IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1602/7/7/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 24th September 2024

Before:
Mrs Justice Bacon
Charles Bankes
Anthony Neuberger
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Christine Riefa Class Representative Limited

Proposed Class Representative

-v-

Apple Inc. & Others

Proposed Defendants

Thomas de la Mare KC, Jamie Carpenter KC, David Went (Instructed by **Hausfeld & Co. LLP**) appeared on behalf of the Claimant

Roger Mallalieu KC, Sarah Abram KC, Tom Pascoe, Lucinda Cunnigham, Michael Quayle (Instructed by **Freshfields Bruckhaus Deringer LLP)** appeared on behalf of the First and Second Defendants

Meredith Pickford KC, David Gregory (Instructed by **Cleary Gottlieb Steen & Hamilton LLP**) appeared on behalf of the Third to Seventh Proposed Defendants

Transcript of Epiq Europe Limited
Lower Ground, 46 Chancery Lane, London, WC2A 1JE
+44 (0) 207 404 1400
Email: casemanagers@epiqglobal.com
(Official Shorthand Writers to the Court)

Tuesday, 24 September 2024

(10.30 am)

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

Yes, Mr de la Mare.

Housekeeping

MR DE LA MARE: The case is going to be called on, madam.

Can I say just a very few brief words about cross-examination and privilege before I call the witness. The position here is I think as follows: Professor Riefa is to be cross-examined on her three witness statements in line with this Tribunal's order. Her witness statements are very clear, she does not intend to waive privilege -- that was made clear in her second statement at paragraph 4 and confirmed in her third statement at paragraphs 4 to 6 -- and that reflects the difficult line that may have to be straddled between things that are covered by privilege and which can be answered and those which are not.

MRS JUSTICE BACON: Yes. You will no doubt make your views known if the question crosses the line.

MR DE LA MARE: Absolutely. I have also discussed the matter with Mr Pickford who I think is leading the charge and he has assured me that he has not got an intent to ask questions that effectively invite the witness to waive privilege, and if he does so, I will need to jump up. But I do ask that the Tribunal be mindful that the witness is, whilst an academic lawyer, she is not a practising lawyer or a litigator.

MRS JUSTICE BACON: Yes.

MR DE LA MARE: And it may well be that a question produces an unanticipated need -- unanticipated on Mr Pickford's account -- to refer to things that might have happened under the cloak of privilege.

Obviously there are some high-level matters which I think -- and here it may be that my request is really in the nature of a request for a ground rule -- that merely advert to the taking of advice as part of a description of the process that has been followed.

MRS JUSTICE BACON: Yes.

MR DE LA MARE: And for our part -- and we would like this to be confirmed if possible -- such a bare reference to advice as part of the process rather than drawing on its contents is not intended to be a waiver of privilege.

MRS JUSTICE BACON: Yes. Well, if she says, "I took advice and considered that and then made this decision", she is not referring to the content of it.

MR DE LA MARE: Absolutely, my Lady.

MRS JUSTICE BACON: Yes.

MR DE LA MARE: That is the clarification we thought helpful to obtain at the outset and it may well be therefore that thereafter that really does, I am afraid on certain topics, close down the useful discussion.

With no further ado, at that stage, then, can I proceed to call Professor Riefa?

MRS JUSTICE BACON: Yes. And can I just take it that the agreed timetable is that she will be cross-examined to start off with and then everyone's submissions will follow?

MR DE LA MARE: Correct.

MRS JUSTICE BACON: All right. Thank you.

MR DE LA MARE: In the usual order.

MRS JUSTICE BACON: All right.

A. There doesn't seem to be any bundles or anything.

MR DE LA MARE: No bundles?

A. No, nothing on the table.

MR DE LA MARE: I should have spotted they were not there.

PROFESSOR CHRISTINE RIEFA (affirmed)

MRS JUSTICE BACON: Do take a seat. I see there is a glass of water there.

A. Thank you.

Examination-in-chief by MR DE LA MARE

MR DE LA MARE: Professor Riefa, I think it may be sensible first of all to unpack that box of bundles and set them up on the spine, so you have ready access to them.

MRS JUSTICE BACON: Does Professor Riefa need someone to assist her in finding the bundles?

A. It might be helpful.

MR DE LA MARE: Mr Langley is willing to undertake that.

A. Okay, great.

Q. Professor Riefa, you have made three statements in these proceedings; if you could go firstly to bundle A, tab 13, page 460.

A. What page did you say?

Q. Page 460.

A. Is that the right tab?

Q. Tab 13, page 460.

A. Sorry, I didn't hear that, my apologies.

Q. If you would just like to look at that document and then in particular the last page at 477.

A. The last page?

Q. The last page; is that your signature on the last page?

A. It is.
Q. And then the second statement is in bundle E, tab 14, page 158. Same process.
A. Yes.
Q. Is that your second statement?
A. Yes.
Q. Is that your signature at page 167?
A. It is my signature.
Q. Lastly, at page 195, tab 18, there is your third statement of 11 September; again, is that your signature on page E/200?
A. Yes, it is my signature.
Q. And are you satisfied that the contents of those three statements are true and correct?
A. I am.
MR DE LA MARE: I am grateful. Mr Pickford may have some questions for you.

Cross-examination by MR PICKFORD

MR PICKFORD: Good morning, Professor Riefa.

You are I am sure aware that under rule 78 of the Tribunal's rules you are required to act in the interests of class members?
A. I am.
Q. You would say those interests have always been your top priority?

A. Absolutely.
Q. In large part, your evidence in these proceedings is intended to prove that fact to the Tribunal?
A. That's correct.
Q. And before entering into the original litigation funding agreement, you would have wanted to ensure that it was in the best interests of class members?
A. Yes, of course.
Q. And in that regard, a critical question was how the funder would be paid?
A. That's correct.
Q. That issue would be crucial to understand fully and properly because it goes to the heart of the interests of class?
A. Yes, it does.
Q. In particular from your perspective, because you are representing the class, a critical issue is whether the funder only gets paid from unclaimed damages or from the whole award?
A. That would have been the ideal position to have been in, yes.
Q. So you would have fully read and understood all aspects of the original litigation funding agreement you were planning to enter into on that issue?
A. I read it. I tried to understand it to the best of my

abilities, yes.

Q. And you attempted to do that as carefully as you could, to the best of your abilities?

A. Yes.

Q. Okay, if we could go, please, to that original litigation funding agreement. You will find it in bundle C at page 223.

A. 223.

Q. So the tab number there is tab 10, thank you.

A. Tab 10, okay.

Q. Do you have that? You see that is the first page of the original litigation funding agreement --

A. That's the original LFA I've got in front of me, yes.

Q. Could I ask you please to go on to external page 236.

A. I am getting a bit confused with the bundles.

Q. Do take your time.

A. Is that this one?

Q. At the bottom --

A. Yes, 236, sorry, got it.

Q. It should say "C/236".

A. Yes.

Q. You will see about half to two-thirds of the way down the page it says:

"General undertakings ..."

And then 4.1:

"The claimant shall ..."

Do you see that?

A. Yes.

Q. And that is you?

A. Yes.

Q. And then if we go over the page, please, to 237, and look at 4.1.17.

A. Yes.

Q. That says:

"Following a final judgment or a settlement [you] will instruct the law firm to request that the court makes an order that all or part of the award may be paid to the claimant in respect of the costs, fees and disbursements, including the success fee."

And then 4.1.18 requires you to take all reasonable steps to obtain or realise the success fee in full; do you see that?

A. I do.

Q. And if we go back to page 226 to have a look at the definitions, do you see that award there is defined as meaning:

"In respect of the claim all monetary amounts (inclusive of interest) which have been awarded to the claimant for the benefit of the class members pursuant to any interim order, interim payment, insurance

payment, final judgment or otherwise (including any damages, costs and/or disbursements) or under any settlement."

Do you see that?

A. Definition of award, yes. Yes, I do.

Q. Yes. I think we can agree that "award" refers to all damages, not just to unclaimed damages, doesn't it?

A. Yes.

Q. Now, at the time you were writing and signing your first witness statement in these proceedings you must have been aware of the commitment under 4.1.17 because you refer to it in paragraph 50?

A. I was.

Q. Well ...

And this is a very important clause because it went to one of the most important issues from the perspective of the class?

A. It does go to an important issue, yes.

Q. Okay, if we can then, please, go back to that first statement, so you will find that at -- bundle A, and if you look on the bottom right, it is A/ 476, and someone will tell me what tab that is. 13, thank you.

Do you have that page?

A. I do.

Q. If you look, please, at paragraphs 49 and 50, you say as

follows:

"In entering into the LFA, I have considered in my capacity as the sole director of the PCR, the overriding and primary requirement that, as the PCR, it must act in the interests of the proposed class. The LFA reflects Asertis' commitment to fund these proposed collective proceedings and acknowledges that the PCR has control of the litigation. In return, for Asertis' commitment under the LFA, if the proposed collective proceedings are successful and there are any unclaimed damages, the PCR will make an application to the Tribunal under section 47C(6) of the act for its costs and expenses incurred during the proposed collective proceedings, including the sums due pursuant to the LFA, to be awarded from any unclaimed damages (and to the extent not recovered from Amazon or Apple)."

Do you see that?

A. I do.

Q. So you are explaining to the Tribunal your obligations under the LFA in this respect, and you refer to making an application to be paid out of unclaimed damages -- sorry, rather, for Asertis, I beg your pardon, to be paid out of unclaimed damages, and I think you agreed with me earlier on that that would be a good thing from the perspective of the class because they would get more

, not less money?

A. I agree.

Q. Thank you.

So telling the Tribunal this would help you to demonstrate to the Tribunal that you were acting in the best interests of the class?

A. Yes.

Q. And indeed if we look at paragraph 51, you go on to say that for the foregoing reasons, i.e. referring back to the rest of your statement:

"... I am of the view that the PCR meets the requirements for authorisation to class representatives pursuant" to the relevant rules.

So what you were doing there was referring back to your statement, including paragraph 50, and implicitly that was one of the reasons why you believed you would be acting in the interests of the class?

A. Yes, that was one of the reasons.

Q. Now, we also saw a few minutes ago that the true obligation that you were under, pursuant to clause 4.1.17, was to make an application not from unclaimed damages, but from the award as a whole; do you recall that?

A. I do.

Q. So under the terms of the LFA the application that you

agreed to make is not the application that you told the Tribunal that you were going to be making in paragraph 50?

A. Not in the way you are putting it across, that's correct.

Q. You agree with my statement?

A. Yes.

Q. So I think we can agree then that paragraph 50 is not a true reflection of what you had in fact agreed to do?

A. Well, at the time I thought it was because my understanding of how the clause was working is not exactly the way you understand it to work.

Q. Well, it is not how I understand it to work. We looked at it earlier on and you agreed with me about how it worked, so the way that I put it was what you agreed with as well.

A. Yes, I can see that the difficulty here, but at the time that was not my understanding.

Q. Okay. Perhaps if we could go back to -- just briefly, back to that clause. It is at C237.

A. Yes.

Q. If I could ask you to look at 4.1.17 again.

A. Yes.

Q. What has changed between when you originally carefully looked at this clause to make sure that you were acting

in the interests of class members, and now when we looked at this clause a few minutes ago to understand how it worked; what has changed between the two?

A. So my understanding at the time was that the clause might become operative, but it would be an exception, it would be in unlikely circumstances and linked to the way the case law had operated to that point, and I believe that is the case of Le Patourel. Whereas now obviously I have been made aware of the case of Gutmann, which makes it a bigger prospect that indeed the Tribunal may choose to award from even -- from -- well, not from the undistributed only.

Q. Okay. Could we then go, please, back to your first statement then, just to follow that through, back to paragraph 50, so that is back in bundle A and page 476, and tab 30.

A. Sorry, could you repeat that?

Q. Yes, of course. So it is bundle A --

A. Got it.

Q. Tab 30, and page 476.

A. Tab 30. Sorry -- okay. Yes.

Q. So what you have just been telling me is that you thought that it was -- I think what you have been telling me is you thought it was unlikely that the application that you had agreed to make would succeed,

but that since the case of Gutmann you have got greater confidence in it succeeding; is that a fair summary?

A. Not exactly, no, I don't think that is what I would say.

Q. Can you please tell me in your own words, then.

A. So I thought at the time that because the circumstances surrounding Le Patourel, the fact that in that case it was talking about direct credit and that might not occur, then I felt the risk was not as big as now understood in context.

Q. So what is puzzling me here, slightly, is that in paragraph 50 you are not talking about the likelihood of success of an application, you are simply talking about, very simply, what you are asked to do by Asertis in return for Asertis providing the funds. That is all you are addressing there, and what you say is that your obligation in return for that is to make an application from unclaimed damages.

So I am struggling to understand how, when you were writing that paragraph, a point about the prospects of success of that application fed into what you were saying here because it doesn't seem to be reflected at all in what you are saying.

A. Yes, I can see your point.

Q. You refer to the case of Le Patourel. It is right, isn't it, that in that case the Court of Appeal didn't

see an inherent problem with the funder being paid from damages, did they?

A. I am not sure I can answer that question. I cannot claim that I know the case well enough.

Q. I see. But you did refer to it as one of the reasons why you thought that the application at the time was unlikely to be successful?

A. Yes.

Q. Right. So you must accept that putting aside the issue of success or otherwise -- sorry, putting aside the issue of those cases, it was possible that the application that you were agreeing to make might succeed?

A. I suppose I didn't see it like that at the time.

Q. Right, so you, at the time, believed that you had signed up to make an application which you believed was guaranteed to fail; is that what you are telling the Tribunal?

A. I am not sure I would go as far as guaranteed to fail, even though my understanding was that it was with the Tribunal's approval as well and my obligation was to ask the Tribunal.

Q. Okay. So it wasn't -- on the basis that it wasn't guaranteed to fail, you, I think -- if I put my earlier question again, you must accept that there was a chance

that you might succeed?

A. I am not sure that I remember clearly what I was thinking, but it would make logical sense if I thought that, yes.

Q. And if you had succeeded, that outcome would be against the interests of the class, wouldn't it?

A. Well, I think the upshot probably wouldn't be where the class would be in as good a position, but it was with the Tribunal's approval, in my understanding.

Q. So that is not my question. My question is a much simpler one, which is: if you had made the application and you had won your application, that would have been against the interests of the class that you were representing; that's right, isn't it?

A. I don't think I would say it was against the class, it would have put the class in not as good a situation as it would have been otherwise.

Q. I am not sure I follow the difference, but I don't think it really matters.

Given that you accept that it would be putting the class in a worse situation than it would otherwise have been in, that should have been something that you drew to the Tribunal's attention, shouldn't it?

A. I accept that.

Q. Okay, I am going to move on to a different topic.

From your professional background and in bringing this very claim, I think we can agree that you have a strong general belief in the power of competition to drive better results for consumers?

A. I don't think I would totally agree with that.

Q. No.

A. No, the consumer can do great things, but competition has always been the chosen vehicle and --

Q. Yes, sorry --

A. -- and it can deliver important results with this collective proceeding regimes, yes.

Q. Perhaps we are misunderstanding one another. I am not saying anything about the utility or otherwise of consumer law. Let's just put consumer law to one side.

I think, if I could put it again, that you would agree with me, from both bringing this case and your background, that you have a belief in the power of competition to drive better results for consumers?

A. Yes, competition law, if well respected in marketplaces, can normally, in theory, deliver good results for consumers.

Q. Because to make it a bit more concrete, for example, if you want to get a good deal from a supplier and the supplier believes that they are competing against other suppliers to secure the deal, they are likely to give

you a better deal than if they know that you are the -- they are the only person you are talking to; that is a fair general proposition, isn't it?

A. By that do you mean you get a better price because they are competitors?

Q. Yes, so say you have got a situation where you have got a supplier and you want some services from that supplier, and in general you would expect that if that supplier believes that they are in competition against other suppliers, they are going to give a better price than if they think: there is no competition here, this person who wants my services is only speaking to me.

It is a very simple proposition and I am asking whether you agree with that.

A. Yes, but this is the theory of competition law, isn't it?

Q. Sorry, I didn't hear.

A. Yes, it is the theory.

Q. And do you agree one can ordinarily expect that to be the practice?

A. Not always.

Q. Right, so you think there are some situations in which when a supplier believes that there isn't any competition for the job that they are trying to win, they are likely to give a better price than if they

thought that there was competition?
A. No, I think if you are not in competition, of course there is a possibility that the prices are going to be higher.
Q. I am not just talking about the possibility, I am talking about likelihoods -- I am not saying 100 per cent either way, I am just saying, generally speaking, it is likely that if you put people in competition with one another, you will squeeze a better deal out of them than if you don't; do you agree with that?
A. It is possible, yes.
Q. Do you agree that that is likely?
A. Well, it is possible, yes.
Q. Okay. Okay.

Now, I understand from your evidence that you were originally sent the draft litigation funding agreement for review around 16 December 2022. The exact date doesn't matter, but do you recall that roughly?
A. Yes, I do recall.
Q. And were you aware at that point that Asertis was the only funder with whom there were negotiations?
A. I -- I thought of that and I am not sure I recall whether it was on 16 December when I first received the LFA or it was when I met with Hausfeld for the first

time in person that I was made aware of it.
Q. Okay, but around at that date, one or the other?
A. Yes.
Q. It was either -- it was one or the other?
A. Yes.
Q. Were you aware around this time of roughly how many funders were operating on the market?
A. At the time of 16 December?
Q. Yes, or a few days later when you had your meeting with Hausfeld?
A. I am not sure that I was aware at that point how many funders were operating on the market.
Q. Without wishing you to waive any privilege -- and I am going to give an opportunity here for my learned friend to jump up -- did you ask anyone about that topic? I don't think that is an unacceptable question, but I am forewarning.
MR DE LA MARE: So long as the witness is clear that she doesn't have to answer it if it tends to reveal communications covered by legal advice or litigation privilege. So if she asked her lawyers, she is entitled to decline the question.
A. Well, it is part of privilege, but obviously in the court proceedings I was obviously aware there was at least one other funder in the market.

MR PICKFORD: Which funder are you referring to there?
A. I am not sure I can disclose the details of that case.
Q. Did it concern you at all that the broker who was involved at this point had only delivered a single funder and therefore might not be doing a very good job?
A. I believe that in my first witness statement I have explained that and what I did during the course of that --
Q. Yes.
A. -- meeting and the sort of questions that I did ask, so those would be reflecting some of the concern that you have highlighted.
Q. So --
A. If I have understood your question correctly.
Q. Are you agreeing with me therefore that you were concerned that the broker had only delivered one --
A. No, I'm not agreeing with that. No.
Q. You were not concerned that the broker had only --
A. Okay -- I pause because I think you are twisting my words.
Q. Sorry, I am not trying to, I am just trying to be clear.
A. I understand, and me too, I am trying to do that. So perhaps repeat your question, so I can reflect on it.
Q. Of course.
Were you concerned that the broker that was involved

at the time, Exton, had only delivered one potential funder for the claim?

A. Okay, I see what you mean. That actually is something that I discussed with the lawyers on the day, so I am not sure what side of privilege I am falling here.

Q. I am not asking for any information that you received from them. I think my question is simply directed, which I don't think is going to reveal anything privileged and I think I am allowed to ask it.

A. Of course.

Q. Were you, given your role, concerned about that?

A. On the day, it was explained the conditions and what had happened and how it came about, that there was one offer on the table, so it seemed a reasonable way to have proceeded, so I don't think I would then say that I was concerned.

Q. Do you know in general terms -- I am not asking for any confidential details -- do you know in general terms how the broker was remunerated for finding funding?

A. So this particular broker?

Q. Yes.

A. I recall seeing some figures.

Q. I am not asking for the figures, I am just asking in general terms how they were remunerated. Put it this way: do you know that they would benefit if they got you

better terms? Was there an incentive that enabled you to get better terms and for that to then get passed on in terms of them getting a better fee?

A. I don't think that I knew that particularly, but there would at least be reputational incentives for them to get a good deal for their clients.

Q. Okay.

Now, in your statement explaining what went on around this time -- in your second statement, in fact -- you talk about how the multipliers had been reduced in negotiations and then you talk about gaining confidence in the agreement from the reduction in the multipliers -- I think it was after the meeting that you had at Hausfeld.

A. Do you mind if I turn to it?

Q. No, of course, let's turn to it. It is in your second statement, so that is in the E bundle, tab 14, and I am on page 161.

A. Page?

Q. 161.

A. 161.

Q. And if you would like to look, please, at your evidence starting at paragraph 12 and just refresh yourself down to paragraph 15.

A. Yes. (Pause)

Okay, I have read it now.

Q. Thank you. So at paragraph 15, when you talk about gaining further confidence from the reduction in the balancing multipliers in the final draft, I take it what you are referring to is back to paragraph 12 where you are talking about your understanding that there had been some reductions prior to negotiation -- prior to your involvement?

A. That's right. So from my discussion on the day, with Hausfeld I was made aware of the efforts of John Astill, and the copy that had been sent contained a set of multipliers, that by the time we get to a few days later, were so more advanced -- I saw a more advanced version, those multipliers had been changed and indeed quite drastically, I would say. I don't remember all of the figures and I think the first one, I am not sure I can say, actually.

MRS JUSTICE BACON: You don't need to. You are not being asked about that.

MR PICKFORD: I deliberately avoided that.

So by the time we were -- by the time you were having these discussions, I beg your pardon, with Hausfeld on 19 December, is it fair to say that this was effectively the final draft that you were being presented with at that time, so the negotiations over

funding had effectively closed? That is my understanding of what you are saying. I am just trying to confirm that.

A. Negotiations closed? I think on the figures, I can't recall seeing anything different, but on terms, I think there was a few more changes and bits of discussion.

