he does not challenge, and says in terms that he cannot challenge, the parties' assessments of the merits of the case, and he does not provide any substantive analysis supporting the UK MIF claim. He does not say, notably, that the parties have underestimated the strength of Mr Merricks'

counterfactual case, or even that it is a case with real merit.

Now, that is not surprising for all the reasons I have shown you, but it is something that the Funder has just failed to really engage with. He has taken pot-shots at the calculations, or said "Oh, you have not given a value", but he has not given you any basis on which to do anything different.

Can I just show you -- I will not take long on it, but can I just show you that Mastercard's analysis and stated position about the merits of this claim have not changed, and indeed that is what we said from the very outset. So if I could just ask for {NC-SB1/8/1} to be pulled up, please.

This is the CPO response of Mastercard in November 2016, and as well as opposing certification, Mastercard identified several key areas where the claim was fundamentally weak, even if it were to be certified. So can I ask for that to be pulled up, please? Thank you.

If we can go first of all to page 28 {NC-SB1/8/28}. Paragraphs 78 to 88 address the UK domestic interchange fees claim, and if we go please to page 31, paragraph 87 {NC-SB1/8/31} to 88, you see that even at this stage it was being said the value of the claim would drop by an

incredible amount, such that the average per capita recovery would fall from a few hundred pounds to less than £25 per person. Now, this is November 2016.

As Mr Cook is rightly pointing out, presumably because he drafted it, the previous two pages set out an analysis that remains relevant and live today. So there was no snapping up of difficult circumstances, there was no attempt to put pressure; this has been our position from the outset and stated to Mr Merricks, as he knows.

Our preliminary issues application and request for the counterfactual causation case was made because it was seen as a major litigation pressure point, given the weakness of Mr Merricks' case, and I just make that point because the Funder says in their skeleton that proposing a preliminary issue shows that Mastercard saw the issue as a threat. We did not follow it, but it is completely misguided. That was at 29.5 in Mr Béar's skeleton, {NC-SBA/3/12}, we do not need to bring that up, but it is completely misguided. Far from being worried about counterfactual causation, we wanted to knock it out early.

If we could then please look at pass-on in this document, the November 2016 document, page 12 please of the document that is on screen {NC-SB1/8/12}. You see at paragraphs 31 to 34 we set out the law on pass-on,

including the *Sainsbury's* judgment.

If we go over the page please {NC-SB1/8/13}. All of that analysis is set out, and again over the page please {NC-SB1/8/14}. Then if we could go please to page 17 {NC-SB1/8/17}, you see paragraph 43 we make the point that the conclusion:

"... directly contradicts the stated assumption in the expert report that there was full pass-on by all merchants ..."

We note at paragraph 43 that the Tribunal concluded in the *Sainsbury's* case that no pass-on had been proven, and again that remains live in the trial that is currently ongoing. That is reflected, just for your note, in the CPO judgment at paragraph 65, which is authorities tab 26, page 28, that the Tribunal had recorded that there was no pass-on.

Then we look at benefits to cardholders please, page 19 of this document {NC-SB1/8/19}, paragraph 51(d). So if we look at (d), and then going on to 52 {NC-SB1/8/20} it shows:

"There is a consistent body of evidence which establishes that a higher MIF will lead to greater benefits or lower costs for cardholders ..."

If we could go over the page, please, paragraph 52 is the crucial one:

"It follows that, in relation to Class members who were holders of Mastercard payment cards, assessment of their loss would have to take into account the benefits that they obtained as a result of the MIF. Indeed, once the value of such cardholder benefits is taken into account, it is likely to result in a finding that some Class members will not have suffered any net loss."

Now, just pausing there, that is a point that I was making, and when Mr Béar showed you Annex 1, no credit is given for that point, but it remains a point that we are very clear about and said in November 2016.

Then we also identified in this document other issues in the waterfall. So, for example, if we look at please page 40 {NC-SB1/8/40}, you see that --

THE CHAIRMAN: Ms Tolaney, if your point is that the matters raised by Mastercard now, or indeed in its defence once the CPO was granted, which is some years later, because I think that -- you do not have to go through it one by one. I mean, I recall, and we can note that they have all been raised --

MS TOLANEY: Indeed.

THE CHAIRMAN: -- relied on those defences. What value you placed on them is another question, but you have certainly consistently been taking those defences and you do not have to take up time going through them one

by one.

MS TOLANEY: I will not. The two points were, sir, that not only did we identify all of these points, including, I was going to show you, limitation, compound interest, debit cards and so on --

THE CHAIRMAN: Yes.

MS TOLANEY: -- but we did also say what value we placed on them, as I showed you in the document. We said about causation, it is going to drop from 14 to 1. We said about benefits, it could mean that there would be no loss for claimants.

THE CHAIRMAN: Well, I mean, that is in your pleaded case.

MS TOLANEY: Exactly.

THE CHAIRMAN: But I mean internally (inaudible).

MS TOLANEY: Well, what I would show -- in a sense what you can see is that we said it externally, and we have maintained that position, and I have shown it to you for three reasons. The first is just to show you that Mastercard pointed out from the outset that the claim was bound to fail, or in any event would be worth a tiny fraction of the amount it was certified for.

Point 2, all of the points raised by Mastercard have either come to pass -- factual causation, limitation, compound interest, Mr Béar's submissions rather ignored that, Solo cards, deceased persons and remote

transactions -- or remain to be determined and could reduce damages to zero or a much lower level than the settlement sum, and that is pass-on and benefits.

The third point is that this is important context to the Funder's suggestion that Mastercard, having flagged up the causation issue and other major weaknesses, would have and should have been prepared to give specific money value to the counterfactual question, which is the thrust of his challenge to the sum.

The reason I am flagging this again and again is that first of all Mr Humphries has not been able to challenge the merits assessment and, secondly, when you look at all of this, neither can Mr Béar answer you on all the weaknesses we have identified, and I will touch on pass-on very briefly because he mentioned it. He has not been able to address you on them. So what his submission came down to is "Surely this claim must have had some value because all claims do", that is what it came down to. The answer to that is, well, (a), as I think Mr Malek said, "Not really", because we have said since 2016 it was hopeless, and the position has just strengthened for us; and secondly, we have given no credit for all the benefits that we identified would give us a good recovery.

So if we were going to give any value to the

counterfactual, we would have to offset it with what we would claw back from our own arguments, and instead we have just given none across the board, and Mr Béar's submission just does not engage with that reality, it is just a cri du coeur, surely the claim has some litigation risk value.

What we would say is when you see this -- again, it may be unusual, but we have said it right from the start, and now nine years later, we have been proven right so far.

So on that point, I think the only other point that Mr Béar had mentioned before today was that Mastercard had not given any merit to the counterfactual that Mr Merricks now would like to run because it has not been pleaded, and therefore we do not know what it is. Well, that is just not right. He spent a lot of time on it at the factual causation trial, as you, sir, will remember, and we know what he intended to say, as our evidence makes plain, and are confident of defeating it and it has been addressed in Mr Cook's opinion.

Could I then just briefly turn to I think the two points that were made today. The first was Mr Sansom's witness statement, the Annex -- I do not need to bring it up, you have it in hard copy -- and it was said that all of the assumptions were -- I do not know really what

he was saying, finger in the air, or did not give credit for things, and in particular the pass-on point he made was that very little had been given to -- it was only 60% cumulatively.

Now, I have addressed you on pass-on and why we think that claim is absolutely hopeless, and notably there was not an engagement again on the merits, it was just a picking of figures. But if we are going to pick on figures --

THE CHAIRMAN: Just pause a moment, will you?

(Pause)

Ms Tolaney, you need not address us on that Annex.

MS TOLANEY: Thank you.

On interest, I would just say that we have addressed interest in our evidence at Sansom 9, paragraphs 2.20 to 2.24, which -- please do not bring up because I think it may be confidential, but the reference is MC-IBA/10/11, and the *Carrasco* point is rather moot given *Le Patourel*.

Could I just flag one extra point that if, sir, you want to develop it, which was the basis point point that we debated I think very briefly at the end of my submissions. BPS is an abbreviation for basis points, and we have added to the bundle a page from Investopedia, which makes clear a basis point is one-hundredth of a percentage point. That is

MC-SBI/9/1.

THE CHAIRMAN: That is what I remember.

MS TOLANEY: So that was the basis on which we were saying the 5% switching could have a material difference. It is not a big point, sir, but I just wanted to make good the points I had made.

MR MALEK: On the attendance notes, we would like to see the attendance notes of the calls on 20 November and 23 November, but Freshfields are free to blank out those attendance notes insofar as it refers to advice they are giving their client.

MS TOLANEY: Thank you.

MR MALEK: But insofar as it records what was said between the two lawyers, then we want to see that.

MS TOLANEY: Of course. May I just take instructions.

MR BÉAR: Can I assume that those will also be distributed to the Class Representative and to us, because insofar as it concerns without prejudice discussions, that is ...

THE CHAIRMAN: Yes. I think that is correct, yes, to Mr Merricks' team. If it is just the discussions between the lawyers, we have the letters and we will have the record of a telephone call.

MS TOLANEY: I think there is a concern about -- there is no problem with the Tribunal -- the way it was put to me in

submissions was: is there any difficulty with the Tribunal seeing it, and I said no, but I think we would regard it as part of our confidential --

MR MALEK: But normally -- let us look at it normally. If two solicitors speak on the phone and one solicitor takes an attendance note of what was discussed, ordinarily that is not privilege -- that is not covered by litigation privilege, and if there is a dispute between the two, those attendance notes on both sides can be produced.

All we were asking for is those attendance notes insofar as they record what was discussed between the two.

MS TOLANEY: I think there is just a concern that it is a settlement discussion and it would not normally be going to the Funder.

MR MALEK: The thing is it is all open at the moment between all of us. The issue is whether or not the settlement is fair and reasonable. I think that you are going to have to produce them.

MS TOLANEY: We are certainly producing it to you, sir. It was the question of giving it to the Funder.

THE CHAIRMAN: But we have the correspondence, the without prejudice privileged correspondence between Freshfields and Willkie Farr about -- well, some things were done in

writing between them. That you have produced and everyone --

MS TOLANEY: Has them.

THE CHAIRMAN: Some things were done over the phone and that is all we are asking to see.

MS TOLANEY: Of course.

THE CHAIRMAN: We do not want to see anything else --

MS TOLANEY: We will produce that.

THE CHAIRMAN: -- about advice from Freshfields to Mastercard, we just want to have, where there is not a written letter but it was a conversation, then the record of the conversation, that is all. It seems to me they go together.

MS TOLANEY: We will produce that, sir.

MR MALEK: Okay, thank you.

MS TOLANEY: I have no further submissions, unless --

MR BREALEY: Sorry, just to -- obviously Mr Bronfentrinker deals with it in his eighth witness statement as well.

MR MALEK: Yes, we know that.

THE CHAIRMAN: We know they (inaudible). That is the point. He has not produced any.

I think that concludes what we identified as being part 1 of the case.

MS TOLANEY: It does.

THE CHAIRMAN: Which was supposed to conclude yesterday.

I think we will then take a break and we will come back at about quarter to 12.
(11.35 am)
(Short Break)
(11.50 am)
Decision
THE CHAIRMAN: All the parties agreed that this application falls in two parts. First, the question of whether the all-in settlement of £200 million as between the Class Representative on behalf of represented persons in the Class and Mastercard is just and reasonable. If the answer is yes, then the second part is the question how that sum should be distributed, having regard to various factors, including the sums for legal fees, for the Funder, and of course for the Class members.
We are very conscious that the trial on pass-on, which includes the issue in the present proceedings of pass-on as between the Class Representative and represented persons and Mastercard is due to resume in just over four weeks' time. If these proceedings continue, the parties then have to work immediately on preparing submissions for that hearing.
Although we will give our reasons in a full written judgment, since we have reached a clear decision on question 1 we think it is appropriate to announce it.

This case began in 2016 with claims estimated by the Class Representative as having an aggregate value of about £14 billion. With further accrued interest since then on the basis claimed, the value today would be still greater. In that context, a settlement at £200 million is clearly a very disappointing outcome, but a lot has happened in these proceedings since 2016.
We have some concerns regarding the way the matter was dealt with in the final weeks before the parties agreed a settlement, as we will explain in our judgment. However, looking at the matter today we have no doubt that the settlement at £200 million, on the terms proposed, is just and reasonable. That is subject to one qualification, that is that the terms should make explicit what we understand is implicit, namely that the settlement will not bind any represented Class member who opts out within a period that will be fixed by the Tribunal in its final order. We understand that both the Class Representative and Mastercard have agreed to amend the agreement to make that small change.
MS TOLANEY: Thank you, sir.
THE CHAIRMAN: We will then proceed to deal with part 2, and if Mastercard, either in the entirety of its legal representation or in part, wishes to be excused, of course you are.

MS TOLANEY: Very grateful. Thank you, sir.
Issue 2: Distribution
THE CHAIRMAN: So, Mr Brealey, you are going to address us on various aspects of deduction and distribution.
MR BREALEY: Yes, so obviously we have set out in our skeleton, at paragraphs 53 to 59, and 13 and 16, the pots. So I mean if we go to 13 to 16 first of our skeleton. I know that the Tribunal will have these pots well aware in mind.
THE CHAIRMAN: Yes.
MR BREALEY: Sir, I am not going to summarise what these pots are.
THE CHAIRMAN: Well, we have seen what is proposed and we are not at all comfortable about that.
MR BREALEY: Right.
THE CHAIRMAN: First of all, the concern is to maximise the amount of money for distribution to Class members.
MR BREALEY: Right.
THE CHAIRMAN: But of course there should be a reasonable amount that has to be deducted from that to deal with various matters, including legal fees, Funder's return, the costs of the distribution and so on. Some of those, it seems to us, we have no questions about. So, for example, there is an elaborate distribution notification plan prepared by Epiq; their costs of implementing that

are some 2.9 million, that is a lot of money, but it is a case which really does need intensive notification, and the numbers of people involved are large, and so on, so we can accept that that 2.9 million should come out.
But the two biggest deductions are effectively for solicitors' fees -- sorry, the legal fees, not just solicitors, legal fees and the Funder's return. The Funder has paid most but not all of the legal fees and wants the reimbursement, but the first question is whether the total legal fees are in fact reasonable. We are not happy with a situation where, just because that level of fees have been billed, and the Funder has therefore paid them, they automatically come out of the pot and are to be deducted.
We accept that insofar as the Funder has to pay them and remains out-of-pocket, as it were, the Funder should be reimbursed, but there has to be some independent consideration of whether on a solicitor and own client basis these legal fees are reasonable, and you will have seen from the Australian cases that we drew to your attention that judges in a jurisdiction with a lot of experience of class actions are quite astute at looking at the legal fees when approving a settlement.
MR BREALEY: Well --
THE CHAIRMAN: It puts you, I appreciate that, Mr Brealey,

personally, in a difficult position, because of course you are representing Mr Merricks and the Class, but you are instructed by the solicitors who have put in the bills, so there are two things we want you to clarify.

One is we saw that there is a reservation of a right on the Funder to seek taxation or assessment, as it is now called, but presumably that is on the basis -- and this is a question really for both of you, but maybe more for Mr Béar, that if you did go to taxation and the fees were reduced, even though you have paid them, you will get reimbursed, is that right? Is that how it --

MR BÉAR: I do not think --

THE CHAIRMAN: Is that correct or not, because I think I read that when paying invoices you have reserved the right to refer the matter for taxation.

MR BÉAR: I cannot answer that without going back to -- I am sure those behind me know, but it will depend on the terms of the LFA and what is called the SLT, which is the basis on which Willkie Farr and their predecessor were engaged, whether there is a claw back provision of the kind --

THE CHAIRMAN: Otherwise the right to refer for assessment --

MR BÉAR: Yes, it would depend whether it was done before. You could refer and the bill could remain outstanding.

THE CHAIRMAN: Yes. Well, or you can pay and have a reservation.

MR BÉAR: Yes.

THE CHAIRMAN: If it is not a final bill, then ...

MR BÉAR: No, if it is on account then you should be able to refer it, absolutely. I do not want to give an answer off the cuff. So I understand entirely the concern about the quantum of fees that have been expended and whether they have in fact been improperly run up, absolutely.

THE CHAIRMAN: Well, it is not so much improper --

MR BÉAR: I mean reasonable.

THE CHAIRMAN: -- it is whether it is reasonable, even on a solicitor /own client -- because otherwise we are in a situation of whatever the solicitor charges -- I am not saying it is this case, but some other case, they charge a wholly unreasonable amount, it is paid by the Funder, the Funder knows it is going to get it back from the settlement, and the only people who are out are the Class, and you can hardly expect the Class Representative to be challenging the fees, particularly when, as in many cases, it is the solicitors who brought the Class Representative into the case.

MR BREALEY: Can I just row back on this, because obviously I -- this has kind of taken us by surprise. Can I just,

by way of preliminary point, just make the point this has been going on for eight years. We have had 34 judgments. It has been a massive exercise.

THE CHAIRMAN: Yes.

MR BREALEY: So it is not surprising that there may be significant costs --

THE CHAIRMAN: I agree.

MR BREALEY: -- after eight years --

THE CHAIRMAN: We fully accept that.

MR BREALEY: -- Supreme Court, three Court of Appeal judgments, preliminary ...

So that is the first point. So your immediate reaction that the costs may be unreasonable, I think one has to --

THE CHAIRMAN: We are not saying they are unreasonable. We are saying there needs to be some independent assessment about whether this level of -- of course the costs will be very substantial.

MR BREALEY: Yes.

THE CHAIRMAN: They are -- have been I think paid in the amount of some 42 million, which is massive. It is also a massive proportion of 200 million that immediately, on the basis proposed, gets deducted. So we are not satisfied that that is consistent with our role to protect the interests of the Class and, as you will have

seen from several of the Australian judgments we have given you, one of the things that the settlement judge always considers is the reasonableness of the legal fees.

MR BREALEY: Well, I understand that.

THE CHAIRMAN: I am a little surprised you say it has taken you by surprise. The reason we drew those judgments to your attention was precisely for this reason.

MR BREALEY: Well, there were other bits in it that --

THE CHAIRMAN: The bits about the Funder as well which we are dealing with later.

MR BREALEY: But can I just -- I mean the Tribunal will do what it wants, but can I just make the distinction between costs that have been paid and costs that have been incurred and not paid. Because there is provision in the LFA for this, and I think we should see this. So we have the LFA, I do not know if you --

THE CHAIRMAN: Yes, exhibited by Mr Merricks, and it is at --

MR BREALEY: Page 50.

THE CHAIRMAN: -- of our volume 2 at tab 6.

MR BREALEY: Yes, page 50. For the screens it is {NC-AB2/6}. It is the Standard Lawyers Terms that begin on page -- right at the bottom, 115.

THE CHAIRMAN: Sorry, what clause is it?

MR BREALEY: It is basically right at the end of this document.
THE CHAIRMAN: Of the LFA?
MR BREALEY: Of the LFA, yes. So right at the end is schedule 4, and then if you go back you have got schedule 3 on page 114.
THE CHAIRMAN: Yes, Standard Lawyers Terms.
MR BREALEY: Yes, so the Standard Lawyers Terms, start at 115, and of course Willkie Farr took over from the previous solicitors, but on page 117 there is provision that if the Funder disputes the invoices because they are unreasonable then there is a notification of 30 days, and then at 5.8:
"In the event that the Funder/Manager ... are unable ..."
This is right at the bottom.
"... to settle the dispute ..."
It will go to mediation.
So the point that I am making about fees that have been paid, there has been a process where the Funder has either decided they are reasonable or not and has paid them.
THE CHAIRMAN: Well, that is for the Funder. But is that not subject to clause 4.4 of the agreement itself? These are just the standard terms, but you --

MR BREALEY: Yes, and -- but it would be, in my submission, very unfair, when you get to settlement, to invoke clause 4.4 for costs that were paid and incurred eight years ago.
THE CHAIRMAN: Well, it is not the Funder that is invoking it, Mr Brealey; it is the Tribunal saying that we have to approve, are mandated by statute to consider what cost disbursements, and so on, should be deducted from the settlement sum before distribution to Class members when we are presented with a number of deductions that are being urged upon us, of which one large reduction is for the Funder's return, and we will come to that, and one large reduction is for legal fees, and then there are some smaller but not insignificant deductions, such as the Epiq charges which I have said we accept are fair and reasonable.
The idea that we are not entitled, just because the Funder and the lawyers are happy -- I mean the Funder knows whatever it pays the lawyers it is going to get back out of the settlement sum, and so it has no particular incentive. But we have an obligation to the Class members to see whether -- this is a massive amount for admittedly massive litigation -- this is a reasonable amount on a solicitor and own client basis, and that is all we are saying.

