Neutral Citation Number: [2025] EWCA Civ 841

Cases No: CA-2024-000151, 000601, 000602, 000603, 000604, 000285 and 000892

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
(Mr Ben Tidswell (Chair), the Hon. Lord Richardson and Mr Derek Ridyard)
[2023] CAT 73

Royal Courts of Justice
Strand, London, WC2A 2LL

Before:

SIR JULIAN FLAUX CHANCELLOR OF THE HIGH COURT
LORD JUSTICE BIRSS
-and-
LORD JUSTICE GREEN

- - - - - - - - - - - - - - - - - - - -

BETWEEN:

(1) SONY INTERACTIVE ENTERTAINMENT EUROPE LIMITED

(2) SONY INTERACTIVE ENTERTAINMENT NETWORK EUROPE LIMITED

Appellants / Defendants

-and-

ALEX NEILL CLASS REPRESENTATIVE LIMITED

Respondent / Class Representative

<u>AND ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL</u>
<u>(Mr Ben Tidswell (Chair), Dr Catherine Bell CB and Dr William Bishop)</u>
<u>[2024] CAT 3</u>

BETWEEN:

(1) VISA INC.

(2) VISA INTERNATIONAL SERVICE ASSOCIATION

(3) VISA EUROPE LIMITED

(4) VISA EUROPE SERVICES LLC

(5) VISA UK LIMITED

<u>Appellants / Defendants</u>

-and-

COMMERCIAL AND INTERREGIONAL CARD CLAIMS II LIMITED

<u>Respondent / Class Representative</u>

AND BETWEEN:

(1) VISA INC.

(2) VISA INTERNATIONAL SERVICE ASSOCIATION

(3) VISA EUROPE LIMITED

(4) VISA EUROPE SERVICES LLC

(5) VISA UK LIMITED

<u>Appellants / Defendants</u>

-and-

COMMERCIAL AND INTERREGIONAL CARD CLAIMS I LIMITED

<u>Respondent / Class Representative</u>

AND BETWEEN:

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE SA
(4) MASTERCARD / EUROPAY UK LIMITED
(5) MASTERCARD UK MANAGEMENT SERVICES LIMITED
(6) MASTERCARD EUROPE SERVICES LIMITED

<u>Appellants / Defendants</u>

-and-

COMMERCIAL AND INTERREGIONAL CARD CLAIMS I LIMITED

<u>Respondent / Class Representative</u>

AND BETWEEN:

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE SA
(4) MASTERCARD / EUROPAY UK LIMITED
(5) MASTERCARD UK MANAGEMENT SERVICES LIMITED
(6) MASTERCARD EUROPE SERVICES LIMITED

Appellants / Defendants

-and-

COMMERCIAL AND INTERREGIONAL CARD CLAIMS II LIMITED

Respondent / Class Representative

AND ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
(Mr Ben Tidswell (Chair), Dr William Bishop and Mr Tim Frazer)
[2024] CAT 5

BETWEEN:

(1) APPLE INC

(2) APPLE DISTRIBUTION INTERNATIONAL LIMITED

Appellants / Defendants

-and-

DR RACHAEL KENT

Respondent / Class Representative

-and-

THE COMPETITION AND MARKETS AUTHORITY

Intervener

AND ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
(Mr Justin Turner KC (Chair), Ms Jane Burgess and Mr Derek Ridyard)
[2024] CAT 18

BETWEEN:

(1) APPLE INC

(2) APPLE DISTRIBUTION INTERNATIONAL LIMITED

(3) APPLE RETAIL UK LIMITED

Appellants / Defendants

-and-

MR JUSTIN GUTMANN

Respondent / Class Representative

Mr Daniel Piccinin KC and Ms Gayatri Sarathy (instructed by **Linklaters LLP**) for Sony Interactive Entertainment Europe Limited and Sony Interactive Entertainment Network Europe Limited ("Sony"); (instructed by **Linklaters LLP** and **Millbank** LLP) for Visa Inc, Visa International Service Association, VisaEurope Limited, Visa Europe Services LLC and Visa UK Limited ("Visa"); (instructed by **Freshfields LLP**) for Mastercard Incorporated, Mastercard International Incorporated, Mastercard Europe SA, Mastercard/Europay UK Limited, Mastercard UK Management Services Limited and Mastercard Europe Services Limited ("Mastercard"); and (instructed by **Gibson, Dunn & Crutcher UK LLP** and **Covington & Burling LLP**) for Apple Inc, Apple Distribution International Limited and Apple Retail UK Limited ("Apple")

Mr Nicholas Bacon KC, Mr Daniel Saoul KC and Mr Richard Hoyle (instructed by **Milberg London LLP**) for Alex Neill Class Representative Limited ("Ms Neill"); (instructed by **Harcus Parker Limited**) for Commercial and Interregional Card Claims I Limited and Commercial and Interregional Card Claims II Limited ("CICC"); (instructed by **Hausfeld & Co LLP**) for Dr Rachael Kent ("Dr Kent"); and (instructed by **Charles Lyndon Limited**) for Mr Justin Gutmann ("Mr Gutmann")

Hearing dates: 10 and 11 June 2025

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Approved Judgment

This judgment was handed down remotely at 2.30pm on Friday 4 July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sir Julian Flaux C:

Introduction

1. These appeals which we have heard together all concern the enforceability of litigation funding agreements ("LFAs") entered into by various class representatives with litigation funders in collective proceedings before the Competition Appeal Tribunal ("the CAT"). The LFAs under consideration were amended from the LFAs originally entered which had been rendered unenforceable as a consequence of the decision of the Supreme Court in *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28; [2023] 1 WLR 2594 ("*PACCAR*"). In that case, the majority of the Supreme Court (Lady Rose JSC dissenting) held that the LFAs in question were damages-based agreements ("DBAs") under section 58AA of the Courts and Legal Services Act 1990 ("the CLSA") since the funder was providing "claims management services" within that section and, in consequence, the LFAs were unenforceable.

2. So far as material to these appeals, section 58AA of the CLSA in its current form provides as follows:

> "58AA Damages-based agreements
>
> (1) A damages-based agreement which satisfies the conditions in subsection (4) is not unenforceable by reason only of its being a damages-based agreement.
>
> (2) But … a damages-based agreement which does not satisfy those conditions is unenforceable.
>
> (3) For the purposes of this section—
>
> (a) a damages-based agreement is an agreement between a person providing advocacy services, litigation services or claims management services and the recipient of those services which provides that—
>
> (i) the recipient is to make a payment to the person providing the services if the recipient obtains a specified financial benefit in connection with the matter in relation to which the services are provided, and
>
> (ii) the amount of that payment is to be determined by reference to the amount of the financial benefit obtained.
>
> (4) The agreement—
>
> (a) must be in writing;
>
> (aa) must not relate to proceedings which by virtue of section 58A(1) and (2) cannot be the subject of an enforceable conditional fee agreement or to proceedings of a description prescribed by the Lord Chancellor;

> (b) if regulations so provide, must not provide for a payment above a prescribed amount or for a payment above an amount calculated in a prescribed manner;
>
> (c) must comply with such other requirements as to its terms and conditions as are prescribed; and
>
> (d) must be made only after the person providing services under the agreement has complied with such requirements (if any) as may be prescribed as to the provision of information.
>
> (5) Regulations under subsection (4) are to be made by the Lord Chancellor and may make different provision in relation to different descriptions of agreements.
>
> …
>
> (7) In this section—
>
> …
>
> 'claims management services' has the same meaning as in the Financial Services and Markets Act 2000 (see section 419A of that Act)."

3. The "funder's fee" in the original LFAs in *PACCAR* and in the present cases was calculated as a percentage of the proceeds which the class representative would recover if the proceedings were successful. In broad terms, the revised LFAs provide that the funder's fee is to be calculated as a multiple or multiples of the funder's outlay (or its committed outlay) in the proceedings, although it is still paid out of the proceeds. The revised LFAs also provide, expressly or by implication, that the amount of the funder's recovery is capped at the level of the proceeds recovered (or some possible subset thereof).

4. In each of the cases under appeal, the CAT found that the revised LFAs were not DBAs so that the LFAs are enforceable. The unsuccessful defendants appeal in each case with the permission of the CAT.

5. It is agreed between the parties that the appeals raise three issues:

   (1) If the amount payable to a funder or insurer under the LFAs is payable from and/or capped by the proceeds of a successful outcome, is the amount of the payment "*to be determined by reference to the amount of the financial benefit obtained*" for the purposes of s.58AA(3)(a)(ii) of the CLSA? This issue arises in all the appeals.

   (2) If the LFAs provide that the funder or insurer is paid a percentage of the proceedings, "*only to the extent enforceable and permitted by applicable law*" (or similar), is it a DBA, otherwise impermissible, or inappropriate for the purposes of certification? This issue arises in the *Neill* and *CICC* appeals.

(3) If the LFA is unenforceable and/or unlawful, can any parts of it be severed? This issue only arises in the *Neill* appeal.

6. A fourth issue arose in the *Kent* appeal alone concerning "ratchet" arrangements whereby the funder's fee increased, but on 5 June 2025, the solicitors for Apple in that case informed the Court that this issue was no longer pursued in the appeal.

Background

7. The *Neill* proceedings involve a standalone claim against Sony concerning alleged restrictive terms and conditions and/or technical restraints in breach of Article 102 of the Treaty on the Functioning of the European Union ("TFEU") in that it requires sole distribution of digital games for its PlayStation video games console via its PlayStation Store and imposes excessive and unfair prices for distribution via the PlayStation Store, which is said to have caused PlayStation's users loss and damages valued at between £600 million to £5 billion (excluding interest).

8. The *CICC* proceedings concern standalone claims brought by card merchants for the imposition of inter-regional and commercial card transactions fees in the UK and/or EEA by Mastercard and Visa in alleged breach of Article 101 TFEU in such a manner as to artificially raise prices leading to the class being overcharged.

9. The *Kent* proceedings bring standalone claims against Apple concerning alleged excessive pricing and/or exclusionary abuses in breach of Article 102 TFEU in relation to the Apple App Store, involving the imposition of restrictive terms and conditions and/or technical restraints on the development and distribution of iOS-compatible applications which had the effect of increasing prices which caused loss and damages to Apple users.

10. The *Gutmann* proceedings concern standalone claims against Apple concerning the introduction of a performance management feature to address the increased prevalence of unexpected power offs in iPhones, and the alleged lack of transparency over these issues. It is alleged that the introduction of the additional feature and the alleged lack of transparency around this amounted to a breach of Article 102 TFEU.

11. As already noted, the LFAs in these cases were amended in the light of the decision in *PACCAR* which was handed down on 23 July 2023. The judgments under appeal were handed down by the CAT on various dates between November 2023 and March 2024. In each case the CAT granted permission to appeal on the basis that, while it considered that the appeal had no real prospect of success, there was another compelling reason to grant permission, namely that the continuing uncertainty regarding the issue of enforceability of the revised LFAs now being deployed warrants consideration and resolution by the Court of Appeal.

12. In March 2024, the last government introduced into Parliament the Litigation Funding Agreements (Enforceability) Bill (the "Bill") which would have

amended the CLSA to exclude LFAs from the definition of DBAs. On 29 April 2024, I ordered the stay *pro tem* of the appeals in the light of the Bill, which would render them academic if it were passed. However, the general election was called and Parliament was dissolved without the Bill being passed. Shortly after the present Government was elected, it announced that it would not reintroduce the Bill until after the conclusion of the Civil Justice Council's wider review of third-party litigation funding, then estimated to be delivered in the summer of 2025.

13. Following a hearing on 10 February 2025 before me and Green LJ, we ordered that the stay of the Appeals be lifted and that they be listed for hearing. Thereafter the present hearing of the appeals was fixed for 10 and 11 June 2025.

14. On 2 June 2025, the Civil Justice Council issued its final report. It recommended that *PACCAR* be reversed through legislation with both prospective and retrospective effect. The Government has yet to comment on that report.

The amended LFAs

15. In the *CICC* proceedings there are four claims, two opt-out claims against Visa and Mastercard respectively and two opt-in claims against Visa and Mastercard respectively. The distinction between the two types of claim is in broad terms that larger businesses with a turnover of £100 million or more are required to opt-in but smaller businesses can opt-out. There are separate LFAs in the case of each of the two opt-out claims and one LFA covering opt-in claims against both Visa and Mastercard.

16. In relation to the opt-out CICC claims, the Court was taken to the amended and restated Visa LFA dated 15 September 2023. Clause 3 headed "Proceeds" deals with the funder's fee in these terms:

> "3.1 The Funder is entitled to receive a payment out of the Total Fee in accordance with the Waterfall.
>
> 3.2 Subject to the terms of any order or direction of the Tribunal, on each occasion, if any, on which Proceeds are received by the Solicitor, the Class Representative or any connected party, the Class Representative will procure that a portion of those Proceeds equal to the Total Fee be applied in accordance with the Waterfall to pay fees to the Solicitor, to Counsel and to the adverse costs insurer and to pay to the Funder the Capital Outlay and Profit Share."