Q. I see. On the figures, is it fair to say that, whilst perhaps on the one hand you could ask about how they had got to those figures, it wasn't really open to you at this point just to reopen those figures -- reopen those figures?

A. I think it seemed to be -- yes, where we would land.

Q. Do you regret at all not involving additional funders?

A. Well, my understanding was there was no other funders that had come forward, so from that point of view I am not sure I can say I regret it because it had already gone to market and that is what we got back.

Q. Okay. I would like to ask you my final topic of questions.

You are aware, I am sure, that in the July hearing one of Amazon's objections in relation to the agreement concerned the 45 per cent internal rate of return; I am sure you recall that?

A. Yes, I do.

Q. And you in fact didn't expect that that 45 per cent IRR

clause was likely to be triggered, did you?

A. I felt it was unlikely because the proceedings would have had to go on for over five years, according to what I had understood.

Q. So if we could go, please, to your third witness statement, which is in the E bundle at tab 18 -- thank you -- and I am going in particular to page 198.

A. All right.

Q. So I am looking at paragraph 11.

A. Yes.

Q. That says, after the first sentence:

"During the course of negotiations, it was agreed that the XIRR calculation was to be removed and a number of replacement formulations with varying multiple figures and durations was discussed. These negotiations culminated in the multiple structure set out above."

Again, just referring to your own concerns and views, not referring to advice that you received --

A. Okay.

Q. -- you must have been concerned at this point that the Tribunal might consider that the IRR calculation could lead to excessive returns, so that is why you were trying to find a different type of agreement that would cut through that worry?

A. I am not sure I necessarily felt that the returns would

be excessive, but I definitely thought that the Tribunal had concerns that were needing to be taken into account, yes.

Q. When you say that you didn't think the returns were excessive, are you aware that if money were invested at an internal rate of return of 45 per cent for seven years, that would get a very high rate of return in total -- it would actually go over 1200 per cent -- I am not asking for the exact numbers, but are you aware that IRRs, because they are exponential, can give very high rates of return?

A. That's not the way I understood the IRR to work, but also I am not a specialist in the way those things are calculated.

Q. I see.

A. But my team seemed to have a very different view of how the IRR would operate compared to yours.

Q. In paragraph 11, can we agree that nowhere does it say that Asertis proposed some terms and then you went back and pushed for better terms, is that --

A. Sorry, are you referring to the third --

Q. I am referring to paragraph 11, I am referring to this -- your third statement and the changes that took place after the last hearing.

A. Right. Okay. Sorry, please repeat your question.

Q. So I asked -- we looked at paragraph 11 -- and please do refresh yourself in relation to paragraph 11. I read out most of it before, so I will let you do that.

(Pause)

A. Okay.

Q. So my understanding of what you are saying in paragraph 11, but correct me if I am wrong, is that you didn't go back and in fact push for better terms from Asertis, they provided some new terms but you didn't push back and counter offer; is that correct?

A. I am not sure that is entirely accurate, but I am not sure I can talk about the discussions, about the XIRR versus the new model. So ...

Do you want to perhaps put your question across again and I will try again, and see if I can help.

Q. Well, I am obviously being very cautious and trying to avoid creating any difficulties for you in relation to privileged material.

A. Thank you.

Q. I am just considering whether there is a different way of me tackling it, which in light of what you have said is not going to cause problems.

I think, if I could put it this way, and you may give me -- I am not going to put words into your mouth.

Did you in your role make a counter offer to the new

terms that were put forward by Asertis? You explained that Asertis put forward new terms and you have also explained that there was a discussion about those terms -- and I am not asking you about the discussion because that may well be privileged -- but what I am asking you about is whether you then counter offered to Asertis.

A. I am hoping I can answer that. All I can probably say is that there was a lot of back and forth.

MR DE LA MARE: I think more than that, it is likely to take this into the terrain of privilege.

MR PICKFORD: Okay, I am prepared to accept that is probably as far as we can go on that.

Okay, just a few more questions.

If we look back, please, at the original payment terms, you will find this back in bundle C and page 272, tab 10.

A. Can you repeat that, please?

Q. Yes, bundle C.

A. 272?

Q. Tab 10, page 272.

Sorry, have I -- I think I have given myself a bad reference.

MR MALLALIEU: 272 is the first amendment. If you want the original, it is 255. That is the original.

A. 255.
MR MALLALIEU: Tab 10, page 255.
MR PICKFORD: Thank you very much.
A. Yes.
Q. I don't know what happened to my references there.
So this sets out the original success fee?
A. Yes.
Q. And you understand that success fee was made up of a number of components, firstly, the drawn funds, so you get back what you put in, then there is the priority multiplier and then the balancing multiplier?
A. That's right. Or --
Q. Sorry?
A. Or it was a percentage if it was greater.
Q. Yes, or the percentage, exactly. And if we look at what the multiples add up to, we see that the -- so we are looking at the table which says "priority multiplier" and "balancing multiplier", and for the first column, they add up to 2.5?
A. Yes.
Q. And then the next column they add up to 3.5?
A. Hmm.
Q. And then the column after that, they add up to 4.5?
A. Hmm.
Q. So that is for "pre-collective settlement approval order",

"post-collective settlement approval order (settlement)" or "post-collective settlement approval order (trial)"; you see those terms?

A. Yes.

Q. We are now going to compare those to the terms which are in the new agreement, which is at E, page 397. And it is at tab --

A. 397, you said?

Q. Thank you. Something seems to have gone wrong with my references here.

MR MALLALIEU: It should be tab 25.

MR PICKFORD: 25.

A. Yes, that's right, I think I've got them.

Q. Then if we go to page 397.

A. Yes.

Q. Towards the top, we see the new multipliers and we see in the columns now they have changed from being based on particular points in the trial to being based on a number of months into the trial -- or the proceedings, I should say, I beg your pardon, using the wrong word, proceedings?

A. Yes, that's correct.

Q. And we see that in the first column we have now got 3.5 total multiple, and in the next column we have got a multiple that ranges, I can tell you from the maths, between 3.5 and 5.75, depending on which month you are

in; do you -- are you willing to go along with that?
A. The second column it would have to be lower than 5.75 because it is from 84 months plus that it would reach that level.
Q. Sorry, I beg your pardon, it goes from 3.5, I think is what I said at the beginning -- starts at 3.5 and then it goes up to 5.75?
A. That's right.
Q. Basically takes you from the first column to the third column in increments, essentially?
A. That's right.
Q. That is what it is intended to do?
A. There's two blocks, really. There is one block for the 47 months 4 to 7 months inclusive and then the block in between where it rises.
Q. Where it rises?
A. And then we are capped --
Q. Exactly --
A. -- when we go over.
Q. Just like in the first agreement, these sums are in addition to being repaid -- the drawn funds as well?
A. That's correct, yes.
Q. So can we agree that under the new agreement the multipliers in each column have increased relative to the multipliers under the old agreement?

A. Yes.
Q. At every stage?
A. Yes, we can agree to that.
Q. So save in a scenario that you told me you didn't think was likely to happen, namely where the IRR kicks in because it has been going on for a long time, the funder is in fact going to earn more money under this new agreement than the old one; that is right, isn't it?
A. That is possible.
Q. Well, it is actually likely because you told me that the IRR kicking in was unlikely, so it therefore must be likely under the new agreement that the funder will earn more than under the previous agreement?
A. I am not sure because that also always depends on the length of trial and I do not have a ball to look through and see into the future.
Q. Quite, so we can only deal in likelihoods. We can --
A. Yes.
Q. We cannot deal in certainties, but in terms of likelihoods. You told me earlier on in our discussion that you thought it was unlikely that the IRR term would ever have kicked in, that is what you told the Tribunal?
A. Yes. Yes.
Q. So it must follow that you think it is likely that this agreement will actually lead to Asertis getting paid

more than it had under the previous agreement; it must follow logically?

A. No, I don't hope for Asertis to get more.

Q. I am not asking for what you hope for, I am asking what is likely in terms of the difference between the two agreements.

A. I am not sure I understand the question. Please rephrase it.

Q. I will try it again.

We agreed before that it was unlikely that the proceedings would go on for long enough that the IRR calculation kicked in; you remember that?

A. Yes.

Q. And you agree with that still?

A. Yes, at the time I thought it would be unlikely that it would go for five years, yes.

Q. Okay. So therefore the likely scenario is that the IRR would not kick in, you must agree with that; that just follows naturally from the first proposition?

A. Hmm.

Q. Okay, so the likely scenario then is that in both worlds, under the old agreement and the new agreement, the only way that Asertis gets paid is by reference to the multipliers; in the second agreement because there are only multipliers and in the first agreement because

that is what you considered to be the likely outcome?
A. Okay, yes.
Q. Do you agree with that?
A. Yes, that I think I understand what you mean.
Yes, I suppose I do agree with that.
Q. You agree with that?
And we have also seen that the multiples are always higher under the second agreement than the first agreement -- you saw that?
A. That's correct.
Q. Yes. So it must follow, if you put all those propositions together, that Asertis, in your view, is likely to earn more money under the revised agreement that you are now putting forward to the Tribunal, than it was under the agreement that you were previously putting forward to the Tribunal in July -- just logically it follows?
A. Well, it may be logically, but the two agreements I entered into are in different worlds, aren't they? So ...
Q. Okay.
A. The commercial terms, my understanding, they have moved on and I cannot go back to the first agreement because it was considered DBA and it is not a legal agreement.
Q. I think I have put my question and I think you have had

probably a fair opportunity to answer it.

A. Sorry, I ...

Q. I am assuming, but correct me if I am wrong, that you didn't either seek to work out or otherwise inform yourself about the internal rates of return that Asertis was likely to earn under the new agreement. Now obviously, to be clear, it has no IRR term -- we know that, but nonetheless you can calculate what the rate of return that Asertis would in fact earn from its own perspective under that agreement; you understand that point of principle?

A. What agreement are you talking about, the IRR agreement or --

Q. The new agreement, the restated and amended agreement, so the latest agreement.

A. Okay.

Q. You understand that it is possible to calculate, from Asertis' perspective, what the internal rate of return that that agreement generates for Asertis; do you understand that as a general proposition?

A. That is a tricky question because the IRR was about internal rate of return.

Q. Yes. Yes. So point one is we can agree that this new agreement has no term in it that refers to an IRR?

A. Yes.

Q. We agree that. What I am putting to you is, notwithstanding that it has no term in it that refers to an IRR, if you are Asertis' finance manager and you are trying to work out how profitable your agreements are, you could quite easily if you wanted to, sit down and work out the rate of return that this agreement might generate you in different scenarios; you could think, okay, let's suppose that I have to invest in year X and I get my return in year Y, and this is the rough profile of my investments, this is the type of return that I would expect to get.

You understand that Asertis could do that?

A. Yes.

Q. Yes. And I am assuming that you didn't seek to do any of those sorts of calculations for yourself to judge for Asertis, from Asertis' perspective, whether it was getting a particularly good deal or not?

A. I did not do that for myself, but I saw what they put forward as their calculation.

Q. Okay. If I told you that this amended and restated LFA could generate returns for Asertis that were in 50, 60, 70 per cent, would that surprise you?

A. How would you arrive at that figure?

Q. Well, so the way that you would do it is that you would look at the dates when you thought that Asertis would

have to make funds available, and you would look at how much they would make available on each of those dates, and then you would look at what they were due to get paid and you would make an estimate of when they would get paid. And then you would put those numbers into an Excel spreadsheet, and Excel very helpfully has something called an XIRR calculation, which I think your broker explained, and you ask Excel to calculate what the rate of return is of those investments versus a return. It is a familiar thing that businesses do when they are trying to work out whether deals are profitable or not.

A. Time value of money.

Q. So that is how they do it.

A. Okay.

Q. My question is, would you be surprised if the kinds of returns that Asertis might expect were, say, 50 or 60 or 70 per cent?

A. I don't know whether I would be surprised or -- I don't know.

Q. You don't know? Okay.

Final question. Do you think that Asertis may be exploiting the fact that they faced no competition in providing you with these terms because they know that you are not speaking to anyone else?

A. Well, when you only have one funder to negotiate, that is always a possibility, but I think they also want to be able to support the class and put a deal forward that is going to be competitive, regardless.

MR PICKFORD: I have no further questions, thank you.

Thank you, Professor Riefa.

MRS JUSTICE BACON: Do you have further cross-examination?

MR MALLALIEU: I do, madam, yes.

MRS JUSTICE BACON: How long do you think you will be?

MR MALLALIEU: Probably about 40 minutes. It may be an appropriate moment to take a break for the transcriber.

MRS JUSTICE BACON: Why don't we do a five-minute break now. All right.

We are going to take a five-minute break. You can use the facilities, but you cannot speak to your legal team about the case, and then we will return and your cross-examination will continue with Mr Mallalieu.

(11.33 am)

(A short adjournment)

(11.38 am)

MRS JUSTICE BACON: Two comments from the Tribunal before we continue, Mr Mallalieu. I would be grateful if you would curtail your cross-examination as far as possible. The Tribunal said that we were expecting the total

length of the cross-examination to be an hour and a half.

Secondly, the Tribunal has noted that there are certain people in the courtroom who are responding in their body language to some of the questions being asked; that is not appropriate.

Can everyone, please, just sit still and not indicate their comments on the questions or their thoughts on the questions by their gestures, or shaking head, or nodding head or whatever -- or talking. I don't want the witness or anyone else in the courtroom to be distracted going forward, thank you.

Cross-examination by MR MALLALIEU

MR MALLALIEU: Thank you.

Professor Riefa, I am going to ask you some questions on some related, but hopefully slightly different topics. But can we just pick up, because I hope you may still have the document in front of you, with a question related to the matters Mr Pickford was just dealing with.

So if you have it still in front of you, or if not, can you please turn up page E/397. Tab 25 of bundle E.

A. Yes.

Q. As Mr Pickford has just been taking you through, this is the latest iteration of the litigation funding agreement

where we have a new approach to the multiples. And we can go back to the witness statement, if we need to, but in the interests of time, I will try and summarise.

As I understand from your evidence, when you were considering this new funding arrangement, you compared it to the XIRR model that had been in the previous one; does that make sense?

A. Hmm.

Q. And as I understand it, the basis of this new funding arrangement is the XIRR has been taken out, but it has been replaced with a new set of multiples and one of the purposes of those new sets of multiples is to deal with the question of increasing return to the funder, as the proceedings take longer; does that make sense?

A. Yes.

Q. Just in terms of that, you deal with those points in your evidence, but there is one change in this funding arrangement which you don't deal with in your evidence.

You have given evidence that you thought it was relatively unlikely that the XIRR would be triggered because of your understanding of the likely timescale of the proceedings; yes?

Now, when we look at the previous form of the funding arrangement -- could you keep a finger in 397, if that is possible, or leave that bundle open and pull

out alongside it bundle C, and if in bundle C you would come to tab 10, page 255.

A. 255, okay, yes.

Q. This is the original LFA, but in terms of the point I am going to come to, the relevant term is the same in every iteration until the most recent one.

If you just come to box 9, we can see that the multiplier -- we have the drawn funds, then the priority multiplier, then the greater of the balancing multiplier or a percentage -- we can forget about the percentage for now.

Then the last two lines of that box:

"In each case, calculated by reference to the stage the claim has reached at the time of the successful outcome."

So the trigger point in that arrangement in terms of which multiplier is going to apply is when a successful outcome is achieved; is that your understanding?

A. Yes.

Q. And we can turn it up if we need to, it is on page 232, but successful outcome in the agreement tells us it means when you get a judgment or settlement which is final, so it cannot be appealed, which entitles the class or the claimant to an award. So it is when you go to a judgment and the Tribunal says, "Yes, you are

entitled to damages", that is the trigger point.

A. Sorry, can you do it again?

Q. Sorry, let me take it in stages.

So at 255, was it your understanding that the trigger point which would tell you how long -- what the time was that had passed --

A. Yes.

Q. -- was when a successful outcome was achieved?

A. Yes.

Q. Yes. And would you agree with me -- I will take you to the definition just so you can see it, page 232 in the same tab, about a third of the way down that page, can you see some bold words "successful outcome", and then a definition that is accurate?

A. Yes.

Q. So we can see what that says?

A. Okay.

Q. But I am putting it to you that what that means is the trigger point is the point in time at which this Tribunal hands down a judgment which cannot be subject to an appeal or has failed on appeal?

A. Yes.

Q. Which entitles the class to an award, whether or not that award has yet been distributed?

A. Yes.

Q. Does that make sense?
A. Yes.
Q. Thank you.
Can we now come back to page 397 in bundle E, and then can we look at the words above the box at the top of bundle E.
A. Mm.
Q. Can we see that where it says, under C, "balancing multiplier", it says:
"The above success fee being calculated by reference to the amount of time that will have elapsed from the date of the original LFA that was the same under the previous funding arrangement until the date on which all amounts due to the funder following a successful outcome have been received by the funder."
Do you see that?
A. Yes, I do.
Q. That is a material difference, isn't it?
A. It is.
Q. And that makes it much more likely that the highest stages of these multiples, with their higher figures, will be triggered because it is going to take longer for the funder to receive all their monies because that comes after the successful outcome, doesn't it?
A. That's correct, yes.

Q. Was that a point you took into account when deciding whether to agree this revised funding arrangement?
A. Yes, I was aware of that change.
Q. So you took into account that it was much more likely under this funding arrangement that these multiples that were already higher would reach the even higher stages that they could potentially reach?
A. I was aware of the changes, yes.
Q. Thank you.

Whilst we are on that page, can we turn to the previous page, page 396. With Mr Pickford, you have looked at the question of clause 4.1.17 in the original litigation funding agreement, and I am not going to go over that, but you consider the question of the obligation that you agreed to make an application for the funder to be paid in priority to the class members; yes?
A. Yes.
Q. Now, there were concerns raised in relation to that at the previous hearing and in light of that, you tell us in your witness evidence that you asked Asertis -- or Asertis were asked on your behalf to suggest revised terms, and the revised term to which you have agreed and that you put forward before this Tribunal as being appropriate is the one we see in the middle of page 396,

isn't it?

A. That is the term where we landed in the end.

Q. That is the term you've landed on which you consider an appropriate term, observing your duties to act in the interests of the class members?

A. Correct.

Q. So can we look at what has changed in this term because it is still an obligation on your part -- 4.1.17.1(b) -- it is still an obligation on your part, is it not, to make an application for payment out of the award, so including distributable damages, of the return to the funder; yes?

A. Yes.

Q. The only thing that has changed is it is now qualified with the words "where appropriate in all the circumstances"?

A. I think there is perhaps little bit more changes in the clause, but I don't think I am qualified to discuss what it really means.

Q. The key change is that it has now been qualified, instead of being an unqualified obligation, where it simply said you had to do it no matter what, which was the effect of the previous term, it now starts with "where appropriate in all the circumstances"; yes?

A. Yes.

Q. Can you help the Tribunal with this because I don't think this is addressed in your witness evidence:

In what circumstances do you consider it would be appropriate for the class representative to apply for the funder to be paid in priority to the members of the class?

A. Do you mean where I foresee that this element of the clause could kick in?

Q. Yes, you have agreed you were aware there were concerns about the obligation to make an application. You have gone away, you have thought about it, you have taken advice -- I am not asking what the advice was -- you have taken advice, you have gone back to Asertis, you have renegotiated the terms and we have come back with the same obligation but now with a qualification in it.

So I want to understand what you understand the effect of that qualification to be. The qualification is that you will only be obliged to make the application where appropriate in all the circumstances; in what circumstances do you consider such an application would be appropriate?

A. So I think that -- I am not sure. (Pause)

My understanding of the clause is that we would have more of an opportunity to decide where would be okay for me to make that application.

Q. And are you able to --
A. I understand it is vague.
Q. Are you able to assist the Tribunal now with any circumstances you have considered where it would be appropriate?
A. Well, it could be appropriate if we, for example, didn't -- were not as successful as we wanted or were not successful at all.
Q. If you are not successful at all, this issue is not going to arise?
A. No, that is not true.
Q. If you were less successful than you wanted, there would be less money to go round?
A. That might be why the funder wants --
Q. Sorry I talked over you, please give your answer.
A. Sorry, we have spoken over you.
Q. Would you prefer it if I asked the question again?
A. Yes, please.
Q. You mentioned two possibilities then, one if the claim was less successful and one if it was unsuccessful. We can put aside the unsuccessful?
A. Yes.
Q. If the claim is less successful, in short terms there will be less money to go around and therefore any application to pay the funder in priority is going to

leave even less money to go to the class members, so why would that be an appropriate situation in which to make such an application?

A. Well, sometimes you might apply for money but not get the full amount, and if that leaves a shortfall, then the funder may want to exercise the opportunity to be paid.

Q. I can see very much why the funder might want to be paid. The question is why you, as the person nominated to act in the best interests of the class, would think it was in the best interests of the class for the funder to be paid in priority to the class, particularly when there is less money to go round?

A. I didn't think it was in the best interests of the class for the funder to be paid, but these were the circumstances under which I had to make choices and I took advice on that.

Q. Can I -- again, I am not going to ask you what the advice was -- can we just look at the two -- there are two -- it is in all the circumstances test, but two specific circumstances are specified that you have to have regard to when considering whether it is appropriate, and they are the funders' investment in the claim and the level of the success fee. So that is how much the funder wants as a reward.

So those are the only two matters specified that you have to have regard to. Both of those are matters in the funder's interest, aren't they, taking into account how much it has spent and how much it wants back?

A. I guess so.

Q. Is the effect of that therefore, if we take it on face value, that the more the funders spent -- and we know the more it spends, the bigger its reward because its reward is on a multiple -- the more the funder spends and the bigger the reward it wants, the more appropriate it is, on the face of this funding arrangement, for you to make the application?