You have seen from the Australian cases what is the approach taken there, because obviously we cannot summarily assess costs of these prolonged massive proceedings. It is that they are referred to a cost referee for assessment who makes a report to the court, and we have the power, as you know, under our rules, to appoint an expert, and we are minded to refer the costs, both paid and unpaid, to an independent -- to take the Australian language -- cost referee who will act as expert and advise the Tribunal as to what is reasonable on the generous basis of assessment of solicitor and own client, and if 44 point whatever it is million are reasonable then that will be, subject to any points that are made about the referee's report, you may have seen one of the Australian cases in fact the judge did not fully accept the referee's report and reduced it even further.
MR BREALEY: I saw that, yes.
THE CHAIRMAN: I am not anticipating that would happen, but that is the course that we think should be taken, rather than just saying, well, that is what the successive solicitors have billed, that is what the Funder has therefore paid. The Funder clearly ought to get back legal fees that it has paid but not if legal fees are unreasonably high, in which case the lawyer should

reduce those fees and reimburse the Funder.
MR BREALEY: Well, that is a mammoth task going over eight years.
THE CHAIRMAN: That is what happens if you had gone to judgment.
MR BREALEY: Well, if you go to --
THE CHAIRMAN: You would have been -- there would have been a massive party and party costs exercise.
MR BREALEY: Because this is not really party and party, this is --
THE CHAIRMAN: Solicitor and own client.
MR BREALEY: It is solicitor and own client.
THE CHAIRMAN: Yes, but that is a well-known basis of assessment.
MR BREALEY: The court does not normally assess the fees between the solicitor and own client.
THE CHAIRMAN: Well, they do if --
MR BREALEY: It is only if someone else is paying.
THE CHAIRMAN: If the client challenges them, they do. That is the statutory mechanism.
MR BREALEY: In this case, this is why the take-up rate is quite important, though, because if there is sufficient there, and the reports say there will be sufficient there --
THE CHAIRMAN: It is nothing to do, with respect, with the

take-up rate. There will be more money for Class members, however many take up or do not, if the deductions from the 200 million are less.

MR BREALEY: Well, the --

THE CHAIRMAN: There are two massive pots of deduction, one is legal fees and the other is the Funder's return, and I think you -- I mean your duty is to the Class members. That is whom you represent. You do not represent -- you are not here representing the solicitors. They instruct you, but your clients are the Class members and Mr Merricks.

MR BREALEY: Mr Merricks has put forward a settlement sum which the Tribunal has found is just and reasonable, and he has put forward a distribution and he believes that -- and per the -- for the last eight years the fees have been paid, and if the Funder has said they are unreasonable, there is provision for it. He is putting forward that the fees are reasonable on behalf of the Class, so the Class in a sense is saying to the Tribunal between solicitor and legal team and the client, "We believe these are reasonable."

THE CHAIRMAN: Yes, and just as you said, you believe the settlement is reasonable.

(Pause)

Yes.

MR BREALEY: I think maybe that is the legal fees.

Can I -- I think we need to -- I would need to take instructions and talk to various people. Unless the Tribunal is going to make the order, I just need, if I can, to have some minutes to --

THE CHAIRMAN: Well, I can imagine that your instructing solicitors will not be happy --

MR BREALEY: No.

THE CHAIRMAN: -- with this course, obviously, but just as we had to scrutinise the terms of the total settlement, although of course you told us, and it came to the Tribunal as a settlement, Mr Merricks was happy with it, but the fact that he was happy with it, if that was all, then we would not be having this hearing over the last day and a half. The Tribunal has to scrutinise whether that figure of 200 million is just and reasonable for the Class members. We have been satisfied that it is, but not just because Mr Merricks thinks it is, we have been satisfied it is, and the fact that Mr Merricks is not unhappy about -- or challenging the total legal fees, that is not determinative for the Tribunal.

MR BREALEY: Can I -- I understand the Tribunal's strength of feeling on this, but can we just work through it, if possible? So let us assume that the solicitors in the Supreme Court -- let us assume that it was six years

ago, or five years ago, people have incurred those fees and spent those fees, acted upon it, they have acted upon the basis that they have been paid, they have spent it. There is a point of principle here as to whether any leading counsel six years ago or the solicitors have got to repay it.

There is a deep point here that costs that the Class Representative have put to the Funder, the Funder under the agreement says they are reasonable, people have spent them five years ago, six years ago, is it being suggested that the legal team have got to repay?

THE CHAIRMAN: Well, if they have been charging amounts that are unreasonable for clients who are not in any direct contact with the solicitors because it is a class action, so there is no negotiation with clients as such, then it seems to me any other approach is basically saying there is no control over the legal fees, other than if the Funder wishes to object to them.

MR BREALEY: Well, there is --

THE CHAIRMAN: The interests of the Funder are not the same as the interests of the Class members.

MR BREALEY: But there is an approved budget. But I come back to the point that --

THE CHAIRMAN: Well, yes.

MR BREALEY: -- on certification there is an approved budget

and the Tribunal looks at that. So the Tribunal for the last eight years has been looking -- it is his duty to obviously scrutinise as it is going along, but I do come back to whether, as a point of principle, lawyers who have acted upon the Class Representative and the Funder saying "These are reasonable", brief fees or whatever, hourly rates, are then obliged outside the statute of limitation period to repay back money? There is a deep principle there. As I say, they have relied on the fact that they have been paid, and one then has to ask the question how is that going to affect collective actions going forward?

I mean I understand the Tribunal wants to -- I understand where -- but whether this is the right way of going about it, because if someone is going to act for a Class Representative on day one and gets paid and goes on holiday or buys a house or whatever, and then six years down the line they are somehow told "Sorry, you have got to pay back the money because the Tribunal eight years ago has said that your brief fee or the hourly rate was too much", in my submission that is -- that is liable to deter anybody from acting in collective actions. There needs to be some legal certainty.

THE CHAIRMAN: Well, the Australian regime has been going

for over a quarter of a century. It is the practice, as you saw, of Australian courts to do that. The regime of class actions is quite vibrant in Australia. It certainly has not dried it up.

MR BREALEY: Well, whether it is fair to ––

THE CHAIRMAN: I mean it is –– I emphasise it is not that they are going to have to repay all the fees, of course not. It is only insofar as they may be found to be –– to exceed what is reasonable on a solicitor and own client basis, which is a very generous basis of assessment.

MR BREALEY: Well, I may ––

THE CHAIRMAN: I think anyone who is acting for absent Class members who have not in any way had the opportunity to agree to things knows that the court is going to take a much more interventionist and protective approach than it will in ordinary litigation when, in the first place, it is usually the party that selects the solicitors, whereas in this case it is the solicitors who have selected the Class Representative, which inverts the normal process of instructions.

MR BREALEY: That has –– as we saw in many, many cases that is very often the case.

THE CHAIRMAN: Well, with class actions, but only with class actions, so there is –– there are special ––

MR BREALEY: But I mean nonetheless the Tribunal does impose a very clear –– and Mrs Justice Bacon –– a heavy duty on the Class Representative to act in the interests of the Class and, as I say, Mr Merricks and Innsworth have regarded the fees so far as reasonable.

I understand the Tribunal, but there is a deep point of principle as to whether –– I can maybe understand going forward for the settlement that have been incurred, but actually what has been paid, that is a new jurisdiction, a new power, and a massive development in the collective actions, and something that no one in my submission foresaw, that you were in the Supreme Court X years ago and you may be having to repay some of the money that you spent.

THE CHAIRMAN: But you are asking us to approve a settlement, including a provision for the deduction of some 44 million out of 200 million, in respect of costs and fees.

MR BREALEY: Well, can I just ––

THE CHAIRMAN: Is that not right?

MR BREALEY: No, well, with the greatest respect it is not, because the costs were incurred on the basis that it was a much larger sum. So let us assume for the sake of argument that Innsworth had succeeded, or Mr Merricks had settled for 700 million, we would probably not be

having this debate.

THE CHAIRMAN: But you are asking us now to approve a settlement and on terms that 44 point something million is going to go for legal fees. That is what we are being asked –– is that right?

MR BREALEY: Well ––

THE CHAIRMAN: Is that not what you are asking us to do?

MR BREALEY: As a matter of maths it is, but ––

THE CHAIRMAN: No, not as a matter of maths, as a matter of actually substance. We are being asked to approve a settlement with –– whether it is 44 million or 10 million, you are being asked to –– us to proceed on the basis of distribution that that is the amount of fees.

We will pause so you can take –– we can –– if you wish us to rise to take ––

MR BREALEY: Well, I have got Mr Merricks who is there says "I want to give you instructions".

THE CHAIRMAN: Yes, well, I think you should.

I will draw your attention to the fact that under the rules, that is expressly taken account of, that we have to consider what is reasonable for costs and fees and disbursements.

MR BREALEY: All I would and I think it is, with the greatest respect, a powerful response, maybe the

Tribunal will not take it, but these costs were incurred for an 11 billion, 14 billion, as you said, claim, and it was only a year ago that 95% of the claim was rejected. So when one is looking at the percentage of the costs that have been incurred, and what we now get is the 200 million which is reasonable, one does have to consider that the Tribunal took out 95% of the claim and, as I say, had the claim been a lot bigger, had Mr Merricks been able to get a better settlement, which he could not because the Tribunal has said that this is just and reasonable, the only reason –– you are looking at 44 versus 200, but that is how things played out.

THE CHAIRMAN: It is very like the *Petersen* case in Australia where you got a very poor outcome compared to the claim that started.

MR BREALEY: It does not mean ––

MR MALEK: But when it comes to assessment, you can say, look, this was the claim for 14 billion and that is why we did these acts and stuff like that, we may have done it differently if we thought we were only going to get 200 million at the end, and I am sure whoever is looking at this bill will take that into account. This was a major, complicated case.

But this is a case where you have reached a settlement on a global basis where 200 million is the

figure that everyone has calculated is fair and reasonable for Class members and you are asking us to approve to take out 44 million–odd. The funders do not necessarily have any real incentive to challenge the figures, because if they are asking for a multiple of the amounts they have paid out, the higher the figure is, the more they are going to get.

So who is overseeing the cost basis in circumstances where the underlying clients have no input on the fees, and that is why the president is saying that surely this is something that should go to a process where the fees are looked at.

MR BREALEY: Well, I submit that if that is the fear –– I mean Australia is Australia. In England and Wales and Scotland it should be that it should be a continuing process, there should be a case management, how many fees have been incurred. But to say that people who have been paid what they think are reasonable and to disgorge it, there is a deep principle.

MR MALEK: Well, let us see what your instructions are because Mr Merricks may have a different view from what you are saying because he ––

THE CHAIRMAN: You say you have not had time to think about this, so ––

MR BREALEY: It is not that I did not kind of –– well,

I read the cases and I saw them, but I did not actually know that there was going to be a point taken ––

THE CHAIRMAN: We will come back ––

MR BÉAR: Can I trespass on your time a little?

THE CHAIRMAN: Sure.

MR BÉAR: The Funder does have a number of stakes in this particular facet of the discussion. One is that, as you know, it is also funding other cases, so it has an interest in how the system works in the point that Mr Brealey just made. Whether it is a good or less good one, I am not saying at the moment, as well as (inaudible). I just wanted to pick up on something that has been said a couple of times, which may not be entirely fair, which is that the Funder does not have an incentive to challenge the costs.

MR MALEK: I said may or may not.

MR BÉAR: May or may not, exactly. Well, without wanting to get into matters which are –– which I do not want to discuss with Mastercard in court, the principle that a Funder is just happy to let costs be run up because it hopes to get a multiple is not one that I would accept as accurate either on principle or in practice.

THE CHAIRMAN: –– think the case might fail, in which case ––

MR BÉAR: Exactly.

MR MALEK: I have obviously read the emails ––

MR BÉAR: Yes, well, quite.

MR MALEK: –– that you have given us, and I understand it may be different on the facts of this present case, but we are talking about in principle do we have the power to say this should be done, whether we exercise it or not, and it may be that your clients are having a pretty stringent eye on the figures, but at the end of the day if the figures are 44 or whatever, 40 –– over 40 million, the Tribunal still may take the view that in the interests of the Class members they should be looked at, even if you were happy or not happy –– I do not want to go into privileged material –– at the time on the figures.

MR BÉAR: Yes, of course. Just to be absolutely clear, some of that is adverse costs of that 44.

MR MALEK: (Inaudible – overspeaking)

MR BÉAR: So although I think there is a view on –– certainly on the Funder's side that Mastercard's costs for the causation trial were pretty eye watering, those are what they are, and they have been assessed, or may be assessed as far as there is anything –– they have been assessed.

THE CHAIRMAN: Of course insofar as costs have been assessed, and on the adverse basis, some I think may be

still awaiting assessment.

MR BÉAR: Well, I think they have been wrapped up into –– so Mastercard have dropped that.

THE CHAIRMAN: They have dropped it so you have got that benefit. No, costs that have been paid on a party to party basis, we are not concerned with that, they have been assessed.

The only thing that is important for us is clearly the one thing that would be quite wrong is if we were to go down this course, and let us say the 44 million is reduced to 39 million, and you were to say "Well, we have had our 44 million, we are not going to give you the 5 million back", you are not going to –– but you still want –– you have paid it and you cannot get it –– you still want the full amount because you cannot get it back, so there must be an arrangement so then it can be reimbursed otherwise ––

MR BÉAR: That is part of what Mr Brealey I think is raising. One would have to then contemplate some sort of further mechanism.

But I was just going to make a slightly more fundamental point, which is that although obviously you have given your ruling orally, what this discussion shows is that the settlement has been presented to you on the basis that the 44 million of costs that have been

paid, and within that the share that has gone to Mr Merricks' solicitors, for example, is a given, that that has been presented as a given for the settlement, but it now turns out that it is not a given, and that does -- I have to say there is a bit of tension in that, because you have been presented with a package, and your point, which I completely understand, shows that a tenet of that package may not hold good.

In a sense the Funder's whole point has been this is not big enough to allow, for it, a proper return, and what we are discussing now is in effect related to that, that the amounts that have already been incurred, the 44 million which is sunk costs, is already too big relative to the 200. So the issues of distribution -- although we have argued it, and are arguing it in two phases, it is not as if the issues of distribution do not have some potential interrelationship.

Anyway, all I -- you can see, I am sure, where we are going, but it does make it difficult when a settlement is put forward on one particular basis and then one has to redo that basis.

This is not a criticism of you at all, it is a difficult situation, but I can see there is a potential --

MR MALEK: But as the Tribunal already made clear in

previous decisions, when it comes to costs, fees and disbursements nothing is going to come out unless it is approved by the Tribunal.

MR BÉAR: I do not --

MR MALEK: So nothing is given. I would have thought that the people in this area of law would realise that this is something under the control of the Tribunal. Nothing is given.

MR BÉAR: Well, indeed, but again that is the point I am making, rather, that in that case there is a relationship between the distribution and the decision on principle, whether it is just and reasonable outcome. That is the difficulty.

THE CHAIRMAN: But we have -- even on distribution we have been presented with different alternatives.

MR BÉAR: Well, indeed, but that is why, with great respect, one -- although there has been a division of the argument and you have obviously given your ruling, but one might think that there is some potential feedback from the distribution issues. There we are, I will not say any more.

MR COOK: Sir, could I briefly? Mastercard does not have obviously, I recognise, much of a dog in this fight, but in terms of how the system would operate all of us in the front row and those behind probably have our views

about how this operates.

The way the CSAO is currently drafted, including the variation that was sent by Innsworth, is about the Funder being entitled to deduct money and certainly I would anticipate this is how this could operate, or should operate, is really it is how much money should the Funder be allowed to recover in respect of that 45 million and that is where the reasonableness issue arises. The Funder is the one who has effectively controlled that aspect. How much do they get back? In the same way that in a standard cost order the Tribunal might say at the end of it, you know, "Those fees were excessive so the client only gets back 70% of what it has incurred but it is still liable for the full amount it has agreed with counsel or solicitors ", so essentially the same way should operate here.

It is not a question of clawing back from solicitor or counsel who did work six years ago. The Funder was happy with those fees, but essentially the Funder is before you now saying "I would like 45 million" and that is actually what the Tribunal rightly is saying it needs to be engaged with, but it is a question of whether Innsworth gets 45 million or 35.

Innsworth then has Mr Merricks' ability to potentially challenge fees. If they have not done so,

those fees are fixed. So I would suggest it is not a question of clawing back money from lawyers many years ago, it is Mr Béar's client wanting to recover money and the Tribunal deciding what is appropriate in that regard.

THE CHAIRMAN: Then it is a matter of whether they can recover from the lawyers.

MR COOK: Absolutely, which is about their contractual relationships and if money has been agreed and is -- you know, they have not exercised rights to challenge fees, then that is their look out and then the funders go in knowing, as every client does, that you will not expect to recover 100p in the pound in litigation, but you will only ever recover 70% or 80% realistically, exactly the same position as here, and then that is part of, you know, the risk that any funder -- whether that is the client funding it themselves or an external funder takes.

THE CHAIRMAN: Yes, thank you. Just a moment.

(Pause)

I think what we will do, as it is 12.30, is to take an earlier lunch adjournment to give you proper time to consider this and for Mr Brealey to talk to Mr Merricks and also Mr Béar to talk to your client, and we will come back -- perhaps we will come back -- just to take

a slightly shorter lunch break because I am a bit worried about time -- at 1.20. Sorry, one moment.

(Pause)

No, I am reminded that I have a professional obligation. No, we will have to take a full hour, sorry. So it will be until 1.30.

MR BÉAR: Is there anything else it might be helpful for us to consider to be alerted to before you rise?

THE CHAIRMAN: Well, we are going to also scrutinise the Funder's return, as you might expect.

MR BÉAR: Indeed.

THE CHAIRMAN: Again, it is a matter which we have to have regard to as reasonable.

There are -- as regards the smaller element of costs I can say that for your adverse costs exposure Mr Garrard explains there is not ATE insurance in this case. We would have regarded the ATE premium as a reasonable deduction and he, I think, helpfully evaluates what the guarantee that I think Elliott gave -- what would have been the equivalent cost of covering that by ATE insurance, which I think he says is 9.75 million.

MR BÉAR: Something like that, yes.

THE CHAIRMAN: We accept that as a reasonable deduction, so if that helps --

MR BÉAR: It does, thank you.

THE CHAIRMAN: So we are really looking at the return.

MR BÉAR: Yes. Can I just check, did you receive an alternative form of draft order from us? If not, I will get it.

THE CHAIRMAN: I think we did, but we have not had a chance to look at it.

MR BÉAR: You have not had a chance to look at it, that is fine.

THE CHAIRMAN: We are not going to make an order today. We have obviously given judgment.

MR BÉAR: No, but as often when one is discussing the principles it can also be helpful to look at the form of the order because that crystallises what it is that is actually going to happen.

Just before you rise, there are potential adverse costs that could arise out of Trial 2 because obviously there are merchants who are still participating in that and indeed there were some letters -- I think they may even have been sent to the Tribunal --

THE CHAIRMAN: They were.

MR BÉAR: -- saying -- Visa for example put down a marker, so there will need to be some catering for that, but in effect the adverse costs element potentially might go up.

THE CHAIRMAN: Yes. Well, we thought the best thing to do would be to, as it were, carve out a reserve sum to await no doubt what happens in Trial 2 as regards costs once the Tribunal hearing Trial 2 is told that is Mr Merricks is no longer participating and that that part has come out, but if there are any costs applications that is a matter for that Tribunal, but we will clearly have to reserve sums to cover that contingency. But there will not be a distribution for some time, so I think the costs position will have crystallised by then.