17. "Proceeds" is defined in Annex 1 in these terms:

> "Proceeds means the total amount of damages and costs paid by the defendants in aggregate in the Claim pursuant to an order of the Tribunal or otherwise."

"Total Fee" is defined as follows: "Total Fee means such amount as is determined in accordance with Annex 6."

18. Annex 6 provides:

> "Annex 6: Definition of Total Fee (new)
>
> Total Fee means, subject to the following sentence of this definition, an amount equal to:
>
> (a) the Capital Outlay; and
>
> (b) the Insurer Outlay; and
>
> (c) the amount of the success fees due to the solicitors under their conditional fee agreements; and
>
> (d) an amount equal to the Capital Outlay multiplied by 200% (such percentage increasing by 50% on 1 January and 1 July in each year, starting on 1 January 2024, and will stop increasing on the earlier of: (i) the date of a final judgment of the CAT that brings the Claim to a final resolution by way of an award of damages, and following the determination of any appeals from that Judgment; (ii) the date of a settlement that brings the Claim to a final resolution; or (iii) the occurrence of a Termination Date as a result of a Funder Default.
>
> Notwithstanding any other provision of this Agreement, the Total Fee shall not exceed the portion of the Proceeds that have not been distributed to class members within any period stipulated by the Tribunal for distribution to class members following success in the Claim."

19. The cap or limit in the last paragraph of that provision that the Total Fee shall not exceed the undistributed damages plus recovered costs is confirmed by clause 7.4 which provides:

> "The total liability of the Class Representative for the Total Fee shall not exceed the sum total of (i) the amount of any unclaimed damages which the CAT orders to be paid to the Class Representative and (ii) any costs and disbursements recovered from the defendant."

20. The Waterfall is set out in clause 2 of the Priorities Agreement dated 25 August 2021:

> "REPAYMENT
>
> 2.1 On the date on which any Proceeds are received or, if later, the date on which all relevant permissions required from the Tribunal have been granted, the relevant recipient will procure that a portion of the Proceeds equal to the Total Fee be paid into

the Ringfenced Account and distributed within 5 Business Days of receipt as provided for below. Until that distribution is made, and subject to any order or direction of the Tribunal, any party receiving any portion of the Proceeds agrees to hold those Proceeds on trust for the parties in accordance with the terms of this Agreement:

2.1.1 first, to pay, on a pro rata basis and pari passu:

(a) to the Funder, an amount equal to its Capital Outlay plus a monthly compounding rate of interest of 25% per annum on all amounts advanced by the Funder under the Funding Agreement; and

(b) to the Insurer an amount equal to (a) the Insurer Outlay plus without double counting (b) any insured losses actually paid by the Insurers (and not previously reimbursed to them pursuant to this Agreement) in respect of the Claim that are covered by a common ATE insurance policy (but excluding for the avoidance of doubt any insured losses actually paid by the Insurers in respect of the related opt-in claim against substantially the same defendant entities as the Claim).

2.1.2 secondly, to pay, on a pro rata basis and pari passu:

(a) to the Solicitor for its own account, all outstanding fees and disbursements properly incurred by the Solicitor at its standard rates and as set out in the Budget plus any uplift and other amounts due to the Solicitor under the terms of its CFA;

(b) to Counsel, all outstanding fees properly incurred by them plus any uplift and other amounts due to them under the terms of their respective CFAs; and

2.1.3 finally, the balance of the Total Fee to be apportioned as follows:

(a) 16% to the Insurer; and

(b) 84% to the Funder."

21. In relation to the opt-in CICC claims, there is one LFA covering claims against both Visa and Mastercard. This is in fact an agreement between the funder and Harcus Parker Limited, CICC's solicitors, described in the agreement as the "Counterparty". The agreement had not been executed at the time of the hearing before the CAT. Clause 3 is headed "Proceeds" and clause 3.1 provides: "The Funder is entitled to receive a payment out of the Proceeds in accordance with the Waterfall." "Proceeds" is then defined in Annex 1:

"Proceeds means any and all value due to and/or received by (or in lieu of payment to) the Counterparty or a related party directly

> or indirectly pursuant to the terms of any of the DBAs in any circumstances whatsoever."

22. The Waterfall is in the Amended and Restated Priorities Agreement, clause 2 of which, headed "Repayment", provides for alternative recoveries for the funder on the basis of a percentage of the Proceeds if that is enforceable as a matter of law and on the basis of the funder's outlay if it is not. It also contains, at clause 2.1.7 an express cap that the fees recoverable shall not exceed the total amount of the proceeds. Clause 2.1 provides:

> "2.1 If any party receives any Proceeds, that party agrees to hold those Proceeds on trust for the parties in accordance with the terms of this Agreement and to immediately remit such Proceeds to the Ringfenced Account and within 5 Business Days of such remittance, the Counterparty shall apply, or procure the application of, those Proceeds as follows:
>
> 2.1.1 first, to pay, on a pro rata basis and pari passu:
>
> (a) to the Funder, an amount equal to its Capital Outlay (as defined in the Opt-in Funding Agreement and to the extent not previously reimbursed to it pursuant to this Agreement or any other agreement) plus a monthly compounding rate of interest of 25% per annum of such Capital Outlay under the Opt-in Funding Agreement; and
>
> (b) to the Insurers an amount (if any) without double counting equal to any insured losses actually paid by such Insurer (and not previously reimbursed to them pursuant to this Agreement or otherwise) in respect of the "opt-in" Mastercard claim ("Mastercard Opt-In Claim"), the "opt-in" Visa claim ("Visa Opt-In Claim"), the "opt-out" Mastercard claim ("Mastercard Opt-Out Claim") and/or the "opt-out" Visa claim ("Visa Opt-Out Claim) as the case may be:
>
> provided that:
>
> (i) if the payment referred to in 2.1.1(b) above relates to the Mastercard Opt-In Claim and the Mastercard Opt-Out Claim is on-going, and/or
>
> (ii) if the payment referred to in 2.1.1(b) above relates to the Visa Opt-In Claim and the Visa Opt-Out Claim is on-going, and
>
> (iii) under the terms of the relevant ATE insurance policy the Insurer remains on contingent risk (the "Residual Contingent Risk"),
>
> then the parties (each acting reasonably) shall agree an escrow arrangement pursuant to which an amount equal to the Residual Contingent Risk (subject to a maximum of £20,000,000) shall be

retained by the Counterparty on trust on the terms of this Agreement in order to reimburse the Insurer for any amount actually paid by it pursuant to such Residual Contingent Risk under the terms of the relevant ATE Policy (the "Escrow Amount"). The Escrow Amount will be released, and applied on the terms of clause 2 (Repayment) of this Agreement upon the expiry of the relevant ATE Policy or the termination of the Residual Contingent Risk, whichever occurs earlier.

If the Insurer or the Funder receives any reimbursement under either of the Opt-Out Priorities Agreements at a time when the Insurer or Funder, as the case may be, had already been compensated for such amounts pursuant to the terms of this Agreement (any such amount so received being the "Turnover Amount"), the Insurer or the Funder, as the case may be, will apply the Turnover Amount as if it were Proceeds pursuant to the terms of this Agreement.

2.1.2 secondly, to pay to Counsel all outstanding fees properly incurred by them plus any uplift and other amounts due to them under the terms of their respective CFA;

2.1.3 thirdly, subject to this clause 2.1.3 being enforceable and/or permitted by applicable law, failing which clause 2.1.5 shall apply in place of this clause 2.1.3, the residual amount to be applied as follows:

(a) to the Counterparty in an amount equal to 23.33%;

(b) to the Insurers in an amount equal to 10%; and

(c) to the Funder in an amount equal to 66.67%,

provided that such apportionment of the residual amount shall apply only until the Funder has received under this clause 2.1.3 an amount equal to its Capital Outlay (which amount for the avoidance of doubt shall be additional to any sum received by the Funder pursuant to clause 2.1.1, and to the extent not previously reimbursed to it pursuant to this Agreement or any other agreement); and

2.1.4 finally, subject to clause 2.1.3 above and this clause 2.1.4 being enforceable and/or permitted by applicable law, and failing which clause 2.1.6 shall apply in place of this clause 2.1.4, immediately following the Funder receiving an amount equal to its Capital Outlay pursuant to clause 2.1.3, the residual amount will be apportioned as follows:

(a) to the Funder in an amount equal to 42%;

(b) to the Counterparty in an amount equal to 42%; and

(c) to the Insurers in an amount equal to 16%.

2.1.5 Subject to clause 2.1.3 above being unenforceable and/or not permitted by applicable law, the residual amount to be applied to:

(a) the Funder up to the amount of its Capital Outlay (which amount for the avoidance of doubt shall be additional to any sum received by the Funder pursuant to clause 2.1.1, and to the extent not previously reimbursed to it pursuant to this Agreement or any other agreement); and

(b) to the Insurers in the amount set out in the endorsements to the ATE Policy Schedule, which if executed in the event that this clause 2.1.5 applies, will have the effect of modifying the ATE Policy Schedules to remove any entitlement on the part of the Insurers to any percentage of the Proceeds and replacing such percentage with a fixed amount dependent on the stage at which any Proceeds are received by a Party to this Agreement.

2.1.6 Subject to clause 2.1.3 and clause 2.1.4 above being unenforceable and/or not permitted by applicable law, the residual amount flowing from clause 2.1.5 above to be applied in the following order of priority:

(a) to the Funder up to the amount of its Capital Outlay pursuant to clause 2.1.5(c) multiplied by 200% (such percentage increasing by 50% on 1 January and 1 July in each year, starting on 1 January 2024, and will stop increasing on the earlier of: (i) the date of a final judgment of the Competition Appeal Tribunal that brings the Claims to a final resolution by way of an award of damages, and following the determination of any appeals from that Judgment; (ii) the date of a settlement that brings the Claims to a final resolution; or (iii) the occurrence of a Termination Date as a result of a Funder Default; and

(b) to the Counterparty in an amount equal to the balance of the residual amount.

2.1.7 Notwithstanding any other provision of this Agreement, the fees paid pursuant to the above Waterfall (clause 2.1.1 to clause 2.1.6 above) shall not exceed the total amount of the Proceeds."

23. In the Neill LFA dated 30 October 2023 there is provision for similar alternative bases for recoveries. Clause 11.1 provides:

"If the Class Representative makes any application (including under clause 10.2) for an Order for payment of the Class Representative's costs, fees and disbursements (within the meaning of and including under CAT Rule 93(4) or CAT Rule

> 94) other than from Undistributed Damages, the Funder's Fee shall be the greater of:
>
> 11.1.1 a multiple of the Costs Limit; or
>
> 11.1.2 only to the extent enforceable and permitted by applicable law, a percentage of the Proceeds, calculated in accordance with the table in this clause 11.1, clause 11.4 and clause 11.6."

There follows a table which gives different levels of recovery depending upon when the class representative makes an application to the CAT for an Order for payment of its costs, fees and disbursements. Clause 11.2 then contains a similarly worded provision and table, albeit with different rates of recovery where payment is to be made from Undistributed Damages.

24. The Neill LFA contains an express severance clause at clause 37:

> "37.1 If any provision of this agreement, including any part-provision, shall be held to be illegal, invalid or unenforceable, the legality, validity or enforceability of the remaining provisions (and part-provisions) of this agreement shall not be affected.
>
> 37.2 Any illegal, invalid or unenforceable provision in this agreement shall be severable and all other provisions (and part-provisions) will remain valid and unaffected.
>
> 37.3 If any provision of this agreement, including any part-provision, shall be held to be illegal, invalid or unenforceable in one jurisdiction that shall not affect the legality, validity or enforceability of the whole of this agreement in any other jurisdiction.
>
> 37.4 Without prejudice to the generality of clauses 37.1 to 37.3 inclusive, the Parties acknowledge and agree that, if necessary to ensure the enforceability, legality or validity of this agreement, any provision of this agreement which begins with the words "only to the extent enforceable and permissible by applicable law" shall be severable: (a) without modifying or adding to other terms of this agreement; (b) with the consequence that the remaining terms continue to be supported by adequate consideration; and (c) without changing the nature of the contract, such that it is not the sort of contract that the Parties entered into at all."

25. Clause 3 of the Neill Priority Agreement contains a waterfall setting out the distribution of the Stakeholder Entitlements (essentially any recovered costs and any amount paid or payable to the class representative pursuant to an Order of the Court in respect of the costs, fees or disbursements incurred by the class representative and any amount otherwise made available, payable or paid, by or

under an Order of the court) to parties including the funder, ATE insurers, solicitors, and counsel. So far as the funder is concerned, pursuant to clause 3.1, the Funder is entitled to receive (in order of priority): (i) the Funder's Outlay and any Adverse Costs paid or payable and not reimbursed by one or more of the ATE Insurers; and (ii) the Funder's Fee, the Adverse Costs Fee and the Adverse Costs Exit Fee. Pursuant to clause 3.2, if the Stakeholder Entitlements are less than the sum that the funder is entitled to receive in respect of (amongst others) the Funder's Fee, the funder is only entitled to the lesser amount in full and final settlement of its right to payment. The Funder's Fee is thus capped by the Proceeds and the Stakeholder Entitlements.