A. I guess it is possible, yes.

Q. Again, I am not going to ask about the advice that you received in relation to this, but at any point did you raise the question of whether you should be agreeing to this sort of clause at all?

A. I asked many questions, but I am not sure whether that falls under privilege, if I ...

Q. I am just asking if you asked the question, I am not asking what advice you were given or response --

MR DE LA MARE: I think with respect to my learned friend, that question is an invitation to explain the advice sought.

MRS JUSTICE BACON: He is not asking for Professor Riefa to

explain the advice, he is saying: did you ask the question?

MR DE LA MARE: But that is in itself the question you asked of your lawyers is privileged.

MR MALLALIEU: Did you ask -- without wishing to appear as though I am playing with sophistry, did you ask yourself the question, was it something you considered whether it was appropriate for you to sign up to an obligation which imposes on you --

A. Yes.

Q. -- a duty to act in what, in my respectful submission to the Tribunal is going to be, is always contrary to the best interests of the class?

A. I did ask myself that question.

Q. But you still agreed to the obligation?

A. Yes.

Q. If you made such an application, did you give any consideration to the question of who would provide the counter point, who would act in the class' interests on the hearing of that application? Because if you are making the application -- and it is an application we have discussed and agreed is against the interests of the class -- but it is your application, so you cannot argue against yourself, so if you made that application, who would be representing the interests of the class?

A. Well, we have started appointing a consultive panel, so that there is representation for the class --

Q. So you would expect on an application of that --

A. -- on top of what I am also providing.

Q. Sorry.

So you would expect, on an application of that kind that the class' interest would be protected by the other -- the members of the consultive panel to the PCR that is making the application, standing up and saying that it disagreed?

A. I think for me to be able to figure the clause out we need to rely on the advice of the legal team.

Q. Again, I am not going is to ask you what that advice was.

Final point in relation to this. It has been included in this agreement -- we can see the very last two lines of that paragraph B that we were looking at -- that a clause in the event, in any event, the funder may if it wishes apply to the court for such a payment to be made.

Just two questions in relation to that. On what basis, as class representative, did you consider it appropriate to agree to a specific term whereby effectively you consent to the funder's ability to make such an application?

A. I am sorry, could you repeat your question?
Q. On what basis did you consider it appropriate here to effectively consent to acknowledge the funder's right to make an application which would be contrary to the interests of the class that you are representing?
A. Well, in the course of the discussions there was some disagreement on how that could be triggered.
Q. Again, I don't want to go into the detail of that --
A. I don't think I can say any more, I am afraid.
Q. -- it was something that was discussed but it something you ultimately agreed to?
A. Yes.
Q. I will not ask the second question because I think it will no doubt result in Mr de la Mare popping up, so I will move on to a different subject.

Can we just come, fairly quickly, I hope, to the question of the people who have assisted you. Again, I want to be very careful about this. I don't want you to tell us any advice that you have received from them.

So you have received assistance from, as I understand it, particularly two sets of people, one is Hausfeld, the legal representatives, and one is a firm called Exton, who as I understand it were the funding brokers and they were also the brokers who managed or arranged the after-the-event insurance policies?

A. That's correct.
Q. In relation to Hausfeld, can I pick up in relation to one point. When you were considering relying on the advice from Hausfeld in relation to the appropriateness of these funding arrangements, did you have it in mind at any point that there may be a conflict between their interests and your interests representing the class?
A. So at the time when I entered the original LFA, I was aware that there could be conflicts of interest. My understanding was that those would be more in the round of settlements and I understood that a law firm had a duty to their client. I didn't feel that my interest -- and the class, of course -- wouldn't be aligned to the law firm at that point. And I believe there is evidence that explains that, notably some research from Professor Mulheron that that conflict of interest didn't seem to manifest either in theory or practice because the lawyers effectively are servicing the client, which is me, and not the funder.
Q. So, as I understand it from that, you were aware of a general possibility of conflict between yourself as class member and the solicitors, but you considered that and it wasn't a matter which prevented you from relying on their advice to agree to this funding agreement?
A. No, my understanding is if there was one, it would come

much later.
Q. Did you give any consideration to whether there were specific conflicts arising not from the general idea of what might happen if there was a settlement of a particular sum and how that might be distributed, but that there might be specific conflicts arising from specific terms of the funding arrangement that you were being asked to enter into?
A. I am not sure that I approached the funding agreements with that lens, no.
Q. Because that would have been an important point, wouldn't it? Because it would have allowed you to consider the extent to which you could rely on the advice you had been given and the extent to which you might want to take external advice, perhaps arrange for a consultative panel or arrange for independent counsel or something like that; if there were such potential conflicts, that would be an important matter for you to bear in mind in your evaluation, wouldn't it?
A. Well, yes, of course, if I had thought that was the case, and that the lawyers were not going to abide by their obligations and the way they were supposed to behave, then possibly I would have looked at it differently.
Q. We have discussed the question of clause 4.1.17 and the

question of the funder potentially having priority over the class members in relation to the damages and the distribution.

Can I just invite to you turn up page 309, bundle C, which I think is behind tab 12.

So we have been looking at the success fee on page 309. Can we come underneath that then to box 10, which is the allocation of case proceeds; is this a section that you considered carefully when you considered the LFA?

A. Yes, I did look at -- I believe that is referred to as "the waterfall".

Q. Because the allocation of case proceeds is precisely the sort of area that might give rise to a conflict, isn't it?

A. Yes.

Q. If we can just follow this through for a moment -- I'm not going to go through all of it, but if I take it too quickly and there are parts I am confusing you with, please stop me and I will try to make the position clear.

If we just work through it. So we can see:

"Subject to clause 11, in the event of a successful outcome and subject to any order of the court to the contrary, the parties agree that the case proceeds will

be allocated in the following manner ..."

Then just pausing there, and I don't want to engage in too much of a trawl, but we know what case proceeds are -- Mr Pickford took you to it earlier, but it is page C/279 if anyone wants to turn it up -- and case proceeds are, in the nicest possible way, basically everything: recovered costs, undistributed damages, any amount allocated in a collective settlement approval order, any other amounts ordered or committed by the CAT to be paid to the funder from the award.

So they are all amounts apart from the damages, but apart from that, any part of the damages that is not distributed, any part of the damages that following an application by you can be paid to the funder, all costs, any other amounts in the claim trust accounts, they all form part of the case proceeds. They all go into a big pot; yes?

And then that big pot is distributed. We don't need to go through all of it, but starting at the bottom of 309, first of all over to the top of 310, the funder gets back its drawn funds and the insurance company gets back its outlay.

But then if we come to second, the funder gets its priority multiplier, the contingent insurance premium equal to the priority multiplier is paid, but for my

purposes, C, the law firm's deferred fees will be paid to the law firm and if we come under D, we can see that's done on a pari-passu basis.

So we know from your evidence -- again, I don't want the details of it -- Hausfeld are on CFAs, so they get part of their fees no matter what part of their fees are deferred.

The point I want to come to is just how this works in connection with the clause we have been looking at about making an application for the funder to take priority because, as I understand it, if such an application is made, contrary to the class members' interests, the effect of that application would be that there are more case proceeds available to be distributed, and they are available to be distributed earlier; does that make sense?

A. Yes, I think so.

Q. Because the Tribunal -- if we go back to those categories we looked at, if we just go back to page 279 for a moment, into that pot of case proceeds will be going not just the recovered cost, not just any amount from the undistributed damages but, if we come to (d), the amounts ordered or permitted by the CAT to be paid to the funder.

So, you will have made the application, the

application succeeds, therefore there's that extra resource (d), which goes into that pot, potentially making that pot bigger, but also making that pot available sooner because it is coming out of the distributable damages rather than waiting to see what is left over once they have been distributed; does that make sense?

A. I think so.

Q. In that situation, Hausfeld will benefit, won't they, because this all goes into one big pot and their deferred fees and their success fee, which appears with the other fees under the next part of the waterfall, will get paid out of that, so they will stand to get potentially paid more than they otherwise would, and potentially to get paid sooner?

A. I guess if I follow your logic, yes.

Q. Was that something that you were aware of when you were relying on the advice of Hausfeld to enter into this funding agreement, and in particular this unusual clause requiring you to make an application contrary to the class' interests, in the funder's interests and which was also potentially in Hausfeld's interest?

A. Well, there was a lot of parts to that. I was aware that obviously under the arrangements to pay Hausfeld they would come within the waterfall and be entitled to

part of the money. I am just not sure that -- I am not sure I am going to answer your question.

Q. Well, let me just put it another way and then I will move on. So I take it from your previous answers you were not aware, but can we also take it from that it was not drawn though your attention?

A. No, I was aware that they would come into the waterfall.

Q. You were aware they would come into the waterfall; were you aware that the combination of that with the clause obliging you to make an application for priority payment to the funder, that is an application which would potentially be to Hausfeld's benefit as well as the funder's benefit?

A. No, I don't think I knew that --

Q. So we can take it from that --

A. -- under those terms.

Q. -- it was not drawn to your attention?

A. I am not sure I can answer that.

Q. Okay. In that case I will move on.

Can we come then to the question of Exton.

A. Yes.

Q. We talked about Exton, these are the advisers. And again, in the interests of time I will not go through all of the detail, but you have given your evidence on this and Mr Pickford has taken you through some of it,

as to how you came to see first the litigation funding agreement, the steps you took before you signed up to that.

But there have now been a number of iterations of this litigation funding agreement, we are on the fifth I think now.

A. Mm.

Q. And as I understand it, at each stage you have taken advice from Exton and Hausfeld and accepted their recommendation as to the funding arrangements you are being asked to sign up to; yes?

A. Not for the most recent one.

Q. You didn't take any advice from Exton --

A. I did. I did, but obviously I took advice from Robert Marven.

Q. You may have taken advice from others in addition, but you took advice from Exton in relation to each of the iterations of the funding agreement that you signed up to?

A. That's correct.

Q. I am not going to go through all those funding arrangements, time would not allow, even if it was a pleasurable task in the first place, but can I just pick up one of them and ask you a few questions in relation to it.

It is one we have not seen before, but it is bundle C, page 269. This is the first amendment agreement -- sorry, I will give you a moment. Bundle C, page 269.

You will see on the front page, it says "amendment agreement", and on 271, it is dated 6 April 2023 at the top.

A. Yes.

Q. So this is the first amendment agreement, as I understand it, which is the document that was entered into essentially in anticipation of the PACCAR judgment potentially being adverse to the interests of the funders; yes?

A. Yes.

Q. And this is proposed to you by Asertis?

A. I am not sure that the agreement was put to me by Asertis.

Q. Sorry, it may have been put to you through --

A. It was through Hausfeld.

Q. -- through your legal advisers, but as I understood it, the position was that in March 2023 Asertis raised concerns in relation to PACCAR, and they wanted to agree an option to amend the original LFA; yes? That is your evidence page E/162, paragraphs 17 and 18.

So it was Asertis that raised the concerns and

wanted --

A. Yes, sorry.

Q. -- an amended agreement; yes?

A. Yes.

Q. And now just coming to this amended agreement, if we come to page 272, and this is not a full agreement, this is just an amendment document, so it has excerpts, essentially, which it is inserting in replacement -- if we come to paragraph 3.2, so this is a new paragraph 9 of schedule 1, so the equivalent of the funder's reward terms that we have been looking at in the other agreements.

And if we come to look at this, we can see the fundamental part of this is it strips out the percentage of damages because of the potential of PACCAR, and replaces it with an approach that is solely based on multiples. This is the document that introduces for the first time the XIRR, the internal rate of return, which we can see at the bottom of the page.

But if we just come down it, so we can see we come through the drawn funds at (a), so "repayment of drawn funds"; and (b), "a priority multiplier is then also due on success", and we can see the figures for that at the top of the box; and then we get to the greater of the balancing multiplier or a slightly more complicated

calculation.

And the calculation that we have here is that it is the greater of the balancing multiplier or an amount which is equal to number 1, a further amount of the drawn funds, number 2, an XIRR of 45 per cent; yes? So that is on top of the further drawn funds.

And the third thing, which is actually highlighting an absence of something, if that makes sense, is it doesn't set off the priority multiplier, does it?

A. Sorry, can you repeat that?

Q. So that final paragraph, if we just very quickly -- if we compare and contrast it to the version that was then put before the Tribunal in June of 2024.

A. Yes, it removed the drawn funds --

Q. Page 326 for reference.

A. Yes.

Q. Under the same paragraph, can you see the (d) there, at the end of that had been added about 10 or 12 words:

"... less any amounts already received by the funder as a priority multiplier"?

A. Yes.

Q. And just whilst we are on that page, you can see also that what has been taken out of that is the additional return of the drawn funds.

A. Yes.

Q. So when you were first advised by Exton and Hausfeld to enter into this agreement, this agreement -- putting aside for a moment the XIRR model, which is no longer advanced as a justifiable model, this model also had built into it the extra return of drawn funds, which nobody has sought to justify since, and failed to set off the priority multiplier, which has since been described as a mistake.

A. Yes.

Q. But you were advised to agree to this and you did agree to this on the basis essentially, as I understand it, that these were reasonable terms?

A. Yes, that's correct.

Q. And then we saw this unravel because, come October, the LFA is restated, but Asertis simply drop the one times drawn funds, as I understand it, don't they?

A. Say that again.

Q. When the LFA comes to be restated in October, this idea of an extra one times drawn funds is completely dropped?

A. Yes.

Q. Nobody attempts to say it was reasonable or justifiable, it is just dropped; yes?

A. I don't think I remember the circumstances, but yes, it was taken out.

Q. And then by the time we get to June, by the time it has

been pointed out by the defendants, the priority multiplier is then --

A. Yes -- was clarified.

Q. In addition to this, and just trying to deal with this point shortly, ATE, the after-the-event insurance, which was an important part of you presenting your position to the Tribunal that you should be certified, wasn't it?

A. Hmm.

Q. The after-the-event insurance that had been arranged by Exton contained basic errors, didn't it?

A. If you are referring to the name of the defendants --

Q. Well, it didn't cover the proceedings that you were advancing, because it didn't cover off Amazon sales and it didn't cover the defendants, all of the defendants against whom the proceedings had been brought, did it?

A. I believe it pointed out ...

Q. The defendants pointed that out and it had to be corrected.

So over a pattern of time, you are advised to enter into a funding arrangement which nobody says was one that can be supported the terms under that funding arrangement, and over time it becomes obvious that there are fundamental flaws in that funding arrangement, and you are advised to take out after-the-event insurance and it comes to either fundamental flaws in

after-the-event insurance?
A. If it was -- they were fixed by the insurers, they were happy to oblige.
Q. They were fixed? Did it occur to you that this may reflect on the quality of advice you were receiving and whether you would benefit from external advice?
A. Yes.
Q. At what point did you reach that conclusion?
A. Well, I don't think I received bad advice, I think there are a lot of moving parts and of course you can always get better advice, and that is why in this iteration I definitely wanted to have an external counsel.
Q. One last question on this, and then just a couple of further very short topics and then I will be done.
MRS JUSTICE BACON: How long are you going to be? I mean, there is not time for several further topics, Mr Mallalieu, I am going to give you a few minutes.
MR MALLALIEU: I will be done within the next few minutes, thank you, madam.
MRS JUSTICE BACON: Yes.
MR MALLALIEU: Staying on page 272, you have given an explanation, you gave it again to Mr Pickford, in relation to the question of not thinking the XIRR would be triggered because of your understanding of the likely duration of proceedings.

Would you take it from me that where the alternative model includes not just an XIRR, but an additional element of the drawn funds and doesn't set off the priority multiplier, it makes it not just more likely, but almost inevitable that that alternative model is going to apply in place of the balancing multiplier?

A. I am not sure I understand the question.

Q. Well, one or the other is payable, it is the greater of the balancing multiplier or what is contained in paragraph (d) that is payable; yes?

A. Yes.

Q. If what is contained in (b) is just the XIRR and it is netted off against the priority multiplier, then you would have to work out which of the two was payable. But when you don't net off the priority multiplier and then you lump into this side of the scales also an extra set of drawn funds it makes it almost inevitable that that is going to be the greater figure and that is always going to apply.

If you are unable to answer, Professor Riefa, I will move on.

A. Yes, I am -- I think I would need paper and pen and thinking about how that would work.

Q. Two last short points.

In relation to all of this, you have now indicated

that you are prepared to consider appointing a consultive panel if certification is granted. Your evidence, as I understand it, is you don't think it would have made any difference if you appointed one earlier.

A. So in the summer when we had to produce the witness statement, I was being very candid that I do not think that if I had had to think at the time, at the start, and if I was selecting candidates I might have thought of that. And I know from the class representative network that actually this is not a very common thing, and we have done a survey which we have passed on.

So I was simply saying that at the time I don't think I would have thought about that. But indeed, in light of everything that has unravelled and thinking of how to move forward, and also at the time in July I wasn't sure we could get to the piece of work of looking at the consultive panel and not wanting to make promises that wouldn't be kept, but I did also say I was very open to it. I am on one, I understand the value of it and I am happy to say that we now have been able to -- David Greene, I have met with and is on board and we have also confirmed another member of the consultive panel. I don't know whether I can reveal who that is.

Q. I am not going into that. I will leave that to your

lawyers to reveal if they want to in due course.

You have just mentioned Mr Greene. He is on board. In your witness statement you expressly draw attention to his experience in litigation funding, "funding and insurance arrangements", you say at paragraph 18 of your latest witness statement.

Have you asked Mr Greene to look over these funding arrangements before you advanced them to the Tribunal as appropriate arrangements on which to be certified?

A. I have not because sequentially he comes after we had to renegotiate and present the new deal, so Robert Marven was the KC that was appointed to give me the independent advice on that LFA.

MR MALLALIEU: Thank you. Will you just give me one moment.

(Pause)

Professor Riefa, thank you.

Thank you.

MRS JUSTICE BACON: Thank you. Is there any other --

Questions from THE TRIBUNAL

PROFESSOR NEUBERGER: Yes.

Can you just give me some description of what you would see your role being at the time, if there were a settlement agreement -- and it's not a terribly satisfactory settlement from the point of view of your perspective, but there is settlement with substantial --

with the amounts of money owing to the funders and other parties being in excess of the size of the settlement; how do you see your role at that stage?

A. Well, I certainly think that I would make sure the consultive panel is consulted and can give some views. I would also probably, if I felt it was going to be a bad settlement, refer to external advice. And I would probably want to have everything in writing as to the rationale for the recommendation that would be made, so that I would have time to reflect on it and certainly pause for time to make sure that there are no rash decisions, potentially, being made or feeling the pressure of time to make them.

PROFESSOR NEUBERGER: Thank you.

MRS JUSTICE BACON: Can I just follow up on that question. I mean, you have described the process, but what is your interest at that point?

A. At the settlement point?

MRS JUSTICE BACON: Yes. I mean, if the amount proposed under the settlement was left -- left the funders and the lawyers under water, effectively, there isn't enough there to go round, what is your interest at that point, and how do you see your interest as playing out in the negotiation and what do you say to the court?

A. That is a good question. I think trying to get

something for the class would be very important, if we can, but you might be referring to the situation where it has gone pretty bad. I am not quite sure what I would do at that point. But I would certainly want to rely on advice and see whether there is a way of also renegotiating what funders' lawyers may be expecting., trying to give the class an element of the award.

MRS JUSTICE BACON: All right, thank you.

Is there any re-examination?

MR DE LA MARE: No.

MRS JUSTICE BACON: All right. Thank you very much, Ms Riefa, you can leave now and it goes without saying you can now discuss the matter with your lawyers.

A. Thank you.

(The witness was released)

MRS JUSTICE BACON: If it helps, Mr de la Mare, the Tribunal can sit a little late tonight.

MR DE LA MARE: I am grateful. What sort of time does that embrace?

MRS JUSTICE BACON: Up to between 4.45 and 5.00.

MR DE LA MARE: I am grateful. I will make as brisk a start as I can.

MRS JUSTICE BACON: We obviously hope we don't need to sit quite that late, but if needs must.

MR DE LA MARE: I understand, madam.

The arguments put forward by the proposed defendants require the Tribunal to answer three questions. Logically, the first question is this: are the present funding arrangements suitable so that they satisfy the authorisation question?

The second question is whether the previous funding arrangements were unsuitable; and the third question is to the extent that they were unsuitable, does the fact that the PCR entered into them mean that the authorisation condition is not satisfied, notwithstanding the fact that the Tribunal is now presented with an application which presently, in all aspects, is otherwise capable of certification.

The follow-up question indeed could be put another way: if a new PCR advancing exactly the same claim with exactly the same funding arrangements would be certified, should this PCR not be certified only because of what has gone before?

We say that that could really only be the answer in an extreme situation where a PCR had, through their previous conduct, properly attributable to them, demonstrated that they could not, in the future conduct of the proceedings, act fairly and adequately in the

class member's interests, notwithstanding the professional advice available to them. We say that is plainly not this case.

So let's start with the first topic, the suitability of the present funding arrangements.

The revised LFA before the court now provides for the funder to be paid a set of straight multiples of drawn funds, starting at a multiple of 3.5, where it will remain until January 2027, that is four years after the conclusion of the original LFA, after which it will gradually increase over time to a cap of 5.75 multiples at the conclusion of seven years, and that is achieved by quarterly increments of 0.1875 of the multiple. So that catch rate of 5.75 will only be reached if these proceedings are still going in January 2030.

Our case is straightforward: those funding terms should be considered simply on their own merits as they stand now. Indeed, that was the Tribunal's primary stance last time, see page E/107, lines 3 to 6. The history is relevant at most to the topic of whether the Tribunal is satisfied sufficient efforts have been paid by the PCR to get a competitive quote.