MR BREALEY: Also the costs of this application. People have been working quite hard on it and so --

THE CHAIRMAN: On this application?

MR BREALEY: Yes, on --

THE CHAIRMAN: Mastercard is not, I think, seeking any costs.

MR BREALEY: No, but obviously Willkie Farr have incurred costs, so we need to make provision for that.

THE CHAIRMAN: Yes, there are a whole series of costs that have been identified.

MR BÉAR: Yes, so in -- just so everyone understands, in our revised draft order, the first tranche which is the new 5(a), does contain a figure above 44 or 46 million, precisely with that reserve element in mind, but

I will --

THE CHAIRMAN: The cost of this application are costs that we can assess.

MR BÉAR: Yes, that is so.

MR COOK: Sir, just to flag on that, I will need to take instructions, but Mastercard is not in any way accepting its costs are not potentially recoverable from Innsworth, for example, of this hearing, or parts of the cost anyway.

THE CHAIRMAN: I see. You are not seeking any costs under the agreement from Mr Merricks?

MR COOK: That is not -- I have not got instructions in relation to the Innsworth point, but a lot of time and expense has been caused by the intervention which has failed, so I will take instructions.

THE CHAIRMAN: That would not come out of the 200 million anyway.

MR COOK: No, it --

THE CHAIRMAN: So that can be dealt with separately.

MR COOK: Apart from the fact Innsworth -- it would then be another one of the adverse costs which Innsworth would be -- it might not be, but --

THE CHAIRMAN: Well, yes, but it seems (inaudible) quite separately. So 1.30.

(12.37 pm)

(The lunch break)
(1.41 pm)
THE CHAIRMAN: Yes, Mr Brealey.
MR BREALEY: Thank you. Can I just make two preliminary points and then I am going to make an application.
So just on the first preliminary point -- these are ballpark figures but I think the Tribunal should have them in mind. The figures I have got in front of me, we have the 41 million up to 30 November 2024. So this is the 41 million.
Can I just give you some percentages --
THE CHAIRMAN: Just to interrupt you, that includes a certain amount paid for adverse costs?
MR BREALEY: Correct, yes, so that is what I was going to say. So of that 41 million, around about 16% is adverse costs, so that is almost 7 million.
The counsel's cost is 15%, around 6 million.
THE CHAIRMAN: Are these not set out in --
MR BREALEY: They are, but if I can --
THE CHAIRMAN: Do we not have them on paper with Mr -- one of the witness statements?
MR BÉAR: Mr Garrard's statement.
THE CHAIRMAN: Because if we could have it open, that makes it a lot easier.
MR BÉAR: It is page -- WMIC-IBA/2/8, paragraphs 21 and 22.

MR BREALEY: In hard copy?
MR BÉAR: In the hard copy ...
MR BREALEY: Well, there we go.
THE CHAIRMAN: Just a moment. Yes, I think it is -- is it page 8 of Mr --
MR BREALEY: Page 8, yes, section E.
THE CHAIRMAN: -- of Mr Garrard's witness statement which is in our supplementary --
MR BREALEY: It is on the screen if you want --
THE CHAIRMAN: It is on the screen?
MR BREALEY: It should not be. Sorry, it should not be on the screen.
So in the hard copy it is in --
THE CHAIRMAN: So this is paragraph 21 of Mr Garrard's witness statement. These are inclusive of VAT, I think, these figures?
MR BREALEY: Yes, so I just think to get a perspective on this -- this is kind of an eight-year period -- you have got experts at (c), that is 6 million, you have got counsel at 6, and you have got solicitors at 18, but a very large proportion of that was Quinn Emanuel because Willkie Farr took over two to three years ago.
MR MALEK: Because the partner moved.
MR BREALEY: Pardon?
MR MALEK: The partner moved from one firm to the other.

MR BREALEY: Well, yes, but it does not affect the kind of partner profitability and who has to disgorge it, if you are going to go back right to the first day of the proceedings. So if the Tribunal is going to make the sort of order it does, it is going to affect Quinn Emanuel in some way.
THE CHAIRMAN: Well, I think we will consider the point Mr Cook took, that actually it is the Funder that is seeking the money --
MR BREALEY: Correct.
THE CHAIRMAN: -- and if we therefore decide the money should be less, we give the Funder less, and it is a matter between the Funder and the solicitors what happens.
MR BREALEY: Correct. So that is my first preliminary point.
THE CHAIRMAN: Sorry, what is the point? You have shown us this.
MR BREALEY: Just to remind -- so the costs are, you say, 40 million, but they are broken down into smaller compartments.
THE CHAIRMAN: Yes, of course. Well, that is obvious.
MR BREALEY: Well, I just want -- you got the impression that it was kind of almost --
THE CHAIRMAN: It is not all going to one -- we are not

suggesting it all goes to Mr Bronfentrinker. It is obviously going to different people at different times. I mean that is obvious.
MR BREALEY: Right. Well, then I move on.
The second point is over the adjournment we contacted costs silk and he has pointed out that under the Solicitors Act 1974 there is a 12-month limitation period.
THE CHAIRMAN: Yes. That is for taxation.
MR BREALEY: Yes, but that is to give parties legal certainty that you cannot go back and say the costs are unreasonable after a period of 12 months. So that is picking up on the point that I am making, that if you are going to go back eight years, the Solicitors Act 1974 actually introduces, for the purposes of legal certainty, a one-year limitation period. But I would have to check that --
THE CHAIRMAN: -- time in which you could ask for a taxation --
MR BREALEY: Yes.
THE CHAIRMAN: -- on receipt of a final bill.
MR BREALEY: So that is -- so I just wanted to draw that to the Tribunal's attention.
The third point --
THE CHAIRMAN: That is why we were -- raised the point

Mr Garrard makes at the end of this witness statement, where he says we do not know what was done in terms of payment. It is in Annex 2, paragraph 2, page 29, about assessment, and whether the Funder has that option.

If there is no final bill but they have only been paid on account, the 12 months does not start to run, as costs counsel I am sure has told you. It is only if there has been a final bill, which there may have been, I do not know.

MR BREALEY: Then that -- we would say -- well, so that -- if that is Funder and Mr Merricks, then we would say that is also subject to the LFA, the provisions that I showed you, which is there is a time limit in clause 5.8 if there is a dispute.

MR MALEK: Mr Brealey, if, at the end of the day, fees have been unreasonably incurred, do you accept that those fees should not eat up the money available for the Class?

MR BREALEY: Well, clearly I am acting for Mr Merricks, and Mr Merricks is trying to act in the best interests of the Class. But equally, Mr Merricks has approved the fees as he is going along, so he will have -- he has approved the hourly rates, he has approved the brief fees. So although clearly he wants more money for the Class, and he has said that in spades, he also has to

realise that he has been instructing solicitors and experts and counsel and he has throughout been given -- Willkie Farr, for example, have given counsel's brief fees or whatever, so he has had to check it. That then goes to the Funder, and under the LFA the Funder will determine whether it is reasonable or not.

So the answer to the question is clearly he does, but he also realises that he is also part of the machinery which is trying to bring a collective proceedings forward and, if, for example, it was contrary to a principle that says you cannot go back eight years beyond the limitation period and ask for fees that were unreasonably -- I mean, that is a question of law to a certain extent, or the Tribunal's powers, and I just do not -- I do not know today, and this is going to be my application. I do not know for certain whether the Tribunal has the power to go back eight years.

THE CHAIRMAN: Well, no, we are not going back eight years. We will just say that the amount that should be paid to the Funder with regard to legal fees is X and we have the power to decide what X should be.

MR BREALEY: That I understand, so if that is --

THE CHAIRMAN: That is all we would seek to do.

MR BREALEY: So that was really my last point, which is we

endorse what Mr Cook sensibly submitted. That is the way forward, so that is the way that we do it today, and we endorse that. But if the Tribunal was not minded to do it, it does open up some very deep principles, and we would need time to properly put it in writing to the Tribunal.

THE CHAIRMAN: Yes. Just give us a moment.

(Pause)

Yes, well, we would follow that route. I mean, we are being asked to take out a certain amount from the 200 million for it to be paid out and we will not feel it is appropriate to authorise more, and that is on account of expenditure on legal fees, more than we think is reasonable for that expenditure. So it is not a question of us seeking to order anyone to repay anything, that we have no power to do; it is a question of -- what we do have power to do is to say how should the 200 million be distributed.

MR BREALEY: Yes, well, that --

THE CHAIRMAN: So the third point we accept.

On the second point, we fully understand that Mr Merricks thought these were reasonable at the time, but we do not see that that is determinative. If it was, we would not be having this hearing at all, because Mr Merricks thought the 200 million settlement was

reasonable, and on that basis, if he thinks it is reasonable, we approve it.

But that is not how it works.

MR BREALEY: No, no.

THE CHAIRMAN: We have to exercise our own judgment, as we have, having listened to your helpful submissions and Ms Tolaney's submissions, as to whether, in our view, as a Tribunal, it is reasonable, and it is exactly the same approach with regard to the total amount of legal fees. We take account of the fact that that was Mr Merricks' view, just as we do on the settlement, but that is not binding.

MR BREALEY: As long as -- as Mr Cook submitted -- it is then for the Funder -- it comes out of the Funder, and then the Funder may then have --

THE CHAIRMAN: It does not come out of the Funder, it does not go to the Funder.

MR BREALEY: Quite, yes.

THE CHAIRMAN: Then that seems to us -- because that is what we are being asked to do, and we of course obviously will hear from Mr Béar, but we will not be ordering anyone to repay anything.

MR BREALEY: No, I understand. Thank you.

MR BÉAR: I strongly object to that. Let us start with the rule, rule 94, which is authorities bundle 37, page 51.

{AUTH/37/51}. You have a jurisdiction to make a collective settlement approval order, and under 94, paragraph (8) {AUTH/37/52}, you may make that order where you are satisfied that the terms of the collective settlement are just and reasonable, and the terms include, obviously, under 94(9)(a), provisions as to costs, payment of costs, fees and disbursements. That is also a matter which sub-rule 4(b) requires to be set out in the application.

So part of -- so you have, in a sense, a binary jurisdiction, that you either approve the settlement or you do not, and can I just say until you have approved the settlement, which you have not yet done, there is no settlement. I just want everyone in the room to be clear about that. You have obviously made a -- announced a view at midday, but unless and until you approve a package then there is no settlement and everything goes on. I just want everyone in the room to be perfectly clear about that.

Can we go then to the application itself, the joint application by the would-be settling parties, page 38 and 39 together, please, on the screen. So this is part of the terms which you either approve or not, and indeed you do not have jurisdiction, as I understand it, to modify the terms, so you are being given a package.

I am looking at paragraphs 38 -- pages 38, sorry, and 39 of the application notice, paragraph 73.

THE CHAIRMAN: 74, paragraph -- I seem to have a different --

MR BÉAR: 73 is the CR --

THE CHAIRMAN: I have two different paginations, yes.

MR BÉAR: I am so sorry.

THE CHAIRMAN: Paragraph 73 is the Class Representative's proposal.

MR BÉAR: Yes.

THE CHAIRMAN: Paragraph 74 is the defendant's proposal I think.

MR BÉAR: Well, the defendants do not actually make a proposal on distribution.

THE CHAIRMAN: Well, they consider that it is principally a matter for the Tribunal.

MR BÉAR: It is their obiter dicta, as it were.

Let us start with the Class Representative's proposal.

THE CHAIRMAN: Paragraph 73.

MR BÉAR: Paragraph 73, thank you, sir.

So he proposes a distribution model, an integral part of this settlement which you either approve or you do not approve, and Pot 2, as he calls it, on the next page, letter (b):

"... the sum of [45,500,000-odd] is to be ringfenced as a minimum return to Innsworth, representing 100% recovery ..."

So that is an integral part, that is the application made. It does not matter what Mr Brealey --

THE CHAIRMAN: Well, is that right, Mr Béar? If you look at the application and the way it is structured, section C, starting on page 16, is the proposed collective settlement, going through the various requirements of rule 94, and that is section C, full and final settlement proceedings.

Then at section E is noticing and distribution, and it is under that section that we have sub-section (c) on page 34:

"The settlement agreement does not address how sums received should be paid and distributed."

MR BÉAR: No, the settlement agreement does not, but the application for a settlement approval order does, and the payment of costs, fees and disbursements includes, as indeed does distribution, they are all matters within the scope necessarily of an approval order. So the application makes a proposal to you, and this is an integral part of that proposal, and indeed that is reflected in the draft order which was also attached to the application --

THE CHAIRMAN: Yes.

MR BÉAR: -- at paragraph 5(c), which in effect says what paragraph (b) of 73 says in the application notice. So that is -- it is part of the order, it cannot be severed off, and unless and until something is approved then there is no settlement approval.

The basis on which this has been put to you, the only basis on which it has been put to you, is that in relation to the money already paid out, that was to be ringfenced. So there was -- left open was the question of the division between the two other pots and the amount of the individual payout that was to be ordered under -- to the Class. What was not in dispute, and what is, therefore, an integral part of this application, and which Mr Brealey is not in a position to resile from, is Pot 2 reflected in paragraph 5(c) of the draft order. That is the basis on which everyone has come here, and you are not given power, with great respect, to modify that.

So if you do not approve that, then you do not get to approve the settlement, and we are all back to square one, and the case would go on, and perfectly happily so from my client's perspective, obviously not from other parties in the room.

Just to look at paragraph 74, Mr Cook perfectly

understandably -- it is in his client's interest to make life difficult, not just for Innsworth on this case but generally for collective proceedings, of which they are always going to be on the wrong side. So if they can make it harder for the system to operate, if they can introduce deterrents and disincentives for funders and claimants, that is something which they would be expected to pursue.

Nonetheless, they did not say what they now say in paragraph 74. First of all, they say that:

"... the distribution ... is principally a matter for the Tribunal and the Class Representative."

We say that the self-denying ordinance is one which perhaps should be adhered to a little more faithfully from here on.

Secondly, they say they:

"... agree with the principles of the distribution model proposed by the CR ..."

They do not say "Oh, by the way that 45.5 million, that should only go to the Funder to the extent that you, the Tribunal, think it is appropriate", an opportunistic divergence by Mastercard.

In relation to Pot 2, at page 41, they re-emphasise that the sum, they say, does not represent a payment of costs, fees and disbursements, et cetera, so they make

some points about it, but simply in terms of its labeling. What they are saying is it is not recovery of inter partes costs, and that is true. It would not be, as I think the Chair's remarks this morning made perfectly clear, it would not be party and party costs. But it is money that has been spent, and the fact that it had been spent and that it was going to be ringfenced was an integral part of this order and this application.

So I do submit that where you are now is you either approve that part and we have a discussion about the other bits which were left open and come to a ruling on those, or you do not approve the settlement at all, and then, as I say, we are back to square one.

MR BREALEY: Can I just --

MR BÉAR: Can I just go on, sorry.

I did just want to say something about the way the costs have been incurred. As it happens, the 12-month period would be quite significant, because approximately half of the total that has already been incurred, 40-odd, has been incurred in the last 12 months. That includes nearly 7 million of adverse costs, but therefore 30 million --

MR MALEK: Are all the previous bills final bills or are they interim bills or what?

MR BÉAR: I do not know. I am just telling you about the --

I cannot answer questions about --

MR MALEK: What are they?

MR BREALEY: They are monthly final bills.

MR MALEK: Monthly final bills.

THE CHAIRMAN: You say about half of -- excluding the adverse costs --

MR BÉAR: No, including the adverse costs half. So net of the adverse costs it is about -- it would be therefore 13, so about 40%. Well, yes, it is 13 out of 33, whatever percentage that is, about 40% I think.

THE CHAIRMAN: So that part could go to --

MR BÉAR: Yes; and no lawyer could complain that he or she was being asked to re-open a settled account, because the legal framework, as we have been reminded, provides for things to stay open for 12 months, and that of course is a significant 12 months, because 12 months ago was your judgment on the factual causation.

THE CHAIRMAN: Yes.

MR BÉAR: Of course -- and then three or four months later the Court of Appeal turned down permission to appeal.

A great deal of money has been spent since then, as far as my clients were concerned in a good cause to pursue a claim which, as we have heard, also contained a UK claim based on a counterfactual argument.

I am sure the Tribunal sees where I am going with

this.

THE CHAIRMAN: So you would be in time to refer those costs for taxation.

MR BÉAR: Well, there is a -- I do not want to say anything that goes beyond what I know, because there is a mechanism under the LFA and the associated solicitors' terms, the legal services terms, which provides for -- which I think Mr Brealey took us to this morning, clause 7, if my memory serves --

MR BREALEY: It is clause 5.7, you have 30 days.

MR BÉAR: 30 days, is it not. So I am afraid I am not costs counsel and I do not know if there is some sort of statutory override, but on the face of it that would seem to --

MR BREALEY: It is a contractual --

MR BÉAR: Yes, that would seem to be a shorter cut-off period. But I am not making any submission on that, I am just trying to help you.

THE CHAIRMAN: No.

MR BÉAR: I am simply pointing out that the costs have been incurred -- put another way, there were a lot of costs incurred in relation to the pass-on trial, perhaps unsurprisingly, but that trial was one which could appear very differently if it is attached to an EEA claim which was settled for the sum we know about, or if

it is attached to a potential UK claim which has a much, much bigger number. Was that a real claim or not? We thought and still do that it was and is a real claim, but if there are different views about that, that might affect the reasonableness of those charges.

Coming back to the Australian cases, the *Petersen* case is a very interesting case, because the way that the judge there treated the costs, as the Tribunal may know, it was a securities class action or group action in Australia and it was started off I think by Quinn Emanuel in Australia, on the basis that they considered they agreed with the lead plaintiff, or whatever they are called in Australia, that the -- there was a potential for quite a large class to exist and for claims to be brought extending back in time, that there was some argument that would disapply the limitation period, I think some far-fetched equitable argument. It certainly did not impress Justice Murphy, if I remember the name correctly of the judge dealing with it.

So he goes through a very detailed analysis of why it was unreasonable for the Quinn Emanuel partner -- I think it was a Mr Scattini -- to take the view that he did, and he effectively did not do due diligence on the claim when he went into it, and there of course what was being considered -- the variable -- because this is how

it works in Australia, is everything is done on a deeply discounted CFA. So here you do often have CFAs, not in this case, but heavily discounted.

So of course what the court is looking at is something slightly different, which is lawyers who have not yet been paid, they have run up a work in progress to be given to them, but that was -- that is obviously very different from receiving a cheque, and Justice Murphy held that the initial assessment had been extremely superficial, and it was wrong of Quinn Emanuel to have taken on the case on the basis that it was going to be a case which could result in a very large payout, and they should have realised that the Class of people who had a non-time-barred claim was much smaller.

So on that basis he wrote down the claim, and he did so despite the principles that he recognised -- I will not take you to it because it is (inaudible) familiar, but it is paragraphs 134 and 135 of the judgment, and in those he cites some earlier jurisprudence, including, as it happens, some of his own, in which the Australian courts very clearly recognised what I guess we would call an ex ante approach, so that you look at what is reasonable to incur -- and this would apply to a Funder as much as to a solicitor -- by reference to what they reasonably expect might be achieved in a litigation.

The conclusion in that particular case was that it was actually unreasonable at the time when the case started for Quinn Emanuel to be as optimistic as they were, they just did not see -- did not attach enough weight to the problem, they were slipshod. But if the judge had found that it was a reasonable anticipation, he would have allowed them to claim in the amount that they did.

So very different principles might apply in a case like this, depending on what view one wants to take -- again, I am sure the Tribunal sees where I am going. My clients have their view, which they still adhere to. Other people, Mastercard, have their view. Mr Merricks, well, his views maybe shall we say have changed over time, and that is rather different, and of course -- so by "Mr Merricks", I include everyone sitting behind him -- that could well affect the position on the point that we are talking about and the bills that have been submitted in the last 12 months.

THE CHAIRMAN: That is a very different situation where you say you should not have taken on the case at all, and therefore he made a dramatic, as he did, the judge in that case, reduction in the fee.