26. In the Amended and Restated Kent LFA dated 7 November 2023, clause 9 is headed "Success in the Action". Clauses 9.1.1, 9.1.6 and 9.2 provide:

> "9.1 In the event of Success, the Class Representative, assisted by her Solicitors, shall:
>
> 9.1.1 in addition to compliance with the provisions of clause 3.2.12.5, use all reasonable endeavours to procure that the Court makes an Order that Undistributed Damages may be paid to the Class Representative in respect of her costs, fees, disbursements and expenses, within the meaning of CAT Rule 93(4), incurred by the Class Representative in connection with the Action including but not limited to the Funder's Fee;…
>
> 9.1.6 pay or procure payment of the Funder's Fee from Stakeholder Proceeds, save that subject to Clause 9.1.1 and 3.2.12.5 this obligation shall be reduced to the extent that the aggregate amounts ordered by the Court to be paid to the Class Representative in respect of this obligation falls below the Funder's Fee.
>
> 9.2 The Funder's Fee shall be payable as set out in the Priorities Deed and calculated as follows:
>
> 9.2.1 a sum equivalent to the greater of: (i) two times the Funder's Outlay; or (ii) 30% (thirty percent) internal rate of return on the Funder's Outlay (the "Funder's Initial Return");
>
> 9.2.2 a further sum equivalent to two times the Funder's Outlay; (the "Funder's Further Return"); and
>
> 9.2.3 a further sum equivalent to either (i) 0.5 times the Funder's Outlay in the event that Stakeholder Proceeds are determined and available to be distributed in accordance with Clause 3 of the Priorities Deed prior to 10 March 2026 or (ii) one times the Funder's Outlay in the event that any Stakeholder Proceeds are determined and available to be distributed in accordance with Clause 3 of the Priorities Deed on or after 11 March 2026 ("Funder's Additional Return")."

27. "Proceeds" is defined in clause 1.38: ""Proceeds" means the total amount of damages (including any non-monetary damages) paid by the Defendants or one or more of them in the Action pursuant to an Order of the Court or otherwise." "Stakeholder Proceeds" is defined in clause 1.44:

> ""Stakeholder Proceeds": means (i) any Recovered Costs; (ii) any amount paid from Undistributed Damages to the Class Representative pursuant to an Order of the Court in respect of costs, fees, disbursements or expenses incurred by the Class Representative within the meaning of CAT Rule 93(4); and (iii) any amount approved by the Court in a Collective Settlement Approval Order to be paid to the Class Representative as costs, fees, disbursements or expenses within the meaning of CAT Rule 94."

The *Kent* LFA thus contains a cap on the recovery of the Funder's Fee by reference to the undistributed damages and recovered costs similar to that in the CICC opt-out LFAs.

28. Under the draft Revised Gutmann LFA dated 17 October 2023, the Funder's Return is calculated not as a percentage of the damages awarded but by reference to a multiple of the capital committed. Schedule 2 to the LFA identifies the two ways in which the Funder's Return is calculated in Table 1 and Table 2. Table 1 provides for the calculation of the Funder's Return in accordance with Priorities Waterfall 1 (as varying multiples of Committed Capital depending upon when recovery is made) if the CAT approves the payment of costs, fees and disbursements otherwise than from, in effect, undistributed damages. Table 2 provides for the calculation of the Funder's Return in accordance with Priorities Waterfall 2 (again with varying multiples depending on when recovery is made) if the CAT does not approve the payment of costs, fees and disbursements otherwise than from, in effect, undistributed damages. There is no express cap on the amount which the funder can recover, but the appellants argue that it is capped by the Proceeds because it is payable from the Proceeds.

The judgments below

29. It is only necessary to refer to those parts of the judgments of the CAT relevant to the issues on appeal. The earliest judgment of the CAT is that in *Neill* ([2023] CAT 73) dated 21 November 2023. The CAT dealt first with the alternative bases for recovery. It recorded at [146] Sony's submission that the words: "only to the extent enforceable and permitted by applicable law", as inserted into clauses 11.1.2 and 11.2.2, do not convert the LFA from a DBA into a lawful funding arrangement and at [147] the rival submission of the class representative that, unless and until there were a change in the law, clauses 11.1.2 and 11.2.2 have no effect and do not engage section 58AA(3)(a)(ii), as there is no amount of payment to the funder which is determined by reference to the Proceeds.

30. At [148] the CAT agreed with the class representative, saying:

> "The clauses operate with a contingency, such that they have no legal effect until the contingency (legislation by Parliament to reverse the effect of *PACCAR*) eventuates. There is therefore no logical possibility that section 58AA could be engaged to make the provisions unenforceable. As a matter of freedom of contract, it is open to the PCR and the funder to agree on such a provision, and we see no reason of public policy or otherwise to make that objectionable. The drafting expressly recognises that the use of a percentage to calculate the Funder's Fee will not be employed unless it is made legally enforceable by a change in the law, which appears to us to be an entirely proper position to take.

The CAT went on at [153] to conclude that, if it had been necessary to decide the point, they would have been prepared to sever clauses 11.1.2 and 11.2.2.

31. The CAT turned to Sony's case that the revised LFA engaged section 58AA of the CLSA and so was a DBA and unenforceable. The principal argument advanced as recorded in [154(1)] was the one raised by Issue 1 on these appeals, that "the Proceeds are a natural cap on the amount which can be paid to the funder, so that there is inevitably a reference to the amount of financial benefit obtained by the PCR in determining the Funder's Fee."

32. At [158], the CAT rejected that argument:

> "158. We do not accept Sony's submission…for the following reasons:
>
> (1) Sony could not point to any provision in the Current LFA by which the amount of the Funder's Fee was limited by the amount of the Proceeds. The Current LFA is not therefore "an agreement…which provides that…the amount of the [Funder's Fee] is determined by reference to the amount of the [Proceeds]", as section 58AA requires.
>
> (2) It is in fact the Tribunal, exercising its discretion under Rule 93, that will determine the Funder's Fee in the event of any judgment. In a settlement, the Funder's Fee will be determined by the terms of the settlement, if approved by the Tribunal, in accordance with Rule 94.
>
> (3) It may well be the case, in either scenario, that the size of the Proceeds will be a relevant consideration for the Tribunal (or indeed the parties, in a settlement), not least to ensure that the Funder's Fee (together with other Stakeholder payments) does not eliminate or unfairly reduce the benefit of the collective proceedings to class members. That is entirely beside the point, as far as section 58AA is concerned. Neither situation will give rise to an agreement between the funder and the PCR by which the amount payable to the funder is determined by reference to the amount of the financial benefit obtained by the PCR.

> (4) In this regard, we note that Lord Sales JSC dealt with an argument about the significance of the Tribunal's intervention in [96] to [99] of the majority judgment in *PACCAR*, in which he said that the Tribunal's discretion in settling the return to the funder did not prevent a percentage based funder's fee from being a DBA. That must, with respect, be correct, but it is quite a different position from this case, where there is no effective provision for a percentage based funder's return. In this case, Sony is arguing that the exercise of discretion by the Tribunal, in referring to the size of the Proceeds, itself gives rise to a DBA. We do not think that *PACCAR* assists on that point.
>
> (5) Finally, we have already dealt with Sony's argument that *PACCAR* has materially changed the way that the Tribunal should approach the question of whether a funding agreement is a DBA (see [144] above). We do not, as Sony suggested, consider that the approach we have accepted above is a mechanistic one which ignores the reality of the funding arrangements. On the contrary, our conclusions reflect the reality of the situation, and we reject the artificial approach urged on us by Sony."

33. Similar arguments were advanced by Mastercard and Visa before the CAT in *CICC*. In its judgment dated 17 January 2024 ([2024] CAT 3) at [51] the CAT noted that the funding arrangements for the opt-out and the opt-in proceedings both contain express provisions capping the funder's fee at the amount available for distribution. The CAT recorded at [52] the defendants' submission that the cap means that the funder's fee is "determined by reference to" the damages recovered, as set out in section 58AA(3)(ii). At [54] the CAT noted that in *Neill* the CAT had considered a similar argument albeit in the absence of any express provision in the contractual arrangements applying a cap. The CAT then quoted [158] of the *Neill* judgment (set out at [28] above).

34. At [55] the CAT noted the anomaly that, on the defendants' case, the effect of a cap which ostensibly protects the class representative is to render the LFA an unenforceable DBA:

> "Mr Kennelly [counsel for Visa and Mastercard before the CAT] accepted in argument that his position would be more difficult (in relation to the Cap Point at least) if there were no contractual provisions in the funding arrangements in this case. 9 We pointed out that it seemed a rather arbitrary result for the LFAs to be DBAs because of an express provision, put in to protect the PCRs, about a cap on the funding obligations, whereas the LFAs would not be DBAs if there was no express provision, but the PCRs would be exposed to potentially greater risk. Mr Kennelly's answer was that this consequence flowed from the exercise of statutory construction and in particular the broad scope of the language, which was designed to regulate funding arrangements across the entire legal market."

35. It is worth noting at this stage that, before this Court, the appellants accepted that, if there were no cap (express or implied) but only a funder's fee calculated by reference to multiples of the funder's outlay with no upper limit, the LFAs would not amount to DBAs and would be enforceable. I will return to this point later in the judgment.

36. The CAT considered that the assessment of the funding arrangements by reference to section 58AA(3) of the CLSA needed to be approached on a holistic common-sense basis. It held that while there were many ways in which the funder's fee could be adjusted, including by reference to the size of the award, the CAT's oversight and/or specific terms of a settlement, it did not follow that every such factor "*determines*" the amount of the funder's fee in the way required by section 58AA(3)(a)(ii). At [58] the CAT said:

> "We consider there to be a difference between a factor which might have an influence, and one which is determinative in the sense of being the substantive mechanism by which the funder's fee is arrived at. In other words, it is necessary to form a view about the true nature of the contractual arrangements and what can be said to be the real and substantive basis on which the funder's fee is determined."

It further considered at [59] that such an assessment requires looking at the closeness and quality of the causative connection as well as standing back and asking what is the true commercial arrangement: "and whether that commercial arrangement is substantially based on the size of the proceeds determining the size of the funder's fee." The CAT considered at [63] that there is nothing in section 58AA that requires a narrow, forensic approach and, instead, the words used suggest a common-sense focus on the real substance of the LFA.

37. At [65] the CAT set out [98]-[99] of the judgment of Lord Sales JSC in *PACCAR*:

> "98. Under the opt-out LFA Yarcombe's funder's fee is expressed to include a percentage of the proceeds of the litigation. As the appellants point out, according to the procedural rules in the Tribunal and by virtue of the Competition Act 1998 the funder of opt-out proceedings always takes the risk that all of the damages recovered will be distributed to members of the class with the result that there will be nothing left to pay its fee and also takes the risk that the Tribunal might decline to exercise its discretion to order a payment in favour of the funder. UKTC is the proposed representative in the opt-out proceedings and, if those proceedings succeed, will obtain an award of damages on behalf of the class represented. Distribution of the damages is governed by rule 93 of the Competition Appeal Tribunal Rules 2015 (SI 2015/1648). Members of the class who claim their share of the damages in time are to be paid; but it is in the nature of opt-out proceedings brought on behalf of a wide class of people, many of whom may be unaware of or uninterested in the proceedings, that there may be a substantial

amount which is not collected. Rule 93(4) enables the Tribunal to order payments out of undistributed damages in respect of the representative's costs, fees and disbursements and it has been established that this also permits payment of a funder's fee: Merricks v Mastercard Inc [2017] 5 CMLR 16, paras 117 and 127. The terms of the opt-out LFA between UKTC and Yarcombe are structured to take this mechanism into account. Clause 10.1 imposes an obligation on UKTC to pay the funder's fee (including the stipulated percentage share of the damages) save to the extent that the aggregate amount ordered by the Tribunal to be paid to UKTC in respect of that obligation falls below the funder's fee, and by clause 3.1.4 UKTC warrants that it will use its best endeavours to obtain such an award.

[99] None of this affects the application of section 58AA(3). The LFA provides that payment of the funder's fee is conditional on UKTC receiving a "specified financial benefit" in the litigation. The payment to be made is obviously a success fee. As the appellants submit, the fact that a claims management service provider enters into an agreement which adds a further condition which must be met before a payment is due does not deprive the remuneration being of the character of a specified financial benefit within the meaning of section 58AA(3)(a)(i). This is a general point which has particular force when, as here, the additional condition simply reflects the mechanism in the Tribunal Rules which allows such a payment to be made. It also remains the case that the amount of the payment due to Yarcombe is to be determined by reference to the amount of the financial benefit obtained", so as to satisfy the condition in section 58AA(3)(a)(ii) as well, even though the structure of the opt-out regime according to the Competition Act 1998 and the Tribunal Rules means that this is treated as capable of being departed from in certain circumstances. Yarcombe's primary contractual entitlement is to payment of an amount determined as stated in that sub paragraph, even if there may be a departure from that in certain identified circumstances. As a matter of substance, the LFA retains the character of a DBA as defined. It is inherent in any DBA that risk is shared by the funder, so the fact that under the opt-out LFA Yarcombe as funder shares the financial risks associated with the litigation provides no basis to say that this LFA falls outside the statutory definition of a DBA."