The starting point for that objective and current analysis is that the funding terms in play here are fully in line with, indeed, more advantageous to the

members of the class than multiples which have been approved in other cases.

In any event, as the Tribunal has repeatedly emphasised, the principal time for the determination of what the funder should actually receive, at which the LFA, as concluded, will be a central but not determinative input, is as and when an application is made for payment of the funder at the conclusion of the proceedings.

That is what this Tribunal has said in Gutmann v Apple -- that is paragraph 36, the reference for which is D, tab 26, page 1525. It is what the Tribunal said before that, some months before, in the Alex Neill case, D, bundle 2, tab 21, page 1439, at paragraph 167, and we would suggest it is also the flavour of Lord Justice Green's remarks in Gutmann v South West Trains at 83 to 87.

Now, either in arguing these current terms are in themselves unsuitable, the proposed defendants make three points.

The first point is they say that the multiples are too high in themselves, and that is a point made in Apple's skeleton at 10 to 13, and the Amazon skeleton at paragraph 24 and its sub points.

Apple's concerns on this front are entirely new,

having expressed no concern whatsoever on the topic of funding multiples in relation to the prior version of the LFA, which contained the XIRR uplifts. It was Amazon alone, as you will recall from the last hearing, that advanced the charge and only principally against the IRR element of the funding.

That is the first topic, multiples.

The second topic is they say together, that it is inappropriate for the litigation funding agreement to make the provision it does for the possibility of the funder getting paid before the class members.

Here, we say Apple is substantially seeking to resuscitate the concerns it had previously ventilated, but said, see paragraph 15 of the prior skeleton, the reference for which is C/2, page 27. It said it was not pursuing those concerns pending the Court of Appeal decision in Gutmann.

I am going to take you through what the CAT said in Gutmann in some detail and you will see why that concession was made.

For the avoidance of doubt, that same point was made very clearly, orally, on a question from the chair, see page E/94, line 24, to E/95, line 9.

Mr Mallalieu was asked in terms whether any of these points were taken and he expressly disavowed them.

Now it is resuscitated, Amazon is enthusiastically joining that argument.

Then, thirdly, echoing the concerns that the Tribunal raised shortly before lunch at the last hearing, both proposed groups of defendants now say that there is not enough evidence of the process where the funding arrangements were agreed. And we have had a flavour in cross-examination of some of the arguments that are going to be made about some form of competitive procurement operations or repeatedly going back to the market. That is the flavour of the case to come.

So let me take those topics in turn and start with the levels of multiples.

The proposed defendants don't say in terms that the multiples are objectively extreme in the way that the Tribunal called them out to be in the Gormsen case. Although I think Amazon comes the closest to suggesting something adjacent thereto when it refers to the multiples being avariciously high.

They provide no reasons for saying the multiples are too high, except that they say that they were lower in the previous agreement and that there may be lower multiples available in the market.

In the case of Amazon, they say one way to test of all of this is to analogise the IRRs to interest rates,

and that is where the "avariciously high" comment comes in, paragraph 24(b) of Amazon's skeleton argument.

Our primary response is that those points are largely irrelevant even if they were accurate, which in many ways they are not.

The test is and remains for the PCR to satisfy the Tribunal that it would act fairly and adequately in the interests of the class members, which includes having a litigation plan, budget and funding for proceedings.

No previous case has drawn from that a requirement or an obligation on the PCR to obtain and show that they have obtained the best possible funding deal in the market, or even an agreement that in some way is competitive or has been exposed to some kind of tendering obligation.

On the contrary, the Tribunal in Gormsen at 35 to 36 -- the reference is D2/24/1491 -- and in Gutmann at paragraph 10 -- and the reference is D2/26/1515 -- were absolutely clear that the Tribunal should not get into the commercial negotiations which lie behind the funding arrangements which are presented to the Tribunal, except in an extreme case.

It certainly cannot be a test which in effect routinely requires waiver of privilege, as Apple seemingly requires at paragraph 13 of its skeleton,

where it criticises the PCR for saying nothing about the date and content of Mr Marven's advice. You cannot make a point like that. That is simply unfair in the grand scheme of things. The most one could advert to is the fact of the advice being available.

Amazon's paragraph 24(d) is to like effect, in that it criticises the evidence we have led as to how the multiples were calculated because it says we have not done so in the light of the risks presented by the instant claim. But as soon as you get into the risks presented by the instant claim, you are getting into the topic of advice on litigation risks, the very stuff that is behind the claims of privilege. And it is for that reason the courts have routinely refused to get into parsing that material because it necessarily entails waiver of privilege.

But in any case the material relied upon by the proposed defendants does not demonstrate that even the current multiples are high, let alone too high, to permit certification. And it is here that I should engage head on with this exercise that they invite. It is a partial exercise of comparison between the two agreements, the LFA in its amended form as presented to the Tribunal in July and its current version.

The process of comparison that the defendants

attempt -- and I think this is most obvious in paragraph 10 of Apple's submissions -- is a comparison between apples and oranges, and that is because the payment structure in the new agreement is significantly different from that in the old agreement.

First, there are no differential multiples depending upon whether or not there is a settlement or a resolution at trial. So under the old agreement, the cumulative multiples differed. 3.5 was the cumulative total, if it was settlement; 4.5 was the cumulative total at trial.

That is the first critical difference. That is not reflected in the current agreement; in multiples the priority in balancing multiples apply in either circumstance.

The second is that there is no long stop IRR provision, which was the sole focus of previous criticisms in terms of remuneration in the last hearing, and which in certain circumstances operated to increase the rate of return beyond those implied by the total of the balancing and priority multipliers. It has been fully removed.

In consequence, the way that the multiples operate has been changed. It has been changed to provide for this gradual ramping between year 4 and year 7 -- the

end of year 4 and the end of year 7, culminating in a cap. And that, we will see, is exactly the same structure, albeit with better rates than that which was used in the Alex Neill case and approved by this tribunal. It is exactly the same.

So we have a previous arrangement which provided for a binary number, 3.5 or 4.5, depending on settlement or resolution at trial, and that binary number was not in any way related to the duration of proceedings. The funder's protection against the possibility of the proceedings being prolonged beyond five years was the IRR provision. That worked only on funds as and when paid, not when committed. That is quite an important distinction when one is comparing with some of the other funding agreements in some of the other cases that have been certified, whether multiples operate not on funds as drawn, but funds committed. There is a massive implication for the implied IRR of those arrangements.

Given those differences, the multiples under the two versions of the agreement cannot really simply be compared because the agreements operate in very different ways. It is obviously completely meaningless or misleading to compare just the multiples in the old LFA shorn of the IRR provision, which was designed to uplift them in the case of protracted litigation and

then compare them shorn of that IRR with the multiples under the new arrangements.

In any event, it is not surprising that the maximum multiplier in a scheme without the minimum IRR backstop would be higher than the maximum multiplier where it is the minimum IRR provision rather than the multiplier, which is expected to provide the guarantee of reward in a case where the funder is dealing with unexpectedly protracted proceedings.

So let's compare. The starting multiplier under the new arrangement is the same as the settlement multiplier under the old arrangements, and Apple are wrong in their skeleton at paragraph 10 to say that it was three times as opposed to 3.5 times. It is one times lower than the old starting rate for disposal at trial. So in that respect, there is already substantial improvement.

Thereafter, the multiplier increases gradually. And there will be points under the arrangements where depending upon the vagaries of when capital are drawn, there may be more or less advantage under one agreement rather than the other.

Where you get to at the end, is at the end of the seventh year everything is capped out by the 5.75 rate, and so the spectre which haunted the last hearing of the funder receiving 13 times its outlay, or the other

examples Mr Pickford gave and of which was so much made -- never a realistic one, in our submission -- that cannot arise under the new arrangements.

If the proceedings are very significantly delayed in their resolution, then one could be very confident that the funder will receive less under the new arrangements than it would have done under the old ones.

So let's then compare with Alex Neill and the multiples that were approved in that case. That is in bundle D2, tab 21, the decision of this Tribunal from 21 November 2023, so pretty recent in the scheme of this Tribunal's jurisprudence. It is really the passage starting at D1436 at 160, under the effect of the funding arrangements on the incentives of the PCR and the funder, that is relevant.

Can I ask you to note the summary of submissions before the Tribunal at 161, and you can see Sony focused on two aspects of the current LFA. The second one, page 1437, chimes with the present case. They complained about the requirements, please note, for the PCR to ask the Tribunal to order that the funder is paid before class members, which significantly benefits the funder at the expense of class members. So it had exactly the same structure as the LFA as it was as before you last time.

So there is then a helpful recitation of some of the law and what Lord Justice Green said in Gutmann, all of which I know will be familiar to you.

And then at 168 to 169 -- before we get there, it is helpful actually to look at 166 because this is then drawn upon what is said later. This chimes with paragraphs 37 to 41 in the Gutmann case. It is said that Lord Justice Green is recognising there are inherent risks for the fulfilment of the policy objectives in the funding model, which enable collective actions to proceed. And it is the Tribunal which has responsibility to manage those risks and has a variety of means for doing so. And those are then listed.

Satisfying itself that it has a class representative who is sufficiently independent and robust, that is the first check; scrutinising the funding arrangements at the certification stages, the second check; managing costs is the third; and exercising oversight over the terms of any settlement is the fourth, to which we would add exercising any control over any application after the conclusion of a claim resulting in gross damages for the funds to be paid first to Tribunal, would be the fifth control.

167 says it is a matter for the judgment of the Tribunal as to how it employs those levers. Then we

come to the detail of the Alex Neill arrangements. And from 168 and 169, you can see that the structure of this agreement was a starting multiple of 3.75, so already higher than the 3.5 in play in this agreement, and it was then fixed, but would become in year 4, subject to an increase of a multiple of 1. That would increase by a multiple of 1 for every year thereafter, so there was no cap provision.

And what happened was that the Tribunal expressed its concern about the multiples jumping in annual increments because of the distortions that that might proceed or produce depending on when payments landed.

And so there was an amendment by the PCR to provide for the multiples to increase, not by a full one every year, but by 12 monthly increments -- and there is a typo. It should obviously be 0.0833 because when you multiply that by 12 you get 1.

So there was, if you like, a gradual staging of the increases.

Now, compare and contrast to the present case. We have an entry multiple of 3.5; that is locked for four years, not three. We then have only a three-year period in which there is any increase, and the increase that incurs in that year is at a 0.75 rate as opposed to one, and instead of being spread monthly, it is spread

quarterly. Our rate is then capped off at 5.75 multiple, and there is no such cap in the Alex Neill case.

There is, we would suggest, nothing in the differences between the case that suggests that that arrangement was fine when you were bringing effectively an App store case against Sony, but is not acceptable when proceedings are brought against not one giant tech company, but two of the gaffers, Apple and Amazon, you would have thought that might be a concern from the funder against higher multiples, but instead, as we have seen, the multiples in play here are lower than those certified in Alex Neill.

So in every respect it is a directly comparable structure, whose main features are actually more advantageous in the present case, resulting in appreciably better terms for the PCR.

What is more, it vindicates entirely the evidence given by Mr Astill -- to which we will come to in terms -- about the sorts of deals which are available, particularly post-PACCAR in the constrained funding market.

It is simply impossible to say that the funding model on the table now is out of line with what the Tribunal has previously approved.

So what you get instead is the calculus we get from Cleary Gottlieb for Amazon last night seeking, irony of ironies, to now look at all multiple-based arrangements in terms of their implied investors' rate of returns.

And that is a pretty ironic exercise since they were ones complaining about that metric last time. It is not part of our case to say, as Mr Pickford put to Professor Riefa, derive on certain assumptions about when funding lands -- which may vary, there may be big chunks of funds at different times, et cetera, but you can have lots of different assumptions and see what kinds of numbers were produced -- it is not part of our case to imply you cannot derive the implied IRRs from funding multiples. But if you were to imply that exercise to the Alex Neill arrangement, you would generate IRRs even higher than the ones that Cleary has generated in this case.

And of course, in any case where there is any kind of cliff edge about a multiple, let's say, the initial multiple of 3.5, which applies for the first four years, it may result in one IRR, if in fact the case terminates for whatever reason, immediately after the certification hearing before substantial sums are incurred, and a completely different IRR if it is terminated at the very end of the four-year period, or the five-year

period or the six-year period, or what have you.

So there is always going to be a variation. When you come down to the actual numbers in terms of the IRR that has been generated by any particular investment, so much is self-evident. And it is self-evident that the reason the IRR calculus was included was to prevent previously potentially higher IRRs being eroded by the passage of time to fall below an IRR of 45 per cent.

So it is self-evidently obvious that the old agreement operated on the implied premise that until the IRR long stop kicked in, higher rates of IRR were implied, or potentially implied, by the multiples themselves taken on their own.

So we don't think that there is any basis now for this Tribunal to pivot away from its treatment of multiples in cases like Alex Neill, and for that matter Gormsen where again multiples were looked at. The result in Gormsen was that the very substantial spike from 0.1 to 20 months later in the implied IRR was softened by some further glide path, which is not in the public domain.

There is no basis to pivot from that approach of multiples to effectively testing everything on an entirely speculative basis by reference to IRRs now on the basis of assumptions about when capital will be

released, funds will be released, et cetera, which may be unsafe or wrong, given the imponderables and how litigation develops.

So that is the first point, we are squarely within the four corners of the case previously certified.

Then we have the evidence as to the shape of the market, and in this respect I think this case is unique. This is I think the first certification case where there has been any evidence of the kind contained in Mr Astill's statement, before the Tribunal to aid it in its consideration of these issues.

It is important to emphasise that Mr Astill's evidence is unchallenged. There was no application to cross-examine him. I note my learned friend, Mr Pickford, put some questions to Professor Riefa that were tending to suggest: well, is this capable of reliance in circumstances where his commission structure may incentivise him to favour someone else or some speculative question? None of that has ever been suggested as a basis not to rely on the Astill evidence. And if there had been any basis for making those questions, they should have asked to cross-examine Mr Astill as well. It is quite wrong to do it by a sort of innuendo and side route.

So that evidence is unchallenged. And the evidence,

despite the very bizarre reading given to it by Amazon in paragraph 24 of its submissions, is absolutely clear. So can you take it up, and we will just momentarily look at it. It is in bundle E, tab 16. The relevant passage starts at E/188, the funding arrangements in this case.

The evidence describes the efforts made to tap into the market, the short list of funders drawn up as likely candidates based upon knowledge of the market. And you don't waste your time and effort approaching a funder who you think is unlikely to want to fund, let's say because they have just, as may be public knowledge, committed a large amount of money to funding a claim of a similar or more ambitious kind. Because all of these funders want to diversify their portfolio, they don't want to have risk concentrated in one type of litigation or one type of litigation investment, if indeed they want to concentrate on litigation at all.

So choosing funders to approach, a perfectly rational sensible approach for a broker to adopt. Only one broker comes back, it is Asertis. The agreement is concluded before the PACCAR problems get real, if you like. By that stage you are locked into a funder with putatively, legally enforceable agreement. And in these circumstances because of the amendment provided before the Supreme Court decision in PACCAR, it would have been

an enforceable agreement. That obviously ties your hands in any renegotiation, though there of course is a full alignment in interests between the PCR and the funder because it is in the interests of both that the claim is funded and certified.

Thereafter, there is a description of the features of the agreement, and in particular at 26, there is a description of the IRR feature, which came to be prominent after PACCAR as the funding market responded to PACCAR, and some funders -- not all funders, but some funders began to seek IRR provisions to cater for the fact that because they didn't have access to a multiple of damages, which of course would also accrue interest, there was no way to track or trace the -- effectively, the continued lack of liquidity in their money and the continued lack of utility of money.

You see at 27 the IRR component was included by Asertis on the basis that it would provide a baseline level of a return; in other words, they are seeking to secure against erosion by time. And he expresses his view that given the state of the market at the time, i.e. where funders were taking an especially cautious approach to new investments, particularly in the opt-out space pending PACCAR, it would have been very difficult for the PCR to secure replacement funding at that stage

at all.

So not on better terms, there wouldn't be any rival offer in any shape even on worse terms, let alone on terms more favourable than Asertis were offering.

Then 29, and this is the bit that really is butchered by Amazon, since the Supreme Court judgment in PACCAR, litigation funders have of course not been able to provide for returns based on a percentage of damages, I have seen different approaches taken by different funders. Some have, like Asertis, made provision for an IRR basis of calculation -- so in using IRR, no kind of outlier from the market:

"Others have provided for higher multiples or added an interest rate to the multiples. I have seen LFAs with multiples rising from around three times up to the maximum of 5.75 and 6.75 times the level of funding deployed, with the applicable multiple rising over time depending on the timing of the successful outcome."

That is a description of other agreements, a bit like the Alex Neill agreement, that share exactly the same contours as the present agreement.

Amazon, if you look at their skeleton, reads that as him saying there is a static multiple of three, such that 5.75 is nearly double the multiple in question, and that is obviously not a fair or satisfactory basis to

read this.

Then he says:

"Typically, the multiples rise in six-monthly increments with the lowest multiple applying to a recovery achieved in the first six months and the highest multiple applying to a recovery achieved after 5.5 or 6 years."

Here, we have the lowest or lower end multiple fixed in for a period of four years before there is any change, whereas this envisages a situation where there is a gradual annual increase every year.

He also says:

"I have seen funders charging success fees based on committed capital, i.e. the total case budget, rather than deployed capital ..."

And that of course would lead to massively larger implied IRRs, and that is not this case, though it was the case in the Gutmann v Apple arrangements which had a rate of 3.8 times committed capital.

Is that a convenient moment?

MRS JUSTICE BACON: Well, yes. Just before we rise and so that you don't end up talking at cross purposes, you said at the start of your submissions that there were three questions and you outlined them, and I will not repeat them.

MR DE LA MARE: Yes.

MRS JUSTICE BACON: But listening to the tenor of the cross-examination, I perceive that the -- or at least one of the arguments made by Apple and Amazon may be slightly different to the three questions that you outlined.

I perceive, and I may be wrong -- and Mr Pickford and Mr Mallalieu will develop their submissions this afternoon -- but a lot of the questions seemed to be going not to the questions that you outlined, but rather to Ms Riefa's understanding of the obligations that she was entering into. If that is not going to be a subject of the submissions from Apple and Amazon, perhaps that can be confirmed, but if I have rightly understood the tenor of the cross-examination -- Mr Pickford.

MR PICKFORD: Yes, it is indeed. We will be criticising --

MRS JUSTICE BACON: Her understanding.

MR PICKFORD: -- regrettably.

MRS JUSTICE BACON: No, I understand.

So it is not about -- it is not just about the three issues that you raise, Mr de la Mare, but I think you also need to address in opening, as far as you are able to, the criticisms that I perceive are going to be made about her understanding of the arrangements, so far as you can, obviously, from the way it has been put in

cross-examination and the skeleton arguments, and you will be able to then come back to that in response. But I don't want you to entirely miss over what I perceive is going to be a significant part of the arguments put against you.

MR DE LA MARE: Yes, I -- thank you, and that is a theme that seems to be being expanded by cross-examination, rather than present in the submissions, which are very much focused upon what entry into the part arrangements have changed -- but --

MRS JUSTICE BACON: It certainly is touched on in the skeleton arguments and I think it would be appropriate for you to say what you can in opening, so it is not all left to reply.

MR DE LA MARE: I am grateful, my Lady.

MRS JUSTICE BACON: Thank you.

(1.02 pm)

(The Luncheon Adjournment)

(2.00 pm)

MRS JUSTICE BACON: Mr de la Mare, do you have a time allocation for this afternoon agreed between you and your colleagues?

MR DE LA MARE: Agreed would be a stretch, my Lady.

MRS JUSTICE BACON: Suggested by you?

MR DE LA MARE: Suggested by me, the best efforts I hope are

going to mean I am finished by 3.00.

MRS JUSTICE BACON: All right.

MR DE LA MARE: I am going to do my level best, but obviously I have had to give some thought about how to answer the question my Lady posed to me shortly before lunch.

MRS JUSTICE BACON: That doesn't give much time for Mr Pickford and Mr Mallalieu.

MR DE LA MARE: I understand that. I am doing the best I can, but obviously a good deal of time, more than anticipated, was consumed in cross-examination as well. And there is quite a lot of points for me to gather.

MRS JUSTICE BACON: You have had more than half an hour already.

MR DE LA MARE: Yes, my Lady.

MRS JUSTICE BACON: Mr Pickford.

MR PICKFORD: I don't actually think we took more time in cross-examination than one and a half hours, which was what was permitted. We do need a fair amount of time this afternoon. The Tribunal obviously has to stop, it cannot be expected to keep going. If Mr de la Mare could finish, say, within 40 minutes, I think that would assist.

MRS JUSTICE BACON: I think you should try to finish within 40 to 45 minutes, Mr de la Mare, because even if we sit

late, we need adequate time for Mr Pickford and Mr Mallalieu to make their submissions.

MR DE LA MARE: I am grateful.

So I had dealt with the position in relation to the objections to the multiples. Let me turn to the next topic then, which is order of payment. And both Apple and Amazon criticise the current and the past arrangements for providing for the possibility of the funder being paid out of gross funds before the class members. And again, as I mentioned earlier, that is a reversal from the position that they adopted at the previous hearing.

It is said that incant the effect of the Tribunal decision in Gormsen too much but let me take you to that decision, because I think it will explain more clearly where we are coming from. In bundle D2 -- Gutmann, sorry, I said Gormsen -- under D2, tab 26, page 1510.