We are not hypothesising that there will be a dramatic reduction in the fee. We do not know. We

think reasonable fees within the generous solicitor and client standard can be charged throughout, and we are not suggesting there should be any deduction because this case should never have been brought.

MR BÉAR: No.

THE CHAIRMAN: We are just saying that it is not right that the Class should suffer a deduction from the settlement sum, which it was reasonable in terms of compensation for the Class --

MR BÉAR: Can I --

THE CHAIRMAN: Just a moment. If and insofar the fees that had been incurred on a solicitor and own client basis were unreasonable, and it may be that the reasonable fee is 41 million, in which case there is no reduction. But to abdicate any form of evaluation and just say "Well, that is what has been agreed, therefore Class members are stuck with it" --

MR BÉAR: No, I understand.

THE CHAIRMAN: -- is something we find deeply unattractive.

MR BÉAR: I am not suggesting that, but I am -- so what are the principles? Well, as between the Class and the Funder who has actually outlaid the money, also obviously in reliance on the fact that it is getting bills from solicitors, as between the Class, the notional client as it were, or the actual client through

the medium of the Class Representative, plainly for the moment the Class should bear that cost, because the Class is personified in the Class Representative and he has signed off the bills and approved the work, and the whole point of the CAT's certification process is to get a suitable person in as Class Representative to approve his or her suitability -- we recently had some ruling on that in the (inaudible) case, as I am sure the Tribunal know.

So the Class, in effect, are treated as having, to use a metaphor, delegated their client powers or prerogatives to the Class Representative. If he has signed off and then the Funder has paid, as between the Class and the Funder for the time being it is obviously the Class that should bear that, and the Funder should be reimbursed its costs which it outlaid, as is obvious, as a necessary part of the steps that were taken that has enabled the Class to get anything at all.

If one imagines -- if one thinks of it not just as a class of people, if one imagines that there is a true client, and that Mr Merricks is actually the person who owns the whole of the claim, he would not now be allowed to say "Oh, well, I think that the person who funded me should have to bear this cost". If there is a disagreement to be had, an assessment, that should be

between the Class and the lawyers, and then if it turns out that there is something to be repaid it should go from the lawyers to the Class. The Funder in the meantime, having laid out the money, should not be disadvantaged, and it has a preferential claim over and above the Class, and that is why --

THE CHAIRMAN: You say because Mr Merricks signed off the bills so the Funder relied on him --

MR BÉAR: No, I did not say the Funder relied on him in that regard, although --

THE CHAIRMAN: I thought you said taking the bills through the Class Representative, he signed off on bills, and so the Funder could rely on the fact that it satisfied the Class Representative to pay the bills. Is that not what you say?

MR BÉAR: I am saying you can -- if you are looking at the equities between the Class and the Funder at this stage, which is effectively what you are doing, the Class have chosen to authorise that work and the bills, so -- and then the Funder -- if the Class had not done that, the Funder would never have been asked to pay at all.

So as between the Class and the Funder, in relation to who should currently be refunded and where the balance should lie for the time being, the Funder plainly has the better equity. The Class, through their

representative, have chosen to incur these costs.

Now, if there is a complaint that the costs were unreasonably incurred, that is a complaint not between the Funder and the lawyers, but between the Class and the lawyers.

THE CHAIRMAN: What is the point of clause 4.4 of the agreement?

MR BÉAR: Of the litigation funding agreement?

THE CHAIRMAN: Yes, your agreement with the Class Representative.

MR BÉAR: Let me turn it up, sorry --

THE CHAIRMAN: -- in the agreement. We have got it in our volume 2. I am not sure I have an Opus reference for it, but it is within the agreement on page 59.

MR BÉAR: Yes, well, because plainly once the money is paid out, or if there is a demand which the Funder may be expected to meet, then the Funder is given the right to have the dispute with the lawyers. But once the money has been paid, what you are considering now is a somewhat different situation where money has been laid out and you are simply deciding should the Funder, as of now, be reimbursed out of the settlement for that, and the point I am making --

THE CHAIRMAN: But the Funder could have challenged it at the time.

MR BÉAR: Yes.

THE CHAIRMAN: So the Funder chose not to. That was its choice.

MR BÉAR: The Funder could have chosen -- and indeed it is a fact that there are two control mechanisms that have been operating here, both Mr Merricks' and the Funder. They are both able to intervene. That does not help you decide where it is that the balance lies at the moment.

The reality is, I suggest, that this money has been spent, and it was spent as part of the process of keeping the claim going, and if the claim had not been kept going there would have been no settlement. That much is necessary, so --

THE CHAIRMAN: Well, I do not know, what -- because it did not arise. If you had, as the Funder, been getting some of the bills saying "We think this is too much and we would like to refer it for assessment within" -- whether it is the 12 months or the 30 days, whether then the solicitors have said "Well, in that case we are not going to act any more", we do not know. They may well have said "Well, we will contest it, we think it is reasonable", but it does not mean they will withdraw from the case, and the case would not -- you are suggesting the case would have collapsed?

MR BÉAR: Yes. Well, we looked at it a moment ago, did we

not. Annex 2 to Mr Garrard's statement says:

"Innsworth has raised concerns about the ..."

This is in open text:

"Innsworth has raised concerns about the level of fees incurred in relation to various invoices that have been submitted and has, in principle, the right to invoke an assessment."

THE CHAIRMAN: Yes.

MR BÉAR: But neither Innsworth nor Mr Merricks stopped the money being paid that has been paid, which is what we are talking about. The application has been made to you on the basis that that amount is ringfenced, and that is the application that you either approve or reject. If you reject it, then you are rejecting a fundamental term of the application. You do not, with respect, have power to amend the application.

THE CHAIRMAN: No, I understand that point. It was your second point. If one goes to, you say, we have got no power, it is a binary choice, it is a package deal, if we do not like something within the package you say the whole thing has to be rejected, I understand that point.

But the other point saying that because the Funder got the bill signed off by the Class Representative, therefore it would be inequitable for the Funder now not to get reimbursed, but the Funder had the right at the

time to challenge it and it chose not to. Well, that is its own decision.

MR BÉAR: But it is enured to the benefit of the Class. So the Funder can stop payment or suspend payment to the lawyers if it chooses to invoke that, but not having done so, that does not conclude the question what has been the benefit of that money. It was money that was requested by the Class Representative as work that he wanted his lawyers to do. So he is not -- he having, in effect, the power to speak and act on behalf of the Class, says "I want my lawyers to do some work", and the Funder can challenge it. But if it does not challenge it, that does not mean that the Class, personified by Mr Merricks, has some better right than the Funder, because the Class are the ones through Mr Merricks who have asked for the work to be done.

The whole structure of this regime is that the conduct of the collective proceedings is delegated to or vested in the Class Representative, he represents the Class, and one of the things he has done is to instruct his lawyers to get on with some work.

Now, it may be that he has not vetted it properly, but for the time being he was, if you like, the agent of the Class, and the Class must live, for the time being at least, with his decisions and it would, with respect,

be deeply --

THE CHAIRMAN: One of the things he has instructed his lawyers to do was to accept the settlement offer, but we have listened to you quite extensively saying that the Class should not be stuck with that decision because it is not in the best interests of the Class.

MR BÉAR: Absolutely, and --

THE CHAIRMAN: Why is it different with his decision about paying the lawyers?

MR BÉAR: It is not different in the sense that you have no power to intervene and supervise that, I am not saying that. What I am saying is that we are looking at the equity between the Class and the Funder. For the time being the Class are the ones, through their representative, who have asked for this work to be done and asked, therefore, for the Funder to pay for it, and if the Funder had not paid for it there might never have been a settlement at all. On the face of it there would not have been, because the tap would have been turned off. So the funding has been a necessary condition of getting any settlement at all.

Of course it is open to this Tribunal to say, subject to one further point that I am going to come to, "We are concerned that this may be too high", although, as I understand it, sir, you have been appropriately

cautious not to say in any sense that it is, or that you are pointing to anything specific, you are just saying "Here is something that needs to be looked at". What will -- how would it be looked at? Well, there would have to be some process of assessment, perhaps the appointment of a referee, et cetera, potentially some form of hearing or inter partes process, et cetera.

Now, if you are going back over eight years and looking at the spend of £33 million on solicitors, counsel and experts, then that process of assessment is going to be in itself very expensive. It is going to cost a lot of money, take a lot of time, run up further costs.

So the question arises: if it comes out at the end that the result is little different from what has been presented by solicitors and approved, who is going to pay for those costs, which I can tell you are going to run into the millions. The answer is that if you choose to invoke that process, if you pull that trigger, then the Class will have to pay for it, because the result of that process would be that the bill would stay the same. So you, in your role as guardian of the public, would have been commissioning this assessment, causing these costs to be incurred, and the Class would bear the brunt and the cost of your decision.

So I suggest not that you have no power, but that before you could exercise that power, pull that trigger and cause those costs to be run up, that you would need to have something more than just a potential concern, you would need to have some actual grounds for concern, and there have not been any of those presented, even though we can all look at the figure and say "Yes, this looks awfully high".

The problem otherwise is that your concerns -- and I quite understand why you have them -- but the outcome of the assessment process would be some costs that had to be borne, and they would be borne by the Class, and, with great respect, I suggest you are not in a position, as matters stand, to make that call.

THE CHAIRMAN: Well, we have -- except there is this in this case, we have had to review quite a number of costs of the Class Representative's lawyers at various stages and there have been a number of judgments on the costs.

MR BÉAR: Right.

THE CHAIRMAN: Of course that has been in the context of what order to make on a party and party basis, which is a much stricter basis, but nonetheless one has seen a level of costs and a distinction, and certain things have been said about the actual costs being charged, so we have some basis here --

MR BÉAR: Well, you do. This process, if I may put it, does not, because none of that has been fed in. It is a problem, and I say this with huge respect, it is a problem that one does not have a sort of amicus curiae to help. But what you are saying is not something that has featured in the already quite voluminous materials for this application.

The final point I would make, just by way of an important contextual point, and my client rightly is keen for me to make it, is that when you are considering any aspect of this jurisdiction and the costs, it is very important to remember that all of the payment of the Funder comes out of, in the normal course of things, out of undistributed damages. So whereas in Australia you have a sort of top-down, "Let us take it off the top" -- I think that is a fair summary of it -- and then we will take the costs off, take the Funder's return off, and then what is left goes to the Class; the starting point here, and indeed the innovative and essential feature of the Consumer Rights Act 2015 amendments to the 1998 Act was a different bottom-up approach where you look at what is undistributed.

So those funding the litigation are told to take a bet. That is what Parliament has decided, that you decide how likely it is that there is going to be

something that is not taken up by the Class and out of that you will get your commercial return. This is the innovative bargain that the legislation contains.

PROFESSOR MULHERON: Excuse me, that is for judgments, though, is it not, not for settlements --

MR BÉAR: Yes --

PROFESSOR MULHERON: That is a different point, is it not?

MR BÉAR: No, I understand, because in settlement it is left open.

THE CHAIRMAN: You are getting the benefit, which we are not seeking to question, of a ringfenced sum, so you are not left with waiting to see how much is left from undistributed damages.

MR BÉAR: Well, we would -- on the basis that the distribution would be on the basis of per capita, as had always been suggested, a neutral distribution, then my clients, as we say in the skeleton, would be happy to stick with their original bargain and say "All right, let us see how much is taken on that basis and we will take the rest".

THE CHAIRMAN: Yes, but that is not the application before us, is it?

MR BÉAR: No, that is not the application before you.

THE CHAIRMAN: No, so -- and we are proceeding on the assumption, which is the case, that we are content to

have a ringfenced share for your client.

MR BÉAR: Well, that is only arguendo, as it were, because if hypothetically you thought that the appropriate way would be for the Funder's return to replicate the basic structure for a judgment, hypothetically if you thought that, then you would be able to say to the parties "Well, we do not approve the application, but we would approve it if you came back with an application that was drafted on those terms", and something like that happened I think in -- or perhaps on a rather smaller scale, but in *McLaren*.

MR MALEK: Well, we got the settlement agreements with side letters covering what the Tribunal thought would be the right and appropriate distribution on the facts of that case.

MR BÉAR: You got there in the end.

MR MALEK: We got there in the end.

MR BÉAR: You got there in the end. But the -- so that is one point. Yes, I appreciate of course if you then are faced, as the application is, with a division into pots, so-called, and you decide that in principle you are happy with that, then that is a different matter, but I simply wanted to remind you of the fundamental premise, both of the legislation and of the funding agreement, because all of the returns that the Funder

has ever sought to get come out of undistributed damages, that is -- and the Funder is very happy with that risk, but of course on a sort of distribution basis that is a level playing field rather than one that is taken on a different basis.

Anyway, I believe I have made the points I wanted to in relation to this and thank you.

THE CHAIRMAN: Yes. Just give us a moment.

(Pause)

Thank you very much. We will obviously not rule on this straight away and we will consider all the submissions and address it in our judgment.

I just have one question on the costs regarding VAT. I think the figures we have got are inclusive of VAT, is that right?

MR BÉAR: I am told yes, sir.

THE CHAIRMAN: If they are paid -- as far as they have been paid by the Funder, do you reclaim VAT?

MR BÉAR: Apparently not.

THE CHAIRMAN: No.

MR BÉAR: I have a settled principle I never answer any question to do with tax, but I am told from behind not.

THE CHAIRMAN: Right, thank you. There are, on costs, some aspects I think on the unpaid costs, aside from we have been dealing with essentially the costs that have been

paid. You have raised one of them, which is the potential application for costs (inaudible) Class Representative in the pass-on trial that may occur.

MR BREALEY: Yes.

THE CHAIRMAN: Which has been signalled in some correspondence. We know there is no ATE insurance as such, and so we think it would be appropriate certainly either to preserve or ringfence a part of the 200 million to deal with that, and I imagine that that application might be made on the presumption of the pass-on trial. It would clearly be helpful to have it resolved sooner or later. It may be that you will be submitting there should be no liabilities (inaudible) the Class Representative, but we cannot predict what the --

MR COOK: Sir, I have the advantage of having familiarity with that trial. I suspect that is an application that could not possibly be made until judgment on the pass-on trial because Mr Merricks has, in the context of that trial, run a high pass-on case, and that has obviously incurred a certain amount of costs in people dealing with that, particularly from merchants who are running a low pass-on case. So obviously parties like Visa are running a high pass-on case anyway.

So I think the basis to claim costs would only be if

the outcome is adverse to where Mr Merricks would have been. If essentially he has been there and he was broadly saying the right things, it would be difficult for them to recover costs.

So I think it will be -- it is not the fact that he has slipped out of the litigation which is the issue, it is whether he was broadly adding positive costs or negative costs, so I think it will be --

THE CHAIRMAN: Is his position going to be actually decided in the judgment, because it is a different period, is it not?

MR COOK: Well, it obviously will not be, but a basic position of broadly high, broadly low -- I mean there is obviously a range of different things that can be done there. But I think no party will be able to say Mr Merricks had obviously incurred unreasonable and wrong costs, until we get to the resolution of that trial and a judgment that says, you know, did he take the wrong approach, did he look at the analysis the wrong way. That will not be an assessment of his position per se, but it will provide material for parties to say he was in the wrong or in the right for costs purposes.

THE CHAIRMAN: Or, rather, he caused them to incur high costs which will be the question, presumably.

MR COOK: Absolutely, yes.

THE CHAIRMAN: (Inaudible) costs.

MR COOK: Absolutely. But did he -- absolutely, as you say, did he result in parties incurring costs wrongly because he was taking the wrong position, so I think that is, I am afraid, many months away --

THE CHAIRMAN: -- so I think we will just have to reserve, apart from any distribution, until that can be resolved, and that seems --

MR BREALEY: You did indicate very early on, sir, obviously the parties do need some clarity as to the order because of the significant costs that could be expended on the Trial 2B, as you indicated.

THE CHAIRMAN: Yes. That is why we gave --

MR BREALEY: Yes, that is what we are doing.

THE CHAIRMAN: -- otherwise we would not have said anything.

But there were some, I think -- I do not know how significant they are, but all the costs in this case, almost none of the costs are insignificant -- where there are costs still to be paid where there are some disputes between Mr Merricks and the Funder.

MR BREALEY: There are two disputes, in no particular order. There is a dispute that the Funder is refusing to pay any costs, basically since Novemberish time, insofar as it considers that the costs have been incurred by

Mr Merricks adverse to the Funder's interests. So in other words, we had assumed that the settlement were project costs, and in December the Funder said "We will comply with the terms of the LFA". Then the Funder applied to intervene. Mr Merricks was given a right to respond to the significant statement of intervention, including responding to the evidence.

The responsive evidence was served on 12 February and at almost midnight that same day the Funder said "Well, we are not paying you the costs of any work you have done which is adverse" --

THE CHAIRMAN: So basically -- just cutting in -- costs of this application.

MR BREALEY: Correct, correct.

THE CHAIRMAN: Yes, I do not think -- but you will tell me if it I am wrong -- that this is for the Tribunal to resolve that dispute as to what Mr Merricks is entitled to recover from the Funder under their agreement. That is a dispute under what Mr Merricks is entitled to under the LFA, is that not right?

MR BREALEY: Well, it is. We were hoping that you would interpret the LFA in a certain way, but if not we would ask for a certain sum to be taken out of one of the pots.

THE CHAIRMAN: Or at least reserved until that dispute is

resolved.

MR BREALEY: Or reserved because --

THE CHAIRMAN: I think because -- there is provision in the LFA for resolving such disputes, I think.

MR MALEK: Mr Brealey, normally what would happen is that your interests and the Funder's would be aligned and at the end of this case you say "Look, we want the costs of this distribution exercise to be taken out of the settlement sum", and then the Tribunal will say "Well, let us-- give me a breakdown of the figures," look at the figures and then we come up with a figure.

MR BREALEY: Correct.

MR MALEK: That is what normally happens. But you are saying because of the complications that route cannot be taken.

MR BREALEY: Well, as from when they received BB8, et cetera, they have said "We are not paying any costs which we consider adverse to our interests", which does raise -- I mean it raises a -- one could say it is a contractual dispute, but one can also say that it is subject to the Tribunal's discretion dispute, because if that is the case every time a Funder disagrees with the settlement and then says "We are not paying any costs of the settlement", it may well be that you -- that is a very strong inference as to whether the Class

Representative will go for the settlement. It puts the Class Representative in a very, very sticky position.

MR MALEK: Or you -- if you agree with the Funder, you could possibly say that "We both agree that it can come out of the settlement sum, subject to the Tribunal's approval, of the figure".

MR BREALEY: Yes, and that is essentially where --

MR MALEK: That is simpler, and avoids this arbitration process and unnecessary bitterness, and it can be resolved relatively quickly.

MR BREALEY: Well, that is what we were thinking.

MR MALEK: But then you two would have to agree to put that forward.

MR BREALEY: Yes, but I am not sure -- so if we cannot agree, we would say that the costs are project costs. So we say that you can have a look at the LFA and say the settlement costs are the proceedings, and I appreciate it puts the Funder in a rather strange position, but nevertheless that is the choice it makes if it wants to intervene and oppose the settlement. But the flip -side on a Class Representative, are they ever going to seek a settlement if the Funder says "Right, we are pulling the plug on any funds, you will not get the costs back". I mean that is a dilemma.

MR MALEK: -- this application has to be paid for. The

normal thing is it is going to be paid for out of the settlement sum, one way or another, and if you and the Funders are going to be pragmatic about it, you would say, well, look, we will prepare a schedule of costs, explain it, and the Tribunal, perhaps on a rough and ready basis, will come up with a figure, as I did last summer on one of the other cases, and that way you do not have an expensive taxation exercise. These fees are all relatively recently incurred. It is not going to be difficult to come to whatever is the appropriate figure. There may be a haircut, there may not be a haircut.

The other problem is you just leave it all open in the way that it looks as though is a possibility here, which is not satisfactory I would have thought for either of you.

MR BREALEY: Well, not even from a policy point of view on collective actions. If every time a funder says "I do not want you to settle at this sum and you will now pay the costs, I am going to intervene and you are going to have to find the costs from somewhere", there is a policy issue there.