38. Lord Sales JSC thus rejected the submission that a provision subjecting the payment to the funder to the approval of the CAT prevented the LFA from being a DBA. The CAT recorded the defendants' argument that these paragraphs supported their case by making it plain that the potential intervention of the Tribunal did not convert an unenforceable LFA into an enforceable one. The CAT rejected that argument, considering at [66] that the approach of Lord Sales supported its view that what was required was an assessment of the true substance of the funding arrangement, viewed in the round. The CAT said:

> "Lord Sales JSC refers to the substance of the character of the LFA in that case as being plain. In order to reach a conclusion in relation to the funding arrangements in these proceedings, a similar focus on the substance of the character of those arrangements is required."

39. At [67] the CAT held that, as a matter of substance, the funding arrangements did not have the character of a DBA as defined in the legislation. This is because the arrangements are firmly and primarily based on a determination of the funder's fee by reference to a multiple of outlay and not by reference to sharing in a percentage or other proportion of the amount of financial benefit received. The fact that other factors might affect the actual fee did not change the substantive analysis. At [69] the CAT held that the approach proposed by the defendants to section 58AA(3) was unreasonably wide:

> "capturing agreements where there was no obvious reason why they should fall within the regime created by section 58AA and described in detail in *PACCAR*, and despite the substance of the arrangement providing no basis for that."

40. The CAT went on to consider the alternative bases for recovery in the CICC opt-in arrangements, whereby the funder would recover a fee based on multiples of its outlay if the percentage-based fee was unenforceable. It rejected the defendants' argument that these provisions of the Priorities Agreement were contrary to public policy. They agreed with the reasoning of the CAT in *Neill* rejecting a similar argument saying at [73]:

> "We view the contractual provisions as creating a contingency that will only have any effect if Parliament was in terms to permit funding arrangements of this sort to be enforceable. Section 58AA cannot apply to make the provisions unenforceable, as the premise of the contingency is that section 58AA no longer operates to that effect."

41. The CAT went on at [75] to reject an argument that the provisions create incentives mirroring those made unenforceable by section 58AA:

> "We also disagree with the [defendants'] argument that the creation of incentives that mirror those made unenforceable by section 58AA is contrary to public policy. Either the LFAs are caught by the statutory scheme or they are not. In the latter case, it is difficult to see what public policy considerations would arise. We see no reason why the contingencies set out in the Priorities Agreements should offend public policy and we were not cited any authority to support that proposition."

42. In its judgment of 19 January 2024 in *Kent* ([2024] CAT 5) at [7] the CAT noted that Apple advanced two grounds for challenging the Kent LFA. The first ground was that it is a DBA within the meaning of section 58AA(3)(a)(ii) of the CLSA because it imposes a natural cap and/or is derived from proceeds and, therefore, unenforceable pursuant to s.47C(8) CA as well as for failing to

comply with the DBA Regulations 2013 (which was common ground). The second ground concerned the ratchet provision, which need not be considered further, as the CAT's rejection of that ground was the basis for the appeal to this Court on Issue 4, now abandoned.

43. In relation to the first ground, the CAT noted that, in its judgment in *Neill* the CAT had rejected substantially the same arguments. Apple had asked the CAT for a ruling on its challenges, but it had been agreed that the matter be decided on the papers without oral submissions. At [12]-[15] the CAT then summarised the reasoning in *Neill* and said that it adopted the same reasoning. At [17] the CAT concluded:

> "We can see no basis on which it can sensibly be suggested that the mere fact that the damages which the Class Representative might be awarded creates a limit or cap on the funder's fee is enough to bring the revised LFA within section 58AA(3)(a)(ii). As in *Neill v Sony*, we have seen no contractual provision that would engage section 58AA in this way. On the contrary, the contractual provisions in the revised LFA provide for the funder's fee to be determined by reference to a multiple of the Funder's Outlay. This is the real and substantive reference point for determination of the funder's fee. Any natural cap or limit is ancillary to that and does not engage section 58AA. We see no reason to depart from the conclusion reached in Neill v Sony on essentially the same issue, for the additional reasons given by the Tribunal in that judgment."

44. In its judgment dated 12 March 2024 in *Gutmann* ([2024] CAT 18) the CAT dealt with the only issue on these appeals which arose there (Issue 1) very shortly. At [42] the CAT said:

> "The final point raised by Ms Cunningham [counsel for Apple in that case] is that the fact that the Funder's fee is payable from, and limited to, the amount of proceeds received, which provides a natural cap on the fee, she submits, makes this agreement a DBA. Mr Bacon acknowledges that the fees to be paid cannot exceed the payments made to the class by way of damages. Ms Cunningham recognised that the same point had arisen in [*Neill*] [2023] CAT 73 ("Neill") and [*Kent*] [2024] CAT 5 ("Kent") where the Tribunal held that a natural cap of this sort does not mean the LFA is a DBA. We agree. Ms Cunningham did not argue this point at length but made it clear she was reserving the point for any appeal given that there is to be an appeal on this point in Neill and Kent."

The parties' submissions

45. In setting out the submissions addressed to the Court, I will cite the passages from the authorities on which the parties relied, to avoid repetition in the Discussion section of the judgment.

46. In relation to Issue 1, Mr Daniel Piccinin KC on behalf of the appellants emphasised that this Court had to be careful not to fix what it perceives as a problem in the context of the collective proceedings regime under the CA 1998 by looking narrowly at that context, but in the process leave what he described as a "gaping wound" in another piece of legislation, the CLSA. He took the Court through the various pieces of legislation and then took the Court through the judgment of Lord Sales JSC in *PACCAR*, particularly in the context of the history of the legislation.

47. At the outset of his judgment Lord Sales noted that the case concerned the proper interpretation of a definition first used in one statutory context and then adopted and used in another context, in that case "claims management services". At [2] he said that it was necessary to consider the meaning of the definition in the first context citing what Lord Neuberger PSC had said in *Williams v Central Bank of Nigeria* [2014] AC 1189 at [50]:

> "Where a term in a later statute is defined by reference to a definition in an earlier statute, it seems to me self-evident that the meaning of the definition in the later statute must be the same as the meaning of the definition in the earlier statute. Hence, the meaning of the term in the later statute is determined by the definition in the earlier statute. Further, the adoption of the definition in the later statute cannot somehow alter the meaning of the definition in the earlier statute. It accordingly follows that one has to determine the meaning of the term in the later statute simply by construing the definition in the earlier statute."

Lord Sales noted that they also had to consider whether later legislation throws any light on the proper interpretation of the earlier legislation.

48. At [14] he noted that, although the appeal was concerned with section 58AA of the CLSA it was necessary to go back to an earlier provision of the Compensation Act 2006 which set out the definition of a DBA which section 58AA later incorporated. The 2006 Act provided amongst other things for the regulation of claims management services. At [23] Lord Sales noted that, as of 1 April 2019, responsibility for the regulation of claims management services passed from the Ministry of Justice to the Financial Conduct Authority ("FCA") pursuant to amendments to the Financial Services and Markets Act 2000 ("FSMA").

49. At [25] Lord Sales noted that section 58 of the CLSA introduced conditional fee agreements ("CFAs") under which lawyers were permitted in certain circumstances to charge success fees for their services. At [26] he noted that section 28 of the Access to Justice Act 1999 had made provision for a new section 58B to be inserted in the CLSA making enforceable certain LFAs which were otherwise thought to be unenforceable at common law. He set out that provision, but noted that it has not been brought into force. At [27] he then noted that section 154 of the Coroners and Justice Act 2009 had inserted a new section 58AA of the CLSA introducing DBAs in employment cases and making them enforceable, subject to the satisfaction of certain conditions. The limitation to employment cases was removed by section 45 of the Legal Aid, Sentencing

and Punishment of Offenders Act 2012 ("LASPO"). The current version of section 58AA is set out at [2] above.

50. Mr Piccinin KC referred to the section of the judgment at [40] to [49] headed "The relevant interpretative principles" in relation to issues of statutory interpretation. He noted [42] where Lord Sales said that it was legitimate to refer to Explanatory Notes which accompanied a Bill on its passage through Parliament and [44] where he said that in certain circumstances subordinate legislation made pursuant to powers in a statute could be an aid to interpretation of the statute. The parties in *PACCAR* had agreed that the Scope Order which was roughly contemporaneous with the 2006 Act, could be an aid to its interpretation. At [44] Lord Sales concluded:

> "In my view, on this basis and in line with the position for explanatory notes, the Scope Order is admissible as an aid to interpretation both for such light as it might throw on an assessment of the purpose of the primary legislation and to assist in resolving any identified ambiguity in a provision in that legislation."

51. Mr Piccinin KC cited the further passage at [45] where Lord Sales said:

> "Where the primary legislation and the subordinate legislation are drafted by or on the instructions of the same government department at about the same time, as would be normal in this type of case, it is reasonable to suppose that they are inspired by the same underlying objective and are intended to reflect a coherent position as understood at the time the primary legislation is presented to Parliament. In that situation, it has been observed that the subordinate legislation made under a power in the primary legislation can be regarded as a form of parliamentary or administrative contemporanea expositio (exposition of contemporary understanding) in relation to the primary legislation which may provide some evidence of how Parliament understood the words it used in the primary legislation, even though this does not decide or control their meaning: *Hanlon v The Law Society* [1981] AC 124, 193-194 (Lord Lowry, with whom Lord Edmund-Davies, Lord Fraser of Tullybelton and Lord Scarman agreed). This point is strengthened where, as here, the subordinate legislation is broadly contemporaneous with the Act and is subject to review by the same elected Parliament which passed the Act according to the positive or the negative resolution procedure. This can provide grounds to infer that the Parliament which passed the Act regarded the subordinate legislation as in accordance with it and a fair reflection of it."

52. Finally on this section of the judgment, Mr Piccinin KC noted [47] where Lord Sales had said that the DBA Regulations 2013 could not inform the interpretation of the 2006 Act.

53. Mr Piccinin KC then moved forward to the section of the judgment headed "Events after 2006" beginning at [87] and noted that at [90], Lord Sales had rejected the argument that either the Jackson reports on costs or the Code of Conduct of the Association of Litigation Funders assisted in relation to the statutory interpretation of the 2006 Act.

54. He submitted that [92] of the judgment was important:

> "Mr Rhodri Thompson KC, for the respondents, submitted that later legislation, in particular section 58AA, may be referred to as an aid to interpretation of the 2006 Act in order to resolve an ambiguity in that earlier legislation. He contended that the interpretation of section 4 of the 2006 Act proposed by the appellants produces absurd effects in relation to the application of the later legislation and that this supports the interpretation preferred by the Divisional Court. I am not persuaded by this. It is not clear to me that section 58AA would provide helpful guidance even if the statutory definition of "claims management services" in section 4 of the 2006 Act or section 419A of FSMA were ambiguous. However, it is not necessary to examine this submission in detail, because I do not consider that there is any ambiguity in that definition."

55. Mr Piccinin KC submitted that what this analysis by the Supreme Court demonstrated was that, in looking at the meaning of "claims management services" in the current version of section 58AA and for the purposes of section 47C(8) of the CA, one has to think about what that expression meant when first used in the 2006 Act, not about what Parliament meant in later legislation in 2009 or 2012. The same principle should be applied to the meaning of section 58AA (3)(a)(ii). One should look at the first version of the CLSA in which that provision appeared and the Regulations then made.

56. On that basis, he referred to the definition of a DBA in section 58AA(3)(a) which has not changed since the section was first enacted in 2009. Sub-section (4)(b) as it then stood provided that the agreement "must not provide for a payment above a prescribed amount or for a payment above an amount calculated in a prescribed manner" and (c) provided that the agreement "must comply with such other requirements as to its terms and conditions as are prescribed". The relevant prescribed provisions were in the DBA Regulations 2010. Regulation 2(c) provided that the agreement must specify: "the reason for setting the amount of the payment at the level agreed, including having regard to, where appropriate, whether the claim or proceedings is one of several similar claims or proceedings". Regulation 5 then provided under the heading: "The payment" that the amount prescribed for the purposes of sub-section 4(b): "is the amount which, including VAT, is equal to 35% of the sum ultimately recovered by the client in the claim or proceedings." Regulation 6(2) then provided that: "If the agreement is terminated, the representative may not charge the client more than the representative's costs and expenses for the work undertaken in respect of the client's claim or proceedings."

57. Mr Piccinin KC referred to the Explanatory Memorandum to the DBA Regulations 2010. Paragraph 7.1 under "Policy background" provided that: "The aim is to protect consumers from unfair and unclear agreements by regulating those specific aspects of damages-based agreements where there is most potential for consumer detriment." Paragraph 7.4 provided an explanation as to why the Regulations only applied to employment cases:

> "The draft Regulations only cover damages-based agreements in the employment sector because evidence suggests that different representatives – for example solicitors and claims managers – currently operate in this field under different levels of professional regulation."