Just as was the position before you last time, in this case the terms of the LFA in Gutmann were that the PCR committed to making an application for payment of the funder's return from proceeds before distribution, so that it could recover its multiple of the funding paid. And you can see that from paragraphs 15 to 16. There were differential multiples in operation depending upon whether or not the Tribunal did or did not

authorise such payment. That is the subject of the tables.

There were two issues before the Tribunal. The first was whether or not under the statute and the rules properly construed, there was a provision enabling the payment of damages to the funder prior to distribution, such that the structure of the LFA was not unlawful.

The analysis of that point starts at paragraph 20 and following. It turns upon a construction and an analysis against the access to justice objective of the operation of the rules.

The Tribunal concluded, very much on the strength of the analysis and comments of Lord Justice Green in Le Patourel, as well as the Supreme Court in Merricks, and the PACCAR case, that there was such a power. And that conclusion is at 35, page 1524.

Then, as a discrete topic under the heading 4, "Are the mechanisms in the Gutmann LFA inappropriate? Is the funder's return excessive and disproportionate? Does the LFA create a risk of conflicts of interest between the funder and Mr Gutmann?"

They dealt with the apparent conflicts of interest and this argument, as far as we can discern, is identical to the one advanced now.

MRS JUSTICE BACON: No, I don't think it is.

Mr Pickford's -- or the thrust of the objection is not so much about the existence of a clause, as I understand it, but in the interpretation of the revision to that, this provision about appropriate in all the circumstances and, as I said before lunch, Ms Riefa's understanding of it.

That was the basis on which Mr Pickford was cross-examining on this, whether she understood the clause in its original incarnation before us at the last hearing.

MR DE LA MARE: Yes.

MRS JUSTICE BACON: Whether she understood it then, and indeed whether she understands it now and whether she understands the difference between payment out of the gross award and the undistributed damages, and the implications on that for the conflicts between the different parties involved.

That is the issue before us, her understanding of what she has committed to.

MR DE LA MARE: As I read my learned friends' skeletons, I had understood the wider points to be taken. But nevertheless the point I want to make is --

MRS JUSTICE BACON: I am sorry, I am somewhat -- bearing in mind that we do have limited time, I would like to you address the points which I think are actually being

taken against you.

MR DE LA MARE: I understand that.

The point I am seeking to make is simply this, that the spectre of conflicts, if you like a per se conflict by a provision in the form of the old agreement, because it was identical, is raised, and addressed and answered in this case.

And the conclusion of the Tribunal, having set out the conflict argument at 37, is at 41. The conclusion is that the potential conflicts between the funder and the class are up to a point inevitable and that they accept the protection written into the Gutmann LFA referred to above, the differential weights, et cetera, coupled with the supervisory jurisdiction, that is the requirement for the CAT to approve any such payment, makes the conflict manageable.

That is on all fours with the analysis of Mr Tidswell sitting as chair in the Alex Neill case, at 166, 173 to 175. That is page 1436.

So expectedly, they are saying there is not an inherent conflict once that arises, or a potential for conflict if it is managed by the CAT.

That means that there is no room for the stark proposition that an obligation of this kind is impermissible. And what that does is in effect make the

scope of LFAs that can be concluded in relation to an opt-out CPO much closer to the types of LFAs that can be concluded in ordinary commercial litigation.

In ordinary commercial litigation it is perfectly routine for the funder to insist that any proceeds recovered are first used to repay the funds advanced, and secondly to pay the funder's fees. That is the condition upon which funding is advanced.

Once you understand that, it falsifies the basis on which my learned friend has put some of the questions to Ms Riefa, and indeed the basis of his skeleton argument, because it is not the case that by concluding an LFA that makes provision for a payment of such funds, that you have somehow solved the class down the river because what the class is entitled to is an arrangement that in all and every circumstance means that they get paid the totality of the damages without prior deduction.

That is not what the law says must happen or requires. That means that a party trying to fund a claim and faced with a funding market that only offers them a funding agreement that says, "You must use to the full recourse an ability to apply for the funds in priority", much as with a regular commercial LFA, is advancing the interests of the class, because the choice is either between a claim with a prospect of full

recovery, and maybe a risk, depending upon how the Tribunal exercises its discretion, of less than full recovery, that is certainly better, and a better advancement of the class' interest than no claim at all because there is no funding available in the market on terms where the funder refuses to or accepts not to have access to the power to make an application to the Tribunal.

So it is a false analogy or a false basis on which to criticise any party in Ms Riefa's shoes, to say that by agreeing to something that might result in less than full recovery for the class, she has not represented the interests -- the best interests of the class, because her first objective in a world of constrained funding has to be to secure funding to enable any claim to be brought.

That then falsifies the proposition at paragraph 15 of Amazon's argument that says that anything that entails the class members getting less than 100 per cent of any damages awarded is necessarily contrary to the class members' interests. Not so. Their primary interest is to ensure that a claim is made in their name to get the best that is possible.

That then only leaves the argument that somehow, by committing to this in advance, you have solved the

interests of the class down the river, or the situation we face now, by agreeing terms in which any dispute about whether or not such application will be made, will be resolved by an independent KC.

We say neither provision raises any problems of suitability. The first formulation is the very formulation that was certified by the Tribunal in both Gutmann and in Alex Neill --

MRS JUSTICE BACON: That is no longer before us. We have now got a revised formulation --

MR DE LA MARE: Absolutely.

MRS JUSTICE BACON: -- wording, and I am still not sure what that means.

MR DE LA MARE: The wording is obviously designed to ensure flexibility to respond to the evolving case law of this court and the Court of Appeal. Just as the law has evolved from Le Patourel, where an exception is countenanced for an account credit and it has been widened into the circumstances countenanced by Gutmann, there is a facility, according to the jurisprudence and the context of the case, to enable an appropriate application to be brought.

There is no lack of certainty in the words. Why? Because the adjudication on whether or not such an application is in all the legal and factual context

appropriate is to be taken by an independent KC, and that provides certainty, just as a mediation or mandatory settlement provision on certain topics provides certainty, so the complaints about lack of certainty --

MRS JUSTICE BACON: But what are the criteria for judging whether it is appropriate? Is it just whether it is permitted under the jurisprudence of this court and the Court of Appeal and if it goes higher, the Supreme Court? Because that is not what the provision says. It says: where appropriate, having regard to various factors that go to the interests of the funder.

MR DE LA MARE: Like any exercise of discretion, it is going to be dictated by the law and the operative facts. And one can envisage a variety of scenarios. So, take one circumstance, you have the Account Credits case, that is a plausible case. If, for instance, this claim resulted in only on platform claims having legs, and on platform claims against Amazon are plainly ones that would be in principle capable of an account credits solution. It is difficult to think of anyone with a wider set of Exton customers than Amazon, they don't have the same churn of BT in Le Patourel.

That then would prompt exactly the scenario that arose in Le Patourel, and that would be a perfectly

proper or appropriate circumstance in which to make an application.

Another example, suppose a substantial sum is recovered, but we have not yet got to the process of distribution and that is going to take some time, but it is thought appropriate to pay the funder first because under the terms of the agreement, when the funder is paid, affects the multiples that the funder recovers. So you apply to the Tribunal for payment early in order to ensure that some of the later multiples do not inure and the sum is reduced. That would be a perfectly proper application to make.

I readily accept there will be other cases where the judgment call is more difficult in circumstances where, for instance, modest recovery is made that would only permit, let's say, recovery of the sums outlaid in a small amount of the return from the undistributed sums. And in relation to that, just as it does in relation to settlement, the Tribunal is going to have to deal with that issue as and when it presents itself on the basis of the facts and matters that present themselves at that time.

What we could not conceivably do is prescriptively set out by reference to the word "appropriate" every single circumstance in which it may or may not be

envisaged that such an application would be made. That would be to try to anticipate the development of the law, which is obviously fast moving, and the facts that may develop in the case.

MRS JUSTICE BACON: All right, but none of the factors that you have just referred to are even mentioned opaquely or implicitly in the wording of the clause.

MR DE LA MARE: In my submission, they are captured by the word "appropriate", and if that is inadequate to capture those types of concerns, then that is capable of curative drafting. It is certainly not a proper or proportionate basis on which to refuse to certify the case as a whole, in particular in circumstances where this wording is very much more restrictive than the wording that was approved in Gutmann and in Alex Neill, where there is no such control, no such recourse to the independent KC's advice and no such drafting to make the presumption being one of payment from the undistributed damages, with such an application being exceptional and only made where appropriate. It is a considerably tighter and narrower provision that operates where all the circumstances, as the clause adverts to, dictate that it is appropriate.

MRS JUSTICE BACON: It replaces a provision which has a degree of certainty with one which is entirely

ambiguous. I am not sure how that makes it tighter.
MR DE LA MARE: It is one that reflects the fact that ultimately the control in operation here is the discretionary decision of the Tribunal.
MRS JUSTICE BACON: No, it doesn't because that is once the application has been made, but the question of appropriateness bites at the point at which the PCR is deciding whether to make the application. Whether or not the Tribunal accepts it is a different matter. I mean, that is a problem -- that that is what I am struggling with at the moment. It is not very clear on what basis that decision is to be made. Ms Riefa didn't seem to know either.
MR DE LA MARE: I don't want to repeat the submissions I have already made. I have --
MRS JUSTICE BACON: You have made some submissions --
MR DE LA MARE: -- some submissions about why and how and when it might operate.
MRS JUSTICE BACON: No.
MR DE LA MARE: If the Tribunal does not like that wording and would prefer the old wording, then again I would say that is the old wording that has been certified in previous cases, then I would say that that is not a basis on which to say there is some insuperable problem here and the parties should be given

an opportunity to correct it.

The critical thing is that availability of the power to award damages out of the gross sum falsifies the assumption that anything other than full recovery is a -- is inconsistent with the best interests of the represented class.

So that is that provision looked at objectively.

The third topic of objective complaint was the process by which the commercial terms were agreed. And from the questions put to Professor Riefa, it sounded very close to being a submission that effectively, unless some form of continual procurement exercise was engaged upon, then the terms wouldn't be sufficiently tested so as to be in the best interests of the class, particularly in circumstances where there was a prospect that those terms then translated into an application for payment out of gross proceeds.

We say, first of all, that the sort of detail that has been sought at various junctures is irrelevant. What is relevant instead is the evidential picture as to the general process that has been adopted and the extent to which Professor Riefa has relied upon advice from funding brokers like Exton, Mr Astill, relied on advice from Hausfeld, and latterly had access to advice from Mr Marven and then going forward from Mr Greene.

She has explained both in her evidence, Riefa 2 and Riefa 3, and in cross-examination that there was commercial to and from on the negotiation of these terms, that there were improvements in the terms. There is certainly no basis to suggest that the funder simply presented terms and then they were accepted without demur.

There is plenty of evidence of back and forth, not just back and forth prompted by PACCAR.

And in particular Professor Riefa confirmed in cross-examination that there was consideration about the implications in terms of IRRs between the old and the new agreements, and that she considered the position as between the agreements against that backdrop.

It is difficult, without any express articulation from Apple or Amazon, to know what it is that it is said that should have been done as well as that. Because in a constrained market or a sophisticated market, it may well be for a particular case with a particular funding requirement, there are but a few candidate funders and they fall away because of various factual features of the market, things that have happened recently or just certainly not interested in a case for a particular reason -- they read the merits differently to a different funding.

There is nothing unusual about finding yourself in a position of having one offer on the table and no outside options. The evidence for that is the very helpful report produced by the class representative networks which went into the bundle right at the very end -- back of bundle E.

MRS JUSTICE BACON: Was it produced for the purposes of this hearing?

MR DE LA MARE: No, it wasn't produced by us for the purposes of this hearing and it was not produced at our request or instigation, we had absolutely no hand in the production of this material. I think it resulted from independent concern from the authors of the report about what had happened at the last hearing, combined with the fact that they were already looking at these issues for the purposes of making a report to the Civil Justice Council, which is looking into litigation funding.

So it is suggested -- it is certainly not the case that we have arranged for this to be produced. It is an independent product, in that sense.

The report is the consequence of a survey of existing class representatives. There has been a modest response rate of around about a quarter, just over a quarter of the class representatives to a survey, and that doesn't include, as the report makes plain, Professor Riefa's

response for the purposes of this case.

And that report, I do invite to you read it as a whole, reveals a pretty varied picture. It is the answers at questions 5, 9 and 10, that are of -- 5, 6, 9 and 10 -- that are of particular relevance and they address a situation of where there was only a single offer on the table, how to choose between multiple options.

And then 9 deals with the seeking of independent advice on the terms of the agreement; and 10 deals with whether or not there was effectively constituted a consultative panel even at the time of funding.

I would suggest that what it shows is that the approach that Professor Riefa has taken in this case is by no means an outlier, it is actually in line with the approach adopted by a good number of the PCRs to date who didn't take independent legal advice at the point in time of securing the original arrangements, who may have found themselves faced with only one offer on the table.

Sometimes they didn't even use broking or exploration of the market, they simply went with a funder known to an external solicitor. Here, there has been an attempt to go to the market and the market has responded in limited terms.

And the greater part of the claims had no funding

expert or independent input on the topic of funding at the time of the conclusion of the LFA, and that reflects the fact that the consultative panels have generally operated after certification to assist with the case thereafter, rather than in relation to the funding arrangements upon which certification is secured.

So it is difficult to see what in terms of concrete ask is the metric here, what it is the precise failure that is alleged. It cannot be some failure to procure or to continually go back to the market, particularly in circumstances where, by the time of the various restated LFAs a binding legal agreement has been concluded and you are locked into a particular party.

But in any event, Professor Riefa has put herself in a very good position to assess the reasonableness of the proposed terms. She has had the advice I indicated from Mr Astill, which many PCRs have not, from Hausfeld, and now from Mr Marven, and she has got the advice from Mr Greene going forward.

The suggestion that Mr Astill's advice was somehow tainted because he brokered the agreement, I have addressed that already and there is nothing in that. And it is evident that his efforts in any event resulted in substantial improvements in the commercial terms once negotiations were opened.

Likewise, there is no basis for the factual contention that Mr Marven's advice post-dated the conclusion of the current LFA. Professor Riefa's evidence at paragraph 10 of her third statement, E, page 198, is absolutely clear; it was advice received during the course of negotiation on then what were proposed amendments.

So that being so, we don't say there is any objective basis to be concerned about how these terms were arrived at.

That takes me to my second topic. I will address very briefly the suitability of the previous funding arrangements.

In terms of the core attacks here, which historically were to IRR and to the old form of clause 4.1.17. It follows from what I said that there was equally no basis to attack those arrangements. There was nothing objectionable about the old provision that built upon balancing in priority multipliers and IRR, together with a top-up or backstop provision for IRR. There is nothing objectionable about that at all. It's certainly not an obstacle to funding and certainly not a matter so substantial as to generate any concern as to suitability.

Indeed, I suspect, the correctness of that is going

to be confirmed by all of the IRR calculations that Mr Pickford wants to take you through, comparing the IRR implications of the old agreement and the new agreement. If he is making his case on suitability by reference to IRR, one has to ask: what was wrong with the old agreement expressed in IRR?

The reason for the change was candidly given by Professor Riefa in her evidence; it was to address the potential concern of the Tribunal. And she did what any sensible party would do in those circumstances, seeking to get the claims certified in the interests of the class: she adjusted or sought adjustment in the terms to something she thought would be acceptable to the Tribunal.

And she cannot be criticised for doing that. That is absolutely a core part of her role that follows a template well established by any number of other cases where a concern is expressed by the Tribunal, for instance, in Gormsen about the rates of multiples, for instance in the case of Merricks about the absence of independent KC advices on settlement. And the parties take on board the concern or the criticism made, they go away and conscientiously draft a change and come back to the Tribunal with that amendment.

That is the process that was followed here and that

is the explanation for the removal of the IRR. There is nothing sinister about it, and it certainly doesn't follow from that process that it is pregnant with the acceptance that that which went before was somehow unsuitable.

And as for clause 4.1.17, you have my case that the old form is exactly the same form as was approved in Alex Neill and in Gutmann. So there is no basis for a criticism for acceptance of the clause of the old form; there cannot therefore be a suitability case mounted on that.

So then we come to topic 3, the PCR's suitability. The first point to make is an obviously logical one, that a good number of the complaints fall away once you approach the topic of funding and the topic of applications for payment out of gross funds, against the law and the practice of this Tribunal, because a lot of the criticisms are actually impossible to reconcile with the law or with the practice of the Tribunal.

The second point is the focal point still remains the PCR's suitability to represent the class in these proceedings going forward following certification.

You cannot just point to the fact that within a team mistakes were made in the drafting of the documents or the approach adopted, and say: it follows from that that

there is some fundamental problem of suitability. You cannot even make that argument to go to the chair's concerns by reference to a misunderstanding or a misappreciation of the implications of such arrangements because it may be that the correct response to having such kind of misapprehension or misunderstanding pointed out is to secure access to more specialist, more detailed legal advice or assistance that will help you dealing with such problems going forward. It is a draconian conclusion to reach the view that the PCR is because of past errors or past mistakes not suitable.

There we say it is highly germane that she will be supported going forward by an extremely experienced class litigation claimant solicitor, Mr Greene, one of the most experienced in the field. It is extremely important to see that Professor Riefa has recognised her need to obtain independent legal advice from the likes of Mr Marven, which will continue no doubt as appropriate.

It is against that backdrop you then have to ask yourself should the draconian step of saying there is a problem of suitability, going forward, to be assessed.

Thirdly, we do point to the fact that there is no example in the previous decision of this Tribunal of

a PCR being held to be unsuitable in circumstances such as the present, not even in a case such as Gormsen, where the Tribunal exceptionally call out the very high and rapidly increasing rate of the multiples in that case --

MRS JUSTICE BACON: Well, it is the first time that a PCR has been cross-examined.

MR DE LA MARE: It is.

MRS JUSTICE BACON: So there is always a first time.

MR DE LA MARE: Of course, there is always a first time, but it would be a drastic step in the context of a decision or practice, whose default is to allow the parties to cure and to remedy the problem going forward.

The fourth point feeds into the points I made earlier about the CRN report. There is plainly a substantial divergence of conduct amongst the PCRs. There is no consistency of approach within them, and that varied approach has to be seen against the practice of this Tribunal and the fact that no one has hitherto suggested that there is an obligation to take terms of the market on a repeated basis or matters of that kind.

So it is against that backdrop that the questions posed by the chair really fall to be answered because the focal point, as you put it to me, is going to be upon the lack of her understanding on the obligations

that have been entered into, the obligations being the obligations in the litigation funding agreement and the ATE agreement.

That is a concern, if you like, directed at the changes that have been made to the agreements over time and the errors, to an extent, that those changes reveal were made in previous versions of the agreement.

The easiest example, for instance, is the ATE agreement. And the ATE agreements, as originally concluded, were not fit for purpose because they didn't include all of the relevant defendants in the defendant group and they didn't identify the proper scope of the claim, they were only directed at on-site as opposed to off-site commerce.

Readily corrected, and errors of that kind have occurred in relation to ATE policies or other policies before this court and no one has suggested that some draconian conclusion should be drawn from that.

Those are errors, I would suggest, principally on the technical front that more naturally laid at the door of the lawyers responsible for drafting such documents rather than the PCR in question.

So that is the ATE policy.

The IRR position. We don't accept there is any error in any of the variations, including the IRR or

not. Professor Riefa demonstrated she understood the implications of the IRR calculation when it was added, that it would operate principally to increase rates from year 5 onwards, and she demonstrated that she understood that the reconfigured LFA in years 5 or 6 or 7 would replicate that effect by increasing the rate before capping out. So there is no basis to criticise her basic understanding of the agreement as was and the agreement as is now.

Much of the questioning was put to her on the basis of clause 4.1.17 and her not representing the interests of the class, but you have my point, which is the questioning proceeded from the wrong starting point, which was an assumption that anything other than maximum recovery was not consistent with the interests of the class. And that is a false premise.

But there is no basis to think the old agreement was an error and I would suggest there is no basis to think that a bona fide, good faith attempt to address the concerns ventilated last time by including measures like an independent KC, et cetera, are such as to reveal some fundamental unsuitability.

The real point with traction, I accept, is the inadequacies of paragraph 50 of the first witness statement. Paragraph 50 does not capture the operation

of the agreement in a full fashion for the reasons my learned friend Mr Pickford gave. It doesn't capture the fact that there was in all circumstances, just as in Gutmann and just as in Neill, an obligation to make the application.

But what Professor Riefa said about her understanding of how that clause would operate, albeit I accept not properly captured in her first witness statement, is germane. She understood this to be a provision based upon the case law at the time and in Le Patourel, which would operate in unusual or rare circumstances where an account credit would likely leave you with no undistributed damages and therefore no basis for the funder to obtain payment, and she said that she understood it had an enhanced impact after the judgment in Gutmann in this Tribunal, which had accepted a general power existed.

So it wasn't the fault of understanding of the relevant provision, she understood what the provision did; it is a fault in capturing that in her first witness statement. And I would suggest that it would be unfair to put that at her door alone, when the responsibility for any such inadequacy of drafting obviously lies with the legal team as a whole in relation to the drafting of that paragraph.

But the real error, if any -- and I emphasise, if any -- in hindsight, I suspect boils down to a much more general error of the failure to engage independent expertise on the topic of funding earlier. That seems to be the thrust of some of the concerns. And if that is an error, and we don't accept that it is properly characterised as an error of suitability, given the divergence of practice that the CON report shows, in questions 9 and 10 in particular. If it was an error, it was one that is capable of cure going forward. And we would suggest it has been cured going forward, not least by the provision for advice from Mr Marven and the involvement of Mr Greene.