THE CHAIRMAN: But even if they were paid by the Funder, the Funder would seek reimbursement of the settlement sum anyway.

MR BREALEY: Correct, and that is essentially why we say

that it is a question for this Tribunal and it should come out of one of the pots somewhere and it can be taxed -- it could be subject to taxation.
MR MALEK: Well, one would hope that there would be some sense between the lawyers -- between the two parties that they can discuss it amongst themselves, and if you can come forward with a proposal along the lines that we have indicated, then we, subject to what the other panel members say, we would be content to come up with a figure, to summarily assess it, and that will come out of the settlement sum, but if obviously you cannot agree then we are going to have to go down possibly this other route.
THE CHAIRMAN: Would you be content with that approach?
MR BREALEY: Content to try and agree a sum?
THE CHAIRMAN: Well, to try and agree, but if you cannot agree then you submit the costs that you have incurred and which you seek to come out of the settlement sum.
MR BREALEY: I would have to take instructions.
MR MALEK: Let us break it down. You have got your costs, okay? They have objected to them paying for those costs --
MR BREALEY: Sorry, I beg your pardon, sir. We have got?
MR MALEK: You have incurred these costs. They are saying "We do not want to pay those costs", for the reasons

they have given.
MR BREALEY: Well, no reasons but --
MR MALEK: At the end of the day the Tribunal accepts that those costs have to be met, because otherwise you cannot have settlements and it is a discouragement to settlements --
MR BREALEY: Correct.
MR MALEK: -- and we also think that it is appropriate for those figures to come out of the settlement sum.
MR BREALEY: Correct.
MR MALEK: So it can go down -- around in a circle, ie that they -- well, the original idea, which does not help anyone, but the way to cut it through is if you agree and the Funder agrees that those costs can come out of the big pot, the settlement sum, subject to any assessment by the Tribunal on a solicitor and own client basis to see whether or not it is appropriate, that is all.
MR BREALEY: I ...
(Pause)
Maybe at some point we can, at the short adjournment, we can try and --
THE CHAIRMAN: Yes. It seems to us that is the sensible way of dealing with it. I am not sure, speaking for myself a bit off the cuff, the Funder even needs to agree,

because if we are assessing it and it is coming out of the settlement sum it is not going to be -- there is no bill for the Funder to pay.
MR MALEK: But then the Funder may say there is less of a cake to take the piece out of.
THE CHAIRMAN: It reduces the total of the cake.
MR BREALEY: But the bottom line is that the Class Representative is protected and the policy behind it is protected.
THE CHAIRMAN: Yes.
MR MALEK: The fact is you made an application for a settlement, the settlement has been approved subject to finalisations, no order yet, and that you should get your costs and that one way or another it is going to come out of the fund, whether it goes directly or indirectly. But we are content that, if you prepare your cost schedule, that we will review that cost schedule on a solicitor and own client basis and come back with a figure, which may be the same figure, it may be less, on a rough and ready basis.
MR BREALEY: Yes, I understand, and clearly I --
THE CHAIRMAN: Well, you take instructions.
MR BREALEY: I am not the person to --
MR MALEK: We will all take instructions when we have a break.

THE CHAIRMAN: So that is the first dispute. You said there are two disputes.
MR BREALEY: So that is the adverse -- then the other one is the costs that have gone slightly over budget. This is in Mr Bronfentrinker's statement and essentially I think this is the same point, otherwise things are going to be left completely hanging in the air.
THE CHAIRMAN: Just give me ... which statement is this?
MR BREALEY: This is his ninth. Sorry, there is the issue of the confidentiality that the Tribunal --
THE CHAIRMAN: Can you point us to the paragraph.
MR BREALEY: Yes, on the costs that have gone slightly over budget it is paragraph 25.
(Pause)
That I do not think is going to matter because this is the settlement -- there was a budget for settlement. That has gone over but I think we have just sorted that.
THE CHAIRMAN: So that is part of this. That is a sort of subset.
MR BREALEY: We have got Trial 2 costs and that has gone slightly over budget. We see that at paragraph 29. So:
"An amount of ... has been incurred in respect of Trial 2B of which ..."
So a lot of this over budget will be for Trial 2B which could well be avoided as a result of today's

order, but in a nutshell what it is, is that the Funder -- there used to be a total approved budget from which Mr Merricks could draw, and now there are mini budgets, one for the pass-on trial, one for the settlement, and --

THE CHAIRMAN: I thought this paragraph 29 said that if we go ahead with Trial 2B, a further sum of X will be spent, making a total overspend on pass-on of at least Y, but Y and X are almost the same.

MR BREALEY: They are, so I am -- I would have to take -- when we made the application we did not know what the result was, took the litigation risk, but I will have to just check when we -- as to whether this is still a live issue. Hopefully it will not be.

THE CHAIRMAN: There is also a question of the Funder having paid the previous funder, or is there not, which is rather more ... I thought I saw, which you are objecting to. Is that not right? That is a rather more significant sum.

MR BREALEY: I will need to double check that --

THE CHAIRMAN: -- for work done before their funding agreement was terminated.

MR BREALEY: Yes.

THE CHAIRMAN: I think Innsworth has paid for that, as I understand it -- Mr Béar is nodding -- and therefore

wants reimbursement of that amount, and I think, as I understood it, Mr Merricks is saying --

MR MALEK: I thought it had not been repaid. My understanding was they had agreed to repay it but there was no actual repayment but maybe I am wrong.

THE CHAIRMAN: I think someone is nodding so --

MR BÉAR: Maybe I can help by referring you or reminding you of something which we should not bring up, or only in redacted form, which is IBA/2/29, Annex 2 to Mr Garrard's witness statement.

THE CHAIRMAN: Yes. It is probably Mr Garrard who deals with this in his witness statement.

MR BÉAR: He does.

THE CHAIRMAN: That is where I --

MR BREALEY: It is paragraph 10, 9 as well.

THE CHAIRMAN: It is in Annex 2 to the witness statement of Mr Garrard on page 29.

MR BÉAR: Yes, I think they are connected.

MR BREALEY: It is summarised in Mr Bronfentrinker's ninth at paragraph 10. So he says. 9 and 10 in Bronfentrinker 9. So we have only recently got the agreement but -- and it is 2.4 million basically.

THE CHAIRMAN: Well, plus --

MR BREALEY: Plus quite significant interest.

THE CHAIRMAN: I am not sure if the sum is confidential. It

is said to be confidential though I am not sure why. It is a long time -- it is 2016.

MR BÉAR: It is in the agreement between the two Funders so I do not want to trespass on that without a reason.

MR MALEK: Mr Brealey, what is your objection to them?

MR BREALEY: So, Mr Merricks' position has always been that as the former funder terminated the litigation funding agreement after the CPO was initially refused, it has no right to any recovery from a subsequent settlement, and this was a view he conveyed to Innsworth at the relevant time. So they entered into the agreement to pay the former funder in the knowledge that Mr Merricks considered that he had no liability ... "

Sorry.

THE CHAIRMAN: Well, we are not sure -- well, this is quite a detailed dispute, both under the -- looking at the original agreement between Mr Merricks and Colfax, and the agreement between Innsworth and Colfax, what the rights are. I am rather reluctant to take up time on that. One party seems to be saying this is actually costs incurred by Colfax, not a shared -- not a return on its investment, but I am just thinking of what is a practical way --

MR BREALEY: Shall we just put it in writing?

THE CHAIRMAN: Because otherwise we are going to spend

another hour having to look at contracts which we do not have.

MR BREALEY: If we can put it in writing maybe for Tuesday?

THE CHAIRMAN: I think that seems sensible.

MR BREALEY: Then we have the full picture.

THE CHAIRMAN: Just a moment. Mr Béar, the suggestion is that you -- at the moment these points are dealt with very shortly, as we have seen, both by your client and by Mr Brealey's client, that you put in written submissions on this point and we decide it on the papers and (inaudible) need to look at the contracts which we have not got.

MR BÉAR: No, I understand.

THE CHAIRMAN: It would be a disproportionate use of time. One can see we could spend an hour on this and we have other things to deal with.

MR BÉAR: No, that I --

THE CHAIRMAN: Are you content with that course?

MR BÉAR: In relation to the Colfax --

THE CHAIRMAN: In relation to the Colfax.

MR BÉAR: -- point, yes. There was a -- I am, yes, and --

THE CHAIRMAN: Well, in that case shall we just say -- fix a time when you put in your written submissions and then we can move on.

MR BÉAR: When the parties put in written submissions, or

when we do or ––
THE CHAIRMAN: Yes, well, when –– should it be simultaneous?
MR BREALEY: Innsworth should go first because they have got the contracts.
THE CHAIRMAN: You can explain more fully the basis. If you can do that by some point in the course of next week. What is convenient for you?
MR BÉAR: Seven days, we would be happy to do that. Will you just give me one moment, sir?
(Pause)
We will give you whatever we can. We may not have had everything. Of course Mr Merricks will presumably have had all of the agreements that he entered into. We are not sure whether we have had all of the agreements.
So Mr Merricks entered into an agreement with a Burford affiliate. I do not know if –– I am being told we may not have seen a complete unredacted version of that. I am not sure it matters.
THE CHAIRMAN: Yes, but you obviously saw enough to enter into an agreement with them that you should pay them, so ––
MR BÉAR: Exactly. It may be that Mr Merricks has slightly more detail, whether it is relevant or ––
THE CHAIRMAN: Yes, but you are making the positive case so I think you should go first, and Mr Merricks to respond,

what, seven days thereafter?
MR BREALEY: That is perfectly fine.
THE CHAIRMAN: I mean, if you then learn something you did not know –– but I would have thought if there is an agreement you have not got and you think you need, the sensible thing is to write to Mr Merricks' solicitors before you make your submissions saying "Could we see the contracts so that we can then finalise our submissions", otherwise you have to go back and forth.
MR BÉAR: So we should avoid that.
I think there were one or two other points that were mentioned.
In relation to the costs of the application, Innsworth have said that they are prepared to pay for the costs which would have been incurred in any event, so that they are not saying "We will pay nothing", but unfortunately they have not been shown any bills yet, so Willkie Farr have taken the view, rightly or wrongly, that they do not want to provide any information, so obviously my clients are not going to sign a blank cheque to Mr Bronfentrinker. That would be unwise.
The costs that are –– that is costs that would have been paid in any event. Obviously that might be subject to anything that you say in your ruling because it may

be, I do not know, that you have concerns about the process you mentioned and those may extend to the application. So I think we would want to wait and see what was appropriate in that regard, but obviously the same would go for costs of the actual hearing, about which there might be a lot to be said, not a simplistic approach of "Oh, well, it was granted and therefore", et cetera. We think it is likely to be a little more nuanced than that.
Finally, the approved budget. That is in a different category. It is very simple. Innsworth –– there is a contract, and if that contract is to mean anything it must mean that Mr Merricks and his solicitors simply have no right to claim for amounts over the approved budget. That is a hard contractual stop, and if they run over that is at Willkie Farr's risk, and they just are not going to get paid because there is a budgetary cap.
Willkie Farr of course said to you, on 25 November last year, in the letter we have looked at, that they were satisfied that there was funding available for all ongoing workstreams. So they are at risk, I am afraid, and that may mean that the bonus is a little less this year.
THE CHAIRMAN: Well, it may be that that point is so small

it goes away, I think.
MR BÉAR: I do not think it is going to be that small.
THE CHAIRMAN: It is not that small? It is not just the costs of Trial 2?
MR BÉAR: I am sorry?
THE CHAIRMAN: It is not just the costs incurred on Trial 2, preparing for Trial 2B?
MR BÉAR: The ––
THE CHAIRMAN: Which is what we looked at a moment ago.
MR BÉAR: The figures that I have seen are not de minimis figures.
THE CHAIRMAN: I see.
MR BÉAR: Let us see, they are –– yes, it is in paragraph 29 of Mr Bronfentrinker's ninth statement. Well, anyway, you can see the figures in paragraph 29.
THE CHAIRMAN: That is the point. Paragraph 29, it looks as though that is about expected further costs, but they have not –– "will be spent".
MR BÉAR: Well, we are now on 21 February, so I am assuming that with three-fourths of the month ––
THE CHAIRMAN: Yes, well, as this witness statement was dated the 18th, I rather assumed that it means spent after 18 February, so ––
MR BÉAR: I do not ––
THE CHAIRMAN: That is what Mr Brealey is going to take

instructions on.
MR BÉAR: Yes.
THE CHAIRMAN: But that is the point you are focusing on, is it?
MR BÉAR: In a sense ––
THE CHAIRMAN: –– other ––
MR BÉAR: In a sense, whether the overspend is one amount or another, it is all an overspend, and unfortunately that is how the contract works, and the contract we say must be ––
THE CHAIRMAN: Yes, but if it is the difference between those two figures, I do not think ––
MR BÉAR: No, if it is the difference between them ––
THE CHAIRMAN: (Inaudible)
MR BÉAR: No, absolutely. I am saying if there is a bigger overspend, that is a different matter.
THE CHAIRMAN: Yes. Well, we have your submission on that.
MR BÉAR: Thank you. I would not have troubled you for that amount, obviously, no.
THE CHAIRMAN: Is there anything else ––
MR BREALEY: I think if we can –– can we just finish off the costs, maybe?
THE CHAIRMAN: Yes. What else is there on costs?
MR BREALEY: Well, I think there are two –– there is the last one which is –– well, there are two actually.

Paragraph 30 of Bronfentrinker 9, 30 and 31, is dealing with the costs that the Funder is seeking against the Class Representative for the confidentiality application.
THE CHAIRMAN: Yes. We said we would assess.
MR BREALEY: Assess. We have at paragraph 31 –– it was a single letter of one and a half ––
THE CHAIRMAN: I am not going to assess them before the submissions. I have said that before.
MR BREALEY: Okay.
THE CHAIRMAN: That costs assessment (inaudible) on the papers.
MR BREALEY: Okay, then that is –– so then that leaves, and I think Mr Cook will support me, we would seek the costs –– maybe this is premature, but the costs certainly of, at the moment, the just and reasonableness, because ––
THE CHAIRMAN: Well, no, you will wait for the judgment.
MR BREALEY: Okay.
THE CHAIRMAN: No, what it leaves is the distribution arrangements to the Class and the Funder's return, which are the two major points that we need to deal with which is why I am trying to rush you along.
MR BREALEY: We have done the legal costs ––
THE CHAIRMAN: Yes, we have done the legal costs. I think

we will then take a five–minute break and we will then come back and look at the question of the Funder's return.
Sorry, Mr Cook.
MR COOK: There was an issue raised by Mr Béar in relation to whether the Tribunal has the power to approve a collective proceedings approval order in any terms other than those originally put forward, and that obviously is a matter which is a matter of great concern to my client.
THE CHAIRMAN: Yes.
MR COOK: So I mean that is something on which I wish to be heard if the Tribunal, you know, has any concerns in relation to that matter.
THE CHAIRMAN: Yes, I think we would like to hear you, but I think as we came back at 1.30 we need to take a break. We will do that straight away.
(3.06 pm)
(Short Break)
(3.19 pm)
THE CHAIRMAN: Yes, Mr Cook.
MR COOK: Yes, sir. I mean, as I understood Mr Béar's primary submission here, it is that the Tribunal can only approve or reject the draft order that is directly in front of it. With respect, that is a bizarre

submission in circumstances where Mr Béar's client served this morning, at about 9 o'clock, an amended draft of the CSAO setting out the different terms that it would be inviting the Tribunal to make, so, you know, this position and the idea –– he called me opportunistic, I can return the compliment.
It is even more a bizarre submission where, certainly in my experience, in the vast majority of cases where one comes before a court with an application, the draft order that you ask for is not what the court gives you, something rather different tends to be made.
THE CHAIRMAN: I have never, in all my years as a judge, taken the view that when I am presented with an order I have got a binary choice.
MR COOK: No. So that is my submission, frankly.
Now, in practical terms normally that is dealt with simply by the court deciding to make a different order. There are extreme situations where what arises during the course of the hearing ends up being significantly different, where the court may require formal amendments to applications, but that is, you know, extreme examples of something which is radically different from what was asked for, so we would say that simply is not appropriate.

There is an overlay obviously in these circumstances of notification of the hearing, third parties, particularly the Class members, having the opportunity to participate where, if something that was being talked about was completely out of the realms of what was notified in advance of the hearing, that would be something that the Tribunal would have to bear in mind, but if one is talking about, you know, amendments to individual pots, numbers and points like that of distribution, and we know that nobody externally has chosen to intervene other than the Funder, that is simply not the territory in which we are in.

So we say exactly the same is true here. The Tribunal obviously cannot compel the parties to do something different from what is in the settlement agreement, but the settlement agreement makes no reference to distribution in terms of distribution, because that is not a matter on which Mastercard has any dog in the fight generally.

So it is not part of that settlement. That is exactly -- in terms of distribution, as the acting president rightly observed during the course of submissions, that is dealt with separately in the application for exactly that reason. There is the settlement and the settlement sum, which essentially is

a single lump sum with the effect of that being a waiver of claims, and those are the core terms of that, and that obviously is what the Tribunal said is just and reasonable already.

When it came to distribution -- and this is paragraph 67 of section E of the application -- it was very much presented firstly as being a matter for the Class Representative, not Mastercard, and then being "Here are some proposals". Ultimately it will be for the Tribunal to decide what is appropriate in accordance with its role.

So with respect, we do say the idea that a judge's role is a binary "Take it or leave it", well, it would bring our entire court system to a grinding halt and is simply not the way that business is done.

MR MALEK: Mr Cook, yes, a lot depends on the structure it is done, so you may have a settlement agreement which in itself has the pots embodied, and so the Tribunal may have the position it says "Look, we are not happy with the way you have dealt with the pots, I want to be -- aim to have the ability to adjust the figures for costs, fees and disbursements at the end of the day", and then you can say "Well, that needs to be amended if this settlement is going to be approved".

But this one is not that type. This one is you have

the settlement, it is a 200 million figure, and the rest is really a question of the terms of the order.

MR COOK: Exactly as you say. In effect, you could not compel us to change the terms of our settlement agreement. You can make very clear that, you know, as will ordinarily happen, unless there is a change it will not be approved, and then we have the chance to go away and amend or not. Depending on the scale of that, it might be something that could be done instantly or there might need to be a new process of notification, but yes, beyond matters that require an amendment to the settlement agreement, it is simply the terms of the order which the court always has within its discretion.

MR MALEK: Yes, thank you.

THE CHAIRMAN: Thank you.

MR BREALEY: Can I just formally endorse that, and I thought we had made that plain at paragraph 67 of the joint application.

Can I just -- before we move on to the more important matters, there is the issue of the Trial 2 costs. Is it possible that I can -- we can put that in a very short two-pager next week as to what the position is? Costs have been incurred in February, primarily by Compass Lexecon who have continued to prepare for Trial 2B, but I would want to give chapter and verse on that

and then we can go through in more detail the budget and the contract, so I would ask if we could do that very early next week.

THE CHAIRMAN: Yes.

MR BREALEY: Then just lastly, related to that, I have been asked by Mr Bronfentrinker and Mr Merricks that is it possible that I can put on the record -- because of the Compass Lexecon thing -- that as from today, Mr Merricks can withdraw from the Trial 2 pass-on or -- because obviously there are people still waiting, their costs will be incurred and, like I say, from a personal point of view there are very many barristers who have asked me what is going on. But if the Tribunal could indicate whether it is possible for Mr Merricks to say formally that "I am withdrawing from the proceedings", or maybe you could indicate some time very soon, or -- but it is quite important, because costs --

THE CHAIRMAN: No, I understand that.

MR BREALEY: -- are incurring on a daily basis.

THE CHAIRMAN: Yes. What we suspect is we may have to sit a bit late this evening to finish. We can sit until 5 o'clock. If we do that, we will need to take another short break and we will decide that in that break.

MR BREALEY: Of course, thank you.

THE CHAIRMAN: We now move to the two other aspects which

may be interlinked, I do not know, which is the proposal for distribution to the Class per capita or with a fixed cap, and distribution to the Funder ––

MR BREALEY: Yes.