58. He also referred to paragraph 7.5 which explained what a DBA is in these terms:

> "A damages-based agreement is a private funding arrangement between a representative and a client whereby the representative's fee is contingent upon the success of the case, and is usually determined as a percentage of the compensation received by the client. Damages-based agreements are not permitted in litigation before the courts, but their use developed in employment tribunals which traditionally deal with 'non-contentious' business i.e. work which falls outside the courts. Section 58AA (2) defines an employment matter as "a matter that is, or could become, the subject of proceedings before an employment tribunal"."

Mr Piccinin KC emphasised the word "usually", making the point that DBAs were therefore not always percentage based.

59. In relation to the question of consumer protection which these DBA Regulations were addressing, he also referred to the Impact Assessment which referred to research by Professor Moorhead showing representatives charging between 5% and 50%. The chosen figure of 35% was at the lower end of that spectrum of fee level. Paragraph 2.20 said:

> "The rationale behind this is to provide an incentive to improve cost efficiency on the part of DBA claims managers and lawyers, and also to provide an incentive to consider alternative dispute resolution avenues (instead of the Employment Tribunal) for less certain cases."

60. Mr Piccinin KC then referred to the DBA Regulations 2013, Regulation 3 of which imposed requirements for all DBAs. Regulation 4 regulated payments in cases other than employment, imposing a limit of 25% of the damages recovered in the case of personal injury and 50% in other cases. He also referred to the Explanatory Memorandum to those Regulations, paragraph 7 of which set out the policy background. 7.1 and 7.2 provided:

> "7.1 Until now, damages-based agreements have not been permitted in litigation before the courts, but their use has

> developed in 'non-contentious' business (i.e. work which falls outside the courts), including employment matters…
>
> 7.2 Lord Justice Jackson recommended that DBAs should be extended to all areas of civil litigation. He argued that this would provide litigants with the choice of funding methods and the freedom to choose the one that they consider is most appropriate for their case. The Government accepted this recommendation, which is reflected in section 45 of the LASPO Act."

61. Paragraph 7.7 noted that the Civil Justice Council had recommended a cap of 50% for consumer and micro-economic cases but no cap at all for commercial cases but the government disagreed:

> "7.7 The Civil Justice Council (CJC), during their consideration of how DBAs should be implemented, suggested that in consumer and micro enterprise cases, the lawyer's fee should be a capped at 50%, but there should be no cap in commercial cases. The Government agreed that there should be a cap of 50% of the damages that the lawyer may take in DBAs, but considered, in the interests of the claimant, that this should be extended to all cases which were not otherwise capped (i.e. personal injury claims and employment matters). The figure of 50% is based on the CJC's recommendation, and would allow claimants to keep 50% of damages."

62. In argument, the Court also drew attention to paragraph 2.1 (to which Mr Bacon KC also referred in his submissions) which provided under the heading "Purpose of the instrument":

> "2.1 A damages-based agreement ("DBA") is a private funding arrangement between a representative and a client whereby the representative's agreed fee ("the payment") is contingent upon the success of the case, and is determined as a percentage of the compensation received by the client."

Mr Piccinin KC countered that the Explanatory Memorandum to the DBA Regulations 2010 had said that DBAs were "usually" percentage based and submitted that what he described as the "loose language" of the Explanatory Memorandum cannot change the meaning of a DBA in the statute.

63. He also referred to the Explanatory Notes to section 45 of LASPO, [288] of which the respondents rely upon. That provided:

> "288. Damages-based agreements ("DBAs") are another type of 'no win, no fee' agreement under which a lawyer can recover a percentage of the client's damages if the case is won, but will receive nothing if the case is lost. Currently, solicitors and barristers are not permitted to act under DBAs in civil litigation, but solicitors are permitted to act under DBAs in non-

> contentious business, including cases before employment tribunals."

64. Mr Piccinin KC then made some submissions about CFAs, pointing out that section 58(1) of the CLSA which introduced CFAs provides that: "(1) A conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a conditional fee agreement;…" It does not say that it will be lawful and enforceable if it complies with those conditions, so that it is not ruling out that CFAs will have to comply with other conditions for example those in the DBA Regulations, to be lawful.

65. He noted that the respondents relied upon sub-sections (4A) and (4B) inserted by section 44 of LASPO:

> "(4A) The additional conditions are applicable to a conditional fee agreement which—
>
> (a) provides for a success fee, and
>
> (b) relates to proceedings of a description specified by order made by the Lord Chancellor for the purposes of this subsection.
>
> (4B) The additional conditions are that—
>
> (a) the agreement must provide that the success fee is subject to a maximum limit,
>
> (b) the maximum limit must be expressed as a percentage of the descriptions of damages awarded in the proceedings that are specified in the agreement,
>
> (c) that percentage must not exceed the percentage specified by order made by the Lord Chancellor in relation to the proceedings or calculated in a manner so specified, and
>
> (d) those descriptions of damages may only include descriptions of damages specified by order made by the Lord Chancellor in relation to the proceedings."

The maximum limit or regulatory cap is only imposed in personal injuries cases under paragraphs 4 and 5 of the Conditional Fee Agreements Order 2013 at 25% of damages in first instance proceedings and 100% in appellate proceedings.

66. In relation to Issue 1, Mr Piccinin KC made his submissions by reference to the CICC opt-out CFA (the relevant provisions of which are set out at [16] to [20] above). His primary submission was that under those provisions, the payment under the LFA is determined by reference to the financial benefit obtained within the meaning of section 58AA(3)(a)(ii) of the CLSA, because what the LFA provides is that the payment should be determined as whichever is the lesser of two things: one is the multiple of the funder's outlay, not a multiple of costs and the other the undistributed damages. He submitted that an agreement which

provided for the funder to recover a multiple subject to a cap by reference to X % of the damages, even 100%, entails the same set of contractual rights and obligations as an agreement that the funder should recover a percentage of the damages. He submitted that in what he described as a "minimum value situation" where the mechanism that determines the amount of the payment to the funder takes the lower of those two numbers, that is a determination by reference to the amount of the financial benefit. In that minimum value situation, you are always determining by reference to the amount of the damages because you always need to look at the amount of the damages to see whether that or the multiple of the outlay determines the funder's fee.

67. Mr Piccinin KC took the Court through the judgment of the CAT in *CICC* (which I have summarised at [33] to [41] above). In relation to the core reasoning at [57]-[58] of the judgment (referred to at [35] above) that factors like the oversight of the CAT were not determinative, drawing a distinction between factors that might have an influence and those that were determined, he submitted that a factor that has an influence feeds into the determination. There was no justification for the CAT's decision that to be determinative it had to be "the real and substantive basis on which the funder's fee is determined." Those words at the end of [58] of the judgment do not appear in the statute.

68. Mr Piccinin KC referred to [64] to [66] of the CAT judgment dealing with [98]-[99] of Lord Sales JSC's judgment. He submitted that what Lord Sales was saying in those paragraphs was that the fact that the agreement made provision for a payment determined by reference to the amount of the financial benefit was not changed by the fact that the agreement and the CAT Rules also provide for that to be departed from in certain circumstances, so that the ultimate outcome might be that what the funder recovered was not a percentage of the damages at all. He submitted that what Lord Sales said in [99] that: "As a matter of substance, the LFA retains the character of a DBA as defined" was equally the case here. The LFA here retained the character of a DBA as defined because it provides a mechanism for determining the payment by reference to the proceeds.

69. Green LJ put to Mr Piccinin KC that the situation with which Lord Sales was dealing was the reverse of the present case. He was saying that the fact that the funder shares in the financial risk does not turn what was otherwise a DBA into an agreement which is not a DBA, whereas what Mr Piccinin KC was saying was that the fact that the funder shares in the financial risk turns what is not a DBA into a DBA. Mr Piccinin KC accepted that Green LJ was correct but submitted that the logic of what Lord Sales said supported his position. If, as was the case here, the LFA exposes the funder's fee to the risk of going up or down, depending on what the damages are, it is a DBA.

70. In relation to Issue 2, Mr Piccinin KC referred to clause 11.1 of the *Neill* LFA (set out at [23] above) which provides that the funder's fee is to be the greater of a multiple of the Costs Limit, in other words the outlay or, only to the extent enforceable and permitted by applicable law, a percentage of the proceeds. He submitted that this was a maximum value function with a single mechanism requiring one to look at the value of the proceeds and therefore a DBA. The question under Issue 2 is whether the words: "only to the extent enforceable and permitted by applicable law" saved the LFA from being a DBA, which the

appellants answered in the negative. It is an agreement which provides that if certain matters come to pass the class representative must pay the funder a percentage of the damages. Those matters are that the claim must succeed, the percentage of damages must be larger than the multiple of costs and that the law must have changed to permit class representatives to make agreements that provide for the payment to be determined in this way. Mr Piccinin KC submitted that it was still an agreement that provides for the amount of the payment to be determined by reference to the amount of the financial benefit, albeit only in those circumstances. The LFA still contains what is in effect a condition subsequent that in certain circumstances the funder's fee will be determined by reference to the damages.

71. The CAT dealt with this issue at [148] of its judgment in *Neill* quoted at [30] above. Mr Piccinin KC submitted that the CAT's reasoning gave rise to a number of problems. One was the possibility that the law changed not by reversing *PACCAR* but by repealing section 47C(8) of the CA, which is one of the recommendations of the Civil Justice Council. He asked rhetorically whether an LFA of this kind would be a DBA or not, which was a complex question. Mr Piccinin KC referred to the Government response to the consultation on Private Actions in Competition Law which preceded the enactment of section 47C of the CA. At 5.11, under the heading: "The Government's Decision", it is stated:

> "The Government recognises that there are strong and passionately held views on both sides of this debate. It recognises the concern of those respondents who worry about frivolous cases and has no wish to introduce a regime that would create a 'litigation culture'."

72. 5.12 recognised the need to introduce an opt-out regime but 5.13 noted that the Government agreed that strong safeguards would be needed as part of that regime, including certification, limited jurisdiction, no contingency fees or treble damages and limits on the type of bodies permitted to bring cases. Mr Piccinin KC focused on contingency fees, referring to 5.62 and 5.63 which stated:

> "5.62. Prohibiting the use of damages-based agreements (DBAs), sometimes called contingency fees, was one of the key safeguards highlighted by many respondents as necessary to ensure that an opt-out collective actions regime did not lead to a 'litigation culture'. The Government agrees that this prohibition would be an important safeguard and that allowing DBAs could encourage speculative litigation, thereby placing unjustified costs on defendant businesses and creating an incentive for lawyers to focus only on the largest cases. No win no fee conditional fee agreements (CFAs) and after the event insurance will remain available for use in these cases, subject to the changes in the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012.
>
> 5.63. The Government has therefore decided to prohibit DBAs in collective actions cases in the CAT. This will require an amendment to the LASPO Act 2012 for this new type of case."

73. Mr Piccinin KC submitted that Parliament had therefore deliberately banned DBAs for opt-out claims to avoid a litigation culture developing and to avoid speculative litigation and the incentivising of lawyers to focus only on the largest cases. All three aspects of that policy relate to the creation of incentives arising from a link between the size of the damages and the payment to the service provider including the lawyers. He submitted that clauses like the one in the *Neill* LFA under consideration were a bad thing because they create those incentives straight away. As Green LJ said in the course of argument, this incentives argument was advanced without any evidence to support it. When I suggested that there was no difference between catering for the eventuality that the law might change in the LFA, as the parties had done here and having in mind that, if the law changed, it might be necessary to enter into yet another amended LFA, Mr Piccinin KC submitted that the difference was that, in the latter case, the class representative might or might not agree to enter such an amended agreement, whereas in the former case the class representative was bound to agree to a funder's fee being determined as a percentage of the damages if the law did change.

74. Submissions on Issue 3 were made on behalf of the appellants by Ms Sarathy. The issue of severance only arises in relation to the *Neill* LFA and then only in so far as the Court finds that the alternative recovery of the funder's fee on the basis of a percentage of the damages is unenforceable. She noted that the respondents rely in their skeleton argument on the decision of this Court in *Lexlaw Ltd v Zuberi* [2021] EWCA Civ 16; [2021] 1 WLR 2729 ("*Zuberi*") for the proposition that only the percentage payment provision constitutes a DBA which is unenforceable without affecting the remainder of the LFA, so that it is not necessary to get into severance at all. However, this point was not argued before the CAT and is not the subject of a Respondent's Notice. In any event, she submitted that the respondents' interpretation of *Zuberi* is wrong.