Together, those features aligned with the independent KC advice function, should satisfy this Tribunal that this PCR is equipped with the specialist advice she requires if further topics of nutty detail emerge in relation to litigation funding.

All of the criticisms made against her, I suggest, could have been made against a number of the former PCRs who have made substantial changes to the litigation funding arrangements. Footnote 14 of our skeleton gives some examples of such cases, Gormsen, Neill, Merricks, to name but a few.

And it would be a draconian consequence from those

mistakes, if they are mistakes, to lead to a refusal to certify the claim, and here the interests of the class members really hove sharply into view.

The relevant infringement started in October 2018, so we are hitting the six-year limitation period in relation to the claim, a refusal to certify, if there is to be a new claim to address these losses, but what no one is suggesting, is a claim on its substance that is not viable, arguable, substantial, as it obviously is with the two competition decisions that have been taken that support it.

The early part of value in that claim, for those class members will drop off and become potentially unrecoverable by dint of limitation. Why would such a draconian result be required for either a problem that has been cured or if the measures we have taken are insufficient, a measure that can still be cured? Because the class representative in this case is a limited company, and if you remain concerned as to whether or not there is sufficient expertise available to the limited company, then measures can be taken to augment the expertise of the relevant limited company by increasing the number of directors, those with decision-making powers and the expertise of those directors directed to the topic of funding.

And a solution like that would and should be entirely sufficient to dispose of the Tribunal's concerns in a case where, let's not forget, Amazon and Apple are engaged in a mission to -- they are not here to represent the interests of the class members. There is any number of dicta in cases saying that is not the function --

MRS JUSTICE BACON: Mr de la Mare, you have had the summer to fix any problems that you saw might be -- might be curable and you are now saying for the first time on your feet that the company could be changed to increase the number of directors. What on earth are we supposed to do with that? We are not going to have another hearing. There is no evidence about this.

MR DE LA MARE: My primary position, madam, is that the problems have been cured. That is my primary stance. But I do have to emphasise that if you don't accept that, and the terms of the funding agreement have moved and different concerns have been ventilated, I don't resile from saying that it would be appropriate in those circumstances to give the parties a further opportunity to sort that particular problem. That is a more proportionate response than refusing to certify with the consequence that those who have got the earliest claims in the claims period may have those claims time barred.

That cannot conceivably be in the interests of the class. And that must be a central concern of the Tribunal when exercising its powers under the rules.

Anyway, I have managed to finish in the time you have given me, madam.

MRS JUSTICE BACON: All right.

MR DE LA MARE: Unless there are any questions I can address, those are my submissions.

MRS JUSTICE BACON: Thank you very much.

Submissions by MR PICKFORD

MR PICKFORD: Madam chair, members of the Tribunal, rule 78(2)(a) of the Tribunal's rules requires that the Tribunal be satisfied that the proposed class representative would be able to act fairly and adequately in the best interests of the class, otherwise the PCR cannot be authorised under section 47B(8)(b) of the Competition Act.

This is the PCR's application for certification, so the burden is on her to satisfy the Tribunal that she should be authorised. And if she fails in that task now, then we say this application must fail and she cannot be given a third go -- we cannot simply come back again and again and again.

Now, if this claim were to be certified, the PCR would shoulder a very significant burden as class

representative. Any PCR needs strong skills, expertise and the ability to robustly defend the interests of the class in situations where others, particularly the funder, may have very contrary interests, and so it is important that this Tribunal has confidence in the PCR and the arrangements she has put in place to pursue the claim.

Now, no doubt Professor Riefa understands that her role would be an important and serious one, and my submissions are not intended as a personal slight on her. However, we do have to say, regrettably, that the evidence before the Tribunal is not sufficient to allow it to conclude that Professor Riefa should be authorised as the class representative.

And an essential point in that regard is indeed her own suitability to act in that role. We say that for a number of reasons. Mr Mallalieu and me have liaised to avoid duplication. I am going to develop three of the points and Mr Mallalieu will develop the other points, including in particular the issue about the ambiguity in the new clause 4.1.17, which you canvassed with Mr de la Mare. It is an important point, but I am not going to address it because Mr Mallalieu will.

So I am going to address the priority of payment issue in the first agreement and Professor Riefa's lack

of understanding of that; I am going to address the lack of a competitive process for obtaining funding and the lack of any push back by Professor Riefa to remedy that; and I am going to address the excessive returns in the latest agreement that is even worse than the previous agreement in that respect, and again Professor Riefa's inability to push back on that.

Now, Mr de la Mare says we did not really pursue Professor Riefa's suitability to be authorised in our skeleton. That is wishful thinking on his part. It's loud and clear. It's a core strand that runs throughout our submissions and it is entirely right that we pursue that point today.

So the first issue is this: who gets paid first, the funder or the class? Professor Riefa simply failed to get to grips with what is arguably the single most important issue she had to address on behalf of the class, namely whether the funder was only going to get paid out of unclaimed damages or whether she was going to make an application that the funder got its money ahead of the class.

Now, she told the Tribunal in her first witness statement that under the LFA she would make an application for the funder to be paid out of unclaimed damages. That was simply not the application

she had agreed to make. That was entirely wrong.

Now, in cross-examination, Professor Riefa attempted to explain that away by reference to the case law on whether such an application was likely to succeed. Now, with respect, that was an inadequate explanation. It is not what she discusses in paragraph 50 of her statement, first statement at all. And moreover, she said that she thought that her scepticism about whether the application would succeed was justified by the case of Le Patourel.

So if we could, please, just go to that case. It is in bundle D at tab 7, page 329 -- or rather I think the passage I would like to go to is at page 329, it is paragraph 99.

If I could ask, please, the Tribunal simply to read paragraph 99 to itself. (Pause)

MR BANKES: Are we in the Court of Appeal here?

MR PICKFORD: We are in the court of appeal here, yes.

(Pause)

MRS JUSTICE BACON: Yes.

MR PICKFORD: So this case does not decide the issue that was then decided in Gutmann, but if you read the second half of that paragraph, there is absolutely no reason why you would read that and then go away with the view that the sort of application that she was being asked to

make was likely to fail.

On the contrary, the statement by the Court of Appeal here is that the Tribunal has a very wide discretion in relation to its ability to make orders. And the clear implication, what it says in the second half of that paragraph, is that the Tribunal would be able to make an order of the sort that she was being asked to make in the application.

So it is entirely unclear why Professor Riefa thought that Le Patourel was the obstacle here. And indeed when I put it to her that it was not an obstacle, she then backed away from Le Patourel and said she was not able to discuss the case.

So in our submission, that was also inadequate.

We say therefore that the reasons that she gave for the original serious error in her evidence make no sense of the original evidence, which has nothing to do with the points that she talked about in her cross-examination, and they make no sense in their own terms.

We do say that is something which counts very significantly against Professor Riefa's application because if in the very evidence asking this Tribunal to endorse you as a class representative, you cannot get possibly one of the single most important issues for the

class right, that calls into question whether you should be authorised at all.

It is not actually a difficult point. It is, with respect, a very simple one. There will be far more difficult -- there will be far more complex issues arising in this case than the meaning of clause 4.1.17 of the original LFA. And not just in the case, but that Professor Riefa will need to grapple with, that any PCR will need to grapple with. And yet in cross-examination, Professor Riefa has struggled with the idea that she had even committed to make an application that was contrary to the interests of the class.

So as much as it is an uncomfortable submission to make, we say that Professor Riefa's willingness to sign up to an agreement which was against the interests of the class, and not even appreciate that she had done that, is pretty damning evidence against her ability to act in that class' interests.

Now, in response to that point, Mr de la Mare says, "Well, Gutmann proved a similar clause", but that misses the essential point here, as madam chair pointed out to Mr de la Mare. The key point here is Professor Riefa's lack of understanding, but we would say that there is also little in the way of analysis in Gutmann as to why

PCRs should be agreeing to make applications that are against the interests of the class they are representing.

In our submission, they simply shouldn't -- both PCRs generally and Professor Riefa in particular. If that means that Gutmann is wrong on that point, so be it. But that is our submission in relation to this issue, for the reasons that should have been clear in our skeleton and previous submissions on this topic.

Now, there was also a suggestion from Mr de la Mare that the fault was not in what Professor Riefa said in paragraph 50, she just omitted something in what she said. That is at least what I understood him to be saying. If that is his submission, it is wrong. Paragraph 50 is just wrong, plain and simple. It is not a problem of there being an omission or an oversight in that respect, it is totally wrong.

Finally on this issue, Mr de la Mare cannot have it both ways on privilege. He cannot emphasise the importance of the fact that they are not waiving privilege, and yet simultaneously insinuate that the problem was actually possibly the fault of her legal team. They either disclose their advice or we must assume -- the Tribunal must assume that Professor Riefa's mistakes are her own.

It was her witness statement. She signed the statement of truth, she signed paragraph 50 and said it was her evidence unless it said otherwise, and she has to own that, I am afraid. It is simply unacceptable for Mr de la Mare to insinuate it is actually probably someone else's fault. It is not open to him to do that. And I would say that the cross-examination showed that it probably was Professor Riefa's fault.

The second point concerns the lack of competition in procuring funding. Now, the class representatives' network of which Professor Riefa is a member, as we heard, published a report on Friday.

As Mr de la Mare said, it is commonplace for class representatives to face a situation where there is only one funder; it is commonplace that they only become involved in an application when, for whatever reason, there is only one funder in the running. In particular, one sees in answer to question 3 -- I can just give you the reference, we don't really need to go to it, it is very short. It is in bundle E, tab 54, 805. What the report says is this:

"Taken together, the responses to questions 3 and 4 suggest that by the time PCRs are involved in making decisions about litigation funding, the solicitors have already completed inquiries with regards to funding

arrangements and have selected the arrangement which they believe to be most suitable."

That is what is being advanced on behalf of the network. What they are saying is what Professor Riefa did is what everyone does, so what they are asking the Tribunal to conclude from that is that there cannot be anything wrong in it.

Well, we say that the Tribunal cannot draw that conclusion, that this in fact exposes what may well be a systematic problem in the way that these actions are being brought.

Now, it appears from what we are told in the report that it is generally the solicitor's firm that finds the funder and the solicitor's firm, without criticising them in any way, doesn't have any particular incentive to promote competitive bidding between funders because they will no doubt want to work with funders again and again for cases that they might want to bring, and so they will want the deals to be particularly attractive from their point of view. That is natural. It is not a criticism, it is just they are not in a good position to be thinking about the interests of the class at that point.

Now, I asked Professor Riefa whether her broker was, for example, remunerated in a way that provided the

broker with an incentive to drive down the cost of funding, and she didn't know. Now, that in itself, we say, is telling because it is the sort of thing that an engaged PCR that was seeking to do everything that they could to promote the interests of the class might be expected to think about.

And in my submission, if you were going to be building, say, just a house and it cost a reasonably large amount of money, let's say it cost £1 million to build a house and you go out to the market to tender, and you come back with just one firm, initially, from the -- you know, the three or four that you approached, in most situations, you wouldn't necessarily just say: okay, that is our only bid, so we will just accept whatever that builder is saying. You would probably go back to market and you would at least try to get some sense of what would be competitive because without at least two people getting involved, you simply have no idea about whether what you are being offered is competitive.

And here we have a claim worth, allegedly, hundreds of millions of pounds and in my submission what one should do if you only get one response back is go back to the market and try again, try harder.

We say in relation to this there is both

a substantial irony, and more importantly a problem. The irony, of course, is that the pleaded claim, both in this and in other actions before the Tribunal, places great emphasis on the importance of competition and avoiding arrangements which undermine competition. And yet the very arrangements which are most critical from the perspective of making sure that the interests of the class are protected are ones where the importance of competition seems to be completely forgotten.

So the problem then is that, for the reasons I have explained, the Tribunal cannot be satisfied that the arrangements are in the interests of the class, unless there is some decent evidence that the funding terms are in fact competitive.

What Professor Riefa has adduced, in particular, is evidence from a broker and a partner in a law firm, who are both used to seeing very big rewards that funders are able to write into these agreements, and they say: well, this is entirely normal and in accordance with our deals that I have seen.

But if we also know, as we do from the report from the network, that those other deals are based on exactly the same institutional arrangements that that is without any competition, it doesn't tell us that those arrangements and those sorts of returns are competitive

ones.

It is the same fallacy that the economists tell us to avoid when applying a SSNIP test in a monopolistic market. Maybe those are the other terms that one sees in the other agreements, but there is no evidence that they are competitive terms. Indeed, what we seem to be seeing from the evidence from the class representatives' network is that they are not.

Now, I would suggest Professor Riefa was surprisingly reluctant in cross-examination to accept the general principle that to get competitive terms, you want to encourage competition. And if she doesn't sufficiently appreciate that point, then, again, we regrettably are drawn to say that that is, again, indicative of her not necessarily being the best person to be put in charge of protecting the interests of the class.

Now, just a few more points on this issue.

The network tells us that if in their report, they make a submission that if you're going to ask people in the position of Professor Riefa to give evidence on market testing, that would give defendants, such as my clients, an unfair advantage in settlement negotiations.

In our submission -- I note that I don't think that point was advanced by Mr de la Mare, but he did

encourage you to read the whole report, so if you read the whole report and you get to that part, my response is that is not persuasive.

Suppose that a PCR produced a witness statement that went along the following lines, in this part of it: I engaged in a competitive tender process, here were my criteria, I received X tenders and if I only received one initially I went back and got some more, and on the basis of my criteria, this was the best tender.

It is impossible to see how that kind of evidence would give my clients an unfair advantage in settlement negotiations, but what it would do is give the Tribunal much greater comfort that the funder had not got the better of the PCR.

So in answer to Mr de la Mare's submission, well, that this is just how it normally works, what we are asking -- or rather what the Tribunal is being required to do in this case, is to consider whether this particular applicant for a CPO has done enough in their case. And the Tribunal is quite entitled to come to a view that they have not, but whether or not that has implications for how other cases in the future might work, and in our submission helping shape a better process for the future is in fact to be encouraged.

The final point is on the returns in the new

agreement, the restated -- amended and restated LFA.

We say it is demonstrative of the ability of funders to obtain deals that unduly favour them, or certainly the funder in this case, and/or Professor Riefa's inability to push back hard against that, that what happened following the last hearing is this: Professor Riefa was concerned that the Tribunal might find that the arrangements, with their 45 per cent internal rate of return, were problematic, and so she sought to renegotiate, and her skeleton argument tells us that she pushed hard to get better terms.

We don't actually know how hard she pushed because she asserted privilege in relation to that.

Now, actually, when one looks at the terms, what came out of them was, given her own view about how likely the IRR term in the previous agreement had been to be triggered, was actually a worse deal than the one she went into.

You have seen the figures that I canvassed in cross-examination in relation to the return, so I don't need to go back to that, but I would if I may just like to hand up a letter that we sent yesterday, which unfortunately solicitors for the PCR were not willing to have included in the bundle, so I will have to hand it up and around.

MRS JUSTICE BACON: Is that the worked examples?
MR PICKFORD: It is the worked examples; does the Tribunal have those?
PROFESSOR NEUBERGER: I have seen it.
MRS JUSTICE BACON: I've got a copy of the worked examples.
MR PICKFORD: Sorry, this is just the annex, it is not the actually the letter, but this is the core bit.

Sorry, could I have a second -- so admittedly just at lunchtime -- so the Tribunal can decide what it wants to make of this as it wishes, but in response to Mr de la Mare's point about timing, we did yet another example at lunchtime about which we gave about halfway through lunchtime to our learned friends. (Handed)

So to be very clear, these are indicative calculations because of course, as Mr de la Mare says, and we accept, any calculation of the rate of return that will be earned by Asertis in relation to this agreement depends on when it deploys the funds and when it gets its return. And those are obviously unknowns because although we know a little bit about the funds that it has already deployed, we don't know what is going to happen in the rest of litigation and we don't know how long it is going to last. So necessarily, there is much room for doubt.

But what we have done here is just give some

examples of the kinds of rates of return calculated on an IRR basis that would be implicit in investments made according to the patterns that are set out in each of the examples and then there being a return at the end of that, based on the multiples that are also set out.

What they show is that there are very substantial rates of return that would appear to be implicit in the agreement, higher, in fact, than 45 per cent IRR, which was the problem that we initially alerted the Tribunal to last time around. In particular when we tried in example -- worked example 4 to replicate as much as we could the pattern of returns -- sorry, of investment, by reference to the pattern of investment that one sees in the PCRs' litigation plan, that sets out investment in 2023, 24, 25 and 26, in those amounts. The high amount towards the end is obviously reflecting the fact that the trial is in 26, and then the return in 27 and that gives an IRR of 87 per cent. Again, just indicative.

Mr de la Mare says it is unfair of me now to return to IRRs because we criticised them when they were used in the agreement, but that submission is confused. It confuses the question of the rate with the question of form.

We did indeed have a concern about the IRR term in the original agreement because, given the nature of

an IRR, when set at 45 per cent it was very high and it implied excessive returns to the funder. But just because the express IRR term has been removed from the agreement, that doesn't mean that what we now see is an agreement that cannot still lead to very high implied internal rates of return to Asertis.

And our point is always, ultimately, about what is the rate of return; is the funder getting a fair rate of return or are they getting an excess rate of return? And if the internal rate of return, whether it is an express term or it is implicit in the structure and the multiples chosen, was at a moderate level, we wouldn't be taking this point, but our position is it is not moderate, it is very high.

PROFESSOR NEUBERGER: Can I just ask, Mr Pickford, I am not very clear what test I should be using for an appropriate IRR. I mean, if for example I had come to the conclusion that the case had a very low chance of succeeding, it would seem to me quite appropriate to have a very high return if it succeeded. I mean, against the rate of return the funder would get if the case failed, which is I guess minus infinity; how do I look at these numbers?

MR PICKFORD: Well, I appreciate that, sir, it is difficult because necessarily that is an important issue when it

comes to the relevant rate of return. What we do know is what the claimant herself says, which is that her claim has a very high prospect of success and even if it is not as high as claimed by the claimant, the PCR, we say that the kinds of returns that this is indicative of are very high.

I appreciate, because it has been a struggle for any Tribunal to get a real grasp on how one judges this and it is a struggle for me to give you a benchmark, that it is very hard for me to say, "Look, this is where it crosses the line", because it does involve a judgment call, given the risks involved.

My submission is these are high, and that is about as good as I can make it.

It is not -- it is not the core of my submission because the core of my submission is that what we have seen repeatedly is an absence of robust push back from the PCR in relation to these rates.

What we do see is that they went up, that the opportunity between the July hearing and this hearing you would have thought would be to demonstrate to the Tribunal that the PCR was well on board and the fund was well on board with the idea that maybe they were looking a little bit greedy and that they should pull it back a bit. In fact what they did was come up with even

better ones from their point of view. And that is the essential point, it's the comparison between the two.

Now, Professor Riefa says that she instructed Mr Marven KC to advise her in relation to this, but since she is not willing to waive privilege in relation to that advice, the Tribunal, again, cannot place any weight on that. We don't know what Mr Marven's advice was or wasn't. So there is very little that we can deduce from it, other than that she instructed him.

So those are the three core points that I wish to make.

Firstly, the lack of understanding of one of the most important terms in the original LFA and the failure in cross-examination to deal with that adequately; secondly, the lack of competition in negotiating the LFAs, which Professor Riefa appears to have relatively passively accepted; and thirdly, the fact that when Professor Riefa went back to renegotiate following the last hearing, what we see is rates that have actually gone up rather than come down.

Now, before handing over to Mr Mallalieu, there is just one further discrete point I wish to make that came from a question from Professor Neuberger about how Professor Riefa would deal with a potentially difficult settlement situation, and in my submission the answer

that Professor Riefa gave to that question was telling, and it cannot give the Tribunal the confidence that it needs that even now, even when responding to the question from the Tribunal, she truly understood the need for her, herself, to take a robust position which champions the interests of the class, whether it comes to settlement or it comes to distribution of an award.

It is not just a question of engaging experts, it is a question of being an effective and robust mouthpiece for the class.

So for the reasons that I have given, and the ones that Mr Mallalieu will also give, we say that Professor Riefa should not be authorised as class representative.

Unless of course I can be of any further assistance to the Tribunal.

MRS JUSTICE BACON: Thank you very much, Mr Pickford, we will just take five minutes before Mr Mallalieu starts his submissions.

(3.14 pm)

(A short adjournment)

(3.24 pm)

Submissions by MR MALLALIEU

MR MALLALIEU: Madam chair, members of the Tribunal, I don't intend to repeat anything that has been said on behalf

of Amazon by Mr Pickford. In terms of what he said about the test and burden, we adopt that; in terms of the points he has made about the three points he raised, again, those are consistent with our submissions.

We set out in our skeleton argument for this hearing, just for your reference at E/21, six concerns that we had about the proposed class representative's suitability for this certification process, and there is nothing we have seen following from the cross-examination today which has allayed those concerns.

But I am only going to pick up the ones which remain to me that Mr Pickford has kindly left for me.

Before I do that, just whilst it is fresh in the memory, may I briefly just, I hope, add something to the question from Professor Neuberger about benchmarks.

It is difficult, we understand that, but from our point of view the only point we would want to add is that difficulty in identifying what is an appropriate level of return is why it makes it all the more important that a Tribunal at this stage can be satisfied that the class representative has fully tested the market, properly understands her obligations, or its obligations, and has fully considered what they are agreeing to, because the Tribunal is in a position where

it is very difficult to know objectively what is the appropriate level of return, but it is expected to take a large degree of reassurance from being provided with proper evidence to show that the class representative understands those obligations and has carried them out.

Of course in the present case, we say we are in a situation where there are serious concerns for the Tribunal as to whether that is the case.