THE CHAIRMAN: –– out of the 200 million, after deducting legal costs, or the sum reflecting legal costs, and certain other costs to be incurred like Epiq and so on. Yes, and any cy–près award to the charity. So do you want to –– they seem a bit interlinked, in a way ––

MR BREALEY: They are. I mean, from Mr Merricks' point of view –– taking the legal costs to one side –– he wants a high take up and he wants money for the person who fills in the form on the computer, and that is why he has suggested a £45 per head on the basis that there could well be a 5% take up, and that is 2.2 million, and I think that I should leave it to the Funder to take over this because it depends on the return.

We want as high as possible take up for the Class, and that is why we have moved away from the per capita which would only have been £4.50. So I can take the Tribunal through the two reports if you want me to, maybe I should, because the Epiq report says at £45 you might get 5%, and at £4.50, which is where the Funder wants to come in, it will be like 1%.

The Portland Survey has it slightly higher, and

I can take the Tribunal through that, if you wish, but both reports support the fact that there will be a higher take up the more money that they get.

MR MALEK: The fact is that as at today, no one knows what the take up is going to be.

MR BREALEY: No.

MR MALEK: At the end of the distribution process we will know what the number of people are.

MR BREALEY: Yes.

MR MALEK: Then at that stage we will know how much to give each person for sure.

MR BREALEY: Correct.

MR MALEK: But you are proposing a flexible approach is going to be a minimum of 45 hopefully, and then a maximum of a certain sum.

If we agree that 45 is a minimum sum but then you get higher than 5%, let us say you get 10%, it would have the result that if you are limited to 100 million there is going to be far less than £45 each available.

MR BREALEY: Yes, but it is better than the per capita at £4.50.

MR MALEK: It is, but then let us say that if –– if we know that the –– let us say that the money over the 100, to what extent that is free, then there will be a lot of –– there could be an element of slackage, so if you get

more than 5% then you can eat into whatever the sum is over 100 million. But what the Funder will want is the Funder will probably want certainty to know "How much am I going to get out of the whole cake?"

But on one view –– I am not sure –– the debate could be that certain decisions are best made once you have the results of the distribution, but it may be that is not satisfactory and that people want certainty, insofar as it can, by having the –– let us say the reserve portion for sums which are not going to go to the Class members fixed as at now.

MR BREALEY: Well, I mean it is a very, very difficult exercise and that is why we had three pots. We took the view that there could be a 5% take up. We did not want the £4.50, because the Funder said "£4.50", and we said "Well, the Class is only going to get something like 1% of the 200 million". That is why Mr Merricks said "I never promised £4.50, but I have got to alter it so that there is a higher take up and they get more money", and that is why essentially we fell out with the Funder because we said it should be a higher take up and more money.

THE CHAIRMAN: What about –– where did the 70 come in?

MR BREALEY: Well, essentially the way that it would have worked is that Pot 1 is ringfenced for the Class, so

100 million in Pot 1 is ringfenced for the Class. If 3% or 4% take it up they would get more than 45. If there is more than 5% you would get a minimum of 45 in Pot 1 and then you might eat into Pot 3, so there was slack in Pot 3 if there was a higher than 5% take up.

THE CHAIRMAN: But you would put a cap on the individual –– even if –– if take up is only 3%, you wanted a total cap.

MR BREALEY: At some point there has –– you would say –– we put a cap on at £70 because then you could say "Well, that is a fair compensation", then it may go either to the Funder, and if the Tribunal said no, it could go to a charity.

So we took, I think, the reasonable view that we will go for 45 on the basis that there would be a 5% –– possible 5% take up. That is 2.2 million consumers, which is quite a significant amount of consumers, each getting £45.

That then leaves you the other 100 million to play around with, with the Funder, getting the money back, the return. So we are criticised, but we are conscious that the Funder needs a return and it gets a return, and there may be some sum for charity. But if it is greater than 5% and they want –– because the £45 is in the notice, so the notice is saying "Claim £45".

THE CHAIRMAN: Well, that is the -- we have not approved that notice.
MR BREALEY: No, no, you have not approved it.
THE CHAIRMAN: It would be then?
MR BREALEY: It would be. So it is in the draft.
THE CHAIRMAN: The draft.
MR BREALEY: So the person who is going to fill in the bank details and clicks, thinks that they could get 45, and if it is higher, and the Portland Survey kind of indicates it could be higher, but then these reports apparently overclaim, so it looks as if the money is on some sort of 5% take up and, if that is the case, over 2 million consumers would get £45, which is not -- it is a good sum, and then the rest is left for the Funder to get its money back, get a return, and if necessary for charity to have some part of it, and that is the way we structured it.
MR MALEK: But then if, for example, the take up is let us say higher, then you -- we would have the ability to use some of the money over the 100 million to make sure, as far as it is practicable, that everyone gets something and ideally a minimum of £45.
MR BREALEY: That is the scheme of Pot 3.
MR MALEK: Yes, that is the slack.
MR BREALEY: That is the slack and it just means that

the Funder gets less. We thought that was the fairest way, because Mr Merricks saw the Funder, the obligations under the LFA, because there is no undistributed damages. So clearly you have to have an eye for the Funder getting a return, and we thought that was the fairest way: three pots, guaranteed 100 million, thinking there would be a 5% take up. Pot 2, Funder gets the money back subject to what the Tribunal is going to direct. Then the Pot 3 has the flex.
THE CHAIRMAN: The alternative approach is to fix a return for the Funder on the amount it has expended on costs and the amount it has had to pay out and to fix a reasonable return.
MR BREALEY: You could do -- you could do that but --
THE CHAIRMAN: Then you would have a pot which can be used for distribution. So you still have your -- effectively your three pots, but the pot -- I cannot remember if it is 2 or 3 in what we are talking about, I think it is 3, but then it will have a fixed amount in it.
MR BREALEY: You could say a reasonable return, but -- I mean I am sure the Funder will speak for itself. The Funder might say "Well, look, I thought I would get my return out of undistributed damages. If the take up is low then arguably I should get a higher return, so do not fix my return, I should get a higher return if the

consumers do not take up what is offered to them", so you can see it both ways. The Funder would, I think, strongly argue the latter.
THE CHAIRMAN: But then again, as with legal costs, we wish to have an eye on how much of the total return be given, but this is just the 200 million settlement, and not a 5 billion, let alone 14 billion settlement --
MR BREALEY: It is.
THE CHAIRMAN: -- and that the return should be proportionate to the success or failure of the litigation.
MR BREALEY: All I would say -- I understand exactly that. I come back to the 40 million. It is a slightly unfair comparison to the 200 million, because everybody was working towards a higher sum, and the Tribunal's judgment has cut it down.
But maybe that is the way -- maybe that is the way forward, but we do have the Pot 2. You can ringfence some of that to take that out. But the bottom line is we have done the research, so -- and it has been expensive to get Epiq and Portland, and you have got 200 million and are you realistically going to get more than 2.2, 2.5 million consumers?
At the moment -- I mean, I just do not. As you say, Mr Malek, I do not know. None of us knows.

MR MALEK: But the good thing about this case is that they have done the research and a lot of work has been done. Before we did not have that.
MR BREALEY: Correct.
MR MALEK: It has been really useful. It has not been a waste of money. I think it has been really useful.
MR BREALEY: We did that because of your directions in previous cases.
MR MALEK: Yes, I think it is a sensible thing to do, and it is very hard to know where it is going to be, so there has to be some sort of flexibility in whatever we do.
MR BREALEY: Pot 3 was designed to be the flex.
THE CHAIRMAN: Yes. I mean, I think one of our concerns is that we do not want -- we would be concerned about an outcome where the lawyers and the Funder -- the lawyers having been paid by the Funder -- get a return, a total payment, which seems disproportionate to what the Class members are getting.
MR BREALEY: Well, I understand that, but also if the Class members do not take it up, where does it go? Now, you can say some of it goes to charity, clearly, but the lawyers and the Funder have put the time and effort and the risk in and they should get remunerated for it.
THE CHAIRMAN: Oh, yes, I mean we are not suggesting the Funder does not get remunerated. Clearly it must,

but it is all a question of degree.
MR BREALEY: All a question of degree. But if the Class members do not take it up, and let us assume that only -- and £45 is not an insignificant sum for the consumer who probably does not even know about interchange fees. It is £45, but it could be higher, but the surveys are looking at a 5% take up, and really I think that looks generous, but if it is 5 they get £45. If it is only 3%, then under Pot 1 those consumers will get more.
THE CHAIRMAN: If it is 10%, then?
MR BREALEY: You have the flex -- you get £45 and you get the flex in Pot 3.
THE CHAIRMAN: What will that -- if it is 10%, what will that do to Pot 3? Because that will exhaust Pot 1.
MR BREALEY: Probably. It will exhaust -- so either you would say -- either you would say "Well, we will go from 45 to 35", because Pot 3 is designed to give the Funder some return. So if the Tribunal is saying "I would like to have a reasonable return", you probably know what is in the Tribunal's mind, you could put that into Pot 3 and see what happens if the Class takes a percentage of Pot 3.
That is the way it was designed, that the --
THE CHAIRMAN: Yes, I understand. Just -- I have not got

the figures, but if it were a 10% take up then the total would be -- that would be, what, 8.8 -- no, it would be 4.4 million, would it not?
MR BREALEY: Yes. Yes. Then --
THE CHAIRMAN: If they were all to get their £45, how much would be left in Pot 3?
MR BREALEY: Has anybody got a calculator or got a degree in maths? Well, it would be ...
MR BÉAR: 106(?) million.
MR BREALEY: Yes -- no, if 2.2 million at 45 -- I think that might take up the whole lot, does it not? (Pause)
Yes, I was going to say, it takes up nearly the whole of the settlement. If 2.2 million is going to take up Pot 1 and 100 million at 45, you double it, it takes the whole settlement --
MR MALEK: Almost the whole of --
MR BREALEY: That is why it would have to go down, I think.
THE CHAIRMAN: So it would have to go down. But then the question is does one allow it to go down to what, and what is -- because otherwise you could scoop the whole of Pot 3. Do you understand the point I am making?
MR BREALEY: I do.
THE CHAIRMAN: So if it is 10% they are obviously not going to get £45 each, because there is Pot 2 which is taken out, so we have got, for argument's sake, 150 million to

keep it simple.
MR BREALEY: Yes.
THE CHAIRMAN: It will exhaust Pot 1. How much is taken out of Pot 3 when you want to leave some return for the Funder? Obviously it will not be 179 million or whatever they are talking about, but there ought to be something for the Funder, otherwise they might end up with no return at all.
MR BREALEY: That is what Mr Merricks has really strived to ensure that it does not get. That is why we did the surveys and we looked at 5% and we thought "Well, we are pretty safe then on" --
THE CHAIRMAN: Well ...
MR BREALEY: But if it is 8% or 9%, then it just has to go down to £25 or --
THE CHAIRMAN: Yes, but are you going to allow the whole of Pot 3 to be exhausted? That is my question. Or is a part of Pot 3 going to be reserved for the Funder in any event?
MR BREALEY: I think the straight answer is -- I can speak for -- clearly Mr Merricks wants the best for the Class, but he also has -- he also knows that the case is being funded by Innsworth and he has -- he genuinely wants the Funder to have a certain return, and I think so does the Tribunal.

THE CHAIRMAN: Yes.
MR BREALEY: The question is how much is the return. Innsworth wants more than Mr Merricks.
THE CHAIRMAN: Yes.
MR BREALEY: So really it depends what -- we have put forward the proposal, and really it is now for Innsworth and the Tribunal to work out, I would imagine, what the reasonable return is and where that would leave the Class, but --
THE CHAIRMAN: Well, that is why I am questioning you on your proposal. Because if -- of course if we know that no more than 5% will claim, this all works. But if it turns out that in fact -- and I have not done all the permutations on the maths -- 7% will claim, it may be, if you are saying we are trying to get them close to £45, well, they will not get £45, they will get less, but how much less if you allow them to scoop the whole of Pot 3, in which case the Funder's return is zero --
MR COOK: If it helps, sir, Annex 4 to the application does run a whole series of permutations of -- and 7% take up is one of them -- which shows what the numbers would be, but also if you take an extra 10 million from whichever pot it is, an extra 20 million. So this illustrative work has been done for the Tribunal.
MR BREALEY: Yes. Around about 2.9 million --

THE CHAIRMAN: Just a minute. Annex 4.
MR COOK: It is page 7 -- sorry, page 6. {NC-AB1/6/6}. It continues over the page to go up to a much higher level of (inaudible) 50.33%, bizarrely.
THE CHAIRMAN: That has not been printed out for us.
MR COOK: It is on the screen now, sir.
THE CHAIRMAN: Is this the table to the joint experts' report?
MR COOK: Yes.
(Pause)
THE CHAIRMAN: So just to see if I have understood this, this is saying that if -- is this right, that if there is 7% take up, then to provide £45 per Class member you would get £32.35 from Pot 1, and to get up to £45 you would have to take 40 million from Pot 3, leaving under £1 million for the Funder. Am I reading that correctly?
Well, this I think -- I think it seems to be saying that it is ... is that correct? Am I reading that correctly?
(Pause)
MR BÉAR: I have to say I do not think we are benefiting from Mastercard putting these kind of permutations in front -- it is not an issue that they have any skin in the game on, with respect.
THE CHAIRMAN: It is helpful to have an arithmetical

calculation. This has come from the joint expert. It is just maths, Mr Béar.
MR BÉAR: It is just maths.
THE CHAIRMAN: As long as we can understand it ...
All I want to know is -- the likelihood, apparently, is that with £45 there will be 5% take up, but nobody actually knows. Suppose there is 7% take up. I can see that with 7% take up -- as I say, it is just maths -- then the 100 million will produce £32.35 per Class member.
MR BÉAR: Yes.
THE CHAIRMAN: Yes. So my question is to get up to the £45 from the 32, how much will have to be taken out of Pot 3?
MR BÉAR: That is looking at it the wrong way round, because the 45 is simply the result of dividing the 100 million by the number you are estimated to take it up. It has no other validity.
THE CHAIRMAN: Well, except it is thought as being a good target to try and get maximum take up.
MR BÉAR: With respect, no, that is not how I understand it. It has been put forward on the basis how many people are going to take this up, and we will take that percentage and then divide the relevant pot by that number, so it is demand led, or putatively demand led.

If they had assumed that 10% were going to take it up, they would have put forward half of the amount that they did. They assumed 5%. If they had assumed 2.5%, they would be putting forward £90. In that sense it is -- perhaps "arbitrary" is the wrong word, but it is simply a product of your assumed level of take up. It has no other validity. It does not come from anywhere else. The £45 is simply the result of an arithmetical exercise which you conduct when you have worked out or guessed what the likely take up is.
So if the -- hence the flex that if more people take up, then by definition the number has to go down. But the 45 would not be taken as a sort of benchmark which would then have any independent life or intrude on the Funder's return, because it is simply a way of ensuring that the whole of that pot of 100 million goes to the Class. Or, for the Tribunal, it is said to have some comfort that it would end up with the public. It is an instrumental approach.
THE CHAIRMAN: But I thought the proposal is that there can be -- if it goes down -- if more take it up and therefore the individual recovery is less, then Pot 3 can be used to supplement; is that not the proposal?
MR BÉAR: No, it is not. If that was Mr Merricks' proposal, he would be adding to his list of breaches of the LFA,

and it may be he has already done that.
THE CHAIRMAN: Perhaps I misunderstood it.
MR BÉAR: I think the primary proposal is that you keep the pots and then you work out what number is appropriate to offer the public so that you can have some assurance that Pot 1 -- their approach is split the gross sum so that 100 goes to the public. Then how do we ensure -- or is available to the public. How do we ensure that it should get to the public? If we work out with some assurance what the likely take up is, then we can just arrive at a mathematical -- arithmetical sum which is ...
Let us make it easy. Let us assume it was 100 million and you thought only a million people were going to take it up. On that approach you would then give them 100 quid each. If they think it is 2 million then it is 50 quid or under. It would flex automatically according to the number you thought were going to take it up. It is just a way of getting it to the public, and then they say if it does not end up with the public, because not enough people come forward, then it should -- the rest should go cy-près, which is another way, they say, of getting it to the public, through the Access to Justice Foundation.
So the whole thing is just about mechanisms to get

it into the hands of the public. But we say that is the wrong starting point, that that is not ––
THE CHAIRMAN: But I thought –– I understand you say it is the wrong starting point, but I am just at the moment trying to understand the proposal. I thought the proposal is that there is Pot 3 and that this pot is available to give Innsworth its return, subject to any further sums that need to be used to effect distribution to more than 5% of represented persons. So where there is higher take up than 5%, the amount received by each Class member should not be reduced in those circumstances to maintain the payment level of Pot 1 but you can call on Pot 3. Is that not correct?
MR BREALEY: Can I –– it is and it is not. So can I go to ––
THE CHAIRMAN: That is the way we understood it.
MR BREALEY: No, no, can I go to paragraph 73 of the application.
THE CHAIRMAN: Yes.
MR BREALEY: So Pot 1 is 100 million ringfenced for distribution and we get –– halfway down:
"However, the [Class] recognises that arguments could be advanced to ensure that at least half of the settlement sum is paid to ... the undistributed damages from this Pot 1 could be awarded to an appropriate

charity ... Alternatively, if the take up is higher than 5% ... would have a pro rata adjustment down from £45. By way of ... if the take up was 10%, ([4.5] million ...) this would result in [the representative] receiving £22.50."
So as we say here and in the skeleton, Pot 1 can go up and down.
THE CHAIRMAN: Yes, we have got that.
MR BREALEY: Then Pot 2 is the costs. Then pot ––
THE CHAIRMAN: It is Pot 3.
MR BREALEY: Pot 3, so over the page at (c):
"... as to the remaining sum of [54], given the [Class Representative's] simultaneous obligations to act in the best interests of the Class and to Innsworth under the LFA ... proposes that [Pot 3] be made available to give Innsworth its return, subject to any further sums that need to be used to effect distribution to more than 5% of the represented persons ... recognises, as noted above, that the Tribunal may decide at least some of this pot is used to either make up any shortfall in Pot 1 where there is a higher take up than 5% (if the Tribunal concludes that the amount received by each class member should not be reduced in those circumstances to maintain a payment at the level of Pot 1 only) ..."