75. The issue in that case concerned clause 6.2 of the relevant agreement which provided that if the client terminated the agreement prematurely, which did not in fact occur, the client must pay the solicitor's normal fees and disbursements. The issue was whether that provision was a DBA caught by regulation 4 of the DBA Regulations 2013. At [33]-[34] of his judgment, Lewison LJ said:

> "33 There are two possible views of what the DBA consists of. One view is that if a contract of retainer contains any provision which entitles the lawyer to a share of recoveries, then the whole contract of retainer is a DBA. In other words, a DBA is a contract which includes a provision for sharing recoveries. But another view is that if a contract of retainer contains a provision which entitles a lawyer to a share of recoveries; but also contains other provisions which provide for payment on a different basis, or other terms which do not deal with payment at all, only those provisions in the contract of retainer which deal with payment out of recoveries amount to the DBA.
>
> 34 In my judgment, there are good reasons for preferring the latter view. First, the object of the legislation was to permit the remuneration of lawyers by means of a share of recoveries.

> Second, the only part of the common law that needed to be changed to achieve that purpose was the rule against champerty. As I have said, at common law the contract of retainer, shorn of clause 9.1, would have been enforceable. There was no particular reason for Parliament to modify the other statutory and regulatory controls over lawyers' fees. Third, there is a presumption that Parliament does not intend to change the common law, except expressly or by necessary implication. There is no express provision which displaces the common law (except the rule against champerty). Fourth, the legislation cannot be said to be undermined by the co-existence of the common law. Fifth, the legislative scheme is far from comprehensive."

76. At [36] Lewison LJ said: "As the judge pointed out, the factual premise underlying regulation 4 is that there were in fact recoveries available for sharing. In that respect he was plainly right." At [42] he concluded that the regulation of the circumstances in which lawyers could recover their costs and expenses on termination of a DBA was not intended to be covered by the DBA Regulations 2013 and at [43] that time costs are outside the scope of the Regulations.

77. Accordingly, Lewison LJ concluded at [45] that clause 6.2 was outside the scope of the Regulations and its presence in the contract of retainer did not invalidate that contract. Ms Sarathy submitted that what the Court was not concerned with in that case was a situation where the clause which provided for payment out of recoveries was itself contrary to the DBA Regulations 2013. By contrast, in the present case the Court is concerned with a clause which does provide for payment out of recoveries and is a DBA and therefore unenforceable by reason of section 47C(8) of the CA. In relation to whether, if the clause in *Zuberi* had been an unenforceable DBA, it would have been severable, Lewison LJ at [49] declined to decide that question, which was *obiter.*

78. Ms Sarathy submitted that the respondents' skeleton conflated two distinct questions: which part of the contract was caught by the DBA Regulations and the consequences which follow if part of the contract was so caught. Only the first question was answered in *Zuberi* and the second was not. That is a question of contract law governed by the rules of severance. In relation to those, she referred to the decision of this Court in *Diag Human v Voltera Fierra* [2023] EWCA Civ 1107; [2023] Cost LR 1511 ("*Voltera*"). That case concerned a firm of solicitors who entered a CFA which was unenforceable because it included a success fee that could exceed 100% and because it did not state the success fee percentage as required by section 58 of the CLSA. The relevant issue was whether the solicitors could sever the success fee provisions and recover their fees at a discounted rate pursuant to another provision of the CFA.

79. At [17] of his judgment Stuart-Smith LJ noted that the public policy behind CFAs being illegal had been the potential for conflicts of interest between the lawyers and their clients. In response to the solicitors' argument that public policy had now changed, he said at [26]:

> "Any further modification of public policy in this area is for Parliament to establish and define: it is not for this court to attempt. This must be borne in mind when considering the issue of severance, not least because many of the authorities about severance are cases about restrictive covenants in contracts of employment, where the nature and scope of public policy are not the same as in the field of champertous retainers of solicitors."

80. At [28] he set out the three-stage test for severance as enunciated by Maurice Kay LJ in *Beckett Investment Management Group Ltd v Hall* [2007] EWCA Civ 613; [2007] ICR 1539 at [40]:

> "a contract which contains an unenforceable provision nevertheless remains effective after the removal or severance of that provision if the following conditions are satisfied: 1 The unenforceable provision is capable of being removed without the necessity of adding to or modifying the wording of what remains. 2 The remaining terms continue to be supported by adequate consideration. 3 The removal of the unenforceable provision does not so change the character of the contract that it becomes 'not the sort of contract that the parties entered into at all'."

81. Stuart-Smith LJ then proceeded to give some guidance on the application of the test. Ms Sarathy submitted that there were three key points for present purposes. First, the exercise the Court undertakes is to compare the contract as a whole, with and without the severed part, and ask whether it was of the same character as before: [30] and [37]. The fact that there are some provisions in common does not necessarily or even probably mean that severance should be permitted: [38]. Second, the court's focus is on substance and not on form. It must consider how radical the change is. Third, on the facts of that case, the test was not satisfied because the severance proposed by the solicitors would fundamentally change the nature of the contract: [40].

82. The Court rejected the analogy that the solicitors sought to draw with *Garnat Trading & Shipping (Singapore) Pte Ltd v Thomas Cooper (a Firm)* [2016] EWHC 18 (Ch); [2016] 1 Costs LR 45. As Stuart-Smith LJ said at [44]:

> "Once the "blue pencil" was applied to the offending provisions in *Garnat* (which all related to the work done on the appeal and nothing else) the parties were left with the original retainer, which continued to govern all other work and was unchanged: the original terms (and the consideration provided for them) remained unaffected by the severance."

83. He contrasted that with the position in *Voltera* at [45]:

> "If the "blue pencil" is applied to the paragraphs that provide for a success fee, the agreement between the parties in relation to all work carried out by the solicitors is converted from being a CFA into an agreement for payment on a conventional (if discounted)

> hourly basis. On any view, this is a major change in the overall effect of the provisions as they existed before applying the "blue pencil"; alternatively it may be said that the agreement after the "blue pencilling" (a standard contract for the payment of fees on an hourly basis) is not the sort of contract that the parties entered into (a CFA) at all."

84. Ms Sarathy pointed out that the Court then went to consider whether, if it was wrong that the application of the three-stage test meant severance was not available, severance was precluded by public policy, concluding at [62] that it was:

> "Even if I were wrong in this conclusion, I would hold that severance is precluded as contrary to public policy. The principal effect of severance would be to permit partial enforcement of the unenforceable CFA. As was pointed out during submissions, if the client lost the arbitration, the effect of allowing severance would be that the solicitors would recover precisely the same amount of their fees as if the CFA had been held to be enforceable. That is not, in my view, a tolerable outcome."

85. Ms Sarathy submitted that applying the three-stage test to the *Neill* LFA, severance was not available here. To sever the unenforceable provision in clause 11.1 would require striking through the "shall be the greater of" clause 11.1.2 and amending the table referring to the payment of the funder's fee. She submitted that as a matter of substance this would generate a major change in the overall effect of the LFA converting what was a DBA into an agreement for payment on different terms. Under the LFA there is a single funder's fee for the same consideration and a single mechanism for calculating that fee. She also submitted that severance was not permissible as a matter of public policy, essentially making the same point about perverse incentives as Mr Piccinin KC made.

86. On behalf of the respondents Mr Nicholas Bacon KC submitted that taken to their logical conclusion the appellants' submissions would result in extraordinary outcomes for the civil justice system. In effect, if the appellants were right, when Parliament legislated against the use of DBAs in the CAT by passing section 47C(8) of the CA in 2015, it was closing the door to any funded piece of litigation, since the Government knew at that stage that the only way to pursue opt-out proceedings was with litigation funding.

87. In relation to statutory interpretation, he submitted that Mr Piccinin KC had been wrong to submit that the Court could not have regard to the litigation landscape and what Parliament understood to be the meaning of a DBA in 2012, 2013 or 2015 but could only have regard to what Parliament understood to be its meaning in 2009 when the Coroners and Justice Act was passed. The DBA legislation had been subject to a comprehensive series of amendments, to both primary and secondary legislation. He took the Court to two paragraphs in *PACCAR*, [43] and [45]:

> "43. The courts will not interpret a statute so as to produce an absurd result, unless clearly constrained to do so by the words Parliament has used: see *R v McCool* [2018] UKSC 23, [2018] 1 WLR 2431, paras 23-25 (Lord Kerr of Tonaghmore), citing a passage in *Bennion on Statutory Interpretation*, 6th ed (2013), p 1753. See now *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), section 13.1(1): "The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by the legislature". As the authors of *Bennion, Bailey and Norbury* say, the courts give a wide meaning to absurdity in this context, "using it to include virtually any result which is impossible, unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief"…"
>
> 45…. Where the primary legislation and the subordinate legislation are drafted by or on the instructions of the same government department at about the same time, as would be normal in this type of case, it is reasonable to suppose that they are inspired by the same underlying objective and are intended to reflect a coherent position as understood at the time the primary legislation is presented to Parliament…."

88. He submitted that LASPO, the amendments to the DBA Regulations in 2013 widening the scope of DBAs to all proceedings and the introduction of section 47C of the CA by the Consumer Rights Act 2015 ("CRA") were all passed by the same Parliament or Government which was seeking to achieve a coherent position between banning DBAs in opt-out proceedings in the CAT but permitting the use of them in all other proceedings. Mr Bacon KC also referred to the decision of the Divisional Court in *R (Hertfordshire CC) v Secretary of State for Housing* [2021] EWHC 1093 (Admin); [2021] 1 WLR 3714 and its citation of the decision of Leggatt J (as he then was) in *R(N) v Walsall Metropolitan Borough Council* [2014] PTSR 1356, where at [73] the Divisional Court said:

> "*Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 24.19 cites the above extract from para 59 of *N* as authority for the proposition that where the legal meaning of an enactment is doubtful, subsequent legislation on the same subject may be relied on as persuasive authority as to its meaning : see also *DSG Retail Ltd v Mastercard Inc* [2020] Bus LR 1360, paras57-58(Sir Geoffrey Vos C)."

89. Mr Bacon KC submitted that it was clear from [99] of *PACCAR* (set out at [36] above) that in deciding whether the amount of the payment due to the funder "is to be determined by reference to the amount of the financial benefit obtained" the Court should focus on what was the funder's primary contractual entitlement. In *PACCAR* the primary contractual entitlement of the funder was to a percentage payment as Lord Sales JSC found "even if there may be a departure from that in certain identified circumstances" specifically that it could

be moderated by the CAT. As he went on to say: "As a matter of substance, the LFA retains the character of a DBA as defined." Mr Bacon KC submitted that the primary contractual entitlement in the present case is to a multiple of the funder's capital funding and has nothing to do with the damages at all. The fact that the multiple may be subject to some subsequent moderation by the CAT depending on the level of damages does not alter the character of that primary contractual entitlement.

90. He also submitted that in [98] of *PACCAR* (also set out at [36] above) the Supreme Court was recognizing that in all cases, it is the proceeds that are utilised to discharge the entitlement of the various stakeholders, including the funders. It was obvious that it could not be said that where the funder says that it is going to charge a multiple by way of return, not subject to the damages but that of course it will limit what it charges to whatever the statutory regime permits, namely the damages, that somehow made the LFA an unenforceable DBA so that the funder cannot fund the case. The appellants' submission was incoherent and led to absurdity.

91. Mr Bacon KC submitted that it was important to look at the history of conditional fee agreements before 2009. He referred to the decision of this Court in *Hollins v Russell* [2003] EWCA Civ 718; [2003] 1 WLR 2487 where the judgment of Brooke LJ set out the history from the enactment of the CLSA in 1990 onwards.

92. Mr Bacon KC referred to the Consultation Paper of the Ministry of Justice on Regulating Damages Based Agreements dated 1 July 2009. He noted the first paragraph of the Overview which said of DBAs that: "The fee is payable only if the claim is successful and is calculated by reference to the damages awarded." This used the word "calculated" rather than "determined" but he submitted that the two were synonymous here. The second paragraph drew the distinction between DBAs and CFAs which was expanded upon later in the Paper, but he submitted that if the appellants' argument were right, all CFAs would be DBAs. The distinction was that CFAs provided that if successful the lawyers would be entitled to an uplift on their normal fees, the so-called success fee whereas as [17] of the Paper said: "The key feature of a DBA is that the persons using the agreements are not paid fees if they lose a case but are paid a percentage of the damages recovered if they win." He drew attention to the voluntary cap of 25% of damages recommended for CFAs by the Law Society referred to in [36]. This demonstrated that the fees under CFAs were always paid out of damages and that there was a cap on the recovery out of damages which did not make the CFA unenforceable.

93. Mr Bacon KC referred to a letter dated 5 March 2013 written by Lord McNally, Minister of State at the Ministry of Justice to Lord Beecham following the debate in the House of Lords on the draft DBA Regulations 2013. There were two passages of interest:

> "Class actions and the use of DBAs
>
> We are aware of concerns raised by the United States Chamber of Institute for Legal Reform and others that the introduction of

> DBAs in civil litigation could have the potential to encourage speculative actions. particularly in collective or class actions, given the experience in the US. However, there are a number of important distinctions between civil litigation in England and Wales in and in the US.
>
> Further, the Government has always maintained the position that we are not in favour of the introduction of class actions as they exist in the US. and does not intend to introduce any sort of generic class action across the various types of civil litigation. As a result, the Government announced on 29 January 2013 that it would prohibit the use of DBAs in collective actions cases in the Competition Appeal Tribunal (CAT).
>
> Third party litigation funding
>
> This matter was debated at some length during the passage of the LASPO Act through Parliament. Some colleagues were concerned about the future growth of third party litigation funding arrangements and, in particular, a move into personal injury claims, While there was a call for the introduction of statutory regulation, the Government does not believe this is the right course of action at his stage: rather this is an issue that we are keeping under review and we will not hesitate to act should we need to do so in future."