May I start then with the question of what we can take -- which is the overarching point we make, what we can take from how the class representative, or the proposed class representative, has approached the question of litigation funding and the related issues in this case, and what we can take from that as to the important point of whether this Tribunal can be satisfied that it would fairly and adequately act in the interests of the class.

In terms of the current funding arrangements, the most stark point in relation to that is of course the point in relation to clause 4.1.17. Just in relation to that, the issue here is not -- we are not attempting to rerun before this court the appeal that we will be running in the Court of Appeal in Gutmann next year, as to whether it is possible under the statute to contemplate this Tribunal making an order for payments

to the funder out of distributable damages.

The concern we raise here is if that is possible under statute, in what circumstances is it appropriate, and in particular how does a class representative explain to this Tribunal the circumstances in which it has come to agree to that, what it understands the implications of that are and how it would work in practice.

I will not go over the point in relation to the earlier arrangements which have been addressed by Mr Pickford. Our submission on that in short is that the original unfettered obligation to make such an application, combined with the unfettered obligation to take all reasonable steps to realise the funder's success fee in full, was an arrangement that no reasonable class representative should have bound themselves to.

But we now have the modified version and our concerns in relation to the modified version are that either the addition of the words "where appropriate in all the circumstances" amount to no real change to that obligation, or if they do or are intended to amount to some real change, it is very unclear what the effect of that change is, how it would work in practice, and indeed what Professor Riefa herself understood as to her

obligations under that revised clause.

There is, as we have seen, no indication in the proposed class representative's evidence of what the circumstances are in which she considers that such an application might be appropriate, and that wasn't bettered by her answers in cross-examination.

The only identified matters are two matters: the level of the funder's investment and the level of the funder's desired success fee, which tell us nothing beyond the fact that those are two matters which are in the funder's interest.

So we have an all the circumstances test with two mandatory -- at least that is my reading and I don't think it has been disputed -- mandatory factors that the class representative must take into account, and they are matters in the funder's interest.

So we remain unclear as to what the effect of this revised clause is or what the appropriate circumstances might be.

With the greatest of respect, Mr de la Mare's attempts on the hoof in his submissions this afternoon to attempt to sort of rewrite some additional reassurances into clause 4.1.17 are not a satisfactory way to proceed; nor is Mr de la Mare's point that in fact it may be in the interests of the class for

an application of this type to be made because the choice may be that the class representative either agreed to a funding arrangement with this obligation in it or no funding arrangement at all, and that therefore that makes it reasonable for this application -- for this clause to be in there.

There are two reasons why that doesn't hold good. The first and simplest is it is not an understanding that Professor Riefa herself put forward as to why she thought it was appropriate to have agreed to this clause in the first place; it is something that has been put forward this afternoon by her representatives.

The second is that, in any event, even if that had been the circumstance, it is not at all clear on the evidence before this Tribunal that that would in fact have been the choice that Professor Riefa was exposed to. It is not clear to what extent if at all the question of whether such a clause, whether the original clause or the modified clause, was required, whether that clause could have been removed or could have been limited in some other way, it is not clear if that was ever properly tested; or if it was, the circumstances in which it was are ones we are not properly told about.

So it is a false dichotomy to say that was the only choice available. We are told that only one set of

funding terms were proposed, and Mr Pickford has addressed that, but were not told specifically whether Professor Riefa challenged the inclusion of this obligation. Indeed, from the points Mr Pickford has already developed earlier, it is quite clear we would say that she didn't originally even understand the nature of the obligation that she had agreed to.

Nor do we consider that any real weight can be attached, as the class representative would ask you to do, to the idea that you can be reassured under the new clause by the fact that if there is a dispute as to whether it is appropriate to make such an application, that dispute will be put to an independent King's Counsel.

There are a number of difficulties with that. The first and most obvious of course is it only applies if there is a dispute. If the class representative considers that it is appropriate for such an application to be made, there is no dispute, and therefore no independent King's Counsel will be involved.

So we come back then to the question of: in what circumstances would the class representative be satisfied that it was appropriate? Because unless we know that, it is impossible to evaluate whether we would even get to the question of the involvement of

an independent KC at all.

Of course we don't know anything about how the proposed class representative would go about deciding whether such an application was appropriate. We know that the class representative is contemplating appointing a consultative panel if this application is certified, but we have been given nothing beyond what we have seen in the agreement to identify what framework would be applied to consider whether such an application was appropriate in the first place.

So in all those circumstances, we say that the modifying clause really gives the Tribunal no further reassurance, and indeed, if anything, it raises additional concerns as to both the class representative's understanding of her obligations to act in the interests of the class and as to the circumstances in which she may find herself bringing an application which is contrary to those interests.

The final point we make in relation to that is that no thought appears to have been given at all to how that would apply in practice if that application was made. It would be the class representative's application; it would be made in the interests of the funder. And the obvious question is -- and it is so obvious one wonders why it doesn't appear to have been given proper

consideration before -- the obvious question is: who would represent the class on that application? It is what the class representative should be doing, but if she were to do that, she would be opposing her own application.

The suggestion given in cross-examination was, I think, that once a consultative panel is appointed, members of the consultative panel might be the ones who effectively oppose the application, which we say is quite a remarkable suggestion and really just serves to indicate a lack of thought given to the obligation that the class representative has signed herself up to.

Moving on from that question, in terms of additional concerns, I will not go over the points about the level of reward that have been made by Mr Pickford under the current funding arrangement, but just very briefly in relation to that, the only additional point we would highlight is the point about the change of the trigger date under the new funding arrangement, because we do say that that is a point which makes it much more likely that the higher levels of the multiples will be reached; it was a point that wasn't drawn out in either the second or the third witness statements that were put forward about the class representative; and it is a point which makes a significant difference to the

consideration of whether the proposed returns are excessive.

It was thrown into stark relief by the example given by Mr de la Mare in his submissions this afternoon as to one circumstance in which the class representative might make an application under 4.1.17, because the circumstance that was averted to there was the situation where an application would be considered appropriate in order to stop the multiples increasing under the funding arrangement, because under the previous funding arrangement the multiples stopped increasing once you had the judgment, a successful outcome, but under the new funding arrangement the multiples keep on ticking up until the funder gets every penny that they are entitled to.

What we end up with is the stark position, which is where the only really fleshed out example of a circumstances in which an application under 4.1.17 might be appropriate is a circumstance which only arises because this class representative has agreed to a new funding mechanism with a new trigger date, which means the multiples keep on going on post-judgment.

So the class representative puts itself in a position where it might find itself essentially obliged to make an application for the funder to be paid

out in full at an early stage from distributable damages because unless it is paid out in full the multiples keep on going up. So every penny has to be paid out to the funder, otherwise the multipliers keep going on.

So a position where the class representative might find itself making that application because it has agreed to a revised funding arrangement, which essentially obliges it to do so or will otherwise face multiples increasing all the way up to the cap.

We say, again, that that is a stark example of these funding arrangements not having been properly considered in the round as to their implications, and the class representative either not understanding or not having received adequate advice as to the effect of those funding arrangements and the effect on her ability to act fairly and adequately in the best interests of the class.

In terms of the second category of our concerns, those relate to how the class representative has approached the previous funding arrangements and what we can take from what the class representative was prepared to agree to under those funding arrangements in terms of the class representative's ability to act fairly in the interests of the class.

I am not going to go back over those in detail, but

we would just invite the Tribunal when considering its decision to consider, in particular, the April 2023 amendment agreement which the class representative entered into because we do say -- and for the Tribunal's reference, that is C/269, and the relevant part of it is C/272 -- because what we say in relation to that is that agreement is really quite stark as an example of what appears to be going on here.

There are terms in that agreement which we say are plainly unsustainable on any basis. Whilst they have had to be developed in the course of submissions and cross-examination, we say for people experienced in this sort of litigation, experienced in dealing with these sorts of agreements, they are terms which were obviously unsustainable. And they were terms which led, we say, to the class representative entering into an agreement whereby it was highly likely to give rise to plainly excessive returns to the funder, in circumstances where she was obliged to make an application for the funder to be paid out in priority and she was obliged to take all reasonable steps to recover that unsustainable success fee in full.

MRS JUSTICE BACON: Do you want to give us a short summary, a list of the terms you think are unsustainable?

MR MALLALIEU: Yes. On page C/272 -- we can do it fairly

shortly. So it is to do with the alternative multiplier, the greater of, and the points we say were unsustainable were, firstly, that in addition to the XIRR method, the funder was to receive an additional one times multiple, so in other words an additional return of the drawn funds.

That was the term that was dropped in the October 2023 restatement and there has not been any attempt at any stage to justify why it was ever in there in the first place.

MRS JUSTICE BACON: That is point one.

MR MALLALIEU: The second is there is no set-off of the priority multiplier, and without wishing to invite the Tribunal to jump around, the easiest way to see that for the Tribunal's reference is to compare it to the June 2024 version, which is page C/326.

And so what happens in that one is that the drawn funds have already been removed and the figure arrived at by the XIRR function is then reduced by the priority multiplier that has already been paid.

That is described by the class representative and those acting for us as having been an error or a mistake, but it doesn't explain why the class representative was prepared to sign up to a funding agreement, which plainly did not provide for that

set-off.

The third point is the XIRR itself, which is no longer advanced by the class representative, and we say, for the concerns that were raised last time and have been elucidated by Mr Pickford was itself, even without those additional factors, a method of return which was always likely to give rise to a risk of excessive returns.

The combination of all of those back on page 272 is that it was almost inevitable that the paragraph (d) calculation would apply in place of the paragraph (c) calculation.

So Professor Riefa's justification of this, that paragraph (d) would essentially only apply if the proceedings took longer than five years, simply was not correct because of those extra factors that were included in there, which have since been dropped and not justified.

The reason we focus on the April 2023 amendment is for the reason I gave at the start, which is that we say if those funding arrangements were being properly considered, if Professor Riefa was properly acting in the interests of the class and/or if she was being given the advice she needed -- and of course we don't know where the fault lies because of the privilege point --

then these are terms that would never have been agreed to.

That is all I intend to say about the previous terms.

The further point in relation to the previous terms of course is the original 4.1.17, but that has been addressed, so there are just two further short points I wish to address, subject to any questions from the Tribunal. The first of those is we also say, as part of our concerns as to whether the PCR has shown an ability to act fairly in the interests of the class, is that the PCR's approach to consideration of the need or desirability of having a consultative panel is also a concerning issue.

We accept that it is not an obligation under the rules or under the statute to have a consultative panel, but this is a situation where Professor Riefa was the sole director and member of the corporate PCR and where she did not choose at an earlier stage to have a consultative panel. But even when concerns were raised by the Tribunal at the last hearing, we say the attitude displayed in the witness statements appears rather dismissive towards the question of the benefit that any consultative panel would or would have provided.

Even now, the PCR advances before this Tribunal funding arrangements without having put in place a consultative panel, and even where one individual has been approached and that individual's expertise in funding matters is positively relied on by the PCR in her witness statement, we were told in cross-examination today that he has not been asked to look at these funding arrangements.

The PCR also maintains -- and for the Tribunal's reference it is E/166, paragraph 30(b) -- that she doesn't think having had a consultative panel would have made any difference. That is obviously a matter for the Tribunal, but we would say that the issues that have been identified of concern as to the PCR's approach to the previous funding arrangements are ones where, at the very least, one would have thought that the class representative would by now appreciate that additional sets of eyes considering these matters would have assisted her in ensuring that she was acting in the best interests of the class members.

And we consider it is quite difficult to escape a picture that the PCR is doing what she feels she has now been obliged to do as a result of the concerns raised by the Tribunal and the defendants, and yet still does not fully appreciate that those are matters which

are proper and appropriate for her to have done if she was acting properly in the interests of the class.

Even now when seeking authorisation, the class representative does not provide the Tribunal with any proper information as to what the consultative panel's functions are going to be, as to who the remaining members were going to be -- we were told apparently from cross-examination that there is a second member but we still don't know who it is going to be -- what its remit is going to be, how often it is going to meet or any other matters that would provide this Tribunal with proper reassurance that going forward the concerns that we have seen to date are ones that might be remedied.

The final concern we raise -- and I will deal with it very shortly -- is the proposed class representative's approach to confidentiality of the funding of terms. This was an issue that the Tribunal raised on the previous occasion. And for the avoidance of doubt we don't say that that issue alone would be reason not to authorise, but what we do say is it is indicative of the same pattern of this proposed class representative not appearing to appreciate its obligations to act in the interests of the class, as opposed to in the interests of the funder.

Professor Riefa's second witness statement -- again,

just for the Tribunal's reference, E/166, paragraph 33 -- indicates that the decision to maintain confidentiality in the levels of reward that the funder was anticipating receiving was a decision made because it was perceived to be in the interests of the funder. That was of course also how it was opened by Mr Carpenter King's Counsel for the class representative on the last occasion -- again, just for the Tribunal's reference, it is E/102, lines 6 to 9 -- where Mr Carpenter said:

"The funder feels quite strongly about the point of confidentiality."

This was of course all despite in February 2024 the Tribunal having given its decision in Gormsen, D/492, paragraph 37, in relation to confidentiality.

We say that this is another example of the PCR not appreciating her obligations and being prepared to do what she thought was in the funder's interests, regardless of whether that was in the class' interests.

Those are the matters we advance in addition to those advanced by Mr Pickford. It is regretful, but in all the circumstances we say in light of these substantial concerns, this Tribunal cannot be satisfied that this proposed class representative has discharged the burden on it to show that it would fairly and

adequately act in the interests the class members, and in those circumstances the proceedings should not be certified.

Unless there are any questions, those are our submissions.

MRS JUSTICE BACON: Do you have anything to say about Mr de la Mare's very final point, about if we were not satisfied with the current directorship of the PCR, then additional directors could be appointed as a cure -- he said it would be draconian if it was -- if this was thrown out with the limitation point looming on the horizon, if there were methods to cure the concerns that had been raised?

MR MALLALIEU: In relation to that, what we would say is that of course the proceedings cannot be certified unless the Tribunal is satisfied. If this was the first occasion on which these matters had come before the Tribunal and there were identified concerns, particularly if they came as a surprise to the class representative, as can happen, then of course it would be entirely understandable that the Tribunal might think it was a proportionate and reasonable step to give the class representative a chance to address those concerns.

MRS JUSTICE BACON: Well, yes, and was effectively what happened at the July hearing.

MR MALLALIEU: It was, and that has happened and we are here again where one would have expected the class representative to have fully addressed all those concerns, to appreciate the importance of doing so and to come forward before the Tribunal on one's feet, simply indicating: if there are still problems, we can probably go away and try and do something about it but we cannot even tell you what that would be, but don't worry, we will be able to do something about it.

We say, regretfully, it's simply not good enough and that the Tribunal is now in a position where it should make its decision.

PROFESSOR NEUBERGER: I think the specific point was whether the constitution of the Christine Riefa Class Representative Limited changing that would raise -- would be an acceptable cure?

MR MALLALIEU: Well, that is a very difficult, if not impossible, question for me to answer because we don't know what the changes would be, we don't know who would be appointed, we don't know whether that would mean a reconsideration of the funding arrangements or not. It is, with the greatest respect, pie in the sky.

It is an offer of, essentially, we will have a solution to whatever problems are identified, but the difficulty is the problems have been identified and this

was meant to be the occasion for providing the solution.

PROFESSOR NEUBERGER: Thank you.

MRS JUSTICE BACON: Thank you very much.

Submissions in reply by MR DE LA MARE

MR DE LA MARE: I will start with the last point because the problems that were identified last time out were principally focused on the rate of return and there wasn't anything like this extensive debate about the suitability of the class representative.

Many of the points that have been taken now were not taken before. I don't say that as a point to say they don't have to be answered, I say it to explain why it may be appropriate and proportionate to give a further opportunity to answer it.

The format of the other cases where one has encountered a similar problem, for instance, Gormsen, the parties in Gormsen had the benefit of the full judgment of the CAT setting out its concerns, which it then went off and was given something in the order of nine months to reconsider. Whereas the position we have been faced with, and I intend nothing other than a factual account, is nine days in which to prepare evidence answering all of the Tribunal's expressed concerns on the express topic contained in the order, I think it's at tab 13 of the bundle E.

The point remains that these proceedings are about providing a mechanism for access to justice for parties who have no realistic opportunity to bring the claims in their own name. That is obviously the only analysis applicable in relation to claims that everyone accepts properly characterised as opt-out proceedings.

The idea of an individual consumer renewing a claim against Apple or Amazon predicated on these agreements is unreal. And the consequence of effectively drawing the curtain at this point in time combined with limitation is that claims that no one suggests are perfectly legally arguable -- there is some argument at the fringes about off-platform commerce, but no one is suggesting that the arguments in relation to on-platform commerce are anything other than entirely plausible and arguable. Of course they are because the Italian and Spanish authorities have concluded that there were infringements to competition law that led to an increase in prices.

For exactly the reasons Mr Pickford gave only earlier, which is the removal of price competition led to an increase in prices for two entities, which on any view have substantial amounts of market power.

The proposal is to curtail, potentially finally, for some within the current class any potential for claim.

And that is not in my submission a conclusion that the Tribunal should lightly arrive at in relation to a claim about which there has never been any substantive argument to suggest that the core claim is anything other than a proper and valid claim. It is in the nature of a follow-on claim, something very closely adjacent thereto.

So --

MRS JUSTICE BACON: We have a statutory test, Mr de la Mare. We have got to apply the statutory test.

MR DE LA MARE: Of course you do, my Lady.

MRS JUSTICE BACON: It is not that if there is a valid claim and irrespective of any flaws in the class representative, it should be certified or that the Tribunal should give endless opportunities for flaws to be corrected.

MR DE LA MARE: I don't demur from that for a moment, but it is not a question of endless opportunities, with respect, and it is a question of discretion, as it always has been, as the Tribunal exercised discretion in Gormsen, about what the appropriate response -- what the proportionate response is in relation to the defect that is, in our submission, capable of cure. If it is capable of cure, then effectively cutting the claims off at source in this way calls for the very closest of

justification.

And at the end of day, if the problem is there had been more hearings than there should have been, those are potentially curable in cost, as is ever the way in litigation.

So in our submission, you must think extremely carefully if you think that the problems are in principle capable of cure before reaching for such a draconian solution. And it is draconian.

So can I start with Mr Pickford's submissions. He had three points he addressed: the priorities point; the lack of competitive process; and the excessive returns point.

I accepted, I hoped very clearly, that the evidence in paragraph 50 of Ms Riefa's first statement was inaccurate. It was an incomplete explanation of the clause and it fails to capture the requirement in that provision to make an application.

The point I made, which, with respect, he only tentatively actually engaged with, was that insofar as his complaint was as to a lack of understanding on Professor Riefa's part as to how this clause operated and what it entailed, under questioning she didn't display any such misunderstanding.

She explained that she thought that the operation of

the clause would result in payments only in, first of all, those sorts of circumstances identified in Le Patourel, account credit cases, and then her understanding as a result of Gutmann was the significance of the clause would be increased.

There is nothing incorrect in that understanding. The fault is in the witness statement, and the witness statement alone, in my submission.

Yes, it is a matter that the Tribunal should take into account, I can't sensibly argue otherwise, but insofar as it is suggested that it betrays some further and deeper misunderstanding of the implications of the clause, that is with respect misplaced.

And I go back to the point I made in opening, which Mr Pickford didn't answer. It is an unduly simplistic approach to say that the duty of the class representative is only to recover the totality of the damages that are awarded because once you admit of a situation in which an application for payment to the funder from gross funds exists, the position -- the potential range of options open on the funding market is much closer to that in a conventional funding agreement where, conventionally, the funder demands payment from any recovery first.

Once you have that complication, the rules of the

game change.

So Mr Pickford's submissions are almost predicated on an assumption that that which everyone had assumed prior to Gutmann, which is that in an opt-out case funders can only be paid out of undistributed sums, remains the law. And it is not. At least not presently.

That is why we had always understood that these points effectively went with the appeal on Gutmann because the conflicts that are engendered are a function of the power of payment that was identified in the first point in Gutmann.

What also was not addressed is this basic point, which is that in both Alex Neill and in Gutmann, arguments about conflicts of interest and the impossibility of the resolution of conflicts of interest were expressly raised before the Tribunal, and in both cases the answer of the Tribunal was: those types of conflicts are inherent effectively in any system in which a funder --

MRS JUSTICE BACON: Well, that's a point you have made in opening.

MR DE LA MARE: Yes, but that the safeguard in question is that provided by the Tribunal, akin to the processes it uses in deciding similar conflicts that arise in

assessment context. And we see from the Gutmann v MTR settlement how those problems arise and how the Tribunal resolves those problems, if necessary with recourse to some form of independent evidence.

So out of this material we submit there is an error in relation to how it was presented to the court -- and we put our hands up in relation to that, we apologise to the Tribunal in relation to that -- but there is no fundamental misunderstanding of the obligations, at least as long as Gutmann remains good law.

MRS JUSTICE BACON: Mr de la Mare, it is -- with respect, you are apologising perhaps on behalf of the legal team, but Mr Pickford said the error was of that Ms Riefa, it was her witness statement. And when one looked at the safeguards in conflicts of interest in Neill, the passage that you showed us, paragraph 166, the very first safeguard is that the Tribunal must satisfy itself that the class representative is sufficiently independent and robust so as to act fairly and adequately in the interests of class members.

So it is not that all of the responsibility for safeguarding the arrangements and dealing with the conflicts lies in the Tribunal, the Tribunal has a role, but the very first point that the Tribunal must ensure is that the class representative is sufficiently

equipped.