So if the Tribunal decides that "Actually I do not want Pot 1 to go down and to keep at 45", then this Pot 3 has the flex.
THE CHAIRMAN: Well, that is exactly, I thought, what I was saying.
MR BREALEY: It was, and I was agreeing with you.
THE CHAIRMAN: It will not get it up to 45 ––
MR BREALEY: Yes, and I was agreeing.
THE CHAIRMAN: –– if it is 10%, and I was just asking that if one took that approach and the take up was 7%, so that then under –– for Pot 1 the Class members would get, as I understand the maths, £32.35 ––
MR BREALEY: Correct.
THE CHAIRMAN: –– how much of Pot 3 would have to be used if one is looking at a target of 45; that was my question.
MR BREALEY: Yes.
THE CHAIRMAN: I take Mr Béar's point that 45 is not a magic number.
MR BREALEY: No.
THE CHAIRMAN: But I just wanted to know, as I understand it this table, which is annexed to the joint experts, is just a mathematical calculation.
MR BREALEY: It is.
THE CHAIRMAN: I think it is saying that –– if I have read it correctly –– that you are then in the –– to get to 45

you are in the purple column with the 7% line, and it means that you need 40 million from Pot 3, which leaves under a million then for the ––
MR COOK: If I can help, it is slightly confusing. Well, more than slightly confusing. It is actually the second column in the purple that is important. So you would need 139 million in total. You have the 100 million so you need to take 39 million more. On the original set of numbers Pot 3 was going to be 54 million, so you would still be left with 14, the 54 minus 39, so 14/15 million or so.
The third column is slightly bizarre. Basically it assumes that you have taken 40 and then you give 900,000 back, which is not a very helpful way of thinking about it at all, frankly. A more helpful way of looking at it would be to say Pot 3 is 54 million and you are taking 39 million out of it.
THE CHAIRMAN: Yes, thank you. So that is a bit misleading, the title of that column, is it not?
MR COOK: But also all of this depends on what the Tribunal does in relation to Pot 2. Obviously Pot 3 is a residual amount. If Pot 2 went down, then Pot 3 would go up.
THE CHAIRMAN: It would go up a bit anyway, yes.
(Pause)

So that third column is very misleadingly titled.
Yes, so that is the proposal.
MR BREALEY: That is the proposal and obviously it can change.
THE CHAIRMAN: Yes.
Mr Béar.
MR BÉAR: Well, you are a funder, sir. I come to you and say "I have got a claim, I would like you to spend £50 million entirely at your risk, I am not going to spend a penny. When we get -- I hope to get 200 million for it, I will give you your money back and then I am going to take nine-tenths of the upside, and for all the risk, if I am successful -- obviously you may get nothing, the claim may be unsuccessful, and you the Funder, just to take the figures that have been mentioned just now, you will get 15 million". In other words, what is left after taking 39 million out of Pot 3. That would be a pretty short conversation, I imagine.
If you said "I have got this claim, I am going to get 200 million, I will give you your money back and the money again and I will walk off with 100 million", again I suggest it would be a very short conversation.
These proposals, with great respect, are just commercially completely unrealistic, and if the Tribunal

is tempted to go along with them, the Tribunal will be putting a big question mark, to put it no higher, over the future funding in this jurisdiction.
THE CHAIRMAN: Is that a threat?
MR BÉAR: I am so sorry?
THE CHAIRMAN: Is that a threat?
MR BÉAR: It is probably a promise, is it not, at 5 o'clock on a Friday afternoon, so it might be thought an attractive option. But no, it is an appeal to the policy.
We can consider some principles. Number 1, what are we looking at? What we are looking at is 150 million approximation of net proceeds and how to divide that up. That is the real question, I think, in practical terms.
Number 2, what are the principles? First of all, what is the public interest? I say the public's interest is in recovering a fair share of what is aggregate damages, and if you are one of 40 million people or so who have suffered a collective loss of 200 million, then prima facie what is necessary to do justice to you is to give you £5. It is not very much money, that is because it is a huge number of people, and not very much has been accepted in settlement for it, but that crystallises the loss.
We cannot approach it on the basis that now that

Mr Merricks has chosen to settle at this very low figure, we cannot carry on thinking as if there is some higher claim and that people have suffered some greater detriment.
So individually, on average, each member of the public -- of the relevant public has suffered just under £5 worth of loss, and that is the amount that is necessary --
THE CHAIRMAN: Well, it is not. No one would suggest it is a realistic approximation of even the individual loss under the 200 million total settlement.
MR BÉAR: Some would have suffered more and some would have suffered less.
THE CHAIRMAN: Some would have suffered substantially more and some substantially less.
MR BÉAR: Yes, absolutely. But the process of distribution that is envisaged does not in any sense attempt to take account of that. There is no conceivable way in which anybody is attempting to assess whether somebody falls into one of the class or sub-class who suffered more loss, simply "Do you want to claim the money?" You could have been a 17-year old in 2007, that is enough, you know, with your pocket money. You will get your £45 if that is what the figure is.
All I am saying is that given the distribution

proposal and the absence of information about individual members' situations, Class members' situations, then what is necessary to do justice is to give people this small amount of money individually reflecting the, on average, small amount of loss they have suffered, and the per capita basis of distribution, which has been accepted throughout, reflects that simple proposition.
So that is the public interest, and anything else -- if I am a member of the public and I get -- I choose to claim £45, if that were the structure, what I am getting is something unrelated to my average share of this damage done to the Class of which I am a member. It is obviously unrelated to my individual situation because I have not had to make any individual claim based on my own circumstances, so what I am getting is a windfall.
THE CHAIRMAN: Well, some will get a windfall and some will still be undercompensated.
MR BÉAR: Yes, but --
THE CHAIRMAN: Your 17-year old will get a windfall -- your 17-year old in 2008 or 2007; the person who was 30 in 2007 will be getting pretty short change.
MR BÉAR: I am getting it without any regard to whether I was somebody who was a member of the Class for one or 15 years, or whether I was a high spender or a pauper. So in that sense, since I have not had to demonstrate

anything more than simply my membership of the Class, I am getting a windfall, because I am getting something which I have not shown any particular entitlement to.

Put it this way, it is a bit of a lottery. It is essentially an arbitrary distribution. Whereas at least giving somebody -- which is what Mr Merricks understandably proposed, and what everyone has been talking about up until 14 November last year, getting your aliquot share of the collective damages at least has the merit that, on average, you are receiving something which, on average, reflects the harm you suffered simply as a member of the Class.

THE CHAIRMAN: You say everyone -- that is what everyone is talking about until November?

MR BÉAR: Well, yes.

THE CHAIRMAN: I had understood that the original proposal was you would get your equal share per year.

MR BÉAR: Yes, I am sorry.

THE CHAIRMAN: Which would be quite different, because that would prevent the 17-year old getting the same as -- someone who has been incurring loss for 14 years, getting the same as someone who incurred loss for one year.

MR BÉAR: True.

THE CHAIRMAN: So it is quite different from what was

originally proposed.

MR BÉAR: I respectfully beg to differ. It is just a slightly more sophisticated way of doing the average. It is taking each year as being a sub-class of the damages, and then, within that, saying -- so you get your average share for each year but there is no further attempt to do it.

That was the position up until the Supreme Court, and then the Supreme Court said that it could be done simply by taking it as per capita without even that sub-division on a --

THE CHAIRMAN: But I do not know if anyone then decided which of those alternatives --

MR BÉAR: No.

THE CHAIRMAN: Until November.

MR BÉAR: No, they did not.

THE CHAIRMAN: So it was sort of left open.

MR BÉAR: But it was either going to be per capita or annualised per capita.

THE CHAIRMAN: Yes.

MR BÉAR: But in either case you can see it is related, however rough and readily, to some notion of compensation, at least by virtue of you being a member of the Class, either at all or for the relevant year, and that linkage is snapped when you have a demand-led

distribution which simply says "We are going to take an amount and try and fill it up with payouts to the public".

That is very difficult, in my submission, to reconcile with the nature of the jurisdiction. It is also very difficult to give it a judicial flavour, because it does essentially become a process that has no principle behind it, and you have divorced, you have decoupled the payment from the underlying wrong, for which Mastercard, without any admission of liability, but for which payment is being made.

So other principles which might be thought relevant are to consider, first of all, the agreement made between the Class through their representative and the Funder, and we say that is a relevant factor.

THE CHAIRMAN: That is the LFA.

MR BÉAR: I beg your pardon -- the LFA, yes, quite, sir. We say that is a relevant factor and a highly relevant factor in itself. The LFA, as I mentioned already, provides for a return out of undistributed damages, and the assumption behind that, reflecting the basis on which this Funder made its decision to invest ...

Are you looking, sir, for the LFA?

THE CHAIRMAN: No, I have got it open.

MR BÉAR: Thank you.

THE CHAIRMAN: Yes.

MR BÉAR: Mr Garrard says in his witness statement, and, with respect, it is an unsurprising statement to make, that the Funder invested on the basis that there was to be distribution on the per capita basis, by which I include the annualised per capita basis. That was the only thing that anyone had ever spoken about. That was the case in 2017 when the Funder came in after your original decision on the CPO application, and it was the case in 2019 when the Funder, after the Court of Appeal's decision, entered into the previous version, the pre-PACCAR version of the LFA.

THE CHAIRMAN: Did Innsworth come in before or after the Court of Appeal?

MR BÉAR: Before. So they came in a few weeks after your original ruling. I think Mr Garrard gives a history in his witness statement. So at that point, Burford decided to withdraw.

THE CHAIRMAN: Of course, at that point the Tribunal said that a per capita distribution is not appropriate. That was our decision.

MR BÉAR: Yes, well, you said --

THE CHAIRMAN: Then the Court of Appeal -- the Supreme Court, they got it wrong. But at the time Innsworth came in, that was our decision which might or might not

have been upheld.
MR BÉAR: Indeed. But throughout, Mr Merricks' proposition was that distribution on a per capita or per capita annualised basis, without having regard to individual characteristics, was sufficient.
THE CHAIRMAN: Yes.
MR BÉAR: The appellate courts in their wisdom said actually what really counts is the aggregate nature of the damages and it all flows from that. I am paraphrasing rather brutally.
So at all times, though, Mr Merricks has said "This is the basis on which I am putting it forward, this is my litigation plan", et cetera, and he was completely clear about that, and I am not going to read it out because it is private, but I am going to ask you to look in Mr Garrard's statement in the confidential copy at one paragraph, which is paragraph 27. It is on page 9 of IBA/2.
Perhaps I could just ask the Tribunal to read paragraph 27 to themselves.
THE CHAIRMAN: So Mr Garrard's witness statement, paragraph?
MR BÉAR: Yes, 27, sir.
(Pause)
THE CHAIRMAN: Yes.
MR BÉAR: The bargain breaks down unless you have some

stable assumption as to distribution, because if the recovery in the claim can be distributed on a demand-led basis, and/or on a basis completely decoupled from the notion of average compensation, a basis which is set precisely in order to make likely the exhaustion of some or all of the damages, then any funder has simply no way of measuring the risk before it invests.
So what this -- what is being suggested here, although it comes in greater or lesser shades of concern for the Funder, is something profoundly inequitable because it disturbs the basis of the bargain, the bargain which formed not only the contract between the Class Representative and the -- and Innsworth, but was part of the basis on which the collective proceedings were certified in the first place.
THE CHAIRMAN: Well, we do not look in great detail at the Funder's return on certification precisely because we think it is much easier to assess what is a reasonable return at the time of judgment or settlement.
If we had to look at it on certification and refused to certify, if we thought the return was high, we would then need to get privileged advice on risk and estimated recovery, and the certification process would become far more complicated. So a policy decision was taken: do

not do it at the outset, do it when you have much better information at the end.
MR BÉAR: I appreciate that, but that is not the same thing as saying that one should overturn the tenets of the bargain, which is a different proposition. The proposition I am making is obviously without funding the claim would not have happened, without funding the claim would not have been certified, there would not have been any recovery at all. The tenets of that funding, the essential basis of that funding should be respected, and the -- of course the total return can be looked at.
But here we are talking about the level of individual distribution, and bear in mind, as I have said more than once, this is a scheme not just in terms of the legislation but the LFA itself, whereby the Funder gets a -- gets its return out of the undistributed damages. So that is -- the Funder is therefore critically concerned with what level of payout goes to individuals because, on that basis, it can form an estimate as to take up and what is going to be left for it.
So if it had been said, you know, "Well, you hope to get 10 billion, that is great, and actually we are going to offer everyone in the Class £250", then at that point -- because then that would exhaust the

10 billion -- then let us assume Mastercard had rolled over on day one "Yes, you know, your case is pretty good, we are going to settle up, we have seen the error of our ways, we do not want to be liable for interest in five years' time so we are going to pay you now". If it was said "Oh, we have to get the whole 10 billion out to the Class", so everybody gets 200 or 250, whatever the figure is, so the Funder's calculation then of being able to get its return out of undistributed damages would be completely jeopardised because the Funder is assuming --
THE CHAIRMAN: Well, can I ask you this: do you accept or not that when we come to distribution out of settlement, the Funder's return should reflect at all the degree of success or failure of the claim?
MR BÉAR: I am saying that the primary factors should be, number 1, what is provided for in the agreement and, number 2, the benefit that the Class has received, but -- and there is some support for this in the Australian authorities -- you value that benefit not by looking with hindsight at what has happened, but by the market value at the time it was provided. The market value at the time it was provided is answered by saying what is the reasonable cost of getting in litigation funding, it is a market test, and you do not -- that

cost does not go down because the litigation does not turn out as well as you hoped.
THE CHAIRMAN: So you do not accept, is that right, the direction of the Australian courts that you have regard also to the degree of success for the amount recovered by the Class? If you look at the degree of risk taken at the beginning as one factor, but there is no exclusive factor, but you also take into account the degree of success or failure of the proceedings?
MR BÉAR: I am going to take as my -- recommendation to you paragraph 284 of the *Street* decision. I do not know if you have got that?
THE CHAIRMAN: Yes, we do. But I was thinking of the Money Max guidelines that all the Australian courts I think follow.
MR BÉAR: Indeed. The learning has evolved somewhat since the checklist in *Money Max*, which was a decision in 2016, so we can see the way that Justice Murphy, who is the -- I think is again the judge in *Street*, if it I have remembered correctly -- yes, he was.
THE CHAIRMAN: That is correct, yes.
MR BÉAR: He seems to feature in a number of cases -- I am assuming it is a he. If you start at page -- sorry, paragraph 279. On my print-out it is page 44 but I do not know if that reflects yours.

THE CHAIRMAN: Yes, he is applying *Money Max* in paragraph 281.
MR BÉAR: Yes, 281. That is a non-exhaustive list.
THE CHAIRMAN: Yes.
MR BÉAR: But then he goes on to say --
THE CHAIRMAN: He says:
"... which have been applied or approved in numerous decisions by single judges in intermediate courts of appeal."
So I think they are still valid but there are further developments -- further considerations. They are not exhaustive.
MR BÉAR: Yes. Well, it is also a question, I suppose, of whether -- how one assesses the risks assumed by the Funder, so point (f) of the *Money Max* list is carefully phrased:
"The amount of the settlement and the proportionality of the commission ..."
But then it says:
"... bearing in mind the risks assumed by the Funder."
THE CHAIRMAN: Well, I fully accept that. I was just asking you is the amount of the settlement --
MR BÉAR: I am just --
THE CHAIRMAN: -- you know, relevant, or is it you just go

back to the agreement at the beginning and it is a good settlement, it has gone very badly, it is a low settlement and that is irrelevant.
MR BÉAR: Can I just draw your attention to and make one or two points on the following paragraphs, please, because they are important, in my submission.
THE CHAIRMAN: Yes.
MR BÉAR: So he goes on -- that was paragraph 80:
"The full court held that the courts should allow funding commission which is commercially realistic and properly reflects the costs and risks the Funder took on by funding the proceeding."
283:
"The court does not engage in a race to the bottom. Funding rates should be set that provide an appropriate reward for the risks undertaken by the Funder."
Then 284:
"The proper analysis of the reasonableness of the proposed litigation funding charge is multi-factorial ... relevant considerations and the weight to be given to them in any particular case will depend on all of the circumstances, rather than just by reference to the amount of the settlement or judgment or by comparison to funding rates available in the market."
Then he cites another case called *Bolitho* with the

judgment from Justice John Dixon with which he agreed; "he", Justice Murphy in that case:
"It is fundamental that the assessment by a court of a fair and reasonable return for a litigation funder more naturally emerges from the inputs specific to the litigation funder, primarily the level of funding, and promise of funding, that it provides and the period of exposure to risk, than a denominator applied to the settlement or judgment sum."
So I do rely on that and that does draw your attention --
THE CHAIRMAN: The next paragraph you rely on as well?
MR BÉAR: The next paragraph as well, of course, that is the funder receiving a reasonable rate of return? So it is not --
THE CHAIRMAN: That was the basis of his reduction of the funder's commission in that case, was it not?
MR BÉAR: Yes. I need to --
THE CHAIRMAN: -- of the case.
MR BÉAR: I would need to check my --
THE CHAIRMAN: The funder wanted 20%, 3.2 two times, as a rate of return, and he reduced it to 16% and 2.77. That is why I am there with -- on the basis of evidence on rates of return on funding agreements.
MR BÉAR: Well, yes. If I have recalled correctly, in that

case the funder had fairly limited involvement. Paragraph 362, what had happened I think was that the Funder had only provided funding for a time and then it withdrew a year before. A firm of lawyers called Shine then took on the case at their entire risk, and we can see ––

THE CHAIRMAN: But the agreement was for 20%?

MR BÉAR: Yes, the agreement was 20%.

THE CHAIRMAN: So that is the basis on which the funder agreed to fund, but the judge refused it.

MR BÉAR: Yes. Here originally, because of course PACCAR does not apply in Australia, so here originally the Funder agreed two things: it agreed a percentage return, which was either 30% or 20% above a certain level, but crucially it agreed that on the basis that there was a flaw. So the return was the greater of either the percentage of undistributed damages –– it was all to come out of the undistributed. So the original return was either the greater of that percentage or 179 million.

179 million was three times the original total commitment amount. In your original –– the figure of 179 million appears twice because, as you picked up in your original ruling, I think it was your original ruling, or –– there is a clause allowing the Funder to

withdraw if the litigation is no longer commercially viable, which is set at a likely return of 179 million. The problem that you picked up, sir, was that that was left just to the unaided discretion of the Funder to decide, and so you understandably required that to be subject to independent review, and the Funder was happy with that, so that –– and that clause, which is 12.1(ii), remains in exactly the same form in the agreement today.

So at all times Mr Merricks, who acts on behalf of the Class, has been funding this case on the understanding that it would not be commercially viable, and the Funder would be entitled to withdraw, if there was not, on advice, a likely return of 179 million.

Subject to that at all times since PACCAR, and since the amendment in August 2023 that followed from PACCAR, it has also been funded on the basis that out of the undistributed damages the Funder would get a multiple of its commitment amount which varies over time and currently is 8, plus the costs already sunk.

That is the agreement that Mr Merricks chose to make on behalf of the Class, and of course, because it is out of undistributed damages, in a sense it is not damaging the Class. But the obvious predicate of that –– no funder would enter into an agreement like that if the

amount of individual payout could be increased beyond individuals' per capita share precisely in order to ensure a full take up, because then the Funder would never have any expectation of undistributed damages. The Class Representative would always be able to inflate the individual payout to ensure that there was take up, whether in full or, as is said now, in part. So the Funder is left completely at sea.

We say that the appropriate yardsticks, the actual real benchmarks that could equitably guide your discretion, as opposed to what we say is the frankly relatively unprincipled approach behind this proposed distribution, is to look at the agreement and try and honour that as much as possible. Failing that, to look at the factors that are summarised in the Australian cases, the level of funding and the promise of funding, period of exposure to risk, rather than saying how much of the total is to be –– of the total that has actually materialised should go to the Funder.

There is another reason why that is an appropriate approach, which is that –– or perhaps it is just another facet in the same proposition, that when you are considering what is reasonable you should not apply hindsight and look at the actual outcome, you have got to look at the whole reasonable spectrum of outcomes

that could properly have been envisaged at the time of entering into the funding agreement and at the time the funding was deployed. We say that there was a spectrum of outcomes whereby the recovery could have run into billions. That was reasonable, and indeed the certification process made that clear.

MR MALEK: If you had what I would call a nice successful outcome like that, there would be no –– we would not necessarily have the sort of arguments we have got at the moment. On the other hand, if you took it to trial and lost, we still would not have an argument because you always understood if you lost at trial you would get nothing.

MR BÉAR: Yes.

MR MALEK: Here what we have got is a very disappointing result relative to how the case was opened, and I think it makes it a lot more complicated, this task.

MR BÉAR: It does, and that is why that dictum from the *Bolitho* case is quite helpful at crystallising it, that you do not just apply a denominator to the actual –– they call it –– to the actual outcome, but you look at the spectrum of reasonably foreseeable outcomes and you say, against that, is not this level of return acceptable? Against that level we say it is acceptable.

THE CHAIRMAN: So your proposal is that, as I understand it,

one keeps the Pot 2 ringfenced, the reimbursement of costs, but then -- leaving about 150 million, a bit more -- and then for the 150 million it is simply a division of what? How is that then distributed and what goes to the Funder? What are you urging us to do?
MR BÉAR: So in our skeleton we put forward alternative proposals, so -- and we acknowledge that there was a commercial viability threshold of 179 million, so we say the agreement does provide a guide there. So we say the appropriate way to do this -- you have got to look at the Funder's return and the individual payout together, keep the individual payout at the level that was always expected. It is low, but the reason it is low is because the damage --
THE CHAIRMAN: You say "always expected".
MR BÉAR: Yes, I do say that.
THE CHAIRMAN: Well, it was not expected with the 16 -- 14 billion claim, was it?
MR BÉAR: No, I mean at the proportionate level -- keep it on the per capita basis, it was always expected. So if you had said to somebody "It is a per capita distribution", they would know that it was whatever the total sum is divided by 44 million. That was always what was expected. We can see that at paragraph 27 where Mr Garrard showed you that at a different level.