94. Mr Bacon KC referred to subsections (4A) and (4B) of section 58 of the CLSA, inserted by section 44 of LASPO (set out at [61] above) dealing with CFAs. These imposed statutory regulation of success fees under CFAs, including a cap on the percentage of damages which could be deployed as the success fee. At around the same time as LASPO made these amendments, the DBA Regulations 2013 introduced statutory caps on what could be charged, reinforcing that in 2012 and 2013 Parliament must have been proceeding on the basis that these are two entirely separate streams of funding arrangements for CFAs and DBAs. The other point he emphasised was that the inherent starting point under both regimes is that it is the damages that are utilised to discharge the liabilities to pay the fees. On that basis, he submitted that the words in section 58AA(3)(a)(ii) of the CLSA: "is to be determined by reference to the amount of the financial benefit obtained" cannot mean that because the source of the payment is the damages, it is determined by reference to the amount of damages, otherwise all CFAs would be caught.

95. He submitted that payment by reference to a multiple of the funder's outlay was not calculated or determined by reference to the damages at all, but by reference to the amount of funding provided. The payment does not become by reference to the damages simply because the LFA respects the fact that ultimately the source for the payment is the damages, nor because there is a cap by reference to the amount of damages recovered.

96. Mr Bacon KC referred to the Parliamentary debate which led to the enactment of section 47C of the CA where the Government rejected a proposal to prohibit

third-party funding in collective proceedings, recognising that many collective proceedings would be dependent on third-party funding and that the damages would be the source of payment for stakeholders, including funders. This was discussed in the judgment of the CAT following the certification hearing in *Merricks v Mastercard* [2017] CAT 16; [2017] 5 CMLR 16, at [126]-[127]:

> "Mr Bacon referred us to the House of Lords debate on 3 November 2014, when the Parliamentary Under Secretary of State for Business, Innovation and Skills resisted a proposed backbench amendment to what became s.47C CA that would have prohibited the use of third party funding in collective proceedings. Baroness Neville-Rolfe stated:
>
> "We have thought carefully about this. The Bill already contains restrictions on the financing of claims as it prohibits damages-based agreements and does not provide for a claimant to be able to recover any uplift in a conditional fee agreement. Therefore there is a need for claimants to have the option of accessing third-party funding so as to allow those who do not have a large reserve of funds or those who cannot persuade a law firm to act pro bono to be able to bring a collective action case in order to ensure redress for consumers. Blocking access to such funding would result in a collective actions regime that is less effective. This would bar many organisations, including reputable consumer organisations such as Which?, from bringing cases as Parliament hoped in 2002. Restricting finance could also create a regime which was only accessible to large businesses. This would weaken private enforcement in competition law, which is of course not the Government's wish or intention."
>
> 127 The Government in promoting the legislation therefore clearly envisaged that many collective actions would be dependent on third party funding, and it is self-evident that this could not be achieved unless the class representative incurred a conditional liability for the funder's costs, which could be discharged through recovery out of the unclaimed damages. Accordingly, insofar as it might be thought that the statutory provision is ambiguous, we consider that the statement from the relevant Minister in the House of Lords on the passage of the Bill supports the conclusion we have reached. In the form in which it is proposed to be amended, the funding agreement is therefore not rendered ineffective by s.47C(6) CA."

97. He submitted that if the appellants were right then a funder under an LFA providing for recovery on the basis of a multiple of its outlay but which said that it was going to respect the Government's intention and limit its entitlement to a funder's return to what is available from the proceeds, the damages, would convert an enforceable LFA into an unenforceable DBA. This would be contrary to the recognition on the part of the Government that the opt-out collective proceedings regime in the CAT required litigation funding. The Government by section 47C(8) did ban DBAs in opt-out proceedings but if the

appellants were right then all multiple based LFAs which had some express or implied cap on the funder's return would be DBAs which was the precise opposite of what the Government intended.

98. In support of his submission that at the time that the DBA Regulations 2013 were passed, Parliament intended that a DBA was an agreement under which the representative's fee was determined as a percentage of the damages recovered, Mr Bacon KC referred to paragraph 2.1 of the Explanatory Memorandum to the DBA Regulations 2013 which is quoted at [58] above.

99. He also referred to the Explanatory Notes to the CRA where, under the heading: "Collective actions and opt-out collective settlements" [434] and [435] stated:

> "434. The second aim is to introduce an opt-out collective actions regime and an opt-out collective settlement regime (both of which involve a case being brought forward on behalf of a group of claimants to obtain compensation for their losses). Cases would be able to be brought by representatives on behalf of individuals and/or businesses.
>
> 435. The CAT can already hear opt-in collective actions under the existing section 47B of the CA. An opt-in regime requires claimants to "opt-in" to the legal action to be able to obtain any damages. However, the CAT does not currently have the power to hear optout collective actions. An opt-out regime means claimants are automatically included into the action unless they "opt-out" in a manner as decided by the CAT on a case by case basis. The purpose of introducing opt-out collective actions is to allow consumers and businesses to easily achieve redress for losses they have suffered as a result of breaches of competition law."

100. He also referred to the CAT Guide 2015 which constitutes a Practice Direction issued by the President of the CAT at the time, Roth J. [6.81] provides:

> "A damages-based agreement ("DBA") for the payment of legal fees is unenforceable if it relates to opt-out collective proceedings. The same restriction does not apply to opt-in collective proceedings. DBAs are defined in section 58AA(3) of the Courts and Legal Services Act 1990. In essence, a DBA provides that the fees payable by the client to its legal or other representative are determined as a percentage of the damages awarded to the client."

101. Mr Daniel Saoul KC also made submissions for the respondents on Issue 1 as well as Issues 2 and 3. In relation to section 58AA(3)(a), he pointed out that the "financial benefit obtained" in (ii) must be the same as the "specified financial benefit" in (i). However, in the case of the CICC LFA, the cap is not by reference to the financial benefit obtained which is the totality of the damages plus costs but by reference to the undistributed damages and recovered costs

which are a different thing and a moving target. The same point arose in relation to the provisions of the Kent LFA quoted at [26] and [27] above.

102. Mr Saoul KC referred to the last paragraph of the definition of "Total Fee" in the CICC LFA (set out at [18] above) and pointed out that the sum total of the four items identified are not to exceed the undistributed damages, only (a) and (d) being amounts paid to the funder. He submitted that it was difficult to see how it could be suggested that the amount payable to the funder is determined by reference to the amount of the financial benefit in any meaningful sense. This is reinforced by the fact that payment to the funder is subject to the waterfall (set out at [20] above). He submitted that what this showed is that there a highly indistinct and fluid relationship between what the funder ends up with and the total amount of the undistributed damages plus costs.

103. He made essentially the same point in relation to the funder's return under the opt-in CICC LFA (the relevant provisions are set out at [21] and [22] above). He emphasised that "Proceeds" as defined in that agreement was the amount that the solicitors recovered under their DBA, in other words not the damages as such but a subset of them.

104. In relation to Issue 2, Mr Saoul KC submitted that it was only the language in the two relevant LFAs, the CICC opt-in LFA and the Neill LFA "providing for a percentage payment to the extent enforceable or permissible by law" which was alleged by the appellants to make this a DBA. Nothing else in these agreements was unlawful or impermissible. He submitted that all that was required is that one asked the question was the provision for a percentage payment enforceable or permissible by law and, if the answer was no, as it is at present because of *PACCAR*, then the provision was of no contractual effect. It could simply not be realistically suggested, if the provision was of no contractual effect, that the LFA nevertheless provides for the amount payable as funder's fee to be determined "by reference to" the percentage of damages. Accordingly, section 58AA(3)(a)(ii) of the CLSA is simply not engaged. The purpose of inserting the provision in the LFA was clear. The draftsman clearly wanted to avoid the necessity, if the law changed, of entering into yet another amended LFA in due course.

105. Mr Saoul KC submitted that if, as the appellants contend, the percentage provisions are unenforceable, then they are simply of no contractual effect and, looking at the two LFAs, clauses 2.1.3 and 2.1.4 of the Waterfall in the CICC Amended Priorities Agreement (as set out at [22] above) do not apply and clauses 2.1.5 and 2.1.6 do apply and clauses 11.1.2 and 11.2.2 of the Neill LFA (as set out or referred to at [23] above) do not apply and clauses 1.1.1 and 11.2.1 do apply.

106. Mr Saoul KC submitted that if the appellants are right, this language not only does not achieve what was clearly intended, but the precise opposite, frustrating the clear intention of the parties. He submitted that this was an absurd interpretation of the agreements. He referred to the decision of the Supreme Court in *Egon Zehnder v Tillman* [2020] UKSC 32; [2020] AC 154 where at [38] Lord Wilson JSC said:

> "…the validity principle proceeds on the premise that the parties to a contract or other instrument will have intended it to be valid. It therefore provides that, in circumstances in which a clause in their contract is (at this stage to use a word intended only in a general sense) capable of having two meanings, one which would result in its being void and the other which would result in its being valid, the latter should be preferred."

Lord Wilson then considered at [39] to [42] the various authorities on the validity principle. Mr Saoul KC submitted that in accordance with those authorities, the Court should seek to uphold rather than defeat the parties' contract.

107. He also challenged the broad appeal to public policy which the appellants made for which they had cited no authority at all. He pointed out that the Supreme Court in *PACCAR* had not decided the case on the basis that litigation funding was some sort of scourge on society that needed to be regulated. To the contrary at [90] of the judgment of Lord Sales JSC they had recognised the public policy arguments the other way but expressed no view on the issue, saying:

> "Even if it might be said that it is desirable in public policy terms that third party funding arrangements of the kind in issue in this case should be available to support claimants to have access to justice (as to which I express no view), this is not a reason why there should be any departure from the conventional approach to statutory interpretation."

108. In relation to the appellants' argument that the conditional language in the two relevant LFAs somehow incentivised funders to invest in only the more valuable claims, notwithstanding that they might be more speculative, Mr Saoul KC reiterated the point made by Green LJ when Mr Piccinin KC had run the argument, that there was simply no evidence that this conditional language was going to alter how funders made decisions. Mr Saoul KC submitted that funders were naturally going to be looking to fund cases that supported their returns where there was a reasonable prospect of the damages being sufficient to cover the returns, whether the funder's return was calculated by reference to a multiple of the outlay or a percentage of the damages. Equally, as I pointed out in argument, there is simply no evidence that, without these conditional provisions addressing the possibility of the law changing, the terms on which the funders would be prepared to fund based on multiples would have been different.

109. Mr Saoul KC also addressed a point taken by the appellants that the conditional language gave rise to what is described as an elevated risk of conflict between the funder and the class representative. He pointed out that there were a number of safeguards within the legal framework in which these collective proceedings are conducted which minimise the risk of conflict of interest as identified in [7] to [9] and [100] of my judgment in the appeal earlier this year in *Gutmann v Apple* [2025] EWCA Civ 459. There are also provisions in the Gutmann, CICC opt-in and Neill LFAs which prohibit the funder from exercising control of the litigation, together with the supervisory jurisdiction of the CAT to control what

is paid out to the funder. Accordingly, there is no elevated risk of conflict as alleged and no risk of harm to consumers.

110. As already noted, Issue 3, severance, only arises in *Neill* because the CICC opt-in LFAs were still in draft at the time of the CAT judgment and could have been amended if there was a problem with the conditional language. Mr Saoul KC referred again to [33]-[34] of the judgment of Lewison LJ in *Zuberi* (quoted at [72] above). The hypothesis here is that the respondents have succeeded on Issue 1 but lost on Issue 2, so the issue is whether the only part of the LFAs which is unenforceable, the conditional language, is severable. Contrary to what the appellants appeared to be submitting it was not the case that the whole LFA was unenforceable and then one had to sever, but the only unenforceable bit was the conditional language in clauses 11.1.1 and 11.2.1 of the Neill LFA.

111. In *Zuberi* at [7], Lewison LJ set the out the three criteria that must be fulfilled before severance is possible (being the same as set out by Stuart-Smith LJ in *Voltera* quoted at [77] above) and at [8], Lewison LJ said those criteria were amply fulfilled in that case. Mr Saoul KC said that the criteria were also fulfilled here and if anything, the case for severance here was even more compelling. The provisions sought to be severed were currently of no contractual effect, their removal did not significantly alter the nature of the contract and it remained the sort of contract the parties had entered into even after severance.