MR DE LA MARE: Absolutely, madam, but just as in Alex Neill and just as in Gutmann, where the PCRs were, in those cases, both obliged to make an application, that safeguard wasn't available. And precisely the problem that Mr Mallalieu describes as to who is presenting the application, arises just as much in a case where you make that application as the class representative as a matter of obligation, as it does in a situation where you have gone through the provisions of the clause.

So in neither Gutmann, nor Alex Neill, was that first safeguard operative. That was the point that was being addressed in the later passages, in paragraph 41 of Gutmann and in paragraph -- I think it is 171 to 175 of Alex Neill.

That is exactly the point the Tribunal was grappling with. So they were dealing with the situation where the first safeguard couldn't work and they were saying that the next safeguard, namely the independent review of such an application by the Tribunal, was the safeguard that was operative. You cannot read paragraph 41 of Gutmann any other way.

So that is the first topic.

The second topic, the lack of competition, this was a genuinely ambitious submission because my learned

friend didn't shrink in any way from the systematic implications of the submission. He said: it is the first time it has been raised and if it means everyone has got it wrong before, everyone has got it wrong before. And effectively every time you have an offer, and only one offer, you have to go back to the market to get another offer. You always have to ensure that there is some position of some competitive tension.

But, first of all, there is not a trace of that obligation anywhere in the rules, anywhere in the decision or practice of this Tribunal. It has never been suggested that there is an obligation of that kind. It is impossible to reconcile with what the president said in the Gormsen case and what Mr Turner said in Gutmann about scrutiny of funding arrangements being confined to calling out extreme examples.

The obligation posited by Mr Pickford is a routine obligation, and if accepted is now going to have to be satisfied in every single case to show that there was tendering or why tendering was impossible.

The minute you get into that, you get drawn necessarily into the very dangerous forbidden territory where the only reason that you can explain why certain offers are on the table, or why they are not competitive or why there aren't further offers, is the territory

about funder's appraisal and appetite for the risks presented by the litigation.

And the risks presented by the litigation are not confined simply to the issue of whether or not you lose your capital all together because the litigation is lost, they embrace the risks of various different forms of victory that may not be total, that may produce all kinds of results, all kinds of pyrrhic victories are possible: you may win on part of the case but not the wider case; you may win on some measure of damage but not the larger member of damage.

And those are the types of matters that any sensible funder is going to think about. They are going to think about what varieties of win might look like, and that is going to inform whether or not they are interested in the case and how they price it.

So the minute you are inviting some kind of explanation of the tendering process, you are straying into the forbidden territory. To avoid that, my learned friend Mr Pickford says: all you need to do is to explain that you have gone back to the market.

But why do you have to go back to the market if you already know that there is no appetite to fund the claim in question and why, in the particular context of this case, would there be any such obligation in

circumstances where the thing that initially disrupted the structure of the LFA originally in place was the PACCAR decision, and where the unchallenged evidence from Mr Maton and from Mr Astill is that that led to a very substantial perturbation or concerned restriction of funding et cetera in the funding market in consequence. It is just an unreal submission.

Procurement obligations for competition reasons are generally only imposed upon parties that have significant market power. The idea that a law firm seeking to bring a claim of this kind is obliged to go through some form of procurement process is, I would suggest, unreal, and it is entirely impossible to reconcile with the very hands-off approach identified in Gormsen and Gutmann.

What you have before you -- and I will not recapitulate it, it is evidence about the sensible steps being taken. This is in fact one of the unusual cases where a broker has been used to explore the market, the market has returned certain information. All that Professor Riefa has done is acted responsibly on that information. And the evidence shows that, even after you effectively are left with counterparties of one, negotiations continued and resulted in improvements in returns.

That leads to the third point. My learned friend makes the argument that the outcome under the new arrangement is worse than the outcome under the old arrangement, and that shows how beholden to the funder this particular PCR is.

That is an argument on an utterly false premise. It is not correct that the outcomes under this new arrangement are necessarily worse than the outcomes under the old arrangement. The starting multiplier was 3.5 in the case of settlement and 4.5 in the case of court-based disposal.

Under the new agreement, it is 3.5 in both circumstances for a flat period of four years. It then rises by 0.75 multiple every year, split into four quarterly instalments, so that by the fifth year, it will have risen to 4.25 per cent.

The evidence has always been clear that the concerns expressed about whether or not the relevant multiples delivered the funder the protection that they wanted and the effect of the IRR calculation, the evidence is that that kicked in at five years or thereabouts, and at the five-year point you are looking at 4.25, compared to a XIRR calculation. And there is no basis to infer that the calculation is necessarily going to be more advantageous or less advantageous.

Then you come to eight years plus, and this was the basis on which my learned friend constructed his extravagant 13 times multiples examples. And here there is clearly a marked improvement because there is a cap on how far the rates can rise.

Then he effectively seeks to bedazzle us on paper with all of these recalculations showing that in fact the XIRR, the IRR, implied by all of these arrangements is greater than 45 per cent and therefore something terrible has changed and happened. And that is a completely bogus argument because the whole reason to have a long stop of 45 per cent is to ensure for the benefit of the funders under the old agreement that the IRR never falls below that level. It tells you nothing about what the IRR is in the earlier years, and it will be, and was, potentially markedly higher than the 45 per cent.

So pointing to some figures up to year 5, which is a convenient cut-off point in circumstances where we all agreed it is after year 5 that is problematic, shows the IRR implied by the multiples is higher doesn't advance anything because it is as true under the old agreement as it is under the new agreement. It is just an utterly unsafe comparison.

The proper analysis is that the structure of the

agreement has changed in two fundamental respects, as I identified, and that effectively this is a new deal that has rough and smooth edges. We would suggest, on balance, it works to the benefit and is a more competitive offering than the old one. That may or may not be proved to be true, depending upon how the facts pan out. And we all agree this is an exercise on prognostication.

If we go back to the central point that I made by reference to authority, the time to control for the effects of those potential concerns is when the applications are made for the relevant settlements or the payments of funding. That is what the Tribunal itself has said on repeated occasions is the appropriate time to deal with those concerns.

That point was, with respect, not answered.

So those are my learned friend, Mr Pickford's, three principal points.

If I then can turn to Mr Mallalieu's points, his first argument was very much focused on the new form of obligation in clause 4.1.17, and its alleged uncertainty and vagueness of operation and the practical difficulties that that may present for the class representative in proceeding under it.

The first point to make in relation to that is in

many ways the counterfactual is the old form of 4.1.17, a form of agreement that has effectively been approved twice, as I have already shown you.

Many of the problems that Mr Mallalieu identified in relation to the new form agreement are identical under the old agreement. They have already given you the example of the PCR making an application, as required unambiguously under the old form, that the PCR doesn't support. That was the problem that arose in Neill and it is in substance no different to the problem that is said to arise now.

What then as to the alleged vagueness of the term "appropriate"? I answer that question, I hope, as fully as I can. It is plainly intended to be language that captures an anticipation of the exercise of the Tribunal's jurisdiction to approve a payment. That is obviously the target of the clause.

MRS JUSTICE BACON: Sorry, it is intended to be language that captures the --

MR DE LA MARE: How a Tribunal is likely to respond to any such application, because if the Tribunal approves any such application, it is going to have taken into account the fact that the funder has sought and is entitled, subject to the blessing of the Tribunal, to payment from gross sums, that that clause is not contrary to the

proper interpretation of the scheme, it is lawful, it is a perfectly commercial thing for a funder to seek, and that the exercise that then presents itself to the Tribunal is how to balance that demand for maximal payment with the requirements to make a sufficient distribution to the class.

MRS JUSTICE BACON: I don't understand why a clause would do that. You make an application and the Tribunal may approve it or not, but how could it workably -- how can you workably build into the question of appropriateness whether you think the application is going to succeed?

MR DE LA MARE: Because it depends upon the nature of the application and the context of the application.

So we have posited a couple of examples where you might make such an application and you would anticipate, maybe rightly or wrongly, that it would be accepted. The first is the Le Patourel account credit-type case. And in particular in a case where, let's say, because of the features of that particular case, Account Credit lose, much as it did in Football Shirts as it did in Le Patourel and as it might in this case in relation to on-platform sales, the prospect of leaving the funder only to payment from undistributed funds may leave the funder with nothing to fund their investment or their return from. And that was the very problem identified

by Lord Justice Green in Le Patourel that effectively drove the solution of authorising funder payment first.

I notice Mr Pickford is all in favour of reading Le Patourel in an expansive fashion and showing that these types of application are obvious and straightforward. Of course I think Mr Mallalieu is going to be arguing the exact opposite for Apple on the appeal in the Gutmann case, saying there is in fact no power to do anything of this kind at all, there are insuperable problems of conflict.

But that is the first scenario where on the law as it presently stands, it is perfectly possible to envisage an appropriate circumstance to make such an application.

The other example I gave -- and I don't shrink from it, despite what Mr Mallalieu tried to make of it -- is where a funding agreement fixes the multiples by reference to how long the funder is out of the money, in other words how long they have to wait for repayment of their money, which is a perfectly sensible basis on which to fix a multiple. And the class representative says, for whatever reason: it is in our interests to ensure that that money is paid earlier rather than later, so that we avoid potential increased multiples --

MRS JUSTICE BACON: But that is the case for this agreement,

it is fixed in that way. So it means that if that is an occasion on which it would be appropriate, then why have you got the appropriateness language? Because you should just simply have an unqualified obligation on the basis that the way that the agreement is fixed and the multiples are fixed inevitably will make it appropriate here.

MR DE LA MARE: Then I think what you are saying to me, madam, is that the clause is defective unless you have taken every step you can to spell out what you think are the circumstances in which such an application would be appropriate.

MRS JUSTICE BACON: No, I am not saying that. I am saying that the example that you give is an example where the clause would be redundant, not where it would be triggered.

MR DE LA MARE: I am probably being quite thick, I don't understand why it would be redundant in those circumstances --

MRS JUSTICE BACON: Because in this case, because the multiple is fixed by how long they are out of the money, as Mr Mallalieu has said, then it would always be appropriate.

MR DE LA MARE: It would always be appropriate ...

MRS JUSTICE BACON: To ask for the payment first to the

funder.

MR DE LA MARE: It may or may not. It may depend upon the size of the undistributed pot, it may depend upon -- you can envisage a situation where you ask for early repayment and there is an enormous pot and likely to be plenty of money, and other circumstances in which there is not and different considerations may arise in different circumstances.

I don't think you can give an axiomatic answer to that. It is perfectly possible to envisage a situation in which it is sensible and in everyone's interests to ask for those sums to be paid off sooner rather than later, particularly if the process of distribution is contested in any way and there is a substantial delay between the award of aggregate damages and eventual payments. All of which is eminently plausible, all of which is frankly terra incognita for this regime as we have never got anywhere close to that.

MRS JUSTICE BACON: Where does the interest of the class come into the calculation of appropriateness?

MR DE LA MARE: The interest of the class comes into it at the stage of the PCR forming their view as to whether or not there is an appropriate application, and if the PCR thinks there is not an appropriate application, then the dispute resolution procedure involving an independent KC

is triggered, and having independent adjudication upon such an issue is a classic way to ensure that you are complying with your relevant duties.

MRS JUSTICE BACON: But on what basis would the PCR, who is representing the class and not the funder, decide that it is in the interests of the class rather than the interests of the funder for the funder to be paid early, as in out of the gross pot? That is what is not clear. You are not giving me -- you are not explaining how the PCR captures the interest of the class in that evaluation.

MR DE LA MARE: Well, there are some circumstances in which the early payment will have no implication for the quantum ultimately received by the class, so those types of cases, for instance a generous pot of undistributed damage but seeking payments early, that is not going to in any way cut across any of the interests of the class.

An account credit, which is intended to facilitate settlement or a proposed disposal of the court, that is going to be in the interests of the class, just as Lord Justice Green described in Le Patourel.

It is a question for evaluation on the particular facts as they present. And it has to be evaluated against what is something of a moving target, which is the case law on this very subject. And no doubt once

the issues of conflict in principle are re-explored with the Court of Appeal, we are going to have the benefit of a Court of Appeal judgment grappling with those issues.

All that the language does is enable that exercise to be effectively run by the PCR and if there is a dispute, for that dispute to be resolved by an independent KC. That is a sufficient discharge of the duties to the class. And it has to be seen in the context of course as to how the PCRs are going to approach this, by reference to its duties under the general undertaking 4.1.11, page C/290, to always act fairly and justly in the interests of class members at all times.

Now, independent KC mechanisms like this have been suggested or insisted upon by the Tribunal in other contexts. It is what Mr Justice Roth suggested in the Merricks case to deal with various issues of settlement and how disputes about whether or not settlements should be accepted or not would be dealt with, and indeed how decisions are taken by funders as to the termination of funding arrangements.

MRS JUSTICE BACON: But how is the KC to be in a better position than the PCR to make a decision about appropriateness if the criteria by which appropriateness is to be judged, are not defined?

MR DE LA MARE: The KC is going to be in a better position to evaluate that in the circumstances where many of the issues might in fact be quite dense and technical legal issues.

MRS JUSTICE BACON: All right, but what is the benchmark? I mean, "appropriate" is entirely vague. "Appropriate" having regard to a set of criteria and if the set of criteria are not -- if there is in fact no indication as to what the relevant criteria are that make it appropriate, then how is a KC going to evaluate these very dense legal issues? The fact that the legal issues are very dense makes it all the more difficult.

MR DE LA MARE: The word "appropriate" in that context is perfectly capable of being given concrete legal meaning in the way that, for instance, an equivalent provision would be given concrete legal meaning in the context of a statute, in the context of a court rule or a discretion rule of that kind. He is going to be informed by the statutory context, the rules, the objective of the scheme, the objectives and duties of the class representative, the necessity for funding, the relevant right, subject to the blessing of the Tribunal, of the funder to seek to maximise their returns in all circumstances, if Gutmann is good law. All of those factors will feed into what is, I accept, the

fundamentally legal judgmental issue.

But what this class representative has done in agreeing this term is sought to identify a better means to resolve some of the problems presented by Alex Neill and Gutmann and that scheme of action. She cannot be criticised for effectively having gone substantially further than the class representative did in those cases and sought to devise better procedures that necessarily and structurally bring in independent advice and perspectives.

That would be a very strange outcome; it would be a strange outcome if the old rule was thought to be better than the present because it suffers from a far more binary analysis.

Once you understand those complexities, with respect, a lot of the criticisms formulated in relation to Professor Riefa's judgment on these difficult issues fall away.

These are not easy topics in any sense. What she has presented before the court is a process that allows those difficult topics to be wrestled with appropriate independent input.

Now, I was criticised for giving some examples on the hoof about how this might work. I don't think that is a fair criticism at all. First of all, in relation

to the Le Patourel example, which was a point adverted to in her understanding as to how this would operate by Professor Riefa herself; and secondly, the example I gave on my feet about the response to the timing of how long you are out of the money was prompted by my learned friend's focus on that point. I think for the first time that point has surfaced in his cross-examination of my client.

It is said that the independent KC will not make any difference and it is said in part that was only because -- the starting point because there will only be this process if there is a dispute. But if the situation is one in which there is substantial implications for the full recovery of the class, without a sufficient justification, it is likely that there will be such a dispute.

Those cases for early payment which are entirely, if you like, revenue neutral from the perspective of the class, well, there may have been no dispute in those circumstances, but why should there be?

Then the last point was the change in trigger dates led to higher returns. The simple answer to those concerns is that many of those concerns arise in relation to the Alex Neill-type arrangements themselves.

The second category of concerns, the previous

agreements made. This seems to boil down to the contents of the April 2023 amendment. And madam, you asked which terms in particular, and my learned friend specified that it was the provision that pointed to the aggregation of drawn funds and the clarification in -- or the wording in relation to priority multipliers and the fact that in the original conception it didn't expressly provide for set-off.

The answer in relation to the latter is, indeed, that that was an error or mistake. My learned friend says that doesn't alter the matters; at the end of the day it is the class representative that signed up to it.

I think there has to be a measure of realism about these arguments, given that this October 23 agreement was concluded in anticipation of the -- the April 23 agreement was concluded in anticipation of PACCAR going south in the Supreme Court, as indeed it did.

What happened after that is that there was a restated LFA in October, by which time these concerns had been removed. It seems excessive in those circumstances to focus upon the wording of a sort of contingent provision pending the full negotiation that actually occurred in the later agreement and resulted in the restatement in question.

Then, it is said that the combination of those

features with the XIRR calculation would mean that, inevitably, it was always the XIRR formulation that dominated. Again, the answer to that is, well, with respect, look at the agreement that was before the Tribunal last time, at which time all of those concerns were not in play.

There were then two further short points Mr Mallalieu made. The first is that he says that the PCR's approach or attitude towards the need for a consultative panel was concerning and that Professor Riefa was somehow dismissive of the value of that process. I think that is a bit of a reach, frankly, on the basis of the single exchange, where she was asked: what difference has it made? And she said she didn't know.

How can you, though? How can you know in concrete terms whether or not, if you had involved a funding expert earlier, some of the mistakes or features of the agreements that are no longer before the Tribunal wouldn't have been ironed out earlier. We just don't know. That is an exercise in speculation.

Her current attitude is surely best embodied in the in fact that she has welcomed in independent costs legal advice from Mr Marven, and she has welcomed in Mr Greene into the consultative panel to assist her on questions

of funding in particular, and cites 2020 vision and all of that.

But the focal point, as I made plain in my opening, is the question of suitability going forward and the question is whether or not those types of steps are sufficient to address residual concerns for what might otherwise be a suitable set of agreements. We suggest nothing that Mr Mallalieu said really answers that core point.

Then lastly, we have the complaints about confidentiality. Here, with respect, I think we are entering a fairly unreal world. That is not to say that concern about confidentiality, and Scott v Scott and the provision of information to the members of the class once there is a class representative appointed are not very real concerns. Of course they are. This Tribunal in many ways is bedevilled by overly wide claims to confidentiality.

All that happened, in my submission, at the last hearing was that the Tribunal was effectively told that those issues hadn't been resolved and were still moot. Those are absolutely centrally legal or lawyer issues; judgment calls about the demands of confidentiality and the circumstances in which public interest or other concerns trump them are legal issues. Of course the

clause in question provides ample powers for disclosure later if it is required for the purposes of legal proceedings or the rights of proceedings of others.

The dispute when it was before you last time, and still now, was one where there are no class members. Application by a class member to see the terms of the agreement to decide whether or not they wish to opt out would be addressed on its merits as and when it is made.

That all has to be coupled with the fact that there is literally no consistency in the decision or practice of this court in relation to those claims of confidentiality. There are cases where the waterfalls have been wholly redacted on the grounds of irrelevance of legal sensitivity; there are cases where the financial terms have been put into confidentiality rings.

What you have to deal with is the position here now, after we have been asked to go away and think about it, discussed it with the funder, who obviously has a legitimate commercial interest in protecting knowledge of its terms before an application is made, and not least because of the prospects of carriage disputes and rival claims, and matters of that kind.

And now that the issue is ripe and before the court, the concerns of confidentiality have fallen away. It is

absolutely impossible to see how any of that can be sensibly laid at the class representative's door.

And I am afraid that point is really indicative of a theme that underlies all of this, which is that if anything happens that the Tribunal expresses an opinion on, doesn't like the particular circumstance or thinks that a wrong tactical decision has been made or an inappropriate application has been made, then all of that is recycled to rebound against the suitability of the class representative. And that is neither fair nor forensically justified.

I can say much the same things with respect about the points made about the ATE policies, and do.

I've finished before 4.45. I have done my level best. If there is anything else I can assist you with.

MRS JUSTICE BACON: We are very grateful, thank you.

Submissions in reply by MR PICKFORD

MR PICKFORD: Madam chair, I had one very short point. Mr de la Mare raised a new point about PACCAR that he went to in reply, he didn't address in his previous submissions, I have a 30-second point in response on PACCAR.

MRS JUSTICE BACON: All right.

MR PICKFORD: For the first time in his reply he said that the judgment of the Supreme Court in PACCAR was the

reason why he advanced that there was a lack of competition in this case. There are two points to make in response.

Firstly, his chronology is wrong. They honed in on only using one provider of funding in December 2022; the judgment in PACCAR was in July 2023.

Secondly, post-PACCAR we have seen no shortage of funders on this market. If Asertis is willing to rewrite its agreement, so surely would other funders have been willing to rewrite their agreements. It is a question of structure, not ultimately the ability of funders to provide funding. That's the only point I wanted to make.

MR DE LA MARE: I don't want to be duly argumentative after a long day, but my learned friend's submission was that after each material stage in which the agreements were reconsidered, there needed to be going back to the market at each stage and PACCAR does it --

MR PICKFORD: No, that is not my submission. To be clear, my submission is there needs to be some kind of competition brought into the process. I am not saying, so it is hopefully helpful to clarify, that that has to keep happening again and again and again.

MRS JUSTICE BACON: Yes, all right. Thank you.

PROFESSOR NEUBERGER: Can I just ask one question. I have

one question following what you said about confidentiality being purely a legal issue. I would have thought that making clear to the class one represents the nature of the obligations one has taken on to a funder would be a consumer rights issue as much as a legal issue.

MR DE LA MARE: In my submission, the position differs before you are appointed the class representative and after. We have only ever been in the before. There cannot be any obligation to the class at a time when you haven't been yet appointed to represent the class. And I readily recognise that once certification is granted, and once then the clock starts for opt-out, a different analysis in relation to confidentiality then prevails. That is the point I am making.

PROFESSOR NEUBERGER: Thank you, that is very helpful.

MRS JUSTICE BACON: Thank you very much.

We are obviously not going to give a decision now. You will be notified in due course of our judgment.

(4.42 pm)

(The hearing concluded)