THE CHAIRMAN: So the £4.50.
MR BÉAR: £4.50, because that reflects the nature of the harm done collectively, and then allow -- see what happens and allow the Funder to see, up to the level of that commercial viability cap, what it can take.
Now, of course it will be said "Well, this is outrageous" --
THE CHAIRMAN: Actually if there is 50 million ringfenced for you, that leaves 150 million, so there is no way --
MR BÉAR: No, you include the 50. Obviously you start at 50 rather than zero.
THE CHAIRMAN: Sorry, you would ...
MR BÉAR: As Mr Brealey points out, you have got 129 left. So because you have taken off 50 for the sunk costs, then you start at -- you have got 129 left and you go up to that, rather than 179.
MR MALEK: We are talking about two bits, are we not? There are the sunk actual costs, which are whatever that figure is, the 44. Then there is a return in respect of having the ATE cover which, had you gone out to the market and taken, what is it, 16 or -- how many million, what was the figure?
THE CHAIRMAN: The cover was (inaudible) --
MR BÉAR: (Inaudible - overspeaking)
MR MALEK: 9.7 million. It would have cost you 9.7 million

to go out to the market and provide that, yes.
MR BÉAR: Yes. Up to a total including those pot -- sorry, I am forgetting pots, but the sunk cost pot, the ATE value of it, and then on top of that the total that reflects the commercial viability, the 100 figure -- 179.
We do not say the Funder should get more than that in any circumstance, but we say it is obviously a lot less than it expected to get. That has the merit not only of reflecting the agreement, but also of reflecting a reasonable market rate for the purchase of funding.
PROFESSOR MULHERON: Mr Béar, I just wondered -- we have concentrated on the contractual entitlement so far. I was just wondering about a restitutionary basis as an alternative.
MR BÉAR: Yes.
PROFESSOR MULHERON: As a point of law, do you think that the level of remuneration on a restitutionary basis, on the basis that the Funder's efforts brought forth this benefit for the Class, would that level of remuneration be the same as the contractual level or would it differ for various reasons?
MR BÉAR: It would not inevitably be the same, but it would -- on this case we say it ends up very similarly because the evidence is -- and it is the Tribunal's own

experience maybe -- that the sort of minimum amount that funders require was indeed in line with the kind of floor that we see in this agreement, the pre-Packard floor.
So if you take a -- and you may have picked it up in our skeleton, we make the restitutionary analogy explicit and we cite *Benedetti v Sawiris*, you may want to look at a couple of passages in that. But again you judge the value of the benefit received by the Class on a restitutionary basis by asking yourself what is the market value of the benefit at the time it is obtained, and the market value of the benefit is what you would have to pay to get it. What would you pay to get a funder, and what you would have to pay to get a funder to fund is to give the funder that sort of minimum commitment and a minimum return, and three times what they have put in does indeed seem to be a minimum sort of return.
So, as I say, one can understand why Mr Merricks, for example, says in his statement "Well, I do not think this is right because the Funder is getting the lion's share", but there are two things wrong with that approach, we say. Number 1, a smaller point, but of course you have got to look at the net proceeds after taking off the actual costs spent, so you start off not

with 200 but 150. But number 2, you cannot look in isolation at the outcome, what you have got to look at, as the Australian authorities show, is what was the value of the services at the time they were purchased.

We can see a similar approach taken in the *Petersen* case -- perhaps I could ask you just to look at that. It is in the -- in the print-out it is page 40.

Now, I should say at once this is Justice Murphy again, dealing with legal costs, presumably therefore the CFA costs of the claimant's lawyers. Page 40, paragraph 134, but we say the principles are still relevant and helpfully they are the ones that Justice Murphy cites in bold:

"What is claimed ..."

I am reading from the extract.

"... what is claimed for legal costs should not be disproportionate to the nature of the context, the litigation involved ..."

THE CHAIRMAN: I am so sorry, what paragraph number?

MR BÉAR: 134, sir, on page 40 of the print-out, and there is a citation from another case, *Blairgowrie*:

"... what is claimed for legal costs should not be disproportionate to the nature of the context, the litigation involved and the expected benefit. The court should not approve an amount that is disproportionate.

But such an assessment cannot be made on the simplistic basis that the costs claimed are high in absolute dollar terms or high as a percentage of the total recovery."

Then dropping down to the next bold:

"The question is to compare it with the benefit sought to be gained from the litigation. Moreover, one should be careful not to use hindsight bias. The question is the benefit reasonably expected to be achieved, not the benefit actually achieved."

Then one can see on the next page, about six lines down in bold type, Mr Justice Murphy cites himself in a case called *Caason* and he says:

"Like Beech J, I consider the appropriate question is the benefit which the solicitors reasonably expected the applicants and class members would achieve, not the benefit they actually achieved."

The same point -- I will not read it out -- is made in bold at the bottom of the page and going on to the top of the next page.

So all of that applies to a funder just as it does to a lawyer acting on the CFA, which is in fact a quasi funder.

PROFESSOR MULHERON: In paragraph 4 and 5 of that same judgment I think Justice Murphy is concerned about the -- you know, the proportionality of giving the

amount obtained, and again emphasises the guardian role of the court in relation to the Class action regime that he was presiding under.

MR BÉAR: Paragraphs 4 and 5, did you say?

PROFESSOR MULHERON: Yes, of *Petersen*, yes.

MR BÉAR: Yes, the -- obviously you have got to be aware of that, but when you come to look at the appropriate lens through which to assess the principle then the question, as is said in *Blairgowrie*, is the benefit sought to be gained from the litigation. So if you are trying to value the benefit of the Funder's services you do not say "What benefit have you actually gained", you say "What was the value of the benefit you, the Class, purchased?" The value of that benefit -- you know, buyer's remorse is not a good answer. You have to judge it by what was expected at the time you made the purchase and what was the value of the purchase, and the value of the purchase, you have got to say to yourself what is the -- a reasonable market price for funding services.

THE CHAIRMAN: Just so I understand your proposal -- I understand the argument, but the proposal you make in your skeleton at paragraph 65 -- you start with the 200 million figure. As I understand it, there is no Pot 1 or Pot 2, it is just the 200 million. It goes per

capita from the 200 million, which is then not £4.50, it is £9, and then from the residue the Funder can take up to 179 million if that is the unclaimed part.

MR BÉAR: Yes.

THE CHAIRMAN: That is the proposal you make.

MR BÉAR: Yes.

THE CHAIRMAN: So it would be a £9 per head.

MR BÉAR: Sorry, did you say 9?

THE CHAIRMAN: Yes, because it is out of the 200 million, not 100 million. There is no Pot 1.

MR BÉAR: Yes, I think it would be 4.50.

THE CHAIRMAN: Is it 4.50 out of 200 --

MR BÉAR: Maybe it is 9, sorry --

THE CHAIRMAN: (Inaudible - overspeaking)

MR BÉAR: I am told by Mr Mukherjee, who I defer to on all questions mathematical, it is --

MR MUKHERJEE: Sorry, because it is 200 divided by 44, that makes it £4.50.

THE CHAIRMAN: I see, yes.

MR BÉAR: Yes, it is -- if it was 40 million and 200 million then it would be £5, and it is just under that.

THE CHAIRMAN: But you have no separate pots at all.

MR BÉAR: That is right.

THE CHAIRMAN: You just have the 200 million, £4.50 per head, uncollected residue, Funder gets up to -- gets 179

or -- if available. If there is that -- or less if there is a greater take up, and if there is an even lower take up, so that out of the 20 the take up is, say, only 15 million, the difference could go cy-près, that is your proposal.
MR BÉAR: Yes, so that is the (inaudible) proposal. Then we have alternatives -- I am conscious of the time -- on the next -- on page 25 of the skeleton.
THE CHAIRMAN: That is the unjust enrichment that you just referred to.
MR BÉAR: Yes, that is the unjust enrichment, and we say -- and that in turn has itself alternatives. So the first variant is you ringfence -- is paragraph 71, that you ringfence an amount of the settlement sum, and we say the agreed minimum floor, 179 million, represents the parties' own best estimate of the market price.
THE CHAIRMAN: Although that was taking the risk out of undistributed damages. It was not ringfenced. The 179 would come out of undistributed damages.
MR BÉAR: That is true but --
THE CHAIRMAN: Here you are avoiding the risk.
MR BÉAR: That is true, but the parties were nonetheless, I submit, assuming, if there was a large damages sum, that there would be at least that amount left. So it is just -- it is a case of how you value the market price.

THE CHAIRMAN: Well, they were, but equally took the risk if there is a low pay out, there might not be.
MR BÉAR: True.
THE CHAIRMAN: Yes.
MR BÉAR: The final alternative in paragraphs 73 to 74 is that you posit, as some cases do, thinking of cases in the intellectual property field, a hypothetical negotiation between the Class and the Funder, having regard, as we say, to the whole spectrum of potential outcomes.
So you are asking yourself, well, in the scenario of getting a very low outcome relative to the hoped for total, what are the parties hypothetically agreeing, and we say, well, first of all you have got the market practice evidence that we cite and, secondly, that on those facts we say that the Class and the Funder are considering the whole spectrum of outcomes, the Class would accept that at the top end of the spectrum, the Class are getting a huge amount of money and the Funder is getting a relatively small proportion.
So, for example, if the Class had got 10 billion then the Funder would have ended up with 400 million, 4% of the total. So on that basis, the Class are getting far more than the lion's share, whereas at the other end of the spectrum the Funder is still putting in the

money, taking the risk of losing the money, actually being out-of-pocket, the Funder is a business, it has to make a profit, and the Class would reasonably accept that on those downside scenarios the Funder would expect to receive the majority, because that is a way of covering its position.
MR MALEK: What about the fact that -- presumably you are operating on a portfolio basis, so the other way of looking at it is to say there will be cases where you make a huge amount of money, as in that first scenario, and other cases where you are not going to make much money, there are cases where you make none, where it is a complete loss at judgment, and there are cases like this one, where it is not a great outcome but you should not necessarily expect to get a high return when you have got not a great outcome?
Now, do we have the figures anywhere in these bundles about your internal rate of return for the last five years?
MR BÉAR: No, and you are still -- you, the Funder, are still providing a benefit in terms of the funding.
MR MALEK: Yes, but we have not a clue, on the basis of the evidence we have got here, whether there are cases out there where you have made hundreds of millions, and they are the ones that basically are making your book a very

profitable book, or is it something else? In the *McLaren* judgment I made it clear that, you know, it would be very helpful for the Tribunal to have information on rates of return for funders when they are asking to be paid out large sums of money.
Now, you have obviously taken a choice not to give us that information, but then we have to work on the basis of what we have got, and we do know that you are operating on a portfolio basis and that presumably, on other cases, you are making significant profits.
MR BÉAR: The value of --
MR MALEK: -- absence of information.
MR BÉAR: The value of the benefit provided does not go up or down according to the wealth or business success of the provider on other transactions. The value of the benefit provided is the benefit received by the recipient.
MR MALEK: But if you are talking about saying "We want a reasonable rate of return", we would like to look and see what is a reasonable rate of return across a book. But it --
THE CHAIRMAN: We have not got that.
MR MALEK: We have not got that, no, and it is your choice. We go on the basis of what we have.
THE CHAIRMAN: Can I -- we need to wrap up, but I think we

have got your submissions, we have got your proposal and the three alternatives now explained to me very clearly.

Just a moment.

(Pause)

Is there anything else? I think we have got your points.

MR BÉAR: You have got my points. I do not think there is time to go into it, but the case of *Benedetti v Sawiris* in the Supreme Court, which we have cited in our skeleton argument, does set out the basic tests for how you value a benefit, and with very great respect to Mr Malek's point, I think one would need to consider whether it was consistent with that case to look at how well a particular Funder was or was not doing on other transactions and what its overall IRR was, and I would respectfully submit it is not consistent, that what you are looking at is the market value, and the market value of a service provider does not alter according to the book or portfolio of the provider.

MR MALEK: It all depends on where you are starting from. There is a whole spectrum of things we could take into account ––

THE CHAIRMAN: I think we have got ––

MR MALEK: I think we have gone through it already.

THE CHAIRMAN: We need to take a brief break, but do you

want to reply? We know you have the outstanding question regarding the pass-on trial which we wanted –– you were asked to consider ––

MR BREALEY: Can I just, while we –– then I can –– five minutes just to make some very brief points in reply to what has just been said, or I can do it after the break.

THE CHAIRMAN: I think after the break. We have got a transcriber who has been hard at it for a long time.

(4.52 pm)

(Short Break)

(5.03 pm)

THE CHAIRMAN: Yes, Mr Brealey.

MR BREALEY: Can I just please make some very short points in response.

THE CHAIRMAN: Yes.

MR BREALEY: The first is under the LFA, there is no clause which gives any guaranteed return and there is no clause which refers to per capita. So it has been constantly said there is an agreed return of 179, this is the bargain. But if one looks at clause 12 of the LFA under the provision "Termination", it is page 103 of the bundle:

"Termination. The Funder is entitled to terminate this agreement upon giving not less than 45 days' written notice to the Class Representative if ..."

Then you go to (ii):

"The Funder reasonably believes that the claims in the proceedings are no longer commercially viable for the Funder to fund because the Funder is unlikely to obtain at least 179 million as a return on its funding of the proceedings. Such a view to be reached based on independent legal and expert advice that has been provided to the Funder."

It is inconceivable that that amounts to a bargain that, come what may, the Funder is going to get a guaranteed return of 179 million. It merely gives the Funder the right to terminate if it does not believe it is in its commercial interest and it values that figure at 179.

So no guaranteed return clause in the LFA and no guaranteed per capita clause in the LFA, and if the commercial entity with the might of the Funder had wanted that, it could have put it in and then the Tribunal could have looked at it on certification, but it was not.

That is the first point.

The second point is there was no promise either of a per capita. Mr Bronfentrinker makes this perfectly clear at paragraph 68 of his eighth statement, paragraph 68 of his eighth statement, and I just have to

read out the bit that he refers to in the skeleton argument to the Court of Appeal. This is in October 2017.

THE CHAIRMAN: Just one moment.

MR BREALEY: Bronfentrinker 8 at paragraph 68 and he cites ––

THE CHAIRMAN: Just a moment.

MR BREALEY: I beg your pardon.

(Pause)

THE CHAIRMAN: The paragraph is?

MR BREALEY: 68 on page 39 of his statement. 68.

So this is an unequivocal promise that amounts to some sort of contractual obligation to have a per capita. We have got the bit in blue, and then after the bit in blue he says:

"Nonetheless ..."

Then he cites from what everybody, including the Funder, has known in the skeleton. He says:

"Moreover [this is in the skeleton] and in any event, the appellant's preferred model of distribution ..."

Put in bold.

"... at this stage before the quantum of damages or the final size of the Class are known uses an annualised approach, whereby individual Class members recover a per

capita sum."

That is quite clearly saying: our preferred model is an annualised per capita sum, but as the Tribunal has clearly indicated, you do not know, and it is at this stage before the quantum of damages or the final size of the Class are known.

So there is clearly an indication that when we know the size of the Class, when we know the quantum, then at the later stage the return -- the -- how it is going to be distributed can be sorted out, and in my respectful submission that is the risk, and that is the -- that is what the Funder understood.

That is the second point.

The third point on the return. There are -- we deal with this at the very, very last paragraph of our skeleton, paragraph 59, where we refer to if Mr Merricks' proposal is adopted -- paragraph 59 -- and keep, please, Bronfentrinker because I am going to go back to that. I should have gone first. But at paragraph 59 we say:

"Ultimately, the Funder has to accept that the causation judgment reduced the claim by 95% and it needs to lower its expectations accordingly. On Mr Merricks' proposal, which others have argued are too generous, the Funder doubles its investment."

Then we refer to the rule of 72:

"... to ascertain the annual interest rate necessary to double an investment ..."

We set it out there. But it is important to realise that the Funder is doubling its investment.

The last point I want to make on that is that Mr Merricks did actually get its expert, Compass Lexecon, to work out the rate of return, because obviously it is not 40 million on day one, it is over a period of eight years.

This is at paragraph 80 and 81 of Bronfentrinker 8 where he sets out a calculation that Compass Lexecon regards -- so this is at page 47 of Bronfentrinker 8, paragraph 80 and 81. Really the punchline is at (a) and (b) on page 48.

So they were asked to run some analysis, and (a):

"The return that Innsworth would have received, had it invested its funds over the same period in a low risk investment, such as UK gilts, Compass Lexecon's analysis, which is exhibited, shows that the total return would have been around 1.5 million in gilts. Therefore, for the risk it has taken investing in the collective proceedings, on Mr Merricks' proposal Innsworth would have received a return over 36 times what it would have achieved with a low risk investment,

and (b) the effective annualised rate of return that Innsworth would receive is awarded 100 million by the Tribunal. Compass Lexecon calculates this to be an annual rate of return of 44.07%. This, on any view, is a very significant rate of return, even accounting for litigation funding being a riskier asset class."

I would put in parentheses: in circumstances where there has been, as the Tribunal says, a disappointing result but nevertheless a very, very good return.

Those are the points I just wanted to make. No contractual bargain about per capita or a guaranteed return, the parties always knew that it would be at the end of the process, and actually when one looks at it ex post the Funder has not got a bad return.

Those are just my short submissions.

THE CHAIRMAN: Thank you very much.

Decision

The question you asked us is whether Mr Merricks can down tools, as it were, on pass-on Trial 2B, and the answer is yes. We have approved the settlement of 200 million, as between Mr Merricks and Mastercard. We shall give, as we said, our reasons both for that decision and our decision which we have not yet arrived at on the various matters that have been canvassed since, in due course.

I think you are going to send us some further submissions on this small costs point in seven days, and seven days for the response. I think Mastercard are going to send us two solicitors' attendance notes just recording the conversation as between Mr Merricks' solicitors and Mastercard's solicitors.

MR BREALEY: Yes.

THE CHAIRMAN: We will obviously take time to consider our judgment.

I do not think, having been myself involved in these proceedings for many years, any of the decisions we have had to come to has been straightforward or easy, and I do not suggest that this one is either, and we are very grateful to all counsel and those behind you for your assistance.

MR BREALEY: Thank you, sir.

MR BÉAR: Could I ask when we may expect your reasons? I appreciate what you have just said. Obviously ultimately, as with any decision, Mr Merricks has conduct of the proceedings, of course he will have heard what you said which will give him comfort, but he must make his own decision as to what to do.

In that context, I would be trespassing on your goodwill, but I have to ask if you are able to tell us when you might expect reasons, and for our part we would

be very grateful to get them sooner rather than later for reasons I am sure you can understand.

THE CHAIRMAN: Yes. Well, I cannot give you a definite commitment as to when. It is not the only case that we are dealing with. If I say as soon as possible, and I would hope in the next three weeks it will be possible to produce the judgment, which would be quite quick on a case of this weight, but we will do our very best.

MR BÉAR: My clients did ask -- and obviously it will be for you how you structure it -- there may be parts of the judgment which would still need to be kept within various rings --

THE CHAIRMAN: Yes, we understand that. Well, it will be sent out in the usual way in draft, and one of the reasons for that, in many of the judgments as tribunals, is if there are confidential matters they can be drawn to the attention of the Tribunal, but we will be alert to, in this case, what is confidential, as it were, as between -- within Mastercard and -- within Mr Merricks and your clients, Innsworth, and therefore not to be in the draft to go to Mastercard.

MR BÉAR: Thank you.

MR MALEK: I would like just to say something. I am conscious that Mr Merricks is here. Being a Class Representative is a huge responsibility. Mr Merricks

has tirelessly fought for the benefit of Class members over the last eight years and that is appreciated. The fact that the outcome has been disappointing in the light of how the evidence and the rulings have developed does not detract from that.

MR BREALEY: I know that that is very much welcomed. Thank you.

(5.16 pm)

(The Hearing Concluded)