112. Mr Saoul KC referred to [36] of the judgment of Stuart-Smith LJ in *Voltera* where he said:

> "the question to be answered in any given case is whether the proposed severance would change the character of the contract as a whole so that, if severance was implemented, it would cease to be "the sort of contract" into which the parties had originally entered."

He submitted that the character of the contract as a whole here would not be changed by severance. The funder will still be funding, its return will only be recovered in the event of success and will still be paid out of the proceeds and subject to review by the CAT. The nature of the contract remains the same. It is still an agreement pursuant to which the funder agrees to fund the claims in exchange for its money back plus a return in the event of a successful outcome. Mr Saoul KC submitted that this was not a case where, applying the so-called "blue pencil" test, it was necessary after the severance to add to or modify the wording of what remained in the agreements. Drawing a line through the conditional language, the agreements were still fine.

113. Mr Saoul KC took the Court to clause 37 of the Neill LFA, the severance clause (set out at [24] above). He submitted that the parties had expressly agreed that if it was necessary to sever the conditional language the three criteria for severance would be met.

114. In relation to public policy, he submitted that public policy did not bar severance and there was little place for it in this context. It is not part of the three criteria

and certainly not a fourth criterion. The appellants had relied on a passage from *Chitty on Contracts* 35th edition 19-274:

> "The court will not sever the bad from the good unless this accords with public policy. For example, part of the consideration for the promise of either party may be such as so gravely to taint the whole contract that there is no ground of public policy requiring the courts to assist either party by severing the offending parts. "[i]n all the cases a distinction is taken between a merely void and an illegal consideration." In this context illegal means that which amounts to a criminal offence or is contra bonos mores, where, on grounds of public policy, the illegality may, though does not invariably, preclude severance…"

He pointed out that the present case was a very long way from the examples given such as agreements to defraud the Revenue or trading with the enemy. There is nothing illegal or contrary to public morals in litigation funding. To the extent that reliance was placed by the appellants on *Voltera*, the public policy being referred to there was the protection of clients from solicitors, not relating to funders at all.

Discussion

115. The important starting point for consideration of Issue 1 on this appeal is the acceptance by the appellants that, if the funder's fee is calculated by reference to a multiple or multiples of its outlay, then the fee is not "determined by reference to the amount of the financial benefit obtained" (i.e. the Proceeds or damages recovered) within the meaning of section 58AA(3)(a)(ii) of the CLSA. This concession is clearly correct, since the amount which the funder has invested in the proceedings is simply not a financial benefit obtained by the class representative.

116. However, the appellants argue that where there is an express or implied cap on the funder's return by reference to the amount of the proceeds or the undistributed damages, then the amount of the payment to the funder is "determined by reference to the amount of the financial benefit obtained" within section58AA(3)(a)(ii) of the CLSA, making the LFA a DBA which is unenforceable unless it complies with the DBA Regulations 2013. Since the entire system of litigation funding is predicated upon the return which a funder makes being paid out of damages or the subset of undistributed damages, it is difficult to envisage in what scenarios, as a matter of practical reality, there would not be an implied cap even if there were no express one. It has not been suggested that somehow, if there were a shortfall between the funder's return and the damages or undistributed damages, the class representative would be liable to make good that shortfall and none of the LFAs under consideration contains a provision to that effect.

117. It follows that the logical consequence of the appellants' submission that any express or implied cap on the amount of the funder's fee by reference to the damages recovered or a sub-set of them converts the LFA into a DBA is that it

is difficult to see how any LFA could avoid being a DBA. Given that the entire landscape of collective proceedings in the CAT is one where third-party litigation funding of claims is required (as was recognised by the Government in what was said by the minister in Parliamentary debate which led to the enactment of section 47C of the CA in the passage quoted in [127] of Merricks cited at [96] above) and that, as I have said in the previous paragraph (and as Lord Sales JSC recognised in [98] of *PACCAR*) it is the proceeds which are the source of the funder's return, the effect of the appellants' argument is to produce the absurd result that funding under LFAs in the CAT would become practically impossible save in those cases where the DBA Regulations could be complied with. Furthermore, given that, as the appellants accept, an LFA which provided for a funder's return as a multiple of the outlay without any sort of cap as an outer limit, if that were practically possible, would be an enforceable LFA, the equally absurd result is reached on the appellants' case, that a cap on the funder's recovery, which by definition protects the class and the class representative from having to pay excessive amounts to the funder, renders the LFA an unenforceable DBA.

118. As Lord Sales JSC made clear in the passage in *PACCAR* at [45] quoted at [87] above, the Court will not interpret a statute so as to produce an absurd result, unless clearly constrained to do so by the words Parliament has used. In the present cases, the Court is not so constrained for a number of reasons. First, applying the same analysis as Lord Sales JSC in *PACCAR* at [99], the words in section 58AA(3)(a)(ii) of the CLSA: "determined by reference to the amount of the financial benefit obtained" should be focused on the primary contractual entitlement of the funder, which in the present cases is to a multiple of its outlay in each case, not to a percentage of damages as in *PACCAR*. The fact that the multiple recoverable by the funder may be subject to adjustment depending on the amount of damages recovered or at the discretion of the CAT does not alter the character of that primary contractual entitlement which is to a multiple of outlay.

119. Second and following on from that first reason, in my judgment, the words "determined by reference to the amount of the financial benefit obtained" are focusing on how the payment of the funder's return is calculated, in other words whether it is calculated as a percentage of the financial benefit obtained, as in *PACCAR,* or as a multiple of outlay which is not by reference to the financial benefit obtained at all. The fact that the funder's return is subject to an express or implied cap because it is limited by reference to the Proceeds, what Mr Piccinin KC described as a "minimum value situation", does not mean that it is determined or calculated by reference to the amount of those Proceeds.

120. Third, if contrary to that conclusion, a possible construction of section 58AA of the CLSA is that the cap does make the funder's return "determined by reference to the amount of the financial benefit obtained", then one is in the territory where both parties' constructions are feasible, in which case it is permissible to look at other aids to the construction of the statute such as Explanatory Notes and Memoranda. I agree with Mr Bacon KC that, in doing so, the Court is not limited to what was intended by Parliament at the time the relevant provision was first enacted but can look at subsequent legislation on the same subject. In

the present instance however, whether one focuses on material from the time when legislation in respect of DBAs was first enacted in 2009 or at a later stage when LASPO and the DBA Regulations 2013 were enacted or when section 47C was inserted into the CA by the CRA, the material all points to DBAs being agreements where what is recovered by a representative such as a funder is a percentage of the damages recovered.

121. Thus, paragraph 7.5 of the Explanatory Memorandum to the DBA Regulations 2010 set out at [58] above provided that a DBA "is usually determined as a percentage of the compensation received by the client". Although Mr Piccinin KC latched onto the word "usually" to suggest that other forms of DBAs might arise, he was not able to point to any example of an agreement being held to be a DBA where the representative's return was determined other than as a percentage of the damages. Furthermore, there had been no such qualification in the Ministry of Justice Consultation Paper which preceded the coming into force of section 154 of the Coroners and Justice Act 2009 on 12 November 2009. [17] of that Paper said: "The key feature of a DBA is that the persons using the agreements are not paid fees if they lose a case but are paid a percentage of the damages recovered if they win."

122. By the time of the Explanatory Memorandum to the DBA Regulations 2013, it was being said at paragraph 2.1 (set out at [62] above) that under a DBA the fee "is determined as a percentage of the compensation received by the client." The same analysis appears in [288] of the Explanatory Notes to section 45 of LASPO set out at [63] above.

123. Using that material as an aid to construction of section 58AA of the CLSA, it is clear that the respondents' construction of the section is to be preferred. DBAs are agreements under which the representative's fees are calculated or determined as a percentage of the damages recovered and an LFA under which the funder's fee is calculated as a multiple of its outlay is not a DBA. As Mr Bacon KC correctly submitted, the fee is determined by reference not to the damages recovered but by reference to the amount of funding provided. The fact that the source of the fee paid is the damages does not turn it into a DBA, nor does the fact that there is an upper limit or cap on the funder's fee recoverable by reference to the amount of damages recovered. The fee is still calculated or determined by reference to the amount of funding provided.

124. Issue 2 only arises in the CICC opt-in LFA and the Neill LFA and then only if Issue 1 is decided in favour of the respondents. Both make clear that the alternative basis for calculating or determining the funder's fee or return by reference to a percentage of the damages only arises "to the extent enforceable or permissible by law". I will refer to this as "the percentage provision". The short and clear answer to this issue is that, unless and until the law is changed either by the legislative reversal of *PACCAR* or in some other way, the percentage provision in the two LFAs is simply of no contractual effect. In those circumstances, in my judgment, the argument that the percentage provision is an unenforceable DBA, let alone an argument that (if severance were not possible) the presence of the percentage provisions renders the whole LFA an unenforceable DBA, is unsustainable. Contrary to Mr Piccinin KC's argument, a provision which is of no contractual effect cannot have the contractual

consequence of rendering what is otherwise an enforceable agreement an unenforceable DBA. Section 58AA(3)(a)(ii) is simply not engaged.

125. As Mr Saoul KC correctly submitted, the effect of the appellants' argument that the inclusion of the percentage provision renders the LFA an unenforceable DBA is that the provision achieves the precise opposite of what was intended. Far from avoiding the need to enter another amended LFA if the law does change, on the appellants' case the inclusion of the percentage provision renders an otherwise enforceable LFA unenforceable, thereby frustrating the clear intention of the parties to the LFA. Even if the percentage provision were capable of bringing the LFA within section 58AA(3)(a)(ii) which I consider it is not, the validity principle as enunciated by Lord Wilson JSC at [38] of *Egon Zehnder* quoted at [106] above comes into play. The respondents' interpretation of the LFA in each case that the percentage provision is of no contractual effect unless and until the law changes so that the remainder of the LFA is enforceable and not a DBA is to be preferred as upholding the parties' intentions and their agreement.

126. As noted at [71] to [73] above, the appellants contend that the inclusion of the percentage provision in the LFA creates the perverse incentive for lawyers and funders to focus on the largest cases, the litigation culture which Parliament wanted to avoid in enacting section 47C(8) of the CA. However, there is simply no evidence to support the contention. Equally, there is no evidence that the presence of the percentage provision had any effect on the terms on which funders would be prepared to fund based on multiples. There is also nothing in any argument that the inclusion of the percentage provision was somehow contrary to public policy which was only faintly argued and for which no authority was advanced. As Mr Saoul KC pointed out, far from suggesting that litigation funding was somehow a scourge on society, the Supreme Court in *PACCAR* had recognised the public policy arguments the other way in favour of funding, albeit they expressed no view on them.

127. As I pointed out in argument, there is no difference between catering in advance for the eventuality that the law might change, which is what has been done in the case of these two LFAs and the parties having in mind that if the law changed it might be necessary to enter into yet another amended LFA. The only answer which Mr Piccinin KC could give was that the difference was that in the latter case the class representative might or might not agree to enter such an amended LFA whereas in the former the class representative was bound to agree to a funder's fee being determined as a percentage of the damages if the law did change. There is a faint irony in the appellants using concern for the class representative as a basis for their argument that the percentage provision renders the LFA an unenforceable DBA, but in any event, the argument is without merit, since the class representative freely entered into the amended LFA with the percentage provision when he was under no obligation to do so.

128. I also consider that there is nothing in the appellants' suggestion that the inclusion of the percentage provision gave rise to an elevated risk of a conflict of interest between the funder and the class representative. As set out in my judgment in the earlier appeal in the *Gutmann* proceedings ([2025] EWCA Civ 459) at [7] to [9] there are a number of safeguards within the legal framework

in which collective proceedings are conducted which minimise the risk of conflict of interest. First the CAT satisfies itself that the class representative is suitable with appropriate independent legal support. Second the terms of LFAs ensure that the funder does not have control over important legal decisions in the litigation. The class representative and his solicitor have independent control over the conduct of the proceedings and any dispute between the class representative and the funder are referred to an independent KC. In the Neill LFA, the relevant provisions are clauses 15, 16 and 24. Finally, the CAT has a supervisory jurisdiction over how the Proceeds are distributed and can always revisit at that stage whether it is prepared to endorse the payment to the funder which is proposed.

129. On the basis that the answer to Issue 2 is that the inclusion of the percentage provision in the Neill LFA does not render the LFA an unenforceable DBA, Issue 3 about severability becomes academic. Given that the issue would give rise to complex and difficult questions about whether the LFA is severable, I consider that it is wiser to leave that issue for decision in a case where it matters. I bear in mind the salutary observation of Mummery LJ in *Housden v The Conservators of Wimbledon and Putney Commons* [2008] EWCA Civ 200; [2008] 1 WLR 1172 at [30]:

> "It is unnecessary to decide the issue for the purpose of disposing of the appeal. In general, it is unwise to deliver judgments on points that do not have to be decided. There is no point in cluttering up the law reports with obiter dicta, which could, in some cases, embarrass a court having to decide the issue later on."

Conclusion

130. For all the above reasons, I consider that these appeals must all be dismissed.

Lord Justice Green

131. I agree.

Lord Justice Birss

132. I also agree.